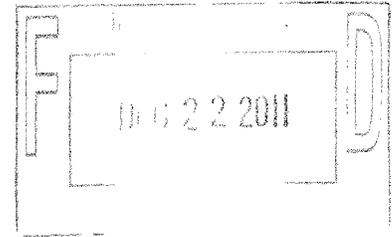


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JAMES MARTIN, in his official capacity as
DIRECTOR, OFFICE OF OIL AND GAS,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION;
OFFICE OF OIL AND GAS, WEST
VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION; and
EQT PRODUCTION COMPANY,**



Respondents Below/Petitioners,

v.

No. 11-1157

MATTHEW L. HAMBLET,

Petitioner Below/Respondent.

**AMICUS CURIAE BRIEF ON BEHALF OF THE
INDEPENDENT OIL AND GAS ASSOCIATION OF
WEST VIRGINIA**

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I. INTEREST OF AMICUS CURIAE

The Independent Oil and Gas Association of West Virginia (“IOGA”)¹ is an association of independent oil and gas producers, with over 650 members vitally interested in issues affecting ownership and production of oil and gas in our State. IOGA’s members apply for the type of well work permit involved in this case and drill horizontal Marcellus oil and gas wells. IOGA moved for and was granted this Court’s permission to file this brief. Pursuant to this Court’s November 22, 2011 Order, IOGA respectfully submits this *Amicus Curiae* brief.

II. THE CERTIFIED QUESTION PRESENTED SHOULD BE ANSWERED “NO”

This case comes before this Court as a certified question presented by the Circuit Court of Doddridge County. The question certified for this Court’s consideration is:

Does the West Virginia Supreme Court of Appeals’ or [sic] opinion in *State ex. Rel. Lovejoy v. Callaghan*, 576 S.E.2d 246, 213 W. Va. 1 (2002) interpret the relevant statutes, when read in *para materia*, to permit a surface owner to seek judicial review of the West Virginia Department of Environmental Protection, Office of Oil and Gas’s issuance of a work well permit for a horizontal Marcellus well?

The Respondent, Matthew Hamblet, and the Intervenor, the West Virginia Surface Rights Organization (“WVSORO”), have, in their respective briefs, asked this Court to modify the question presented. There are many different types of oil and gas wells in this state. The question presented only addresses one horizontal Marcellus wells and no other wells. The certified question, as presented, is clear, concise, and easily answerable. IOGA respectfully requests that this Court limit the scope of its analysis to that contained in the certified question as

¹ Pursuant to Rule 30(3)(5) of the West Virginia Rules of Appellate Procedure, this brief was authored by IOGA’s counsel, George A. Patterson, III and H. Hampton Rose, IV of Bowles Rice McDavid Graff & Love LLP. No other party made a monetary contribution specifically intended to fund the preparation or submission of this brief.

presented by the Circuit Court of Doddridge County. For the reasons contained in this brief, IOGA respectfully requests that this Court answer the certified question as presented by the Circuit Court in the negative.

III. SUMMARY OF ARGUMENT

This Court, in its *per curiam* opinion in *Lovejoy*, did not grant Respondent the right to judicial review of a shallow well work permit. The Legislature does not grant Respondent the right to judicial review of a shallow well work permit. To be entitled to a judicial review of an administrative action in accordance with the procedural provisions of the West Virginia Administrative Procedures Act (“WVAPA”)², “such a right must exist either by statutory language creating [the right], by the agency’s rules and regulations, or by some constitutional command.” *State ex rel. West Virginia Bd. of Educ. v. Perry*, 189 W. Va. 662, 665, 434 S.E.2d 22, 25 (1993).

The Legislature recently enacted the West Virginia Horizontal Well Control Act, W. Va. Code 22-6A-1 *et seq.*, and did not provide surface owners the right to a predetermination hearing or to appeal permit decisions for horizontal Marcellus wells. WVSORO should not receive from this Court relief the Legislature considered and rejected.

The West Virginia Department of Environmental Protection Office of Oil and Gas’s (“OOG”) issuance of EQT’s well work permit does not affect and constitute an infringement on the property rights of Respondent, and, therefore, Respondent does not meet requisite elements to invoke the Due Process Clause. The permit does not infringe Respondent’s rights, it infringes EQT’s rights. Even if this Court determines that Respondent’s property rights

² W. Va. Code § 29A-1-1 *et seq.*

are infringed upon by the OOG's issuance of EQT's well work permit, Respondent's rights are sufficiently protected by the right to notice, the right to file comments, and Respondent's statutory and common law rights and remedies.

Finally, the Legislature's grant of a right to an administrative hearing and judicial review to coal owners, operators, and lessees, and not to surface owners, does not violate the Equal Protection Clause because the Legislature's classification is rational and reasonably related to a legitimate State interest in safety.

