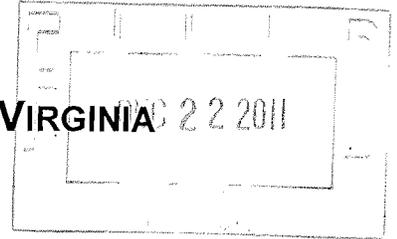


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**  
**DOCKET No. 11-1157**



**JAMES MARTIN, et al,**  
Petitioners,

v.)

**MATTHEW L. HAMBLET,**  
Respondent,

and

**WEST VIRGINIA SURFACE  
OWNERS' RIGHTS  
ORGANIZATION,**  
Intervenor Respondent.

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

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**James Martin and Office of Oil and  
Gas, West Virginia Department of  
Environmental Protection's  
Reply Brief to Intervenor  
Respondent's Response Brief**

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## ARGUMENT<sup>1</sup>

### I. Introduction<sup>2</sup>

WVSORO attempts to hijack these proceedings by setting forth arguments outside the scope of the certified question that the Circuit Court specifically declined to entertain. App at pp. 319-320 (Circuit Court stating “I’m not getting to due process at this point” and specifically basing his ruling on *Lovejoy v. Callaghan*, 213 W.Va. 1, 576 S.E.2d 246 (2002) (per curiam); App at pp. 197-198 (Order of Certification which contains no mention of due process, equal protection or a hearing). WVSORO ignores the Circuit Court’s ruling and certified question to assert surface owners have a right to a hearing, in addition to the right of appeal, and insists on expanding the certified question to **ALL** well work permits, not just horizontal Marcellus wells. This Court should decline to follow WVSORO down a path that undermines the general purpose of certified questions in addressing specific issues upon which Circuit Courts requested guidance. See *King v. Lens Creek Ltd. Pshp.*, 199 W.Va. 136, 143, 483 S.E.2d 265, 272 (1996) (declining to expand the certified question to facts or issues not contained therein).

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<sup>1</sup> WVDEP uses the following abbreviations herein: 1) Appendix (“App”); 2) James Martin, Director [Chief], Office of Oil and Gas and Office of Oil and Gas of the West Virginia Department of Environmental Protection (collectively referred to as “WVDEP”); 3) Petitioner EQT Production Company (“EQT”); 4) Respondent Matthew L. Hamblet (“Hamblet”); 5) Intervenor Respondent West Virginia Surface Owners’ Rights Organization (“WVSORO”); and 6) coal owners, operators and lessees of workable coal seams that underlie a proposed well location (collectively referred to as “coal owners”).

<sup>2</sup> Having failed to substantially address the certified question, WVDEP reasserts herein its arguments regarding the certified question found in its brief and reply to Hamblet’s response regarding the statutory right to an appeal and the decision in *Lovejoy*, 213 W.Va. 1, 576 S.E.2d 246.

WWSORO's attempted broadening of the certified question still fails to show surface owners have a constitutional right to a hearing and an appeal of a well work permit. WWSORO makes the same fatal assumption that a surface owner has a right to unfettered enjoyment of the surface. This is not the case. Mineral owners with rights to the oil and gas estate, in this instance EQT, have the express or implied right to reasonably necessary use of the surface to access the oil and gas estate subject to any limitations (or expansions) contained in the conveyances of those rights. The right to interfere was clearly set forth in the lease granting EQT the right to operate for oil and gas before WVDEP even received a well work permit application. As such, WVDEP's permit is not the authority or action allowing interference with Hamblet's property. The constitutional guarantee of due process safeguards against state action which affects a property interest, but not from actions of private persons. Syl. pt. 1, *Wait v. Civil Service Comm'n*, 161 W.Va. 154, 241 S.E.2d 164 (1978); *Queen v. West Virginia University Hospitals*, 179 W.Va. 95, 103, 365 S.E.2d 375, 383 (1987). WWSORO's due process arguments fail because the issuance of a well work permit by WVDEP cannot affect a property interest a person does not own. The surface owner's property was affected when two private parties had a meeting of the minds and negotiated an agreement that gave rights to the oil and gas estate to someone other than the surface owner. Not the issuance of a well work permit by WVDEP.

