

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

JAMES MARTIN, et al,
Petitioners,

v.)

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

MATTHEW L. HAMBLET,
Respondent,

and

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

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

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION¹

WVDEP incorporates herein its statement regarding oral argument and decision set forth in its Brief. Furthermore, WVDEP notes that EQT is correct in its Brief by referring to not only the inconsistency or conflict between circuit courts, but an inconsistency or conflict within Doddridge County Circuit Court itself. See *O'Brien v. Martin*, Civil Action No. 06-C-30, at p. 6 (Cir. Ct. Doddridge Co., W.Va. Nov. 28, 2006) (“Plaintiff [a surface owner] has no such standing under the APA and pertinent oil & gas statutes to bring an APA challenge”). Therefore, WVDEP reasserts that oral argument would be proper pursuant to Rule 20(a)(4) of the Revised Rules of Appellate Procedure and requests Rule 20 oral argument.

REPLY ARGUMENT

I. Lovejoy’s Holding is Inapplicable to Respondent Because Lovejoy is Contrary to Law

Respondent has to admit *Lovejoy’s* fundamental fallacy: “There exists no explicit statutory right in West Virginia for a surface owner to appeal the issuance of a well permit.” Respondent’s Brief at p. 8. WVDEP could not have said it better. Since there is no statutory right to an appeal, Respondent must resort to extrapolating a reading from *Lovejoy* that is clearly not there.

Respondent asserts that *Lovejoy* paid deference to the due process requirements found within the Fourteenth Amendment of the United States Constitution and Article 3, Section 10 of the West Virginia Constitution. Interestingly enough, there

¹ WVDEP uses the same abbreviations herein as it used in its Brief: 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”); and 4) Respondent Matthew L. Hamblet (“Respondent”).

is not a single mention of either constitutional provision or due process within the *Lovejoy v. Callaghan* decision. See generally 213 W.Va. 1, 576 S.E.2d 246. Respondent's reading of *Lovejoy* inserts into the decision a ruling on a constitutional right that *Lovejoy* never relied upon or even mentioned.

The lack of even a mention of due process in *Lovejoy* is highlighted by *Lovejoy's* distinction as a *per curiam* opinion. *Per curiam* opinions rely upon well settled principles that are set forth in syllabus points and apply those well settled principles of law to alternate factual scenarios. See *Walker v. Doe*, 210 W. Va. 490, 496, 558 S.E.2d 290, 296 (2001) ("While *per curiam* opinions differ from signed opinions based on the absence of new syllabus points, *per curiam* opinions nonetheless have precedential value as an **application of settled principles of law to facts necessarily differing** from those at issue in signed opinions. The value of a *per curiam* opinion arises in part from the guidance such decisions can provide to the lower courts regarding the **proper application of the syllabus points of law relied upon** to reach decisions in those cases." (emphasis added)). *Lovejoy's* syllabus points that set forth well settled principles of law, upon which the *per curiam* decision relied, do *not* refer to due process, explicitly or implicitly. See Syl. pt. 1 & 2, 213 W.Va. 1, 576 S.E.2d 246 (*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).

Additionally, Justice Albright noted in his concurring opinion:

As with all legislation that involves advancing the economic interests of the state, burdens are borne by numerous entities. 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. When viewed with a perspective that

takes into account the combined interests of all the entities involved – the interests of both surface owners and mineral rights owners, as well as the public interest that is necessarily served through such economic endeavors – the interests of all the affected entities, on balance, appear to be properly accounted for and addressed.

Lovejoy, 213 W.Va. 1, 756 S.E.2d 246, 252 (2002)(Albright concurring)(describing the balance between surface owners and mineral owners and specifically mentioning passage of the Oil and Gas Compensation Act, W.Va. Code § 22-7-1 to -8, as evidence of that balance). When drafting legislation to provide for the regulation of oil and gas wells, the Legislature took a meaningful look at all interests involved. Based upon the balancing of those interests, the Legislature properly accounted for and addressed the rights of surface owners as well as mineral owners. Respondent now advocates for this Court to ignore Legislative intent, adopt a reading of *Lovejoy* that is not relied upon by any discussion within the decision, and expand the rights of surface owners beyond those provided by statute *or by constitution*.

