

No. 11-1157

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,

vs.

Docket No. 1157

MATTHEW L. HAMBLET,

Petitioner Below/Respondent.

**BRIEF OF AMICUS CURIAE**  
**WEST VIRGINIA OIL AND NATURAL GAS ASSOCIATION**

This Brief Supports Petitioners and  
Advocates Reversal of the  
Circuit Court's Order on Certified Question

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## **Introduction**

This amicus curiae brief is filed by the West Virginia Oil & Natural Gas Association (WVONGA) pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure.<sup>1</sup> The heart of the issue before this Court is whether or not a surface owner has the right to an administrative appeal of the issuance of a well work permit for a shallow horizontal well. WVONGA submits that, as evidenced by the long and established practice before the agency, the Legislature did not provide for an appeal for the surface owner in this circumstance. Although the Legislature also gave surface owners the right to comment on applications for well work permits and directed that the agency consider such comments, no appeal rights were granted. Instead, recognizing the rights of mineral owners to reasonable use of the surface, the Legislature provided primary relief through the vehicle of property damages even though that right did not exist at common law. W. Va. Code § 22-7-1 *et. seq.* Accordingly, *State ex rel. Lovejoy v. Callaghan*, 213 W. Va. 1, 576 S.E.2d 246 (2002), a per curiam opinion, as relied upon by the Circuit Court, should not govern this action. Instead, *Lovejoy* should either be overruled or limited to its particular facts. WVONGA therefore submits this Court should answer the certified question “no.”

### **Identity and Interest of Amicus, Appellate Rule 30(e)(4)**

The West Virginia Oil and Natural Gas Association,<sup>2</sup> chartered in 1915, is one of the oldest trade associations in the state, and is the only association that serves the entire oil and gas industry. WVONGA members are engaged in exploration, production, transmission, storage, sales and distribution and its allied members serve the industry through drilling, pipeline

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<sup>1</sup> Pursuant to Rule 30(3)(5), this brief was authored by Kenneth E. Tawney and Thomas J. Hurney, Jr., Jackson Kelly PLLC. No party other than WVONGA or its members contributed financially to this brief.

<sup>2</sup> WVONGA's website is at [www.wvonga.com](http://www.wvonga.com).

construction, well service and oil field service and supply. The Mission of WVONGA is to maximize and unify the voice of the membership for the benefit of the West Virginia Oil and Natural Gas Industry.

WVONGA therefore provides this court with the perspective of the industry on the significant issue currently pending. This is particularly important in light of the pending motion by the surface owners' organization to intervene in this action. Of primary importance is the attempt by a surface owner to create a novel and unwarranted right of appeal that has the very real probability of increased litigation over permits, placing the circuit courts in the position of second-guessing the DEP, the agency created with the expertise to protect the public interest, and severely stunting the very industry that has shown great promise for the economic development and well-being of West Virginia.

This amicus brief is submitted pursuant to Rule 30(a) of the West Virginia Rules of Appellate Procedure.

### **Facts**

This action involves the issuance of a permit by the West Virginia Department of Environmental Protection, Office of Oil & Gas (DEP) to the operator, EQT Production Company ("EQT"), for its 513136 Lewis Maxwell well, a shallow well with a horizontal leg into the Marcellus shale formation. App 31. The Petitioner, Mr. Hamblet, a partial surface owner of the property where EQT's well was to be drilled, App. 31-51, filed comments regarding the application as allowed by W. Va. Code § 22-6-10. App. 52-67. EQT responded to the comments and the DEP sent an investigator to the location before the permit was issued. After the DEP issued the permit, Mr. Hamblet filed an appeal in the Circuit Court of Doddridge County, relying upon W. Va. Code § 22-6-40 and *State ex rel. Lovejoy v. Callaghan*, 213 W. Va. 1, 576 S.E.2d

246 (2002) (per curiam). The Circuit Court denied motions to dismiss filed by EQT and the DEP, finding the surface owner had a right to appeal under *Lovejoy* and the statute. App. at 198-200.

### **The Certified Question**

The Circuit Court certified to this court the following question on August 9, 2011:

Does the West Virginia Supreme Court of Appeal's 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 well work permit for a horizontal Marcellus well?