WWSORO's due process arguments lack the necessary foundational requirement of a property interest subject to the protections of due process. This fallacy is fatal to WWSORO's arguments and should be disregarded by this Court.

**II. Surface Owners Do Not Have a Right to a Pre-Decisional Hearing or an Appeal Based on Due Process, Snyder or DuLany**

**A. Introduction**

WWSORO's arguments regarding the right to a hearing and appeal of a well work permit fail for one simple reason: surface owners lack the predicate property interest to invoke the protections of due process of law. If surface owners do not have a property interest that is affected by state action, due process is inapplicable. Due process protection requires consideration of three distinct factors:

[F]irst, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Syl. pt. 5, *Wait*, 161 W.Va. 154, 241 S.E.2d 164. Surface owners, including Hamblet, fail to fulfill the first consideration. WWSORO assumes surface owners have an unrestricted right to enjoyment in their property. This assumption is patently incorrect, because surface owners' rights are tempered by the mineral owner's right to access the minerals.

A right to minerals is obtained by several means, including conveyance of the estate in fee by deed or leasing certain rights to access the mineral. It is well settled in this state that a mineral owner generally has the right to utilize the surface for "purposes reasonably necessary to the extraction of the minerals." Syl. pt. 2, *Buffalo Mining Co. v. Martin*, 165 W.Va. 10, 267 S.E.2d 721 (1980). That general right can be narrowed or expanded based upon the language of the conveying document.

The affect upon surface owners' property WWSORO claims is due to the issuance of WVDEP's well work permit is actually due to a private contract entered into by surface owners, or their predecessors, where they received consideration for conveying rights to the oil and gas estate under the surface. Surface owners are missing a few "sticks" of the anecdotal "bundle" of property rights. And the sticks that are missing are the ones that would invoke due process if the surface owners still had them in their possession. They do not. The missing "sticks" were bargained for and conveyed to the mineral owners. The mineral owners received the property right to use the surface to access their mineral estate. It is this conveyance of the mineral estate that affected the surface estate, not the issuance of a well work permit by WVDEP. As such, there is no private interest affected by an official state action.

As to the second consideration, this Court has held that:

Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the West Virginia Constitution, which are: First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.

Syl. pt. 2, *North v. West Virginia Bd. of Regents*, 160 W. Va. 248, 248, 233 S.E.2d 411, 413 (1977). It is well settled that the Legislature is vested with wide discretion to determine what satisfies the requirements of due process of law. Syl. pt. 6, *Sharon Steel Corp. v. City of Fairmont*, 175 W.Va. 479, 334 S.E.2d 616 (1985) (wide discretion

tempered by the requirement that “legislative acts must bear a reasonable relationship to proper legislative purpose and be neither arbitrary nor discriminatory”).

With regards to the issuance of well work permits, surface owners are entitled to notice and afforded the opportunity to comment prior to the issuance of the well work permit. W.Va. Code §§ 22-6-9, -10. Those comments must be reviewed by WVDEP and WVDEP can cause an inspection to be made, all prior to the issuance of the permit. W.Va. Code § 22-6-11. Thus, surface owners are afforded adequate due process protections prior to the issuance of a permit. See *O’Brien v. Martin, et al.*, Civil Action No. 07-Misc-304, at p. (Cir. Ct. Kanawha Co., W.Va. Nov. 6, 2007) (App at p. 166)(particularly important is that surface owners are given notice and opportunity to be heard prior to the issuance of the permit). In addition to these protections, W.Va. Code § 22-7-3 provides compensation of surface owners for drilling operations.

