

No. 11-1157

OCT 2 1 2011

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. 11-1157

MATTHEW L. HAMBLET,

Petitioner Below/Respondent.

PETITIONER'S EQT PRODUCTION COMPANY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. CERTIFIED QUESTION AND REQUEST FOR REFORMULATION 1

II. ASSIGNMENTS OF ERROR.....2

III. STATEMENT OF THE CASE3

 A. STATUTORY BACKGROUND.....3

 B. FACTUAL BACKGROUND5

IV. SUMMARY OF ARGUMENT.....7

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION9

VI. ARGUMENT.....9

 A. STANDARD OF REVIEW IS *DE NOVO*9

 B. THERE IS NO STATUTORY RIGHT OF APPEAL OF A WELL WORK PERMIT BY A SURFACE OWNER AND THE PER CURIAM LOVEJOY DECISION DOES NOT CREATE THAT RIGHT10

 C. THE PER CURIAM LOVEJOY DECISION DOES NOT APPLY TO THIS HORIZONTAL SHALLOW GAS WELL PERMIT.....18

VII. CONCLUSION24

TABLE OF AUTHORITIES

CASES

Ashby v. City of Fairmont, 216 W.Va. 527, 531, 607 S.E.2d 856, 860 (2004).....8, 10, 11, 12

Burrows v. Nationwide Mut. Ins. Co., 215 W.Va. 668, 600 S.E.2d 565 (2004)13

CBC Holdings, LLC v. Dynatec Corp., USA, et al., 224 W. Va. 25, 680 S.E.2d 40 (2009) 15

Concept Mining, Inc. v. Helton, 217 W.Va. 298, 303, 617 S.E.2d 845, 850 (2005).....8, 13

Crea v. Crea, 222 W. Va. 388, 664 S.E.2d 729 (2008).....8, 10, 16

DeVane v. Kennedy, 205 W.Va. 519, 529, 519 S.E.2d 622, 623 (1999).....8

Ferrell v. Nationwide Mut. Ins. Co., 217 W. Va. 243, 617 S.E.2d 790 (2005).....2, 9

Gallapoo v. Wal-Mart Stores, Inc., 197 W. Va. 172, 475 S.E.2d 172(2005).....9

Kincaid v. Mangum, 189 W. Va. 404, 432 S.E.2d 74 (1993).....1

Nelson v. W. Va. Pub. Employees Ins. Bd., 171 W. Va. 445, 300 S.E. 2d 86 (1982)..... 13

Porter v. Mack Mfg. Co., 65 W. Va. 636, 64 S.E. 853, 855 (1909)5

State ex rel. Blue Eagle Land, LLC et al. v. West Virginia Oil & Gas Conservation Commission, et al., 222 W. Va. 342, 664 S.E.2d 683 (2008)19, 21

State ex Rel. Lovejoy v. Callaghan, 576 S.E.2d 246, 213 W.Va. 1 (2002) (*per curiam*).....passim

State ex rel. Stanley v. Sine, 215 W.Va. 100, 215 W. Va. 100, 594 S.E.2d 314 (2004)..... 12

State v. De Spain, 139 W.Va. 854, [857,] 81 S.E.2d 914, 916 (1954)10, 16

State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968).....12

State v. General Daniel Morgan Post No. 548, V.F.W., 144 W. Va. 137, 107 S.E.2d 353 (1959)
.....12

Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290 (2001)2, 18

West Virginia Department of Energy v. Hobet Mining & Construction Co., 178 W.Va. 262, 358 S.E.2d 823 (1987).....10, 16

Wilson v. Bernet, 218 W. Va. 628, 631, 625 S.E.2d 706, 709 (2005).....9

WEST VIRGINIA CIRCUIT COURT CASES

O'Brien v. Martin, et. al., Civil Action No. 07-Misc-304 (Circuit Court of Kanawha County West Virginia)17

Sines v. Huffman, Civil Action No. 08-AAA-93 (Circuit Court of Kanawha County, West Virginia).....17

STATUTES

W. Va. Code § 22-1-1.....14

W. Va. Code § 22-1-7 (4).....14

W. Va. Code §§ 22-6-1 *et seq.*passim

W. Va. Code § 22-6-1 (e)12

W. Va. Code § 22-6-1 (g).....4, 20

W. Va. Code § 22-6-1 (r).....4, 5, 20

W. Va. Code § 22-6-3.....14

W. Va. Code § 22-6-9.....13

W. Va. Code § 22-6-10.....13

W. Va. Code § 22-6-14.....23

W. Va. Code § 22-6-15.....passim

W. Va. Code § 22-6-15 (a)12, 15, 24

W. Va. Code § 22-6-16.....7, 11, 13, 23

W. Va. Code § 22-6-17.....passim

W. Va. Code § 22-6-17 (a)11

W. Va. Code § 22-6-25.....23

W. Va. Code § 22-6-28.....14

W. Va. Code § 22-6-40.....	passim
W. Va. Code § 22-6-41.....	passim
W. Va. Code §§ 22-7-1 <i>et seq.</i>	passim
W. Va. Code §§ 22C-8-1 <i>et seq.</i>	passim
W. Va. Code § 22C-8-1 (a) (2).....	16
W. Va. Code § 22C-8-2 (21)	4, 20
W. Va. Code § 22C-8-2 (8)	20
W. Va. Code § 22C-8-3 (b) (3).....	22
W. Va. Code § 22C-8-7	passim
W. Va. Code § 22C-8-7 (a).....	15, 24
W. Va. Code § 22C-8-11(f).....	17, 22
W. Va. Code §§ 22C-9-1 <i>et seq.</i>	passim
W. Va. Code § 22C-9-1 (a) (1)-(3).....	16
W. Va. Code § 22C-9-1 (b)	4, 20
W. Va. Code § 22C-9-2 (a) (11).....	4, 20
W. Va. Code § 22C-9-2 (a) (12).....	20
W. Va. Code § 22C-9-3 (b) (1).....	19
W. Va. Code § 22C-9-7 (b) (4).....	3, 4, 19
W. Va. Code § 29A-1-2 (b).....	17

RULES

W. Va. Rev. R. App. P. 20.....	9
--------------------------------	---

REGULATIONS

W. Va. CSR §§ 35-4-1 <i>et seq.</i>	passim
---	--------

W. Va. CSR § 39-1 <i>et seq.</i>	4, 20
W. Va. CSR § 39-2 <i>et seq.</i>	4, 20
W. Va. CSR §§ 50-1 <i>et seq.</i>	21

I. CERTIFIED QUESTION AND REQUEST FOR REFORMULATION

After conferring, the parties were unable to agree on a joint certified question in this matter. Therefore, separate submissions and objections to the same were exchanged. The Court ultimately ordered that the following question be certified 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 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 of Doddridge County answered the question affirmatively.