The Circuit Court answered this question affirmatively. App. at 197-200.

### **West Virginia Code §22-6-40**

The Code section at issue, relied upon by the Circuit Court, is W. Va. Code § 22-6-40, which states:

§22-6-40. Appeal from order of issuance or refusal of permit to drill or fracture; procedure.

Any party to the proceeding under section fifteen of this article or section seven, article eight, chapter twenty-two-c of this code, adversely affected by the 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. 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 extenso in this section.

The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals in accordance with the provisions of section one, article six, chapter twenty-nine-a of this code.

## Argument

WVONGA recognizes the excellent briefs filed by the Parties to this action, and does not wish to repeat or belabor the issues and arguments already set forth. However, WVONGA offers the following perspective to aid the Court in its consideration of this appeal.

The Court should not intrude into a complex statutory scheme which balances competing rights of producers, landowners, and holders of other mineral rights. W. Va. Code § 22-6-40 does not, by its terms, provide surface owners with a right of appeal from the issuance of a well work permit because they are not parties to the proceedings and are not owners of an interest in coal. Thus, this Court should not, as it did in *State ex rel. Lovejoy v. Callaghan*, 213 W. Va. 1, 576 S.E.2d 246, (2002), assume that § 22-6-40 provides such a right. Furthermore, a right of appeal is not necessary to protect surface owners' rights and is inconsistent with the statutory scheme governing oil and gas well drilling.<sup>3</sup> The Court should not substitute its judgment for that of the Legislature.<sup>4</sup>

The right of a mineral owner to use the surface property to extract minerals is well established as a matter of contractual and common law. *Porter v. Mack Mfg. Co.*, 65 S.E.2d 246, 213 W. Va. 1 (2002). This express or implied right to go on the surface in order to extract

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<sup>3</sup> As a *per curiam* decision, *State ex rel. Lovejoy v. Callaghan*, 213 W. Va. 1, 576 S.E.2d 246 (2002), has limited precedential value. See, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001). *Lovejoy* is also distinguishable because it dealt with the statutory scheme for statutorily-pooled deep wells and not the different statutes applicable to the horizontal shallow gas well at issue here. In *Lovejoy*, the petitioners sought a writ of mandamus to direct the DEP to revoke a well permit. The Court found the petitioners waived their right of appeal and therefore were not entitled to mandamus. Without any analysis, the Court assumed that surface owners had a "clear right to appeal the decision to issue the working well permit..." at issue in the case, and therefore concluded they waived their "rights of appeal" and therefore "failed to demonstrate their entitlement" to a later filed writ of mandamus. This language was relied upon heavily by the Circuit Court in this case in denying the motions to dismiss by the DEP and EQT. As pointed out by EQT, the statute at issue in *Lovejoy*, § 22C-9-7(b)(4), requires surface owner consent and easement for *statutorily-pooled deep wells*, and not the horizontal shallow gas well at issue here.

<sup>4</sup> WVONGA notes in this regard that the Legislature is currently grappling with such issues and that the Joint Select Committee on Marcellus Shale is currently considering proposed legislation that would address some of the issues in the case at bar. See, <http://www.legis.state.wv.us> under the heading "MARCELLUS SHALE."

minerals by the holder of the mineral rights is long established in West Virginia and is a fundamental property right.

It is against this severed title backdrop that the Legislature long ago created the Office of Oil and Gas, now a branch of the DEP. The agency was given the power to regulate the oil and gas industry in several respects, including the right to issue well work permits before operators are allowed to drill wells. W. Va. Code § 22-6-6. Under Chapter 22 of the Code, the DEP was given the right to comprehensively regulate numerous aspects of drilling, reclamation, water usage, production and plugging of wells when production ceases. Later, the Legislature gave the DEP broad authority to regulate environmental aspects of drilling, including the authority to issue water pollution control permits. W. Va. Code § 22-6-7. The Legislature also gave the DEP enforcement powers, with the right to issue notices of violations and impose civil penalties, W. Va. Code § 22-6-3, 34, and to seek injunctive relief. W. Va. Code § 22-6-39. Never was the DEP given the statutory authority to resolve disputes between a surface owner and a mineral owner lessee. The Legislature entrusted protection of the public interest, through permitting, regulation and enforcement, to an agency with the expertise necessary to deal with the technicalities involved in the oil and gas and, as noted below, coal industries. While the Legislature saw fit to allow surface owners to comment on applications, it did not find it necessary or appropriate to provide surface owners with a right of appeal (as more fully addressed below).

