

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET No. 11-1157

01 2 1 2011

**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,**
Petitioners,

Certified Question
of the Circuit Court of
Doddridge County (10-P-15)

V.)

MATTHEW L. HAMBLET,
Respondent.

**James Martin and Office of
Oil and Gas, West Virginia
Department of Environmental
Protection's Brief**

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ASSIGNMENT OF ERROR

The Circuit Court of Doddridge County, West Virginia, certified the following question to this Court:

‘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* [sic] *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?’

Appendix 197-198 (hereinafter “App”). The Circuit Court answered the question in the affirmative. *Id.*

The Circuit Court erred by answering the certified question in the affirmative. *Lovejoy v. Callaghan*, 213 W.Va. 1, 576 S.E.2d 246 (2002) (per curiam), misstated that W.Va. Code § 22-6-41 provides a surface owner judicial review of a deep well work permit issued by the Office of Oil and Gas of the West Virginia Department of Environmental Protection (hereinafter referred to as “WVDEP” collectively with Petitioner James Martin, Director¹, Office of Oil and Gas). Therefore, there is a good faith basis for the overruling of the *Lovejoy* decision to the extent it grants an appeal right based upon a misstatement of law. In the alternative, *Lovejoy*’s misstatement of law should not be extended beyond well work permits for deep wells to well work permits for shallow horizontal Marcellus wells.

¹ James Martin’s official title is Chief of the Office of Oil and Gas, West Virginia Department of Environmental Protection; however, the style in the case below, and carried forward to this Court, names James Martin as Director, Office of Oil and Gas.

STATEMENT OF THE CASE

On March 22, 2010, Petitioner EQT Production Company (hereinafter referred to as "EQT") filed a permit application with WVDEP for EQT's 513136 Lewis Maxwell well (hereinafter referred to as the "EQT Well"). App 31-51. The permit application was for a shallow well targeting the Marcellus formation with a "horizontal leg into the [M]arcellus." App 31. As part of the permit application, EQT certified that the surface owners, including Respondent Matthew L. Hamblet (hereinafter referred to as "Respondent"), were sent notice of the application. App 35, 49-50. On April 2, 2010, Respondent, via counsel, submitted surface owner comments to WVDEP regarding the EQT Well. App 52-66. On April 7, 2010, EQT responded to Respondent's comments and on April 14, 2010, counsel for EQT submitted additional information in response to Respondent's comments. App 72-77. "After considering [Respondent's] comments, [EQT's] response, and the inspector's findings" WVDEP issued the permit for the EQT Well and notified Respondent of said issuance on April 22, 2010. App 29, 68.

Subsequently, Respondent filed a "contested case administrative appeal" of the EQT Well permit in the Circuit Court of Doddridge County, West Virginia, Civil Action No. 10-P-15. App 2. WVDEP and EQT moved to dismiss the administrative appeal on several grounds, but focused mainly on the contention that Respondent, a surface owner, does not have the right to file an administrative appeal of a well work permit issued by the WVDEP. App 11-26, 82-106, 107-113. After significant briefing and two hearings on the matter, the Circuit Court denied WVDEP and EQT's motions to dismiss by relying specifically on *Lovejoy*. App 195, ¶¶ 4-7. After the denial, WVDEP and EQT

requested that the Circuit Court submit its ruling via a certified question to this Court. App 197.

By Order of Certification entered August 9, 2011, the Circuit Court certified the following question to this Court:

'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* [sic] *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?'

App 197-198. The Circuit Court answered the question in the affirmative. *Id.*

There are two undisputed facts upon which the certified question relies: 1) that Respondent is a surface owner; and 2) WVDEP issued a shallow horizontal well permit targeting the Marcellus formation to EQT. Neither is undisputed. Respondent's counsel specifically stated at the November 23, 2010 hearing below that they were "here as surface owners talking about the protection of the land and the surface and not of that coal right." App 251, Lines 19-21. Furthermore, EQT's well work permit application clearly indicates it is shallow gas well with a horizontal leg targeting the Marcellus formation and nothing has been presented by Respondent to the contrary. App 31, 73, 75.