The Circuit Court's affirmative answer to the question reflects its denial of Petitioners' Motions to Dismiss. Petitioner EQT Production Company ("Petitioner EQT") respectfully asserts that the Circuit Court was incorrect in finding that a surface owner has the right to appeal the issuance of a horizontal shallow gas well work permit and asks that this Court answer the question as formulated negatively.

Petitioner EQT further asks that this Court utilize its power to reformulate certified questions because it believes that this question as certified is overly broad and does not accurately reflect the facts of the administrative appeal. First, the question as certified states that the relevant statutes are "interpreted" and read "*in para materia*." Petitioner EQT avers that this is not reflective of the discussion in the *per curiam Lovejoy* decision. Further, the question, as certified, fails to identify the well work permit as a permit for a horizontal shallow gas well. This Court can reformulate a certified question "when a certified question is framed so that this Court is not able to fully address the law which is involved in the question..." *Kincaid v.*

Mangum, 189 W. Va. 404, 432 S.E.2d 74 (1993); *Ferrell v. Nationwide Mut. Ins. Co.*, 217 W. Va. 243, 617 S.E.2d 790 (2005).

Therefore, Petitioner EQT respectfully proposes the following certified questions which it believes more accurately present the issues:

Are surface owners entitled to an administrative appeal of the issuance of a well work permit under W. Va. Code §§ 22-6-1 *et seq.*, W. Va. Code §§ 22C-8-1 *et seq.*, or W. Va. Code §§ 22C-9-1 *et seq.*?

EQT avers that this proposed certified question should be answered in the negative.

Does the West Virginia Supreme Court of Appeal's *per curiam* ruling in *State ex. rel. Lovejoy v. Callaghan*, 213 W. Va. 1, 576 S.E. 2d 246 (2002) create the right for a surface owner to appeal the issuance of a well work permit for a horizontal shallow gas well?

EQT avers that this proposed certified question should be answered in the negative.

II. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in issuing an affirmative answer to the certified question, either as stated or as reformulated, because the answer ignores the comprehensive, clear and unambiguous Legislative scheme for permitting of natural gas wells. Specifically, only a coal owner, lessee or operator of a workable coal seam underlying the proposed drill site has a right to administratively appeal the issuance of a well work permit under W. Va. Code §§ 22-6-1 *et seq.*, the general permitting statute, W. Va. Code §§ 22C-9-1 *et seq.*, the deep well statute, and W. Va. Code §§ 22C-8-1 *et seq.*, the shallow gas well statute. There is no right to an appeal by a surface owner under these statutes read individually or read in *pari materia* and such a finding would create a new right or point of law that is not existing in common law or enacted by the Legislature.

As a *per curiam* opinion, *State ex rel. Lovejoy v. Callaghan*, 213 W.Va. 1, 576 S.E.2d 246 (2002)(*per curiam*) cannot create a new point of law. Syl. Pt. 2, *Walker v. Doe*, 210 W. Va.

490, 558 S.E.2d 290 (2001). At least two Circuit Courts, Kanawha County and Doddridge County, have considered this same legal issue and they have found that there is no right for a surface owner to appeal the issuance of a well work permit. Accordingly, the certified question should be answered in the negative and this Court should find that there is no statutory right of appeal by surface owners of the issuance of a shallow or deep well work permit.

2. The Circuit Court erred in allowing Respondent to maintain his administrative appeal of the issuance of a horizontal shallow gas well work permit by ignoring the statutory distinction between deep gas wells and shallow gas wells. *State ex rel. Lovejoy v. Callaghan*, 213 W.Va. 1, 576 S.E.2d 246 (W. Va. 2002)(*per curiam*) applies only to statutorily pooled deep gas wells subject to the “consent and easement provision.” See W. Va. Code § 22C-9-7(b)(4) (providing for surface owner consent and easements if a statutory pooling order is issued). The *per curiam* decision in *Lovejoy* does not apply to horizontal shallow gas well work permits. Accordingly, surface owners of the surface estate underlying the drilling location for a horizontal shallow gas well do not have a right to appeal the issuance of that horizontal shallow gas well work permit.

III. STATEMENT OF THE CASE

A. STATUTORY BACKGROUND

The Legislature created a comprehensive and explicit statutory scheme addressing natural gas permitting. There is a general permitting statute and accompanying regulations that govern all well work permits, W. Va. Code §§ 22-6-1 *et seq.* and W. Va. CSR §§ 35-4-1. There are differing permitting and operating statutes and regulations for what are defined by statute as shallow gas wells and deep gas wells. See discussion *infra*.

Shallow gas wells are defined by statute as “any gas well drilled and completed in a formation above the top of the uppermost member of the ‘Onondaga Group...’” W. Va. Code § 22-6-1(r). *See also* W. Va. Code § 22C-8-2(21); §22C-9-2(a)(11). However, the definition further provides 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...” *Id.* As a matter of public policy, shallow gas wells are traditionally less regulated than deep wells. W. Va. Code § 22C-9-1(b).

The Legislature provided for additional regulation for all deep wells, defined by statute as “any well other than a shallow well, drilled and completed in a formation at or below the top of the uppermost member of the ‘Onondaga Group’” W. Va. Code § 22-6-1 (g). As such, deep wells are governed by both the general permitting statute and accompanying regulations and W. Va. Code §§ 22C-9-1 *et seq.* and W. Va. CSR §§ 39-1 *et seq.* and W. Va. CSR §§ 39-2 *et seq.* Of particular significance in the instant case, surface owners have additional rights under the deep well statute if they are a part of a statutorily pooled unit. W. Va. Code § 22C-9-7(b)(4).