This case illustrates the problem. Hamblet asserts statutory violations and inadequate erosion sediment and control plans as the basis for denying the permit. Those matters are within the exclusive control and discretion of the DEP, which enforces the statutes and applies its expertise in erosion and sediment control to protect the general public and the

environment. As discussed below, Hamblet's remedy is either statutory damages or a civil action to enforce common law rights if the operator (here, EQT) exceeds its rights under the severance deed or lease, or both. In the latter circumstance, the remedy might, in an appropriate case, include injunctive relief. The important point is that the surface owner will be enforcing the severance deed or lease and not interfering with the authority of the agency to employ its expertise in the granting of permits.

The Legislature deemed it appropriate to have the operator notify the surface owners at the drill site to advise them of their right to file *comments* regarding the application and to advise them of their right to have water wells tested. W. Va. Code § 22-6-9. The Legislature provided surface owners could file comments "as to the location or construction of the applicant's well work." W. Va. Code § 22-6-10.

The Legislature also dealt with the correlative rights of coal owners, lessees and operators ("coal interest owners") and oil and gas operators. Sections 22-6-12 and -13 were added to the Code to provide for notice to coal interest owners of well work permit applications and fracturing operations in coal-bearing regions. Here, unlike surface owners, the Legislature conferred upon coal interest owners the right to file *objections* to the application for well work, which can be understood in the context of the complex technical, safety and correlative rights issues associated with drilling in active mining areas or mining through an area where wells have been drilled. Separate provisions were added to spell out the consequences of filing an objection depending upon the classification of the well as a deep well or oil well, W. Va. Code § 22-6-15, drilling or converting wells into waste injection wells, W. Va. Code § 22-6-16, or shallow gas wells, W. Va. Code § 22-6-17. Objections by the owner of coal interest to shallow gas wells – which is the type of well at issue in this case – are then referred by the DEP to the Shallow Gas

Well Review Board and dealt with pursuant to the provisions of Chapter 22C, Article 8. W. Va. Code § 22C-8-1 is quite explicit about the Legislature's intention to encourage the fullest practicable recovery of coal, oil and gas, and the role of the Shallow Gas Well Review Board is to resolve issues in a manner that achieves maximization of energy production.

Importantly, with respect to Chapter 22 of the Code, the Legislature carefully circumscribed the rights to appeal to the *parties pursuant to §§ 22-6-15, 16 and 17*. All three of these sections give the right to *coal interest* owners to file *objections*. None of these three sections bestow any such rights upon surface owners.

As noted above, the Legislature separately granted to surface owners the opportunity to comment on the issuance of well work permits. Section 22-6-10(a) provides that owners of record "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." The DEP must review all comments filed, W. Va. Code § 22-6-11, but, in direct contrast to coal interest owners, no right of hearing or right of appeal is included as an adjunct to the surface owner's limited right to file comments. In other words, the Legislature granted to surface owners only an opportunity to provide the DEP with additional information that DEP is required to consider in evaluating applications for well work permits.

The fact that a surface owner can comment on a well permit does not make the surface owner a party; indeed, the plain language of the statutory provision is that surface owners are not parties to these proceedings. Even if they could arguably be called "parties," they are not parties who filed objections under sections 22-6-15, 16 or 17, and it is only the parties filing objections under those sections (coal interest owners) that are given a statutory right of appeal.

Given this difference in the regulatory role that the agency has vis-à-vis coal and surface owners, this dichotomy in treatment is not surprising. The DEP has extensive and exclusive authority to review applications and grant permits for wells. See, W. Va. Code §§ 22-6-9(c)(12); 22-6-6. To allow surface owners to not only comment upon the issuance of well permits, but to file appeals, would grant rights not bestowed by the Legislature. A surface owner, having received valuable compensation for mineral rights in a prior deed transfer should not be able to extract additional compensation, or hinder the use of the surface rights granted, either expressly or impliedly, in the sale of the mineral rights. A surface owner takes his property subject to the right of the mineral owner to reasonable surface use. This fundamental fact is recognized by the Legislature not including surface owners in the rights of appeal seen in Sections 22-6-40 and 41.