On August 12, 2011, the certified question was received by this Court and a briefing schedule was entered by order dated August 22, 2011. Pursuant to this Court's scheduling order, WVDEP now submits its brief.

SUMMARY OF ARGUMENT

Lovejoy does not permit a surface owner to seek judicial review of a well work permit issued by the WVDEP for a horizontal Marcellus well. As a surface owner, Respondent does not have a statutorily defined right to seek judicial review. The appeal rights of third parties are specifically defined and set forth within West Virginia's statutes governing the issuance of well work permits. To the extent *Lovejoy's* decision can be interpreted as permitting a surface owner to seek judicial review of a well work permit issued by the WVDEP for a horizontal Marcellus well, it was based upon a misstatement of law in contravention of the Legislature's clear intent to limit appeals to certain parties under certain circumstances. Furthermore, accepting that *Lovejoy's per curiam* opinion greatly expanded the appeal rights of surface owners where no right previously existed is contrary to the law of this Court. Therefore, the certified question should be answered in the negative, and there is a good faith basis for this Court to overrule the *Lovejoy* decision to the extent it grants an appeal right based upon a misstatement of law. At a minimum, *Lovejoy's* misstatement of law should not be extended beyond well work permits for deep wells to well work permits for horizontal Marcellus wells.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By answering the Certified Question in the affirmative, an inconsistency or conflict was created between the Circuit Courts of Doddridge and Kanawha Counties. Kanawha County previously ruled that:

The holding in *Lovejoy v. DEP*, 213 W.Va. 1, 576 S.E.2d 246 (2002) notwithstanding, W.Va. Code § 22-6-1 et seq. does not provide a surface owner a right to appeal a well permit.

Sines v. Huffman, Civil Action No. 08-AA-93 (Cir. Ct. Kanawha Co., W.Va. Sept. 5, 2008) *cert. denied*, *Sines v. Huffman*, 08-1949 (W.Va. January 27, 2009) (Justice Davis and Senior Status Justice McHugh would grant); App 158, ¶ 1. Since this case involves an inconsistency or conflict among the decisions of two lower tribunals, oral argument would be proper pursuant to Rule 20(a)(4) of the Revised Rules of Appellate Procedure. Therefore, WVDEP requests Rule 20 oral argument.

ARGUMENT

I. Standard of Review

“The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

II. Lovejoy Does Not Permit a Surface Owner to Seek Judicial Review of a Well Work Permit Issued by the WVDEP for a Horizontal Marcellus Well

The surface owners in *Lovejoy* challenged the issuance of a deep well work permit via writ of mandamus two years after the deep well permit was issued. 213 W.Va. at 2-3, 576 S.E.2d at 247-248. In dismissing the petitioners’ writ, *Lovejoy’s per curiam* opinion indicated petitioners had another adequate remedy and failed to utilize

that remedy. See 213 W.Va. at 4, 576 S.E.2d at 249 (surface owners had an administrative right of appeal in connection with the issuance of a deep well permit pursuant to W.Va. Code §§ 22-6-41 and 29A-5-4). However, W.Va. Code § 22-6-41 makes no reference to deep wells or surface owners. Furthermore, no reference to a surface owner's right to judicial review of a well work permit for a horizontal Marcellus well can be found within West Virginia's statutes governing the issuance of well work permits. W.Va. Code §§ 22-6-1 to -41. Nothing can be found because there are only three distinct instances where the Legislature granted such a right to appeal the issuance of a well work permit, only one of which may apply to surface owners but is inapplicable to horizontal Marcellus wells. See W.Va. Code § 22-6-24²; W.Va. Code § 22-6-40; W.Va. Code § 22-6-41.