IV. ARGUMENT

A. **This Court's Decision In *Lovejoy* Does Not Grant Respondent The Right To Judicial Review Of A Shallow Well Work Permit**

Respondent argues that this Court's decision in *State ex rel. Lovejoy v. Callaghan*³ is precedent for the position that a surface owner has the right to judicial review of the OOG's decision to issue a shallow well work permit to EQT in this case. A *per curiam* opinion is not precedent, and the facts and statutory provisions in *Lovejoy* are fundamentally different than those in the present case. The *per curiam* opinion in *Lovejoy*, if considered at all by this Court, may stand for the proposition that a surface owner who refused consent and to whom the "consent and easement" provision of West Virginia Code § 22C-9-7(b)(4) is applicable has a right to appeal the subsequent issuance of a well work permit in accordance with the procedures contained in the WVAPA, but *Lovejoy* is not applicable here.

In *Lovejoy*, "[an oil and gas operator] applied to the [OOG] to obtain a well work permit in connection with its plan to drill a deep test well" as required by W. Va. Code § 22C-9-7(a)(1). *Lovejoy*, 213 W. Va. at 2. Under West Virginia Code § 22C-9-7(b)(4), the well

³ 213 W. Va. 1, 576 S.E.2d 246 (2002).

operator was required to obtain a “written consent and easement” from “all owners of the surface.” The operator failed to obtain this “consent and easement” from Lovejoy, a surface owner. Almost two years after the permit was issued, Lovejoy filed a writ of mandamus in this Court seeking, among other things, the retroactive revocation of the deep well work permit. Concluding that Lovejoy had failed to exhaust her available administrative remedies, the Court rejected her writ of mandamus, but indicated that had she exhausted her remedies, she would have had a right to appeal the issuance of the deep test well work permit. The Court found that Lovejoy had a right in the “consent and easement” provision of West Virginia Code § 22C-9-7(b)(4)⁴ to approve deep test wells on her surface tract, and that right was violated.

The Court’s holding in *Lovejoy* was not based on a surface owner’s constitutional rights, but on the Court’s interpretation of provisions of the West Virginia Code applicable to deep oil and gas wells.⁵ The language in *Lovejoy* upon which the Respondent bases his argument for a right to judicial review states: “Pursuant to the authority provided by West Virginia Code § 22-6-41, which grants an administrative right of appeal in connection with the issuance of drilling permits, Petitioners had a clear right to appeal the decision to issue the working well permit.” *Lovejoy*, 213 W. Va. at 4, 576 S.E.2d at 249. This language clearly shows that the Court based its decision on § 22-6-41. However, West Virginia Code § 22-6-41 only grants the right to judicial review to coal owners, operators, and lessees. Under West Virginia Code § 22-6-41:

⁴ No drilling or operation of a deep well for the production of oil or gas shall be permitted upon or within any tract of land unless the operator shall have first obtained the written consent and easement therefore, duly acknowledged and placed on record in the office of the county clerk, for valuable consideration of all owners of the surface of such tract of land, which consent shall describe with reasonable certainty, the location upon such tract, of the location of such proposed deep well, a certified copy of which consent and easement shall be submitted by the operator to the commission.

⁵ This article shall not apply to or affect . . . [s]hallow wells other than those utilized in secondary recovery programs as set forth in section eight of this article. W. Va. Code § 22C-9-3(b)(1).

Any party to the proceedings **under section sixteen of this article** adversely affected by the order of issuance of a drilling permit or to the issuance of a fracturing permit or the refusal of the director to grant a drilling permit or fracturing permit is entitled to judicial review thereof. (emphasis added)

The parties referenced in West Virginia Code § 22-6-41, *i.e.*, the parties to proceedings “under section sixteen of this article” are a “coal operator operating said coal seams beneath the tract of land, or the coal seam owner or lessee . . .” W. Va. Code § 22-6-16.

While the Court may have cited West Virginia Code § 22-6-41 in error, there is nonetheless a statute that may be available to a surface owner in Lovejoy’s position. Chapter 22C, Article 9 of the West Virginia Code establishes a separate administrative agency known as the Oil and Gas Conservation Commission with authority to regulate and pool or unitize deep wells and secondary recovery wells. West Virginia Code § 22C-9-11(a) provides:

Any party adversely affected by an order of the commission shall be entitled to judicial review thereof. All of the pertinent provisions of section four, article five, chapter twenty-nine-a of this code, shall apply to and govern such judicial review with like effect as if the provisions of said section four were set forth in this section.

Lovejoy was found to have a statutory right to grant or withhold its “consent and easement” under West Virginia Code 22C-9-7(a), and that law is not applicable to EQT’s shallow well permit.⁶ Because the statutory rights are so different when the statutory right to force pool property to drill deep wells is invoked under Chapter 22C Article 9, the Court’s holding in *Lovejoy* gives no precedential guidance for the present case.