At issue in this case is a horizontal shallow gas well. Joint Appendix (“*App.*”) 29-30. In addition to these permitting and operational regulatory scheme outlined herein, the Legislature considered the interests of surface owners and the damages to the surface caused by gas development and enacted the Oil and Gas Production Damage Compensation Act. *See* W. Va. Code §§ 22-7-1 *et seq.* Under none of these relevant statutes or regulations are surface owners provided with a right to appeal the issuance of a well work permit. *See* discussion *infra*.

B. FACTUAL BACKGROUND

Petitioner EQT is the lessee of a valid Oil and Gas Lease (“Lease”) of the oil and gas estate underlying the surface estate owned in part by Respondent Matthew Hamblet (“Respondent”). *See App.* 131-132 (Lease). The Lease explicitly contemplates reasonable use of the surface to access to produce the gas on the property as one of the bargained for terms. *Id.* Such a right also exists under common law. *See e.g. Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 638, 64 S.E. 853, 855 (1909)(stating that mineral interests are entitled to reasonable use of the land to access the minerals).

Respondent is one owner of the surface estate underlying the well location at issue in this appeal. *App.* 35. Respondent has affirmatively and specifically stated that he is only pursuing surface owner objections to the issuance of the horizontal shallow gas well work permit at issue. *App.* 253.

On March 22, 2010, Petitioner EQT filed a well work permit application with the Office of Oil and Gas (“OOG”) for EQT Well #513136 for a shallow gas well as defined by W. Va. Code §22-6-1 (r). The permit at issue is to construct and drill a horizontal shallow gas well using a fracturing process where there are no objections by a coal owner, lessee or operator. *See generally App.* 29-47. On April 2, 2010, Respondent submitted surface owner comments to the granting of this permit to the Office of Oil and Gas. *App.* 52-67. Petitioner EQT submitted a detailed response to Respondent’s comments on April 14, 2010, addressing each objection raised by the Respondent individually and in detail. *App.* 74-77.

OOG conducted an inspection of the site at issue to ensure compliance with all applicable permitting requirements. *App.* 68. Further, OOG reviewed the file, including Respondent’s comments and Petitioner EQT’s response to those comments. *Id.* On April 22, 2010, the OOG

determined that the application met the requirements of W. Va. Code §§ 22-6-1 *et seq.* and W. Va. CSR §§ 35-4-1 *et seq.* and issued to EQT the shallow gas well work permit for Well #513136 (“permit”). *See App.* 29 and 68. There are at least four wells permitted, without objection, and constructed on Mr. Hamblet’s surface estate. *App.* 260; 269.

On or about May 21, 2010, Respondent filed a *Petition for Appeal of Issuance of Well Permit* in the Circuit Court of Doddridge County alleging, *inter alia*, that the Petition was filed “pursuant to *State ex Rel. Lovejoy v. Callaghan*, 576 S.E.2d 246 at 249 (2002) [*per curiam*] and W. Va. Code § 22-6-40.” *App.* 2-6. Petitioner EQT filed a Response in Opposition to Petition for Appeal asserting that Respondent did not have a right to appeal the issuance of the permit under any relevant statutory authority on or about June 4, 2010. *App.* 11-26.

Petitioners James Martin, Chief of the Office of Oil and Gas of the West Virginia Department of Environmental Protection, the Office of Oil and Gas and the West Virginia Department of Environmental Protection (collectively “Petitioner OOG”) filed a *Motion to Dismiss* on or about June 14, 2010 averring that Respondent had no statutory right of appeal to the permit’s issuance under W. Va. Code § 22-6-40 and noting that the *per curiam Lovejoy* discussion relied upon by Respondent was based primarily on the timeliness of the challenge and not necessarily the underlying right of appeal. *App.* 82-106. Petitioner OOG further noted that the *per curiam Lovejoy* opinion did not create a right of appeal because one does not exist. *Id.*

Petitioner EQT filed a *Motion to Dismiss and Joinder in OOG’s Motion to Dismiss* on or about October 26, 2010 noting that the plain language of the relevant statutes do not provide a surface owner with the right to judicial review or administrative review of the issuance of a drilling or well work permit. *App.* 107-113.

The Circuit Court of Doddridge County held two hearings on the pending Motions to Dismiss, one on November 23, 2010 and another on July 5, 2011. At the hearing on November 23, 2010, the Circuit Court entered a temporary stay of only the one permit at issue in the instant case until the Motion to Dismiss was decided and ordered further briefing. *App.* 180-82. The parties submitted supplemental briefs on the issues raised in the Motions to Dismiss and in the November 23, 2010 hearing. *App.*139-179. A second hearing was scheduled for July 5, 2011. At the July 5, 2011 hearing, the Circuit Court ruled that under the decision in *State ex rel. Lovejoy v. Callaghan, et al.*, 213 W. Va. 1, 576 S.E.2d 246 (2002)(*per curiam*), Respondent Hamblet as a surface owner had a right of appeal of the issuance of this horizontal shallow gas well. *App.* 193-196. The Circuit Court reached no further issues raised by the parties in its ruling and permitted OOG and EQT to pursue this issue as a certified question. *App.* 197-198.

IV. SUMMARY OF ARGUMENT

The Legislature created a comprehensive and unambiguous regulatory scheme governing the permitting of natural gas wells. *See* W. Va. Code §§ 22-6-1 *et seq.* (providing general permitting regulations for all wells); 22C-9-1 *et seq.* (pertaining to deep wells); and 22C-8-1 *et seq.*(pertaining to shallow gas wells where a coal interest objects to a drilling application). The Legislature did not provide for an objection, administrative appeal or judicial review of a well work permit by a surface owner. While surface owners are not without remedies under both statutory and common law, the Legislature specifically and clearly limited objections and appeals to coal owners, lessees and operators of coal seams, as defined by statute, underlying the proposed well site location. *See* W.Va. Code §§ 22-6-15; 22-6-16; 22-6-17; 22-6-40; 22-6-41; 22C-8-7. *See also* W. Va. Code §§ 22-7-1 *et seq.* (providing for surface owner damages).