The language contained in *Lovejoy* was based upon a misstatement of law and is now used by Respondent as a basis for an administrative right of appeal in contravention of the Legislature's clear intent to provide no such right to surface owners. To argue that *Lovejoy's per curiam* opinion greatly expanded the appeal rights of surface owners where no right previously existed is contrary to the law of this Court. As such, *Lovejoy* should be overruled to the extent the language contained therein provides a surface owner an administrative right to an appeal in contravention of the statutes governing appeals of well work permits. Additionally, the deep well at issue in

² WVDEP recognizes that surface owners may have a right of judicial review of a replugging well work permit. See W.Va. Code § 22-6-24(e)-(f) (owners of the land are afforded notice of an application to replug a well, the opportunity to object to the replugging and the opportunity to seek judicial review of WVDEP's decision regarding the replugging application); see *also* App 89. The certified question only addresses well work permits for horizontal Marcellus wells; and thus, W.Va. Code § 22-6-24 is inapplicable.

Lovejoy is distinguishable from the shallow horizontal Marcellus well in the matter at hand. Therefore, in the alternative, *Lovejoy's* misstatement of law should not be extended beyond well work permits for deep wells to well work permits for shallow horizontal Marcellus wells.

It is helpful to begin with an examination of the relevant statutes governing the issuance of well work permits and the rights of third parties to comment, object to or appeal the issuance thereof, because the examination leads to the inescapable conclusion that *Lovejoy* misstated the effect of those statutes.

A. Well Work Permit Statutory Framework – Surface Owners

Surface owners receive notice of any well work permit application, plat, and erosion and sediment control plan pursuant W.Va. Code § 22-6-9. Surface owners are then afforded the opportunity to “file comments with the [WVDEP] 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. Surface owner comments are addressed by WVDEP pursuant to W.Va. Code § 22-6-11, which provides:

The [WVDEP] shall promptly review all comments filed. If after review of the application and all comments received, the application for a well work permit is approved, and no timely objection or comment has been filed with the director or made by the director under the provisions of [W.Va. Code §§ 22-6-15, -16, -17]³, the permit shall be issued, with conditions, if any.

³ Note that these sections allow Coal operators, coal seam owners and coal seam lessees (hereinafter referred to as “coal owners”) to object to well work permits as explained in subsection (II)(B), *infra*.

Of particular note is the distinction between **comments** made by surface owners and **objections or comments** made by coal owners. *Id.* Since, as discussed *infra*, coal owners have significantly more statutory rights regarding objections to well work permit applications and appeals thereof, it is clear the Legislature intended to grant coal owners and surface owners different rights with regards to the issuance of well work permits by the WVDEP.

Once the well work permit is issued, the WVDEP “shall mail a copy of the permit as issued or a copy of the order denying a permit to any person who submitted comments to the director concerning said permit and requested such copy.” W.Va. Code § 22-6-11. This is the end of surface owner participation with regards to the issuance of well work permits by the WVDEP. No additional statute provides a mechanism for surface owners to object to a well work permit, request a hearing on a well work permit or seek judicial review of a well work permit.

B. Well Work Permit Statutory Framework – Coal Owners

Coal owners are afforded notice of a well work permit application under several statutes. See W.Va. Code § 22-6-12 (notice of drilling or fracturing a well); W.Va. Code § 22-6-13 (notice of intent to fracture other wells); W.Va. Code § 22-6-14 (notice of injection wells); W.Va. Code § 22-6-23 (notice of plugging or abandonment of a well). Several additional sections provide coal owners the opportunity to object to well work permit applications. See W.Va. Code § 22-6-15 (coal owner objections to deep wells and oil wells); W.Va. Code § 22-6-16 (coal owner objections to wells proposing introduction of liquids); W.Va. Code § 22-6-17 (coal owner objections to shallow gas wells). The three sections that allow objections to well work permit applications begin

with the qualification that the proposed well work must be “above a seam or seams of coal.” W.Va. Code §§ 22-6-15(a), -16(a), -17.

i. W.Va. Code § 22-6-15: Deep Wells and Oil Wells

W.Va. Code § 22-6-15(a) specifically allows coal owners and WVDEP to file objections to the drilling or fracturing of deep wells or oil wells. The statute does not allow surface owners to make objections. W.Va. Code § 22-6-15. If there are coal owner objections, the WVDEP is directed to conduct a hearing to resolve the objections with the objecting coal owner(s) and well operator as sole parties to the proceeding. W.Va. Code § 22-6-15(a). If the objections cannot be resolved, WVDEP is to hear the evidence and testimony in accordance with the pertinent provisions of the *State Administrative Procedures Act*, W.Va. Code §§ 29A-1-1 to 29A-7-4 (“APA”). W.Va. Code § 22-6-15(b)-(c).