⁶ *Id.*

B. Neither the Legislature Nor the Department of Environmental Protection, Office of Oil and Gas, Grant Respondent the Right to Judicial Review of a Shallow Well Work Permit

In its brief, Respondent admits that “there exists no statutory right in West Virginia for a surface owner to appeal the issuance of a well permit.” *Respondent’s Brief* at 8. This is an accurate analysis of the West Virginia Code. Surface owners are not granted the right to an administrative hearing or judicial review of the issuance of a shallow well work permit, but that is not to say that a surface owner is not granted any statutory rights in the permitting process. Prior to the issuance of a permit, a surface owner has the right to receive notice.⁷ A surface owner also “may file comments with the director as to the location or construction of the applicant’s proposed well work within fifteen days after the application is filed with the director.” W. Va. Code § 22-6-10(a). The Legislature also saw fit to require the Director of OOG to “promptly review all comments filed.” W. Va. Code § 22-6-11. In addition to the statutory rights granted to a surface owner preceding the issuance of a well work permit, the Legislature provided a surface owner a statutory strict liability cause of action for damage to the surface caused by the exploration, extraction, and transportation of oil and gas (W. Va. Code § 22-7-1 *et seq.*) and other protections. The Legislature, however, did not grant a surface owner the right to judicial review of the issuance of a shallow well work permit. *See* W. Va. Code §§ 22-6-16; 22-6-17; 22-6-40; and 22-6-41. Those rights were granted solely to coal operators, coal owners, and lessees. *Id.* To read a right of surface owner to judicial review of a shallow well work permit into the West Virginia Code § 22-6-1 *et seq.* would rewrite the West Virginia Code.

⁷ No later than the filing date of the application, the applicant for a permit for any well work shall deliver by personal service or by certified mail, return receipt requested, copies of the application, well plat and erosion and sediment control plan required by section six of this article to . . . [t]he owners of record of the surface of the tract on which the well is, or is to be located. W. Va. Code § 22-6-9(a)(1).

C. While this Case was Being Briefed, the Legislature Considered, but Did Not Grant, a Surface Owner the Right to a Predetermination Hearing. This Court Should Apply the Law as it is Codified.

During the time this case was being briefed, the Legislature was called into special session to address permitting for horizontally drilled Marcellus wells and refused to enact a procedure to hear surface owner objections to well permits. The Marcellus Draft Bill, which was reported out of the Joint Select Committee on Marcellus Shale, contained a provision that would have granted a surface owner, such as Respondent, a right to a pre-decisional hearing regarding a well work permit application.⁸ However, the final enrolled and enacted version of the bill, the Natural Gas Horizontal Well Act, did not include such a right.⁹ WVSORO lobbied actively, but the unsworn and highly disputed testimony in WVSORO's brief was not accepted by the Legislature, and should not be accepted here. The Legislature considered surface owners when balancing competing interests and determined that surface owners should not be granted a right to appeal a shallow horizontal Marcellus well permit. Under the provisions of the Natural Gas Horizontal Well Act, signed into law December 14, 2011, surface owners were given additional time to comment on permits, provided with additional compensation in the form of \$2,500 cash, provided additional notice time and rights, given different well spacing protection, provided additional damage compensation rights, and other rights. *See* W. Va. Code § 22-6A-1 *et seq.* This Court should avoid undermining the express will of the Legislature and defer to the Legislature's judgment regarding respective rights in the permitting process.

To be entitled to the process afforded by the WVAPA, "an agency must either be required by some statutory provision or administrative rule to have hearings or the specific right

⁸http://www.legis.state.wv.us/legisdocs/2011/committee/interim/marcellus/marcellus_20111118150002.pdf

⁹http://www.legis.state.wv.us/bill_status/bills_text.cfm?billdoc=hb401%20enr.htm&yr=2011&sesstype=4X&i=401

affected by the agency must be constitutionally protected such that a hearing is required.” *State ex rel. West Virginia Bd. of Educ. v. Perry*, 189 W. Va. 662, 665, 434 S.E.2d 22, 25 (1993). In determining whether to hold a hearing on a particular challenge to a particular decision or action, a court cannot create substantive rights entitling certain people to a hearing. “[S]uch rights must exist either by statutory language creating an agency hearing, by an agency’s rules and regulations, or by some constitutional command.” *Id.*

D. Deference.

From the statutory language contained in West Virginia Code § 22-6-1 *et seq.*, it is apparent that the Legislature did not grant a surface owner, such as Respondent, a right to judicial review of a pending or issued shallow, horizontal well work permit. The statutory language, when each applicable section is read together, is unambiguous. “When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” *State v. Inscore*, 219 W. Va. 443, 447, 634 S.E.2d 389, 393 (2006) (quoting *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, Syl. pt. 5, 144 W.Va. 137, 107 S.E.2d 353 (1959)); *Riggs v. West Virginia Univ. Hosps., Inc.*, Syl. pt. 2, 221 W. Va. 646, 656 S.E.2d 91 (2007).

Respondent, in his brief, even admits that he has no statutory right to appeal the issuance of a shallow well permit Respondent’s Brief at 8. “In the interpretation of statutory provisions the familiar *maxim expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.” *Manchin v. Dunfee*, Syl. pt. 3, 174 W. Va. 532, 533, 327 S.E.2d 710, 711 (1984); *Murphy v. E. Am. Energy Corp.*, 224 W. Va. 95, 99, 680 S.E.2d 110, 115 (2009); *Kessel v. Monongalia County Gen. Hosp. Co.*, 220 W. Va. 602, 620, 648

S.E.2d 366, 384 (2007). Under this rule of statutory interpretation, because the Legislature explicitly granted the right to an administrative hearing and judicial review of a well work permit to coal owners, operators, and lessees, it also excluded all other parties from such a right.