There is no need to construe or interpret a plainly written statute; instead it should be applied as enacted. *See Concept Mining, Inc. v. Helton*, 217 W.Va. 298, 303, 617 S.E.2d 845, 850 (2005)(*per curiam*)(citing *DeVane v. Kennedy*, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999))("Where the language of a statutory provision is plain, its terms should be applied as written and not construed."); *Ashby v. City of Fairmont*, 216 W.Va. 527, 531, 607 S.E.2d 856, 860 (2004) (holding that when addressing a statutory provision the "Court is bound to apply, and not construe, the enactment's plain language."). Expanding the narrowly prescribed group of potential objections and appeals to the issuance of a well work permit as defined by the plain language used by the Legislature to include surface owners will significantly and negatively impact the permitting process and is contrary to well settled law. *See e.g.* Syl Pt. 2, *Crea v. Crea*, 222 W. Va. 388, 664 S.E.2d 729 (2008)("Where the Legislature has prescribed limitations on the right to appeal, such limitations are exclusive, and cannot be enlarged by the court.")(internal citations omitted).

Accordingly, to the extent that the *per curiam Lovejoy* decision implies or asserts that there is a clear right of appeal of the issuance of a well work permit by a surface owner, it should be overruled. To hold otherwise would fundamentally alter the statutory scheme and permitting process carefully constructed by the Legislature to balance the panoply of interests affected by the development and production of natural gas.

Even without reaching this broader issue, however, this Court can decide the matters at issue in the instant case on a much narrower basis: that the *per curiam Lovejoy* opinion does not apply to horizontal shallow gas wells. There are significant distinctions under West Virginia law in the governing statutes and regulations between shallow gas wells and deep gas wells. In the *per curiam Lovejoy* opinion, the focus of the relief sought was based on deep well surface owner

consent and easement requirements in a statutory pooling situation that are not applicable to the horizontal shallow gas well permit at issue in this case. *See Lovejoy, supra* at 3-4, 248-49. Accordingly, this Court should reformulate the certified question to reflect this narrow issue and find that the *per curiam* decision in *Lovejoy* does not apply to shallow gas well work permits.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner EQT requests oral argument under Rule 20 of the West Virginia Revised Rules of Appellate Procedure. The issue presented in this certified question is of fundamental public importance given the potential impact of an expanded appeal right to the issuance of a shallow gas well work permit. Further, there is a conflict in the Circuit Courts, and in fact within the Circuit Court of Doddridge County, as to whether or not a surface owner has the right to appeal the issuance of a shallow gas well work permit. Finally, oral argument will assist this Court given the technical distinctions and subject matter of the statutes at issue.

VI. ARGUMENT

A. STANDARD OF REVIEW IS *DE NOVO*

The West Virginia Supreme Court of Appeals evaluates and reviews questions of law answered and certified by a circuit court *de novo*. *See Ferrell v. Nationwide Mut. Ins. Co.*, 217 W. Va. 243, 245, 617 S.E.2d 790, 792 (2005)(citing Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172(1996); *Wilson v. Bernet*, 218 W. Va. 628, 631, 625 S.E.2d 706, 709 (2005)(citations omitted).

B. THERE IS NO STATUTORY RIGHT OF APPEAL OF A WELL WORK PERMIT BY A SURFACE OWNER AND THE PER CURIAM LOVEJOY DECISION DOES NOT CREATE THAT RIGHT

The Legislature has enacted a statutory scheme that clearly and unambiguously defines the administrative appeal process for the issuance of a well work permit. *See* discussion *infra*. That statutory scheme provides for a narrowly defined and plainly stated set of potential administrative appeals. *See* W. Va. Code §§ 22-6-15; 22-6-17; 22C-8-7; 22-6-40 and 22-6-41. It is well settled that courts should not enlarge a right to appeal prescribed by the Legislature. *See* Syl Pt. 2, *Crea v. Crea*, 222 W. Va. 388, 664 S.E.2d 729 (2008) ("Where the Legislature has prescribed limitations on the right to appeal, such limitations are exclusive, and cannot be enlarged by the court." *State v. De Spain*, 139 W.Va. 854, [857,] 81 S.E.2d 914, 916 (1954).") Syllabus Point 1, *West Virginia Department of Energy v. Hobet Mining & Construction Co.*, 178 W.Va. 262, 358 S.E.2d 823 (1987)). In this case, the certified question interprets the *per curiam* opinion in *Lovejoy* to do just that, to expand the Legislature's prescribed limitations of the right to appeal the issuance of a well work permit. This Court should reject that expanded appeals process and find that the *per curiam* opinion in *Lovejoy* does not enlarge the category of interests that the Legislature plainly provided a right to appeal the issuance of a well work permit: coal owners, lessees and operators. To the extent the *per curiam* opinion in *Lovejoy* states otherwise, it should be rejected.

The certified question further provides that the *per curiam* opinion in *Lovejoy* "interprets" the clear and unambiguous statutory scheme enacted by the Legislature. There is no need to interpret or construe the clear statement of the prescribed limitation on the right to appeal in the instant case. *See Ashby v. City of Fairmont*, 216 W. Va. 527, 531, 607 S.E.2d 856, 860 (2004)(stating courts are bound to "apply, and not construe" the plain language of a statute). As

such, this Court should apply the clear and unambiguous language of the statutes as written to find that a surface owner does not have a right to appeal the issuance of a well work permit.

In the instance of natural gas well permitting, the Legislature has explicitly limited the type of interests that can appeal the issuance of a well work permit to coal seam owners, lessees or operators of workable coal seams underlying the proposed well location. *See* W. Va. Code §§ 22-6-15; 22-6-16; 22-6-17 and 22C-8-7. W. Va. Code § 22-6-40 states:

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 ...

Id. (emphasis added). The sections referenced within this provision, W. Va. Code § 22-6-15 and W. Va. Code § 22C-8-7, by their plain language, do not provide the right for a surface owner to judicial review of the granting of any well work permit. Courts are bound to “apply, and not construe” the plain language of a statute. *Ashby, supra* at 531, 860. Thus, to the extent that the *per curiam* decision in *Lovejoy* interprets or construes the statutes language to provide a surface owner such a right of appeal, it is incorrect and should be overruled.