ii. W.Va. Code § 22-6-16: Introduction of Liquids

W.Va. Code § 22-6-16(a) is very similar to the previous section. It specifically allows coal owners to file objections to the drilling or converting of a well for the introduction of liquids for recovery of oil or disposal of wastes. *Id.* The WVDEP, including in this particular instance the Director of the Division of Water and Waste Management, may also make objections. W.Va. Code § 22-6-16(b)-(c). The statute does not allow surface owners to make objections. W.Va. Code § 22-6-16. If there are coal owner objections, the WVDEP is directed to conduct a hearing to resolve the objections with the objecting coal owner(s) and well operator as sole parties to the proceeding. W.Va. Code § 22-6-16(c). If the objections cannot be resolved, WVDEP is

to hear the evidence and testimony in accordance with the pertinent provisions of the APA. W.Va. Code § 22-6-16(d)-(e).

iii. W.Va. Code § 22-6-17: Shallow Wells

W.Va. Code § 22-6-17 specifically allows coal owners to file objections to the drilling of shallow wells. However, the statutory scheme regarding objections to shallow wells changes because the Legislature created the Shallow Gas Well Review Board (“SGWRB”) to address coal owners’ objections to shallow wells. *Id.*; *See also* W.Va. Code §§ 22C-8-1 to -19. Once a coal owner objection is received, WVDEP submits the well work application, plat, and objections to the chair of the SGWRB and shall take no further action regarding the well work permit application until WVDEP receives an order from the SGWRB with further directions. W.Va. Code § 22-6-17. The SGWRB then holds a conference, in which the objecting coal owner(s) and well operator are the sole parties, in an attempt to resolve the objections. W.Va. Code § 22C-8-7(a). If the objections cannot be resolved, the SGWRB is to hold a hearing to consider the well work permit application in accordance with the pertinent provisions of the APA, with the coal owners and well operator as sole parties to the proceeding. W.Va. Code § 22C-8-7(b). An administrative appeal is provided to those parties adversely affected by an order of the SGWRB. W.Va. Code § 22C-8-13. The only parties to a SGWRB proceeding and a subsequent order therefrom are coal owners and the well operator. *See* W.Va. Code § 22C-8-3 (SGWRB article only applies to shallow wells when there is a coal owner objection); W.Va. Code § 22C-8-7 (only parties present at a conference or hearing are objecting coal owners and the well operator).

There is no statutory distinction between horizontal and vertical wells; therefore, horizontal wells are classified by their target formations. The EQT Well, a horizontal Marcellus well, is a shallow well. App 31, 73, 75. A shallow well is defined as:

[A]ny gas well drilled and completed in a formation above the top of the uppermost member of the "Onondaga Group": Provided, That in drilling a shallow well the operator may penetrate into the "Onondaga Group" to a reasonable depth, not in excess of twenty feet, in order to allow for logging and completion operations, but in no event may the "Onondaga Group" formation be otherwise produced, perforated or stimulated in any manner

W.Va. Code § 22-6-1(r). The Marcellus formation is the formation immediately above the Onondaga Group. App 33. The EQT Well proposed to drill into "the Onondaga not more than 20', then plug back approx. 5,748' and kick off the horizontal leg into the [M]arcellus, using a slick water frac." App 31. Since the well did not propose to enter the Onondaga Group more than twenty feet and no Onondaga Group formation was to be produced, perforated or stimulated in any manner, the EQT Well is by statutory definition a shallow well.