To allow surface owners to exercise a right of appeal, and the inherent delay, expense and unpredictability inherent to such appeals, would greatly expand their rights. The Legislature aptly recognized that a surface owner is likely to raise issues concerning property damage and whether the producer's use of the surface has been reasonable. Indeed, it is the property damage aspect that is the only thing that sets the surface owner apart from any other member of the public. The Legislature did not want to embroil the DEP in such property damage disputes; the court system is best equipped to handle such matters. The Legislature thus gave the DEP no authority to address property rights or property damage claims.

Here, Mr. Hamblet seeks to create a new mechanism to enforce Chapter 22 of the Code. Instead of suing for property damages, he seeks remedies that are not available to him at common law, and rights that were not given to him by the Legislature by seeking to prevent a

well from being drilled.<sup>5</sup> The Legislature did not provide surface owners with any private cause of action to generally enforce Chapter 22 of the Code. The Legislature knew what it was doing and could have created such rights for the relief he seeks had it chosen to, as evidenced by section 22-6-33, where the Legislature created a right for any plaintiff “interested in the lands situated within the distance of one mile from such well” – specifically including surface owners – to file a civil action to restrain waste of oil and gas.

An analysis of the objections raised by Mr. Hamblet demonstrates the wisdom of the Legislature’s approach and underscores the point. Mr. Hamblet objected to the adequacy of the erosion control measures, road damage, and violation of previous permits. App. 52. He also raised an issue regarding timber being cut in a haphazard manner. App. 53.

Addressing the permit violation first, enforcement of the Oil and Gas Act is the prerogative of the DEP. W. Va. Code § 22-6-2(a). Any alleged violations (none of which were supported by showing that a notice of violation had been issued by the DEP) do not provide Hamblet with additional private rights as a surface owner. And, prior violations certainly do not entitle him to force the DEP to stay drilling or to refuse to issue a subsequent permit. Enforcement is the exclusive domain of the DEP. It bears emphasis that the relief sought via the surface owner’s appeal is a court order staying drilling and a denial of permit application.<sup>6</sup>

As to his objection about roads, jurisdiction is within the Department of Transportation, Division of Highways. The Division of Highways requires producers drilling horizontal wells to file bonds with the Department conditioned upon the maintenance of certain

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<sup>5</sup> Indeed, if Mr. Hamblet believed the actions of EQT violated the terms of the mineral lease, he could have sought injunctive relief.

<sup>6</sup> Petition for Appeal of Issuance of Well Permit, Nov. 21, 2010. App. 6.

roadways. See, Memorandum re Oil and Gas Road Policy issued by Division of Highways on February 1, 2011.<sup>7</sup>

Finally, the alleged erosion and sediment control and alleged haphazard timber cutting claims again do not create for the surface owner a statutory right to force the DEP to stay drilling or to force the DEP to deny issuance of a permit. Yet, that is the relief sought by Mr. Hamblet by objection and appeal to the Circuit Court of Doddridge County.

The protection for surface owners has not been ignored by the Legislature. In 1985,<sup>8</sup> the Legislature provided protection unavailable at common law for surface owners when it passed the Oil and Gas Production Damage Compensation Act, W. Va. Code §§ 22-7-1, *et seq.*, to provide surface owners with the right to receive compensation for property damages related to oil and gas production. This statute ensured that surface owners could be compensated for property damage resulting from the rotary method of drilling oil and gas wells which was virtually unknown prior to December 31, 1959, or thereabouts. The Legislature recognized newer methods of drilling were being performed and determined that surface owners should be given the right to collect damages from those extracting minerals pursuant to leases and, in addition, to exercise any other common law right the surface owner may have for the unreasonable, negligent or otherwise wrongful exercise of the contractual right, whether express or implied, to use the surface of the land for the benefit of the developer's mineral interest. See, W. Va. Code §§ 22-7-3, -4. For example, if there was a separate agreement between the parties

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<sup>7</sup> It is notable, too, that roads are also being considered by the Legislature as a part of the Marcellus shale legislation. This document can be found online at <http://justbeneaththesurfacewv.com/Resources/Docs/February%201,%202011%20Road%20Bonding%20Policy.pdf>.