As set forth above, W. Va. Code §§ 22-6-1 *et seq.* and the accompanying regulations provide the parameters for the general permitting process for all natural gas wells. A coal owner, lessee or operator may file an objection to a proposed well work within fifteen days from receipt of the notice and plat object to the issuance of a well work permit “[w]hen a proposed shallow well drilling site is above a seam or seams of coal.” W. Va. Code §22-6-17 (a). A coal seam is defined as interchangeable with “workable coal bed” under this statute and is further defined to be “any seam of coal twenty inches or more in thickness, unless a seam of less thickness is being

commercially worked, or can in the judgment of the department foreseeably be commercially worked and will require protection if wells are drilled through it.” W. Va. Code § 22-6-1(e).

Objections to deep well permits and fracturing permits are also provided for by coal owners, lessees or operators when the proposed well location overlies a workable coal seam. W. Va. Code §22-6-15 (a); W. Va. Code § 22-6-1 (e). There is no similar provision in any of the statutes or regulations cited herein providing a right of administrative hearings on objections or judicial review for surface owners. *See* W. Va. Code §§ 22-6-15; 22-6-17; 22-6-40; and 22-6-41.

The Legislature has plainly and clearly limited the appeals of the issuance of well work permits through their comprehensive statutory scheme, while providing surface owners with alternate statutory damage remedies. *See e.g.* W. Va. Code §§ 22-7-1 *et seq.* (providing statutory remedies for surface owners whose surface is disturbed by the development of natural gas resources). Surface owners, in appropriate circumstances, would also have the option of pursuing injunctive relief or other common law remedies. They do not, however, have a right to administrative appeal based on the plain language establishing the appeal process for the issuance of well work permit. *See* W. Va. Code §§ 22-6-15; 22-6-17; 22-6-40; and 22-6-41.

This Court has consistently held that where a statute is unambiguous and clear, “the plain meaning is to be accepted without resorting to the rules of interpretation.” *Ashby, supra*, at 533, 862 (quoting Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968); Syl. Pt. 2, *State ex rel. Stanley v. Sine*, 215 W.Va. 100, 215 W. Va. 100, 594 S.E.2d 314 (2004)). In cases such as this, “the statute should not be interpreted by the courts, and in such case[s] it is the duty of the courts not to construe but to apply the statute.” *Id.* (quoting Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) and Syl Pt. 2,

Burrows v. Nationwide Mut. Ins. Co., 215 W.Va. 668, 600 S.E.2d 565 (2004)). The statutes at issue are clear and unambiguous and should be applied, not interpreted or construed.

Surface owners are provided with notice and the opportunity to comment on a proposed permit in accordance with W. Va. Code § 22-6-9 and W. Va. Code § 22-6-10. This is a right to comment to the director or Chief of the Office of Oil and Gas. The statute specifically notes that such comments are for the benefit of the director, who may then:

...cause such inspections to be made of the proposed well work location as to assure adequate review of the application. ...The director 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 section fifteen, sixteen or seventeen of this article, the permit shall be issued,** with conditions, if any. Nothing in this section shall be construed to supersede the provisions of sections six, twelve, thirteen, fourteen, fifteen, sixteen and seventeen of this article.

W. Va. Code § 22-6-10 (emphasis added). The sections referenced within the emphasized language *supra*, sections fifteen, sixteen and seventeen, all specifically limit objections to coal owners, lessees, or operators of coal seams underlying the proposed well location. *See* W. Va. Code §§ 22-6-15; 22-6-16; and 22-6-17. Thus, the Legislature has unambiguously indicated that if the conditions of W. Va. Code § 22-6-10 are met, the director approves the application, and there is no coal owner, lessee or operator objection, the permit shall be approved. *See Concept Mining, supra*, at 303, 850 (citing Syl. Pt. 1, *Nelson v. W. Va. Pub. Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E. 2d 86 (1982) and noting that the use of the word shall is afforded a mandatory connotation). This leaves no doubt that the Legislature did not intend to provide for an administrative appeal by a surface owner of the issuance of a well work permit outside of the comments provided for in W. Va. Code § 22-6-10.

In addition to permitting procedures, the Legislature provided the OOG with enforcement authority. Environmental concerns with regard to the actual drilling of the well or compliance of operations on the property with regulations are properly addressed with the OOG through its inspection process. *See* W.Va. Code §22-6-3. The OOG has full authority to address issues of noncompliance and violations of drilling permits and environmental regulations. *Id.* *See also* W. Va. Code § 22-6-28. In fact, protecting the environment is the area of specialized expertise and responsibility of the West Virginia Department of Environmental Protection and the Office of Oil and Gas. *See* W. Va. Code § 22-1-1 and W. Va. Code § 22-1-7(4). In addition, complaints and allegations of damages to property are properly addressed through leases, statutory or common law actions that are ripe for discussion or adjudication after drilling is complete. *See e.g.* W. Va. Code § §22-7-1 *et seq.* Thus, there is a comprehensive statutory scheme that deals with both the potential environmental impact and surface damage aspects of the development and production of natural gas that provides surface owners with a myriad of options to address any issues that arise.

What a surface owner does not have, however, under this comprehensive statutory scheme, is a right to appeal of the issuance of a drilling permit. W. Va. Code § 22-6-40 states:

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 ...

Id. (emphasis added). The sections referenced within this provision, W. Va. Code § 22-6-15 and W. Va. Code § 22C-8-7, do not expressly or by implication provide the right for a surface owner to judicial review of the granting of a drilling permit. Instead, the sections referenced

specifically limit objections and appeals of a drilling permit for a deep gas well, fracturing a gas well, or shallow gas well to objections by a coal seam owner, lessee or operator whose coal seam underlies the proposed drilling site. *See* W. Va. Code § 22-6-15(a) and W. Va. Code § 22C-8-7(a).

The Court encountered a similarly comprehensive statutory scheme in *CBC Holdings, LLC v. Dynatec Corp., USA, et al.*, 224 W. Va. 25, 680 S.E.2d 40 (2009). In *CBC*, this Court examined the Coalbed Methane Act and evaluated the authority of OOG to resolve issues of conflicting ownership claims. In that case, as in this case, a review of the statutory scheme as a whole revealed a clear decision of the Legislature to circumvent a particular legal issue within the statute and take it outside the authority of the permitting process. *Id.* at 30, 45. While in that case the issue left outside the statutory scheme was a resolution of ownership of coalbed methane, in this case it is the issue of surface owner appeals given that the statute clearly provides only for comments by surface owners. In *CBC*, as in this case, the Legislature carefully proscribed a procedure and delineated authority to decide and review certain issues. In this case, as in *CBC*, this Court should find that there is no administrative or procedural basis for either the OOG or the Circuit Court to deal with Respondents' appeal of the issuance of a well work permit.