Therefore, objections to a well work permit for a shallow horizontal Marcellus well would ostensibly be filed pursuant to W.Va. Code § 22-6-17. However, as noted above, only coal owners are afforded the opportunity to file objections to the issuance of a shallow well work permit. Surface owners may only file comments "as to the location or construction of the applicant's well work" which the Respondent did in this case. W.Va. Code § 22-6-10.

iv. W.Va. Code § 22-6-40: Appeal from Permit to Drill or Fracture

W.Va. Code § 22-6-40 provides:

Any **party to the proceeding** under [W.Va. Code § 22-6-15] or [W.Va. Code § 22C-8-7] 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 [W.Va. Code § 29A-5-4] 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.

(emphasis added). As indicated above, the only parties to a proceeding held under W.Va. Code § 22-6-15 are objecting coal owners and the well operator as sole parties in the hearing before WVDEP; and objecting coal owners and the well operator are also the sole parties to the proceeding held before the SGWRB pursuant to W.Va. Code § 22C-8-7.⁴ W.Va. Code § 22-6-40 is unequivocally clear that it only grants the right to seek judicial review of the issuance of well work permits for deep wells, oil wells and shallow wells to coal owners and the well operator.

v. W.Va. Code § 22-6-41: Appeal from Permit for Introduction of Liquids

W.Va. Code § 22-6-41 provides:

Any **party to the proceedings** under [W.Va. Code § 22-6-16] 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. All of the pertinent provisions of [W.Va. Code § 29A-5-4] 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.

(emphasis added). As indicated above, the only parties to a proceeding held under W.Va. Code § 22-6-16 are objecting coal owners and the well operator as sole parties in

⁴ W.Va. Code § 22-6-40, by virtue of its reference to W.Va. Code § 22C-8-7, would allow those parties under W.Va. Code § 22-6-17 to seek judicial review because objections filed by coal owners pursuant to W.Va. Code § 22-6-17 are submitted to the SGWRB for proceedings under W.Va. Code § 22C-8-7.

the hearing before WVDEP. W.Va. Code § 22-6-41 is also unequivocally clear that it only grants the right to seek judicial review of the issuance of well work permits for the introduction of liquids for oil recovery and waste disposal to coal owners and the well operator.

Given the above statutory examination, objections to a well work permit for a horizontal Marcellus well would ostensibly be filed pursuant to W.Va. Code § 22-6-17 because a horizontal Marcellus well similar to the EQT Well is a shallow well. However, only coal owners are afforded the opportunity to file objections to the issuance of a shallow well work permit. Surface owners may only file comments “as to the location or construction of the applicant’s well work” which the Respondent did in this case. W.Va. Code § 22-6-10.

C. W.Va. Code § 29A-5-4: Contested Case Inapplicable

Surface owners are not entitled to appeal the issuance of a well work permit under the APA, because surface owners’ comments do not constitute a “contested case.” In order to bring an appeal under the APA, the appeal must be from a “contested case.” W.Va. Code § 29A-5-4(a). For the purposes of the APA, a “contested case” is defined as “a proceeding before an agency in which the legal rights, duties, interests or privileges of **specific** parties are required by law or constitutional right to be determined **after an agency hearing.**” W.Va. Code § 29A-1-2(b). (emphasis added) (exclusions from definition omitted). As discussed above, surface owners are not entitled to any type of hearing regarding a well work permit under any statute. See W.Va. Code §§ 22-6-15, -16, -17, 22C-8-7 (hearings regarding the issuance of well work permits only allow coal owners and the well operator as parties to the hearing).

Since APA appeals under W.Va. Code §§ 22-6-40, -41 may only be brought by a party to the proceedings under W.Va. Code §§ W.Va. Code §§ 22-6-15, -16, 22C-8-7, the right of appeal provided by the APA is not available to nonparty surface owners. It is indisputable that, if surface owners were parties to any of these proceedings, the provisions of W.Va. Code § 29A-5-4 would apply and govern the judicial review of the issuance of a well work permit by WVDEP. However, W.Va. Code § 29A-5-4, the APA statute which grants a right of judicial review, unambiguously states that judicial review is only available for contested cases. When a party does not possess a statutory right to a hearing on a well work permit's issuance, there is not a "contested case" as defined and required by the APA. *Lovejoy's* statement to the extent it applies W.Va. Code § 29A-5-4 in its erroneous reading of W.Va. Code § 22-6-41 is a misstatement of law.