As noted in Justice Albright’s concurring opinion in *Lovejoy*, the Legislature struck a balance between all competing interests, including surface owners and mineral owners. 213 W.Va. 1, 576 S.E.2d 246 (“Thus to look at just one particular entity’s interest, without considering the broad panoply of affected interests, is to deny recognition of the vast considerations and tradeoffs underlying these legislative enactments.”). In this balancing act, the Legislature set forth procedures for surface owners that reduce the risk of an erroneous deprivation (even more so given the surface owners’ diminished rights) that are neither arbitrary nor discriminatory. Furthermore, additional procedures in the form of a hearing or appeal have little, if any probable value.

Surface owners are given notice of all information legally required to be provided to WVDEP as part of an operator's well work permit application before the permit is issued. Surface owners then have the opportunity to comment on the application. A hearing will not provide additional information as WWSORO alleges and anything said during a hearing by a surface owner can just as easily be submitted as comments. If a surface owner is still dissatisfied after the notice and comment period, the surface owner still retains the ability to pursue common law rights of action, other remedies allowed by law and/or seek compensation pursuant to the Oil and Gas production Damage Compensation Act, W.Va. Code §§ 22-7-1 to -8. An appeal provides little probable value because an appeal provides nothing more than an attempt to substitute a Court's judgment for the specialized judgment of WVDEP.<sup>3</sup>

When the first and second considerations are coupled with the third consideration, it becomes evident the Legislature passed an act that bears a reasonable relationship to the proper purpose of regulating oil and gas operations that is neither arbitrary nor discriminatory. Contrary to WWSORO's assertion there is no administrative burden whatsoever, the sheer volume of well work permits issued by WVDEP every year begs to differ. If a hearing were requested in only a fraction of those permits, the time involved in holding the hearings could prove significant. It would be the same with appeals. Given the Office of Oil and Gas ("OOG") is currently understaffed and underfunded, additional administrative burdens imposed upon the OOG by hearings and appeals could seriously hamper its operations.

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<sup>3</sup> As mentioned, surface owners can pursue other remedies allowed by law, including writs of prohibition or mandamus, should the surface owner believe WVDEP issued a well work permit contrary to law.

WVSORO fails to show how surface owners satisfy the first consideration. This alone would bar requiring hearings and appeals contrary to Legislative intent. Regardless, when all three considerations are viewed in light of the others, it is clear that the statutes governing well work permits and surface owners' participation in the issuance thereof is adequate, constitutional and neither arbitrary nor discriminatory. Having failed to meet the standards required for due process protection, WVSORO's request for this Court to extend beyond the certified question and impose hearing and appeal requirements on all well work permits should be disregarded.

**B. Snyder**

WVSORO purposefully misrepresents the holding in *Snyder v. Callaghan*, 168 W.Va. 265, 284 S.E.2d 241 (1981), to further its broader agenda of requesting a pre-decisional hearing. WVSORO's repeated statement that *Snyder* concluded neighboring surface owners were entitled to a pre-decisional administrative hearing is simply **false**. WVSORO Response at pp. 10, 12. *Snyder* reviewed the regulations regarding hearings on Section 401 Clean Water Act certifications that specifically stated: "may request a hearing within 30 days of the Department's **issuance** of the proposed certification." 168 W.Va. at 268, 284 S.E.2d at 244-45. *Snyder* goes on to hold:

The request for the hearing **follows the issuance** of the proposed certification and is in nature an administrative **appeal** from Department action which affects the rights guaranteed appellants under the stated constitutional provision.

*Id.* at 274, 284 S.E.2d at 247. How WVSORO concludes *Snyder* stands for the proposition that a hearing that follows the action complained of and is in nature an administrative appeal is a pre-decisional hearing is beyond any stretch of credible legal

reasoning. At most, *Snyder* may stand for the proposition that surface owners are entitled to an appeal, but upon further inspection, it does not.