Allowing a surface owner to directly pursue an appeal to the Circuit Court of the issuance of a permit by the OOG has the potential to significantly impact and delay the permitting process by exponentially increasing the class of people entitled to appeal the issuance of a permit and the possible number of appeals. The Legislature specifically and narrowly tailored its statutes and regulations with regard to the group of interests that can appeal the issuance of a well work permit: coal owners, operators or lessees whose coal seam underlies a well work location. *See*

W. Va. Code §§ 22-6-15; 22-6-17; 22C-8-7. This allows the OOG to employ its expertise and experience in protecting the environment through review of permit applications and investigations of alleged violations efficiently. It further supports the stated public policy and public interest in encouraging the development and production of the state's gas reserves. *See e.g.* W. Va. Code § 22C-8-1(a)(2) and W. Va. Code § 22C-9-1(a)(1)-(3).

Respondent admits that there is no clear right of a “surface only owner to appeal” in the statute, but relies on the lack of a prohibition of such an appeal and the *per curiam* decision in *Lovejoy*, discussed *infra*, as bolstering his position. *App.* 301. However, establishing that there is no express prohibition against an administrative appeal is an illogical and inappropriate method to establish that there is a right to such an appeal. As discussed above, the statutes at issue in this case plainly and specifically provide for limited appeals of the issuance of well work permits. *See e.g.* W. Va. Code §§ 22-6-40; 22-6-15 and 22C-8-7. As such, the Legislature has prescribed limitations on the right to appeal and the court cannot enlarge those limitations. *See State v. De Spain*, 139 W.Va. 854, 857, 81 S.E.2d 914, 916 (1954); Syl. Pt. 1, *West Virginia Department of Energy v. Hobet Mining & Construction Co.*, 178 W.Va. 262, 358 S.E.2d 823 (1987); Syl Pt. 2, *Crea v. Crea*, 222 W. Va. 388, 664 S.E.2d 729 (2008).

For shallow gas well permits, such as the one at issue in this case, the plain statutory language does not provide for a surface owner to appeal the issuance of such a permit by the OOG over the comments or objections of that surface owner. The surface owner has no right of appeal to the Shallow Gas Well Review Board or to judicial review under W. Va. Code § 22-6-40 or W. Va. Code § 22-6-41. Further, even if an objection by a coal owner, lessee or operator objects to a shallow gas well permit and W. Va. Code §§ 22C-8-1 *et seq.* applied, there is no provision that a surface owner must consent to the location of a pooled unit in cases such as the

instant one, where the oil and gas estate has been severed from the surface estate. W. Va. Code § 22C-8-11(f). As such the instant case cannot meet the definition of a “contested case” under the Administrative Procedures Act. *See* W. Va. Code § 29A-1-2(b).

Both the Kanawha County Circuit Court and the Doddridge County Circuit Court have held that the W. Va. Code §§ 22-6-1 *et seq.* and the *per curiam Lovejoy* opinion do not provide a surface owner with judicial review of the issuance of a well permit. Respondent OOG provided copies of Orders from the Kanawha County Circuit Court reflecting these rulings as exhibits to Respondent’s Supplemental Memorandum. *App.* 156-170. In *Sines v. Huffman*, Civil Action No. 08-AAA-93 (Circuit Court of Kanawha County, West Virginia), a petitioner sought to challenge the issuance of a work well permit, relying on, *inter alia*, the *per curiam Lovejoy* decision. *App.* 156-159. Kanawha County Circuit Court Judge Louis H. Bloom concluded that “[t]he 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.” *App.* 158.

In *O’Brien v. Martin, et. al.*, Civil Action No. 07-Misc-304 (Circuit Court of Kanawha County West Virginia), Judge Bloom reviewed as factual background an earlier decision issued by the Circuit Court of Doddridge County involving the same parties and the same shallow gas well permit. *App.* 160-170. In *O’Brien*, the petitioners initially filed an appeal of the issuance of a shallow well work permit to Key Oil in Doddridge County, Civil Action No. 06-C-30. The Doddridge County Circuit Court in that instance, unlike the present case, dismissed the case on the basis that it lacked jurisdiction to consider an appeal of the OOG’s decision to issue a permit and because it found “West Virginia law provides no such remedy for owners of surface property

on which a shallow oil or gas well is permitted.” *App.* 161 at ¶ 7 (citing to Doddridge County Order).

After the issuance of a second permit for a second shallow gas well on their property, Mr. O’Brien filed a Petition for Writ of Mandamus and Prohibition with the Kanawha County Circuit Court. Judge Bloom found that the petitioners failed to demonstrate that they had a clear legal right to a hearing before the OOG and specifically noted that W. Va. Code §§ 22-6-1 *et seq.* provides no statutory right to a hearing for surface owners who object to shallow well permits. *App.* 165 at ¶ 4.

Given the analysis of the comprehensive statutory schemes set forth above, Petitioner EQT believes that the discussion in the *per curiam Lovejoy* opinion regarding a right to appeal does not accurately reflect the fact that only coal owners, lessees and operators of workable coal seams underlying the well site at issue have a right to appeal the issuance of a well work permit. As the *per curiam Lovejoy* decision does not apply the plain language of the statutes set forth above, applying or interpreting that decision to create a right of appeal for surface owners that does not exist in statute and was not intended or created by the Legislature would create a new point of law which cannot be done through the issuance of a *per curiam* decision. *See* Syl, Pt. 2, *Walker v. Doe*, 210 W. Va. 490; 558 S.E.2d 290 (2001). However, as set forth below, Petitioner EQT does not believe that this Court must reach that broader decision in the instant case because the *per curiam Lovejoy*, as decided, does not apply to horizontal shallow gas wells.