Where there is no contested case, one cannot be created. In order for there to be a "contested case":

Our APA, W.Va.Code, 29A-1-2(b), defines a contested case before an agency as a proceeding that involves legal rights, duties, interests, or privileges of specific parties which are required by law or constitutional right to be determined after an agency hearing. Thus, **an agency must either be required by some statutory provision or administrative rule to have hearings** or the specific right affected by the agency must be constitutionally protected such that a hearing is required. In other words, the provisions in W.Va.Code, 29A-5-1, *et seq.*, outlining the procedure for hearing contested cases **do not create substantive rights, as such rights must exist either by statutory language creating an agency hearing**, 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) (emphasis added). Thus, in the absence a contested case, a right of appeal does not arise under the APA nor can one be created.

It is clear that only coal owners and the well operator were given the statutory right to appeal the issuance of a well work permit by the WVDEP and thus only coal owners and well operators can avail themselves of the APA.

D. The *Lovejoy* Decision Was Contrary to Law

After examining *in pari materia* the statutes governing the issuance of well work permits, including horizontal Marcellus well work permits, and judicial review thereof, it becomes evident that *Lovejoy's* statement that W.Va. Code § 22-6-41 provides surface owners a "clear right to appeal the decision to issue the working well permit" was a misstatement of law. 213 W.Va. at 4, 576 S.E.2d at 249. On the other hand, it is abundantly clear that there is no right of judicial review for surface owners because nothing within the statutes governing the issuance of well work permits grants such a right.

"The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syl. pt. 2, *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007) (citing Syl. pt. 8, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953)). Furthermore, "the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another," applies to statutory interpretations. Syl. pt. 6, *Id.* (citing Syl. pt. 3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984)). "The *expressio unius* maxim is based upon the assumption that certain omissions from a statute by the Legislature are intentional." *Id.* at 492, 647 S.E.2d at 928. In *Phillips*, certain medical professionals were specifically included within the 1986 Medical Professional Liability Act but pharmacies were not. *Id.*

at 493, 647 S.E.2d at 929. Therefore, the Legislature intended to exclude pharmacies.
Id.

Applying the same statutory interpretation used in *Phillips* to the statutes governing the issuance of well work permits leads to the conclusion that the Legislature intended to exclude surface owners from the judicial review of the issuance of well work permits. Coal owners' right to seek judicial review of the issuance of a well work permit is expressly mentioned twice within the statutes governing the issuance of well work permits. See W.Va. Code §§ 22-6-40, -41. This express mention of a coal owner's right to seek judicial review, and no mention of a similar right for a surface owner, implies that the Legislature intended to exclude surface owners from the judicial review of the issuance of well work permits.

By answering the certified question in the affirmative, the Circuit Court has interpreted *Lovejoy* as including surface owners within the judicial review of the issuance of well work permits. This is directly contrary to the Legislature's intent. Not only did the Legislature specifically exclude surface owners on the face of the statutes but this Court's own accepted standards of statutory interpretation imply that the Legislature intended to exclude surface owners. "[I]t is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged **not to add to statutes something the Legislature purposely omitted.**" *Phillips*, 220 W.Va. at 491, 647 S.E.2d at 927 (citations omitted) (emphasis added). Answering the certified question in the affirmative would read into the statutes governing judicial review of the

issuance of well work permits a right of judicial review for surface owners that is simply not there.