First, *Snyder* involved the riparian rights of landowners downstream from a proposed project of the United States Army Corps of Engineers (“Corps”). 168 W.Va. 265, 266-267, 284 S.E.2d 241, 243-244. As part of the permitting process, the Corps needed to obtain a Section 401 Clean Water Act certification from the State. *Id.* After recognizing the property interest of a riparian owner “in the flow of natural watercourse through or adjacent to his property,” *Snyder* determined that the issuance of a 401 Certification to the Corps constituted a direct action of the state affecting those riparian rights. *Id.* at 272-273, 246-247. However, the Corps had no independent contractual riparian rights with the landowners. *Id.* at 272-273, 247. Essentially, the Corps was given permission by the State to alter the river upstream of landowners that would essentially affect the downstream riparian rights of landowners. *Id.* *Snyder’s* distinguishing of *McGrady v. Callaghan*, 161 W.Va. 180, 284 S.E.2d 241 (1978), is on point in distinguishing *Snyder* from the case at hand.

*Snyder* sets forth the following analysis in distinguishing *McGrady*:

In *McGrady*, the State authorized the surface mining permittee to use **his own property** for a certain purpose. The permit itself **did not authorize the permittee to interfere with the property of others. Any infringement of the asserted property interests of the abutting landowners would have been the direct result of the manner in which the permittee used his own property and not of the issuance of the permit by the State.** Here, however, the State's water quality certification itself grants the permittee, the Army Corps of Engineers, the right to interfere with the watercourse in which the petitioners claim a property interest. The infringement upon the asserted property rights of the petitioners is the direct result of the State's action and is not a possibility dependent upon some improper activity on the part of the permittee. We recognized this distinction in *Shobe v. Latimer*, W.Va., 253 S.E.2d 54 (1979),

where we held that a riparian owner had alleged a property interest in a watercourse which was 'directly in jeopardy' as a result of a state proposal to divert water from its natural course.

168 W. Va. 265, 273-274, 284 S.E.2d 241, 247 (1981) (emphasis added). A well work permit issued by WVDEP is more analogous to the permit issued in *McGrady*. First, as set forth above, EQT has the property right to use the surface of Hamblet to the extent that is reasonably necessary and within the terms of its lease to extract oil and gas. WVDEP issues the well work permit based upon this right and this right only. EQT is then permitted to use its own property, which is the right to use the surface to extract oil and gas. EQT is not permitted to use another's property. Second, any infringement upon Hamblet's rights regarding his surface estate are the direct result of the manner in which EQT uses its own property – the right to operate for oil and gas – not the issuance of a well work permit by WVDEP.

With or without regulations or permit requirements, surface owners are still subject to the mineral owners' rights to extract their minerals. The well work permit issued by WVDEP was not the authority for EQT to interfere with Hamblet's surface property. *Snyder*, 168 W. Va. 265, 273-274, 284 S.E.2d 241, 247 (by authorizing the use of a permittee's own property, the permit itself did not authorize interference with another's property). The right to interfere was clearly set forth in the lease granting EQT the right to operate for oil and gas before WVDEP even received a well work permit application. App at pp. 131-132.

Second, *Snyder* was interpreting a regulation that mandated a hearing be provided to "Any person entitled to a hearing because of an infringement upon an interest protected by the State Constitution Article 3, Section 10." 168 W.Va. at 268,

284 S.E.2d at 244-45. There is no such mandate for the issuance of well work permits. W.Va. Code §§ 22-6-1 to -41. By providing notice and the ability to comment, the Legislature has satisfied the requirements of due process and a hearing and/or appeal provides little if any probable value. Furthermore, the Legislature has absolute authority, within constitutional limits, to define the rights, including who may or may not appeal a well work permit. Syl. pt. 1, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 686, 408 S.E.2d 634, 636 (1991) (in part) (citations omitted) (“The general powers of the legislature, within constitutional limits, are almost plenary.”).

Nothing within *Snyder* supports WVSORO’s argument that a pre-decisional hearing is required. *Snyder* is also clearly distinguishable from the matter at hand. In fact, *Snyder*’s own analysis supports WVDEP’s position that surface owners lack the requisite property rights for due process protections to attach.