For this Court to hold that Respondent does have a right to judicial review or an administrative hearing would directly contravene the intent of the Legislature. “It is vital to the rule of law that legislative commands be honored, so long as they are constitutionally appropriate. Courts are not at liberty to disregard lawful directives of the Legislature simply because those directives conflict with [a court’s] notions of fairness.” *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 111, 459 S.E.2d 374, 388 (1995). Because no statutory provision or regulation can be cited by Respondent or WVSORO which grants a surface owner the right to appeal a shallow horizontal well work permit, if this Court were to find Respondent deserving of such a right, it would have to conclude that the current well work permit application procedural framework for horizontal Marcellus wells is unconstitutional. In that regard, this Court has held that:

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the Legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the Legislature, the negation of legislative power must appear beyond reasonable doubt.

State ex rel. Appalachian Power Co. v. Gainer, Syl. pt. 1, 149 W.Va. 740, 143 S.E.2d 351 (1965); *Louk v. Cormier*, Syl. pt. 1, 218 W. Va. 81, 622 S.E.2d 788 (2005).

The deed which severed the minerals from the surface of the tract now owned by Respondent was never admitted into evidence and has not been submitted to this Court. Without the important “severance deed,” there is incomplete evidence regarding the scope and nature of the parties’ respective property rights. Constitutional issues were not considered by the Court below; the Circuit Court of Doddridge County did not ask this Court for constitutional guidance; and constitutional questions should not be considered now. In its brief, WVSORO requests that the Court amend the certified question to include the issue of whether Respondent is entitled to an administrative hearing. The assertions made by WVSORO are not in evidence and are contested. Again, this is not germane to the issues raised by the certified question submitted. Respondent did not seek an administrative hearing, only judicial review of the OOG’s issuance of a well work permit to EQT. This Court should not grant Respondent a remedy he did not seek in the proceedings below.

E. A Surface Owner Has No Constitutional Right To Judicial Review And The Legislature’s Delegation Of The Right To An Administrative Hearing And Judicial Review To Coal Owners, Operators, And Lessees Does Not Violate The Equal Protection Clause

Both Respondent and WVSORO argue that a surface owner has a right to appeal the OOG’s issuance of a well work permit based on the Due Process Clauses of the West Virginia Constitution¹⁰ or the Constitution of the United States.¹¹ Neither Respondent nor WVSORO presents any case law from this Court or any other adjudicative body which explicitly

¹⁰ W. VA. CONST. art. III, § 10.

¹¹ U.S. CONST. amend. XIV, § 1.

holds that denying a surface owner the opportunity to appeal the issuance of a well work permit constitutes an infringement on that surface owner's property rights without due process.

1. Due Process

Article III, Section 10 of the Constitution of West Virginia guarantees that “[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L. Ed. 2d 18 (1976). The rights guaranteed in Article III, Section 10, as interpreted by this Court, are largely synonymous with those described in *Mathews*.¹² See *North v. West Virginia Bd. of Regents*, 160 W. Va. 248, 253, 233 S.E.2d 411, 415 (1977) (“[*Mathews*] illustrates some of the guiding principles in regard to procedural due process when the case involves a deprivation of a liberty or property interest.”). “[W]henver government action infringes upon a person's interest in life, liberty or property, due process requires the government to act within the bounds of procedures that are designed to insure that the government action is fair and based on reasonable standards.” *Major v. DeFrench*, 169 W. Va. 241, 251, 286 S.E.2d 688, 695 (1982).

Meeting the minimum threshold to invoke the Due Process Clause requires the analysis of two issues: “first, whether the Respondent had a ‘liberty’ or ‘property’ interest subjected to a deprivation and, second, whether the deprivation occurred ‘without due process of

¹² Respondent and WVSORO, in their respective briefs, seem to argue that the standard for a government action invoking the Due Process Clause is more favorable to a party seeking to invoke the Clause in West Virginia as compared to the federal standard. Its assertion rests on the use of the term “affect and constitute an infringement of property rights” in *Snyder v. Callaghan* as opposed to the use of the term “deprivation” in *Mathews* and its progeny. With respect to Due Process rights regarding property, IOGA submits that this variance represents a distinction without a difference.

law.” *Hutchison v. City of Huntington*, 198 W. Va. 139, 153-154, 479 S.E.2d 649, 663-664 (1996) (citing *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 1923-1924, 64 L. Ed. 2d 572 (1980)); *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). In the context of permit issuance, to have due process standing, a plaintiff must show that the infringement of his property interest was caused by the permit and not by some improper activity on the part of the permittee. *Snyder v. Callaghan*, 168 W. Va. 265, 274, 284 S.E.2d 241, 247 (1981).