Not only did *Lovejoy* eschew accepted standards of statutory construction, it did so in a *per curiam* opinion. “This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution.” Syl. pt. 2, *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001). Prior to *Lovejoy*, surface owners clearly had no right under law to seek judicial review of a well work permit. However, *Lovejoy*’s decision arguably changed that with its statement that W.Va. Code § 22-6-41 provided surface owners a “clear right to appeal the decision to issue the working well permit.” 213 W.Va. at 4, 576 S.E.2d at 249. Having arguably announced a new point of law, *Lovejoy* was constitutionally obligated to articulate the creation of a surface owner’s right to seek judicial review of a well work permit through syllabus points. See Syl. pt. 2, *Walker*, 210 W.Va. 490, 558 S.E.2d 290 (the state constitution requires that new points of law are announced in syllabus points). *Lovejoy* did no such thing. *Lovejoy*’s syllabus points address well settled principles of law regarding the elements necessary for the granting of a writ of mandamus and the exhaustion of administrative remedies, but makes no mention of creating a substantial appeal right for surface owners. See Syl. pt. 1 & 2, 213 W.Va. 1, 576 S.E.2d 246.

Lovejoy is a flawed decision for several reasons. First, it misstates the applicable law, as an examination of the statutes governing judicial review of the issuance of well work permits clearly shows. Second, *Lovejoy* failed to follow accepted standards of statutory interpretation. *Lovejoy*’s statement purportedly granting surface

owners a right to seek judicial review contains no discussion, let alone proper interpretation. It is only a blanket misstatement of the law. Third, *Lovejoy* did not place the statement arguably expanding the judicial review rights of surface owners within a syllabus point. This is a significant expansion of rights and unquestionably a new point of law which requires it be articulated in a syllabus point. These flaws call into question the legitimacy of the *Lovejoy* decision. Furthermore, they clearly show *Lovejoy* did not interpret the relevant statutes to permit a surface owner to seek judicial review of a well work permit for a horizontal Marcellus well.

Since *Lovejoy* did not interpret the statutes to permit a surface owner to seek judicial review, the certified question should be answered in the negative. Additionally, to the extent *Lovejoy* grants an appeal right based upon a misstatement of law, there is a good faith basis for this Court to overrule the *Lovejoy* decision.

E. In the Alternative, the *Lovejoy* Decision Should Not Be Extended Beyond Well Work Permits for Deep Wells to Well Work Permits for Shallow Horizontal Marcellus Wells

Due to the flawed nature of *Lovejoy*'s analysis, and resulting misstatement of law, the decision should not be extended beyond the case to apply to anything but deep well work permits. The petitioners in *Lovejoy* were surface owners, one of whom did not consent to the drilling of a deep well. 213 W.Va. at 2, 576 S.E.2d at 247. Where petitioners were non-consenting surface owners challenging a deep well work permit, their relief centered on the "consent and easement" provision. *Id.* at 3, 576 S.E.2d at 248 (citing W.Va. Code § 22C-9-7(b)(4)). There is no such "consent and easement" provision regarding shallow wells. Through the statutory examination of West Virginia's oil and gas laws, it is clear the Legislature intended to give stakeholders distinct rights

with regards to the issuance of well work permits. That distinction between deep and shallow wells is no different.

As explained above, the ability of a person to seek judicial review of the issuance of a deep well work permit is limited to coal owners and the well operator. See W.Va. Code §§ 22-6-15, -40. Furthermore, the ability of a person to seek judicial review of the issuance of a shallow well work permit is also limited to coal owners and the well operator. See W.Va. Code §§ 22-6-17, -40, 22C-8-7. Nothing provides a right for a surface owner to seek judicial review of either a deep or shallow well work permit.

However, deep wells are recognized by the Legislature as being unique. See W.Va. Code § 22C-9-1 (explains difference between shallow and deep wells and states it is in the public interest to enact legislation to encourage the maximum recovery of oil and gas from all formations in the state). Within the Oil and Gas Conservation statutes, W.Va. Code 22C-9-1 to -16 (“Conservation Statutes”), the Legislature set forth a scheme of conservation of oil and gas, including the creation of the Oil and Gas Conservation Commission (“Commission”).⁵ The Legislature specifically set forth the right of a deep well operator to request the establishment of drilling units and to pool the interests within a unit. See W.Va. Code § 22C-9-7 (drilling units and the pooling of interests in drilling units in connection with deep wells). Under W.Va. Code § 22C-9-7(b), interests in a drilling unit that are not leased can be pooled into the unit without their consent by order of the Commission. It is under these circumstances where the “consent and easement” provision becomes applicable. See W.Va. Code § 22C-9-7(b)(4) (a deep well cannot be permitted upon or within any tract of land in a unit without

⁵ The Commission was a respondent party in *Lovejoy*.

the consent and easement of all surface owners of the land). Additionally, no “drilling shall be initiated on the tract of an unleased owner without the owner’s written consent. W.Va. Code § 22C-9-7(b)(1).