**C. *DuLany***

Several circumstances of *DuLaney v. Oklahoma State Dept. of Health*, 868 P.2d 676 (Okla. 1993) call into question its applicability to the case at hand. First, and most importantly, the *DuLaney* decision was issued in light of, and did not overrule, a prior Oklahoma Supreme Court decision that is directly on point with regards to the matter before this Court. See generally, *Turley v. Flag-Redfern Oil Company*, 782 P.2d 130. *Turley* involved a similarly situated surface owner who was requesting notice and a hearing before the Oklahoma administrative agency reviewing an application to establish, reestablish or reform an oil and gas drilling and spacing unit that included the surface owner’s property. *Id.* *Turley* stated that given the relationship between a surface owner and a mineral owner (i.e. the surface estate is subject to the rights of the

mineral estate to access that estate through reasonably necessary use of the surface), the surface owner did not have the predicate property right to subject it to the protections of due process. *Id.* at 137. In addition, *Turley* goes even further to reference Oklahoma's Surface Damages Act as protecting the rights of surface owners. *Id.*

A nearly identical situation exists before this Court that existed in *Turley*. A surface owner with no oil and gas rights seeks a hearing and appeal of an oil and gas permit. As noted above, here, as in Oklahoma, the surface estate is subject to the rights of the mineral estate to reasonably necessary use of the surface to extract the minerals. West Virginia also has the similar Oil and Gas Production Damage Compensation Act that protects surface owners' rights. For the same reasons set forth in *Turley* and discussed above, this Court should adopt the reasoning of the *Turley* decision in that because a surface owners' rights in the surface are subject to the rights of the mineral owner, surface owners lack the requisite property rights for due process protections to attach.

Second, prior to the court issuing its decision in *DuLaney*, the Oklahoma Legislature amended its statutes to allow a statutory right to a hearing. 868 P.2d at 682. This may have been all that was needed in the sharply divided court to reach its decision. *See Id.* at 685 ("Although it may be good public policy for the Legislature to allow adjacent landowners or others a **statutory** right to a hearing, public policy in this area should be set by the Legislature, not this Court, under the guise of a constitutional mandate.") (Lavender dissent) (emphasis original).

Finally, *DuLaney* held that:

Minimum standards of due process require administrative proceedings that may directly and adversely affect legally protected interests be preceded by notice calculated to provide knowledge of the exercise of adjudicative power and an opportunity to be heard.

868 P.2d at 684-85. There is no doubt surface owners receive notice of the well work permit. W.Va. Code § 22-6-9. Contrary to WWSORO's assertions, surface owners also are given the chance to be heard through the commenting process. W.Va. Code §§ 22-6-10, -11; *See also O'Brien*, Civil Action No. 07-Misc-304, at p. (Cir. Ct. Kanawha Co., W.Va. Nov. 6, 2007) (App at p. 166) ("Particularly important is the fact that surface owners are given notice and an **opportunity to be heard** before a permit is issued, thereby ensuring that the opportunity to be heard is at a meaningful time.") (emphasis added). WWSORO fails to recognize that surface owners are already afforded the due process protections *DuLaney* calls for.

WWSORO's reliance on *DuLaney* is misplaced. It holds no precedential value and is only persuasive. For the above reasons, it is less persuasive than WWSORO asserts. In light of *Turley* and the law of due process as set forth by this Court (i.e. *Snyder*), the more persuasive statement comes from *DuLaney's* dissent:

This Court has a duty to protect the constitutional due process rights of our citizens. When those rights are invaded or are actually directly threatened with invasion by unlawful government action we should be vigilant to step in and protect them. We, however, also have a duty to respect the other branches of government in our tripartite system and to recognize the roles of each of these branches. In my view, the majority has improperly stepped into the role of a super-legislature in this particular case by mandating constitutional due process protections where no constitutionally protected interest exists. The majority has, in effect, mandated the strictures of a legislative administrative procedure act, and usurped legislative power in doing so.