Respondent’s property interest is not infringed upon by the issuance of a permit, EQT’s rights become subject to state supervision and penalty. A surface owner’s rights are subject to a mineral owner’s right to use the surface in a manner that is reasonable and necessary for the production and transportation of those minerals.¹³

(a) *A surface owner’s right is subject to an implied easement held by a mineral owner and therefore a shallow horizontal well permit does not abridge a surface owner’s constitutional rights.*

An owner of a parcel of real estate can divide that property horizontally into several smaller unsevered tracts. An owner can also divide that property vertically into several estates creating a severed tract comprised of various vertical “estates.” Most often, a severed tract is divided into a “surface estate” and a “mineral estate.” There is one major difference between the ownership of an unsevered tract and the ownership of the “mineral” estate of a severed tract: A mineral estate owner cannot reduce his property interest to possession without some use of the superjacent surface estate. “When anything is granted, all the means of

¹³ See *Squires et al v. Lafferty et al*, 95 W. Va. 307, 121 S.E. 90 (1924); *Adkins v. United Fuel and Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950); *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 18, 267 S.E.2d 721, 725 (1980).

obtaining it, and all the fruits or effects of it, are also granted.” *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S.E. 137, 138 (1907).

In West Virginia, this right has been considered, adjudicated, and an implied easement has been recognized. This Court has held for over a century that a mineral estate owner possesses “the right to use the ‘surface’ of the land in such a manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.” *Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 64 S.E. 853 (1909); *Squires et al v. Lafferty et al*, 95 W. Va. 307, 121 S.E. 90 (1924); *King v. South Penn Oil Co.*, 110 W. Va. 107, 157 S.E. 82 (1931); *Adkins v. United Fuel and Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950) (applying the implied easement recognized in *Squires* to an oil and gas estate); *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S.E. 137 (1907); *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 S.E.2d 721 (1980); *Phillips v. Fox*, 193 W. Va. 657, 458 S.E.2d 327 (1995). An oil and gas estate owner has the right to use the surface so long as that use is “reasonable and necessary for the production and transportation of gas.” *Adkins v. United Fuel and Gas Co.*, 134 W. Va. at 723, 61 S.E.2d at 636. Subject to this limitation of “reasonable and necessary” use of the surface, an oil and gas mineral owner has a property interest in the surface - that of a dominant easement holder. When the minerals have been severed, a surface owner takes subject to this easement and has “no ‘veto power’ over [a] mineral operator’s decision to drill.” *Justice v. Pennzoil Co.*, 598 F.2d 1339, 1344-45 (4th Cir. 1979). If a mineral estate owner leases his rights in the minerals underlying the surface, then “[s]ubject of course to any restrictions in the lease, the lessee/operator enjoys the same right to use the surface as does the lessor/owner.” *Justice v. Pennzoil Co.*, 598 F.2d at 1343. Upon severance, a party who retains the surface while conveying the minerals not only loses any and all ownership interest in the minerals conveyed, but also has lost any right to exclude a mineral

owner or its lessee from using the surface reasonably and necessarily for the production and transportation of minerals. A subsequent surface estate transferee takes “[the surface] subject to the rights of the owner of the minerals, who by virtue of owning such minerals also possessed the rights necessary to produce and transport the same as an incident to such ownership.” *Adkins v. United Fuel and Gas Co.*, 134 W. Va. at 725, 61 S.E.2d at 636. Because the surface estate is subject to use by the mineral owner under common law, the surface owner’s rights are not infringed upon when a permit is issued.

In *Turley v. Flag-Redfern Oil Co.*, 1989 Ok 144, 782 P.2d 130 (1989), the Supreme Court of Oklahoma was asked whether an order of the Oklahoma Corporation Commission violated a surface owner’s constitutional rights to due process and equal protection. The order reduced the size of units therefore causing an eightfold increase in the number of wells that could be drilled, an increase in roads and facilities constructed, and destruction of more surface property. The Oklahoma statutes and rules did not permit surface owners notice of the Oklahoma Commission’s proceedings or an opportunity to be heard. The Oklahoma Supreme Court held that because of the nature of the relationship between the surface estate and the mineral estate, the surface owner did not have a right to notice or hearing. In Oklahoma, like West Virginia, surface rights are subject to reasonable use by the mineral owner. Just like West Virginia’s Oil and Gas Production Damage Compensation Act,¹⁴ Oklahoma’s Surface Damages Action, 52 O.S. Supp. 1982 § 318.2 *et seq.*, affords surface owners the right to compensation and judicial review of decisions regarding surface owner compensation. In *Turley v. Flag-Redfern*, the Oklahoma Supreme Court found: “Where injured parties have an alternative statutory remedy to claimed due process violations, procedural defects are cured by the remedy afforded.”

¹⁴ W. Va. Code § 22-7-1 *et seq.*

Turley v. Flag-Redfern Oil Co., 1989 OK 144, 782 P.2d 130, 136 (1989). The findings, reasoning, and analysis of the Oklahoma court are applicable here.

WVSORO also cites a decision from the Supreme Court of Oklahoma, *DuLaney v. Oklahoma State Dept. of Health*.¹⁵ The holding in this decision is not applicable to the facts in the present case. *DuLaney* involved a landfill permit, not a oil and gas well permit. *DuLaney*, 1993 OK 113, 686 P.2d 676 (1993). The *DuLaney* court held that a mineral owner, whose surface estate is subject to a proposed landfill permit, has a right to notice and a hearing. *Id.* at 681. The court reasoned that a landfill would impair a mineral owner's ability to use his rights in an implied easement over the surface, and explore for and transport the minerals produced. *Id.* The court also found that the Oklahoma Legislature had granted adjacent landowners the right to a hearing in landfill cases, as such a right was granted to any person "who may suffer environmental damage" as a result of a landfill had a right to a hearing. *Id.* at 682. In the present case, Respondent has no easement threatened by a proposed landfill and has no statutory basis to claim a right to a hearing, therefore, *DuLaney* is inapplicable.