With regards to deep well work permits for deep wells within a unit seeking the pooling of interests therein, surface owners have more rights than those set forth in the general oil and gas provisions examined above. A surface owner is given notice of the request to establish a unit and pool the interests therein. W.Va. Code § 22C-9-7(a)(2), (b)(1). A surface owner is also given the right to a hearing on the unit and pooling requests. *Id.* Finally, the surface owner can seek judicial review of an order of the Commission establishing the unit and/or pooling the interests therein. W.Va. Code § 22C-9-11(a). What is absent is any statute within the Conservation Statutes that allows a surface owner to seek judicial review of the issuance of a shallow horizontal Marcellus well work permit. See W.Va. Code § 22C-9-3(b)(1) (specifically excludes shallow wells⁶); W.Va. Code § 22C-9-1(b) (“it is not in the public interest...to enact statutory provisions relating to the exploration for or production from oil and gas from shallow wells”).

Since a horizontal Marcellus well similar to the EQT Well is by definition a shallow well, the Conservation Statutes are inapplicable to the case at hand. To the extent *Lovejoy* based its misstatement of law regarding W.Va. Code § 22-6-41 on an analysis of the “consent and easement” provision and rights of surface owners under

⁶ Shallow wells for the secondary recovery of oil are governed by W.Va. Code § 22C-9-8 but are clearly inapplicable to the matter at hand because shallow horizontal Marcellus wells are not drilled for the secondary recovery of oil, but for the primary recovery of natural gas.

the Conservation Statutes, it should not be followed and applied to shallow wells which are categorically excluded from the Conservation Statutes' operation.

CONCLUSION

The Legislature deliberately and intentionally created a framework whereby surface owners were given one distinct set of rights and coal owners were given another distinct set of rights. Those rights were further defined and narrowed based upon the type of well work permit. See W.Va. Code § 22-6-24(e)-(f) (both coal owners and surface owners can seek judicial review of the issuance of a replugging well work permit); W.Va. Code § 22-6-10, 22C-9-7(b)(4) (surface owners can submit comments to any well work permit but can require their consent and easement with regards to deep wells drilled in a unit with pooled interests); W.Va. Code § 22-6-15, -17 (coal owners objecting to a deep well work permit go through the WVDEP while coal owners objecting to a shallow well work permit go through the SGWRB). To grant a right where none has existed would rewrite the statutes and alter the Legislature's intent.

For the reasons stated above, WVDEP respectfully requests this Honorable Court to answer the Certified Question in the negative by overruling *Lovejoy*, or in the alternative, hold that *Lovejoy* is inapplicable to horizontal Marcellus well work permits, and direct the Circuit Court to dismiss the administrative appeal below.

Respectfully submitted,
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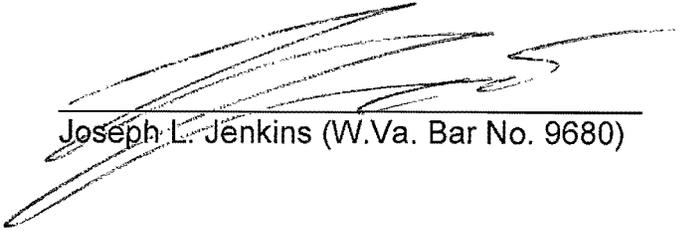
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CERTIFICATE OF SERVICE

I, Joseph L. Jenkins, counsel for James Martin and Office of Oil and Gas, West Virginia Department of Environmental Protection, do hereby certify that I served a copy of the foregoing **“James Martin and Office of Oil and Gas, West Virginia Department of Environmental Protection’s Brief”** on the **21st day of October, 2011**, via U.S. Mail to the following:

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