868 P.2d at 689 (Lavender dissent). This Court should decline to follow WVSORO's lead, restrain itself from stepping into the role of a super-legislature and find that surface owners' property rights are currently, adequately protected by the due process of law making a hearing and appeal unnecessary.

**D. WVDEP's Issuance of a Well Work Permit Does Not Affect the Surface Owner**

Nothing contained within WVSORO's response can show how WVDEP's well work permit affects a surface owner. As set forth above, surface owners' rights in their surface estate are diminished because some of those rights were bargained away through prior conveyance(s). It is this lack of absolute right to the surface estate that is fatal to WVSORO's argument that WVDEP's issuance of a well work permit affects the surface owners' rights. Essentially, the person with oil and gas rights has the property right directly affected by the issuance (or denial) of a well work permit, not the surface owner whose rights are subject to the mineral owners'. WVSORO ignores this basic concept and puts forth an irrelevant regurgitation of statutory well permit requirements and unsubstantiated facts in an attempt to draw the Court away from this fundamental flaw in its argument.

**E. Financial and Administrative Burden**

WVSORO's statements regarding the financial and administrative burden are pure speculation and evidence a lack of knowledge of WVDEP's work. A review of the number of well work permits issued during two recent years will put WVSORO's generalized statements into perspective. In 2008, WVDEP issued 2918 well work

permits, including approximately 406 for horizontal wells.<sup>4</sup> In 2011 so far, WVDEP has issued 912 permits, including 535 for horizontal wells. Contrast with the Division of Mining and Reclamation (“DMR”) that has issued only approximately 80 mining permits. The OOG issues more permits than any other division or office of the WVDEP, yet it remains underfunded and understaffed.

A common complaint from WWSORO has been a lack of inspectors on the ground. What does WWSORO think will happen if an inspector is not only required to be present for a hearing (instead of in the field inspecting) but for appeals as well? Even assuming only a quarter of the permits issued receive requests for a hearing, there are still 228 hearings. There are only around 260 workdays in a year, not including holidays, annual leave or sick leave. WWSORO’s request for a hearing for every single well work permit has the potential to reduce an inspector’s time inspecting to little more than 30 days. This is only for an inspector as well. Permitting staff would also be taken from their primary duties to attend hearings. Furthermore, if a hearing becomes a full blown evidentiary hearing as WWSORO asserts should happen, what about other staff such as agency attorneys? Or the Chief if he is determined to be the arbiter of the hearings? Taken in light of a million dollar shortfall in OOG’s budget, the significant financial and administrative burden becomes evident.

WWSORO asserts that there will not be as many appeals as WVDEP and the industry will say because West Virginians are essentially apathetic, poor, gullible or intimidated by “burley guys in big trucks.” WWSORO Response at pp. 23-24. Frankly,

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<sup>4</sup> The number of permits referenced excludes those permits issued for plugging operations. 2008 saw the most permits issued by WVDEP in any one year of the program, mainly due to market conditions that saw a significant increase in the price of natural gas.

as a West Virginian, this is insulting. WVSORO sets forth a conclusory statement regarding financial and administrative burden with no evidence beyond the insult of the very folks WVSORO purports to represent.

Admittedly, in the example above, a quarter of permits was chosen randomly to simply illustrate the potential burden. However, WVDEP can look to its other divisions for guidance. For example, of DMR's approximately 80 permits, nearly every single one had a hearing requested. Compared to DMR, a quarter does not nearly seem as bad. Even if only 10% of well work permits had hearings, OOG still would have conducted more hearings than DMR in 2011.

This Court has recognized the potential administrative burden if every person opposed to a permit were given the right to request a pre-decisional hearing. See *McGrady v. Callaghan*, 161 W.Va. 180, 186, 244 S.E.2d 793, 796 (1978) ("To afford any and all who desire to object to an application for surface mining a constitutional right to a full evidentiary hearing prior to the issuance of the permit could and probably would result in an administrative catastrophe"). Imagine if the price for natural gas goes up again and OOG sees the number of permits it did in 2008. The burden could virtually grind oil and gas operations to a halt. *Id.* at 186, 244 S.E.2d at 796.