Oil and gas has been produced in West Virginia since at least the early 1800s.¹⁶ The permitting process was first enacted in 1929, and predetermination permit hearings have not been required. The well work permit application and process is solely a creature of statute and many wells were drilled without permits before the permitting statutes were enacted.¹⁷ Neither common law nor any constitutional provisions require a well work permit before a mineral

¹⁵ 1993 OK 113, 686 P.2d 676 (1993).

¹⁶ Apparently, a scientific survey identifying oil and gas took place in West Virginia and Ohio in the 1820s, an oil rights lease dispute occurred in 1843, and kerosene was manufactured in Parkersburg before 1850. MCKAIN AND ALLEN, WHERE IT ALL BEGAN (1994).

¹⁷ *Id.*

owner or its lessee exercises its rights to explore for, produce, and transport those minerals. Permitting is part of a regulatory framework enacted by the Legislature to prescribe safe methods of drilling oil and gas wells. The procedures and rights created by the permitting process and other statutory provisions, like the Oil and Gas Production Damage Compensation Act, represent the Legislature's balancing of surface, coal, and oil and gas interests.

(b) *Snyder v. Callahan does not stand for the proposition that Respondent has a constitutional right to judicial review of OGG's permit.*

In its brief, Respondent relies heavily on the Court's decision in *Snyder v. Callahan*, 168 W. Va. 265, 284 S.E.2d 241 (1981). *Snyder*, however, is not analogous. One must apply the rules of law set forth in *Snyder*, and not merely its outcome. *Snyder* involved the U.S. Army Corps of Engineers ("Corps") planned construction of the Stonewall Jackson dam which created a large lake in Lewis County and was a joint project of our Congress and the State of West Virginia.¹⁸ In order to construct the dam, the Corps requested that the West Virginia Division of Natural Resources ("WVDNR") issue a water quality certification required by the Clean Water Act that would permit the corps to fill and discharge material in the navigable waters of the State. The WVDNR issued the certification without a hearing that this Court found to be required by WVDNR's own rules. Then Section 6.06 of WVDNR's rules provided:

Any person entitled to a hearing because of an infringement upon an interest protected by the State Constitution Article 3, Section 10 may request a hearing within 30 days of the Departments issuance of the proposed certification.

WVDNR argued the riparian landowner's rights were not infringed by the certification and that their rights were not Constitutionally protected interests. This Court found

¹⁸ *Snyder v. Callahan*, n. 1, 168 W. Va. 265, 284 S.E.2d 241 (1981).

that the WVDNR's certification was necessary for the Corps to begin construction of the Stonewall Jackson dam, and authorized introduction of foreign material into the watercourse. The Snyders, downstream riparian owners, and the West Fork River Watershed Association, Inc. were denied an administrative appeal from the water certification.

Here, the Respondent's surface rights are subject to an easement to produce and transport oil and gas, but the plaintiff's rights in *Snyder* were not subject to a comparable easement held by the Corps. In *Snyder*, the Court analyzed the nature of the downstream riparian owner's property right and then the causal relationship between permit issuance and an infringement on the downstream riparian owner's property rights. In contrast to a surface owner's rights, which are subject to the mineral owner's rights, this Court stated:

The riparian owner has a property interest in the flow of a natural watercourse through or adjacent to his property. . . . The right of enjoying this flow without disturbance, interference, or material diminution by any other proprietor is a natural right, and is an incident of property in the land, like the right the proprietor has to enjoy the soil itself without molestation from his neighbors. The property rights of the riparian are in the right to use the flow, and not in the specific water.

Snyder, 168 W. Va. at 271-272, 284 S.E.2d at 246 (quoting *Gaston v. Mace*, 33 W. Va. 14, 23, 10 S.E. 60, 63 (1889)).

The Court held that to be entitled to an administrative hearing under WVDNR's regulation "[t]he infringement upon the asserted property rights of the [downstream riparian owners] is the direct result of the State's action and is not a possibility dependent upon some improper activity on the part of the permittee." *Snyder*, 168 W. Va. at 273, 284 S.E.2d at 247. The dam was a joint state and federal project. The Court concluded that in issuing the water quality certification the WVDNR "yields to an upper riparian user the power to influence or to

modify the property right of the petitioners in their natural flow and integrity of the water course.” *Id.* The Court held that the certification issued by the WVDNR to the Corps approved conduct that constituted an infringement on the property rights of a downstream riparian landowner, and, therefore, a landowner so situated would have standing to challenge the issuance of the certification and, therefore, meet the statutory qualification to be eligible for the an administrative hearing already required by regulation. Snyder’s rights were not subject to a easement, but Respondent’s rights are so subject. As noted, oil and gas wells have been drilled in West Virginia since at least the mid-nineteenth century, and oil wells were originally drilled one beside the other, with facilities that in many cases would occupy many acres. *See MCKAIN AND ALLEN, WHERE IT ALL BEGAN (1994).* *Snyder* is not applicable to this case.