<sup>8</sup> In 1985, the West Virginia legislature enacted Article 2 of Chapter 22B which was the first code provision addressing the potential compensation and damages for surface owners who owned land upon which oil and gas wells were drilled. In 1994, the current article titled "Oil and Gas Production Damage Compensation" was reenacted as Article 7 of Chapter 22, *i.e.* 22-7-1 *et seq.*

calling for a different seed mixture for reclamation than the one included in the permit application (as Hamblet claimed here), a breach of that agreement can be remedied by a breach of contract action in circuit court.

There are other surface owner protections specifically embedded within the statute, such as notice regarding testing of water wells, W. Va. Code § 22-6-9, a rebuttable presumption of fault if the well becomes contaminated, W. Va. Code § 22-6-35, and setback requirements from water wells and dwellings. W. Va. Code § 22-6-21.

This complex statutory scheme is the result of a process by which the Legislature weighed and balanced the varying and sometimes conflicting rights of surface and mineral rights owners.<sup>9</sup> In the final analysis, the appeal by the surface owner here is an attempt to expand the possible remedies and to usurp the authority of both the Legislature and the DEP. The balanced statutory scheme should not be upset by this Court grafting onto Sections 22-6-40 (and 41) a right of appeal that is not expressly stated. The surface owner's only personal rights in the matter is the manner in which the mineral owner exercises its right to use the surface, which is always compensable in damages and common law remedies for any wrongful conduct. But, if the argument is made that the surface owners assert any other "rights," the easy response is that the surface owner is no different than any other member of the public who has no comment rights and no appeal rights.

The practical consequence of providing an appeal where none exists is to place the permitting process in a stance that was never intended. Without being alarmist, WVONGA nonetheless urges this Court to consider that, conceivably, every surface owner could object to an application to drill a well and then file an appeal if the permit is issued. The courts will be

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<sup>9</sup> This brief does not address every distinction drawn by the Legislature in this complex statutory scheme. For example, the Legislature also adopted different statutory provisions relating to coalbed methane wells.

asked to second-guess every agency decision even though the agency has the expertise to evaluate a given permit application. It is noteworthy that Mr. Hamblet even requested an unprecedented evidentiary hearing before the Circuit Court even though he was not entitled to a hearing before the DEP. App. at 6. The attendant delay associated with an appeal in an attempt to impose non-existent remedies is not sound public policy. As seen here, Mr. Hamblet's appeals have delayed this well since April 2010.

The permitting process and enforcement of statutory and regulatory requirements were not designed to address the private property rights between a surface owner and the mineral interest owner or lessee. Regardless of how it may be characterized, that is the reality; this case is nothing more than a dispute over the reasonable exercise of property rights between a surface owner and the mineral interest owner—which always has been and should remain the province of the courts with the remedy being either injunctive relief or compensation for damages. This surface owner attempts to create a judicial roadblock with the end-game being to either deny the mineral interest owner the right to develop its property or to create intolerable delay, perhaps in the hope of extracting undeserved compensation. The court should not become embroiled in these disputes and instead, the existing statutes should be interpreted and applied as the Legislature intended.

### Conclusion

WVONGA submits that the Circuit Court erred in answering the certified question and submits that Court should reverse its decision and answer the certified question “no.”



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**JAMES MARTIN, IN HIS OFFICIAL CAPACITY  
AS DIRECTOR, OFFICE OF OIL AND GAS,  
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**CERTIFICATE OF SERVICE**

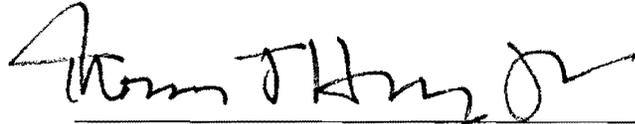
I, Thomas J. Hurney, Jr., counsel for The West Virginia Oil & Gas Association, do hereby certify that I have this 14<sup>th</sup> day of November, 2011, served the foregoing Amicus Curiae Brief on the following parties by mail at the addresses set forth below:

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