When viewed in light of the other considerations on whether due process applies, the administrative burden weighs significantly against granting the right to a pre-decisional hearing and appeal.

III. **Equal Protection Does Not Provide Respondent with the Right to a Hearing or the Right of Appeal with Respect to the Issuance of a Well Work Permit**

WVDEP incorporates herein by reference its arguments regarding equal protection in its reply to Hamblet's response.

IV. **WVDEP Will Not Enforce Surface Owners' Common Law Rights Arising Out of Deeds or Leases**

WVDEP does not have the authority to adjudicate private property disputes nor should it. If an oil and gas owner has the right to an oil and gas estate, WVDEP will issue the permit if all other legal requirements are met. See W.Va. Code § 22-6-8(c) (permit applicant must provide information setting forth the applicant's right to extract, produce or market the oil or gas). And those legal requirements pertain to the protection of the environment. If an operator violates the conditions of its permit or the requirements set forth by statute or rule, WVDEP can issue a violation and require the operator to comply. W.Va. Code § 22-6-3. This is the general extent of WVDEP's authority.

However, throughout their responses, Hamblet and WWSORO set forth numerous allegations of damage, ineffective sediment control and other general comments and objections regarding EQT's operation on Hamblet's property and gas operations across the state in general. These allegations were never substantiated in the proceedings below, but their assertion now highlights the true intent of WWSORO and Hamblet: to obtain leverage in private disputes regarding damages and property rights through the use of administrative hearings and appeals. WWSORO unashamedly admits as much in its response. WWSORO Response at pp. 23-24 ("There ought to be

that same incentive for the gas company to avoid a hearing with surface owners on their legitimate concerns...”).

It is clear Hamblet’s and WWSORO’s main concerns are in effect damage claims, disagreements on whether the gas operator used the surface as reasonably necessary and other property disputes. If a surface owner believes the gas operator has gone outside the terms of the lease and/or beyond what was reasonably necessary for the extraction of oil and gas, then that is a private property matter to be resolved by the Courts and should not include involvement of the WVDEP, as a party or through phantom hearing and appeal procedures.

### **CONCLUSION**

WWSORO has intervened in this matter to further its failed Legislative agenda by attempting to persuade this Court to wade into the bailiwick of the Legislature. For the reasons set forth herein and in its brief and reply to Hamblet’s response, WVDEP respectfully requests this Court avoid being drawn down the rabbit’s hole. The issuance of a well work permit by the WVDEP does not authorize an oil and gas operator to enter and disturb the surface estate. The documents conveying a right in the oil and gas provides that authority and governs the operator’s rights to use the surface to extract oil and gas. Therefore, it is not a violation of due process for failure to provide for a hearing and judicial review because the underlying property right that would necessitate those protections is simply not possessed by the surface owner. Finally, the Legislature’s balancing act between the various private interests in passing the oil and gas regulatory program did not classify those interests in such a way as to violate equal protection.

WVDEP respectfully requests this Honorable Court to disregard WVSORO's arguments and 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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**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 Reply Brief to Intervenor Respondent’s Response Brief”** on the **22<sup>nd</sup> day of December, 2011**, via U.S. Mail to the following:

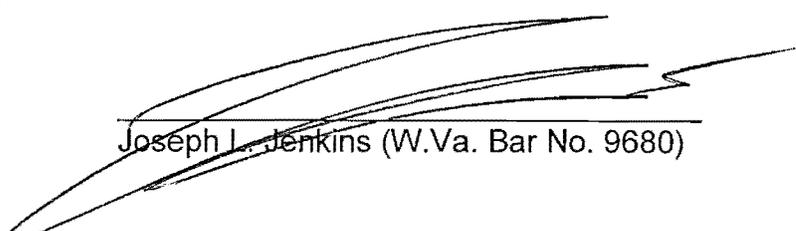
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