In the present case, the OOG’s issuance of a well work permit merely allows EQT to exercise its existing rights on the surface, to which any and all of the Respondent’s property rights are already subject. The permit does not infringe Respondent’s rights, it infringes on EQT’s rights. Any infringement on Respondent’s property rights in the surface of the subject parcel will be caused by the conduct of EQT if EQT exceeds its common law rights. The permit has nothing to do whether or not that will occur.

(c) *Even if this Court concludes that Respondent’s rights are infringed, the process afforded Respondent by existing statutes more than satisfies the that which is required under the Due Process Clause.*

There is no fixed formula for what process is required in any particular situation to which the Due Process Clause is applicable. “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972).

WVSORO argues that this Court's decision in *Snyder v. Callaghan* supports its position that Respondent is entitled to a preliminary administrative hearing under a *Mathews-DeFrench* balancing analysis. However, the WVDNR's regulation provided a hearing to those whose property interests were infringed upon by a permit.¹⁹ This regulation negated any application of the *Mathews-DeFrench* balancing analysis, discussed below. In the present case, no such regulation or similar statute exists; instead, surface owners have notice, comment and other rights.

If Respondent is deemed to have a due process claim, the level of process due to him is determined by a balancing analysis. This Court has applied the balancing analysis set forth by the United States Supreme Court in *Mathews v. Eldridge*.²⁰

The specific procedural protections accorded to a due process liberty or property interest generally requires consideration of three distinct factors: first, the private interest that will be affected by state action; second, the risk of an erroneous deprivation of the protected interest through the procedures used, and the probative value, if any of the additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Major v. DeFrench, et al., 169 W. Va. 241, 257-258, 286 S.E.2d 688, 699 (1982). The existing procedural safeguards available to Respondent or a similarly situated surface owner - a right to notice, a right to comment, and a right to damages - more than satisfy the procedure required to sufficiently protect Respondent's right to due process.

¹⁹ A WVDNR regulation, Section 6.06, provided that "[a]ny person entitled to a hearing because of an infringement upon an interest protected by the State Constitution Article 3, Section 10 may request a hearing within 30 days of the Department's issuance of the proposed certification." *Snyder*, 168 W. Va. at 268, 284 S.E.2d at 244 (quoting *Regulations for Procedures Governing the Director's Certification of § 404 and § 10 Permits*, West Virginia Administrative Regulations, Department of Natural Resources, Chapter 20-1 Series XIV, § 6.06(a) (1979)).

²⁰ 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

A qualified OOG inspector evaluates the permit as well as the proposed site and makes a recommendation on whether the permit should be issued. A surface owner's access to an administrative hearing or judicial review would do little to mitigate an erroneous issuance of a well permit. The burden this Court would place on the State by granting a surface owner the right to an administrative hearing or judicial review would be tremendous. There are over 55,000 wells active in West Virginia, with more permits filed every day. To allow every surface owner the right to appeal a permit would bring to fruition the "administrative catastrophe" this Court predicted in *McGrady v. Callaghan* as it pertained to prospective evidentiary hearings regarding surface mining permits. *McGrady v. Callaghan*, 161 W. Va. 180, 186, 244 S.E.2d 793, 796 (1978). In *Anderson & Anderson Contractors, Inc. v. Latimer*, this Court also considered the "likelihood that a . . . hearing procedure will be abused." 162 W. Va. 803, 811, 257 S.E.2d 878, 883 (1979). Surface owners could use this right to grind mineral production to a halt. It would effectively grant a surface owner a veto, which the Fourth Circuit held West Virginia law did not allow. *Justice v. Pennzoil Co.*, 598 F.2d 1339, 1344-45 (4th Cir. 1979). If surface owners have a constitutional right to a hearing on a shallow well horizontal permit, do oil and gas owners have a right to judicial review of a building permit, a water well permit, and other permits surface owners must obtain? Because statutory limits prevent drilling within a prescribed number of feet of a home or water well, under WVSORO's analysis, it could be argued that permits required for surface operations infringe oil and gas rights.

The Court's analysis in *Snyder* focused not on whether a hearing was required by due process or equal protection rights, but on whether the Snyders fit within the class of people entitled to the hearing required by the WVDNR's own rules, i.e., whether the Snyders had standing to challenge the certification.

Furthermore, the “deprivation” of a surface owner’s property rights, if there is any, would be temporary. The well in question would be drilled, gas produced, and the permit released. Therefore, the Respondent’s property rights may “not require as large a measure of procedural due process protection as a permanent deprivation.” Syl. pt. 2, *North v. W. Va. Bd. of Regents*, 160 W.Va. 248, 233 S.E.2d 411 (1977). After all these considerations, this Court should find that the availability of an administrative hearing or judicial review of a well work permit provides Respondent with no greater protection of his property rights. There is a great risk that Respondent or a similarly situated surface owner would use such process as a sword rather than a shield to unduly delay the permitting process, making production less economically viable. Regardless, if balancing is applied, the rights to notice and comment, the Oil and Gas Production Damages Compensation Act, other statutory protections, and common law rights all provide Respondent with more than sufficient protection of his property interest. The Oklahoma Commission’s decision was constitutional even without notice or comment.