C. THE *PER CURIAM LOVEJOY* DECISION DOES NOT APPLY TO THIS HORIZONTAL SHALLOW GAS WELL PERMIT

Respondent relies on *Lovejoy, supra* to support his contention that he has a clear right of appeal to the decision by OOG to issue a horizontal well work permit. *See App.* 114-115 (citing

Lovejoy, supra at 249). As discussed above, Petitioner EQT avers that there is no right of appeal for a surface owner whether a shallow gas well or a deep gas well is at issue. However, if the Court does not wish to reach this broader issue, the instant matter can still be resolved as a matter of law because the *per curiam* decision *Lovejoy* does not apply to the horizontal shallow gas well permit, it only applies to deep well permits subject to statutory pooling. W. Va. Code §§ 22C-9-1 *et seq.*, and specifically the provision noted as “[a]t the center of the relief sought” in *Lovejoy* and deemed the “consent and easement” provision are inapplicable to this horizontal shallow gas well work permit. *See* W. Va. Code §22C-9-7(b)(4) (providing for surface owner consent before drilling a deep well on a statutorily pooled drilling unit); W. Va. Code §22C-9-3(b)(1) (stating that shallow gas wells other than those utilized in secondary recovery programs are excluded from the provisions of that article).

In the *per curiam Lovejoy* decision, the surface owner petitioners sought a writ of mandamus to compel OOG to revoke a working well permit for a discovery deep well, defined specifically as a well expressly drilled for the purpose of locating a pool of oil or gas. *See Lovejoy, supra* at 2, 247 n. 6. The well work permit had been issued, drilling and reclamation completed, and the permit released. *Id.* at 2; 247. The petitioners had taken no action to have the permit reviewed or stop the drilling process for approximately two years. *Id.*

In West Virginia, the Legislature has clearly and explicitly defined gas wells as either shallow or deep wells.¹ This court recognized the significance of that distinction for permitting purposes in *State ex rel. Blue Eagle Land, LLC et al. v. West Virginia Oil & Gas Conservation Commission, et al.*, 222 W. Va. 342, 664 S.E.2d 683 (2008). The Legislative intent for this

¹In August 2011, emergency rules for horizontal wells were also enacted. These rules do not apply to the instant case as the permit at issue was issued in 2010.

delineation between deep and shallow gas wells is well established and focuses on both practical considerations and the public interest. W. Va. Code § 22C-9-1 (b) states:

The Legislature hereby determines and finds that oil and natural gas found in West Virginia in shallow sands or strata have been produced continuously for more than one hundred years; that oil and gas deposits in such shallow sands or strata have geological and other characteristics different than those found in deeper formations; and that in order to encourage the maximum recovery of oil and gas from all productive formations in this state, it is not in the public interest, with the exception of shallow wells utilized in a secondary recovery program, to enact statutory provisions relating to the exploration for or production from oil and gas from shallow wells, as defined in section two of this article, but that it is in the public interest to enact statutory provisions establishing regulatory procedures and principles to be applied to the exploration for or production of oil and gas from deep wells, as defined in said section two.

Deep wells are defined by statute as “any well other than a shallow well, drilled and completed in a formation at or below the top of the uppermost member of the ‘Onondaga Group.’” W. Va. Code § 22-6-1 (g). *See also* W. Va. Code § 22C-8-2 (8) and W. Va. Code § 22C-9-2 (a) (12). In addition to the permitting requirements set forth in W. Va. Code §§ 22-6-1 *et seq.* and the accompanying regulations at W. Va. CSR §§ 35-4-1 *et seq.*, deep wells are also governed by W. Va. Code §§ 22C-9-1 *et seq.* and W. Va. CSR §§ 39-1 *et seq.* and W. Va. CSR §§ 39-2 *et seq.*

Shallow gas wells are defined by statute as “any gas well drilled and completed in a formation above the top of the uppermost member of the ‘Onondaga Group...’” W. Va. Code § 22-6-1 (r). *See also* W. Va. Code § 22C-8-2 (21) and W. Va. Code § 22C-9-2 (a) (11). However, the definition further provides 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...” *Id.* Shallow gas

wells are permitted under W. Va. Code §§ 22-6-1 *et seq.* and W. Va. CSR §§ 35-4-1 *et seq.* If, and only if, a coal owner, lessee or operator objects, W. Va. Code §§ 22C-8-1 *et seq.*, and the associated regulations W. Va. CSR §§ 50-1 *et seq.* will apply to the well work application and permit.

The application at issue is to drill a shallow gas well where there are no objections by a coal owner, coal lessee or coal interest. *See App. 27-81. See also App. 251.* Accordingly, the applicable statute and regulations are only W. Va. Code §§ 22-6-1 *et seq.* and W. Va. CSR §§ 35-4-1 *et seq.* There is no provision in W. Va. Code §§ 22-6-1 *et seq.* that provides a right to appeal the issuance of a well work permit by a surface owner. As admitted by Respondent, there is in fact no statutory provision that clearly provides a surface owner with a right to appeal. *App. 301.* This does not mean that a surface owner is without remedy. Instead, a surface owner could seek an injunction, seek damages under W. Va. Code §§ 22-7-1 *et seq.*, or pursue common law actions to protect their interests.

As discussed *supra*, the Legislature has consistently made a definitive distinction between the treatment of deep gas wells and shallow gas wells and the rules and regulations governing the same. This Court recognized that distinction in *Blue Eagle Land Co., supra*. Given the recognition by this Court in the *Lovejoy* decision that the consent and easement provision was at the center of the relief sought and a necessary background to the discussion, the fact that the same provision does not apply to this horizontal shallow gas well at issue is fatal to Respondents' reliance on the *per curiam* decision in *Lovejoy* to support his appeal. *See Lovejoy, supra* at 3-4; 248-49.

To avoid this fatal factual distinction between the instant case and the *per curiam* decision in *Lovejoy*, Respondent has averred that a discovery deep well is similar to a horizontal

shallow gas well in the instant case. *App.* 251. Respondent bases this assertion on the administrative rule challenged in the *per curiam Lovejoy* decision that exempted discovery wells from the surface owner consent and easement provision. *Id.* This argument fails because of the clearly acknowledged distinction between the amount and type of regulation required for deep wells and shallow wells as discussed at length *supra*. It further fails because the *per curiam Lovejoy* opinion specifically referenced the “consent and easement” provision as central to the relief sought and as “necessary background” to the decision and discussion. *Lovejoy, supra*, at 3-4, 248-49. Accordingly, this “consent and easement” provision was clearly integral to the analysis set forth in the opinion and does not apply to horizontal shallow gas wells.