2. Equal Protection

Both Respondent and WVSORO argue that because the pertinent statutes grant coal owners, operators and lessees, but not surface owners, the right to an administrative hearing and judicial review, the well work permit application process violates the surface owner’s guaranteed right to equal protection. “[C]ourts must use restraint in the exercise of their power to declare legislative acts unconstitutional.” State ex rel *Appalachian Power Company v. Gainer*, 149 W. Va. 740, 747, 143 S.E.2d 351, 357 (1965).

The Equal Protection Clause “does not forbid classifications. It simply keeps government decision makers from treating differently persons who are in all relevant respects alike.” *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L. Ed. 989

(1920); *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 2332, 120 L. Ed. 2d 1 (1992). “[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect classification, the Equal Protection Clause requires only that the classification rationally further a legitimate State interest.” *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S Ct. 2326, 2332, 120 L. Ed. 2d 1 (1992); *Clayburne v. Clayburne Living Center, Inc.*, 473 U.S. 432, 439-441, 105 S Ct. 3249, 3259-3255, 87 L. Ed. 2d 313 (1985); *New Orleans v. Dukes*, 472 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L. Ed. 2d 511 (1976). The Legislature’s distinction between subterranean coal and visible surface is not of a nature that requires a heightened level of scrutiny. “A person who assails any such classification has the burden of showing that it is essentially arbitrary and unreasonable.” *United Fuel Gas Co. v. Battle*, Syl. pt. 5, 153 W. Va. 222, 251, 167 S.E.2d 890, 907 (1969); *Appalachian Power Co. v. State Tax Dept. of W. Virginia*, 195 W. Va. 573, 595, 466 S.E.2d 424, 446 (1995). Both Respondent and WVSORO have failed to carry their burden to show that the well work permit statutes are “arbitrary and unreasonable.”

The State’s interest in a hearing to space wells so that a well is not drilled through an underground operating coal mine, so that miner’s lives are not endangered, is a rational basis for a distinction between surface and coal. Because the Legislature’s grant of an administrative hearing and judicial review to those with an interest in the coal estate and not to a surface owner is rationally related to a legitimate government purpose, such a classification does not violate the Equal Protection Clause.

F. If The Court Addresses Any Of The Extraneous Positions Asserted By Respondent Or WVSORO, The Court's Decision Should Be Limited And Applicable Only To Horizontal Marcellus Wells

There are over 55,000 wells active in West Virginia, with more permits filed every day. As indicated by the many differing statutes regulating oil and gas wells there are many different types of oil and gas wells in West Virginia. The case below involves only one specific permit. The question presented, the limited evidence below, and all of the briefs submitted address only horizontally drilled Marcellus wells. The legislature recently enacted comprehensive law regulating horizontal drilling. IOGA respectfully requests that the Court answer the question presented in the negative and limit its decision solely to shallow horizontal Marcellus wells and the question presented.

V. CONCLUSION

In West Virginia, surface owners do not have a statutory, regulatory or constitutional right or standing to challenge, either administratively or judicially, the issuance of a shallow well work permit for shallow, horizontal Marcellus wells pursuant to West Virginia Code § 22-6-1 *et seq.*

The permit does not, in itself, constitute an infringement of a surface owners' property rights in the surface, but instead restricts EQT. Therefore, in this case, the Respondent's constitutional rights are not invoked or applicable, and in a case on point, one state, Oklahoma, has so held. *Turley v. Flag-Redfern Oil Co*, 1989 Ok 144, 782 P.2d 130 (1989).

If this Court finds that the Respondent does have due process rights with respect to the permit Respondent seeks to challenge, then the Respondent's due process rights are already protected. A surface owner is afforded the right to notice of a permit application and the

right to submit written comments, and those rights more than satisfy due process requirements, especially in light of other statutory protections and the surface owner's existing common law and statutory rights to compensation.

The question presented does not request constitutional guidance, and the Court's decision should be limited.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "George A. Patterson, III", written over a horizontal line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JAMES MARTIN, in his official capacity as
DIRECTOR, OFFICE OF OIL AND GAS,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION;
OFFICE OF OIL AND GAS, WEST
VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION; and
EQT PRODUCTION COMPANY,**

Respondents Below/Petitioners,

v.

Docket No. 11-1157

MATTHEW L. HAMBLET,

Petitioner Below/Respondent.

CERTIFICATE OF SERVICE

I, George A. Patterson, III, Counsel for the Independent Oil & Gas Association of West Virginia, Inc., do hereby certify that I have served the *Amicus Curiae* Brief on the following parties this 22nd day of December, 2011, by mailing a true and exact copy thereof by United States mail, postage prepaid upon the following persons at the addresses set forth below:

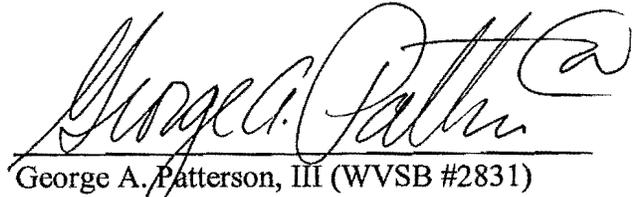
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