Significantly, there is no provision comparable to the consent and easement provision relied upon as necessary background in the *per curiam Lovejoy* decision that could apply to the horizontal shallow gas well at issue in this case. *See generally* W. Va. Code §§ 22-6-1 *et seq.* W. Va. Code §§ 22C-8-1 *et seq.* and the accompanying regulations do not apply to the instant well as no objection by a coal owner, lessee or operator was made under W. Va. Code § 22C-8-3(b)(3). Further, while there is limited pooling provision under W. Va. Code §§ 22C-8-1 *et seq.*, that article does not apply to the instant permit both because W. Va. Code §§ 22C-8-1 *et seq.* does not apply and because it is factually inapplicable given the severance of the oil and gas estate from the surface in this case. *See* W. Va. Code § 22C-8-11 (f) (stating “[i]n no event shall drilling be initiated or completed on any tract [in a pooling order for a drilling unit], where the gas underlying such tract has not been severed from the surface thereof by deed, lease or other title document, without the written consent of the person who owns such tract.”) Thus, even the limited shallow gas well pooling provision is not at issue in the instant case for the following

reasons: there has been no coal owner, lessee or operator objection; there is no pooling order at issue; and the gas underlying this tract has been severed from the surface.

In addition, the *per curiam Lovejoy* decision cited W. Va. Code § 22-6-41 (1994) to support its assertion that petitioners had a right of appeal of the issuance of the well work permit at issue. *Id.* at 2, 247. *See also id.* at 4; 249. This provision provides, in pertinent part:

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. ...

W. Va. Code § 22-6-41. The referenced section sixteen provides for objections by coal operators of the coal seam beneath the well site to be drilled or converted for the purposes provided for in section fourteen of the article. *See* W. Va. Code § 22-6-16. Section fourteen of the article provides for the introduction of liquids for the purposes provided for in section twenty-five of this article or for the introduction of liquids for the disposal of pollutants or the effluent therefrom on any tract of land, or before converting an existing well for such purposes. *See* W. Va. Code § 22-6-14. *See also* W. Va. Code § 22-6-25 (providing “[t]he owner or operator of any well or wells which produce oil or gas may allow such well or wells to remain open for the purpose of introducing water or other liquid pressure into and upon the producing strata **for the purpose of recovering the oil contained therein**, and may drill additional wells for like purposes, ...”)(emphasis added). Thus, W. Va. Code § 22-6-41 is factually inapplicable to the instant case.

However, Respondent relies upon W. Va. Code § 22-6-40, not W. Va. Code § 22-6-41 to support his appeal. As set forth at length above, neither W. Va. Code § 22-6-40 nor the statutory provisions referred to therein, W. Va. Code § 22-6-15 and W. Va. Code § 22C-8-7, provide for the right of a surface owner to appeal the issuance of a well work permit. Nor is there any

support for such appeal by a surface owner found in the general statutory scheme that describes the role and procedures of the OOG. *See generally* W. Va. Code §§ 22-6-1 *et seq.* Instead, the sections referenced specifically only provide for objections and appeals of a drilling permit for a deep gas well, fracturing a gas well, or shallow gas well by a coal seam owner, lessee or operator whose coal seam underlies the proposed drilling site. *See* W. Va. Code §§ 22-6-40; 22-6-15 (a); 22C-8-7 (a).

As set forth herein, Petitioner EQT believes this Court can decide the instant certified question on the narrow question of whether a surface owner has the right to appeal the decision to issue a horizontal shallow gas well work permit when there has been no objection by a coal seam owner, lessee or interest. Based on the focus of the *Lovejoy* Court on the necessary background of the “consent and easement” provision that is not at issue in the instant case and the explicit statutory language discussed above, the certified question should be reformulated to reflect the status of this well as a horizontal shallow gas well and this Court should find that *Lovejoy* does not apply or address this type of well and does not create a right of appeal for a surface owner of a horizontal shallow gas well.

VII. CONCLUSION

The comprehensive and unambiguous statutory language granting a prescribed group of interests an appeal of the issuance of a well work permit provides only for such an appeal by the owner, operator, or lessee of a workable coal seam which underlies the well site at issue. Surface owners were not granted a right to appeal the issuance of a well work permit by the Legislature under this plain statutory language. The Court should not enlarge that clearly defined group to include surface owners. Accordingly, to the extent that the *per curiam Lovejoy* decision suggests that there is a statutory right of appeal of the issuance of a well work permit by a surface owner,

it should be overruled. *Lovejoy* is a *per curiam* decision and should not be interpreted or applied to create new rights not found in the plain language of the relevant statute.

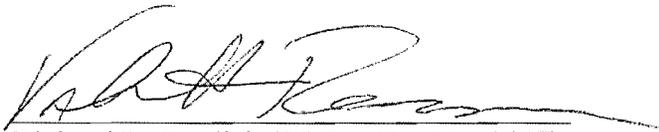
The Court does not have to reach that broad issue, however, because the *per curiam Lovejoy* is inapplicable to the permit application and appeal at issue in the instant case. The *per curiam Lovejoy* decision only discusses and applies to deep well permits and cites as the center of the relief sought the “consent and easement” provision that applies only to statutorily pooled deep wells. That necessary background is not present in this case and so the *per curiam Lovejoy* should not apply and should not be interpreted to create a right that does not exist. Respondent has commented and appealed the issuance of this shallow gas well permit solely as a surface owner and not as a coal owner, lessee or operator. As such he has no right to appeal the issuance of the horizontal shallow gas well work permit under the *Lovejoy per curiam* decision or the relevant statutory authority.

For the foregoing reasons and for all other reasons on the face of the record, Petitioner/ Respondent below EQT Production Company moves this Honorable Court to reject the Circuit Court’s answer to the Certified Question and affirm the Legislature’s plain and unambiguous statutory mandate that limits administrative appeals of the issuance of well work permits to coal owners, lessees and operators. This Court should hold that surface owners are not entitled to an administrative appeal of the issuance of a well work permit, and specifically not the issuance of a horizontal shallow gas well work permit.

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**EQT PRODUCTION COMPANY,
By Counsel**

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A handwritten signature in black ink, appearing to read "Valerie H. Raupp", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2011, true and accurate copies of the foregoing *Petitioner's EQT Company Brief* and *Joint Appendix* were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all parties to this appeal as follows:

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