Respondent also sets forth in this section, as well as in Respondent's Factual Background, numerous allegations of damage, ineffective sediment control, WVDEP's failure to address Respondent's concerns and other general comments and objections regarding EQT's operation on Respondent's property. These allegations were never substantiated in the proceedings below and are irrelevant to the certified question. Respondent is attempting to play upon the sympathies of the Court by making conclusory statements, some of which are untrue. As such, the Court should disregard these red herrings and focus upon whether or not *Lovejoy* provides Respondent with the right to appeal a well work permit for a horizontal Marcellus well. WVDEP submits that *Lovejoy* does not.

Even when addressing due process or equal protection, WVDEP's issuance of a well work permit does not deprive Respondent of his property because Respondent does not have the right or interest to begin with. Respondent's rights to his surface estate are limited by the rights of the mineral owner. The deprivation Respondent claims is occurring because of the issuance of WVDEP's well work permit is actually a contract entered into over a century ago when Respondent's predecessors received consideration for leasing the oil and gas rights under Respondent's surface. Therefore, for the reasons set forth in the following section, this Court should reject Respondent's arguments because due process and equal protection do not provide Respondent with the relief he seeks.

II. **Due Process and Equal Protection Do Not Provide Respondent with the Right to a Hearing or the Right of Appeal with Respect to the Issuance of a Well Work Permit**

A. **Due Process**

Although WVDEP does not dispute the well-recognized right of a person in their property, Respondent's due process argument is based upon an incorrect assumption that undermines his entire due process argument. Respondent assumes surface owners have an unrestricted right to enjoyment in their property. This assumption is patently incorrect, because a surface owner's rights are generally subject to the mineral owner's rights. Therefore, WVDEP's well work permit does not authorize EQT to interfere with Respondent's surface estate. The conveyance documents whereby EQT obtained a property interest in the oil and gas granted EQT (or any other mineral owner or lessee) the right to "interfere" with Respondent's surface. Absent a State action that would deprive Respondent of his right in the surface estate, due process does not

apply. See *Queen v. West Virginia University Hospitals*, 179 W.Va. 95, 103, 365 S.E.2d 375, 383 (1987) (constitutional guarantee of due process protects the individual from deprivations by the state, but not from actions of private persons).

A surface owner's right is tempered by the mineral owner's right to access his 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.

In the matter at hand, EQT has a legally binding lease granting it explicit rights of access to the oil and gas:

[F]or the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of the said products...

App at pp. 131-132. EQT contracted for the right to operate for oil and gas upon Respondent's property. Respondent's predecessors granted another the right to interfere with Respondent's enjoyment of his surface estate by virtue of severing and/or leasing rights to drill for oil and gas.

The fact that Respondent's surface rights are less than Respondent assumes and that EQT has a right to use the surface for the extraction of oil and gas, are dispositive of Respondent's due process arguments. It is this contractual obligation burdening Respondent's surface estate that initially "deprived" Respondent of his full,

unfettered interest in his property, not the issuance of a well work permit.² *Snyder v. Callaghan* can be clearly distinguished with this in mind. 168 W.Va. 265, 284 S.E.2d 241 (1981).

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**

² Although the words “deprived” and “deprivation” are used within the context of due process analysis, there is no deprivation in the true sense of the word in the instant matter, because the lease granting EQT access to the oil and gas was a contract bargained for and with consideration. It cannot be said that the voluntary leasing of oil and gas rights is a deprivation.

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 Respondent 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 Respondent'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.³

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 Respondent's surface property. *Snyder*, 168 W. Va. 265, 273-274, 284 S.E.2d 241, 247 (by authorizing the

³ Given the issues raised during this matter, it is clear Respondent is displeased with EQT's operations. If Respondent believes EQT 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 appeal procedures.

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.

An extreme example clarifies this point even further.⁴ Nothing compels the State to regulate and permit drilling operations beyond political pressure. The Legislature could have easily refused to pass the oil and gas statutes and regulations. Without regulation, EQT and other oil and gas owners would be free to operate pursuant to the terms of the deeds, leases and other conveyances that give them a right to extract oil and gas subject to the common law principles of reasonably necessary use of the surface. Therefore, the passage of a regulatory and permit program for drilling operations actually *limits the operations of oil and gas operators* and *expands the rights of surface owners*. Many of the general contractual rights conveying an interest in oil and gas do not provide for notice and the ability of a surface owner to comment on a proposed well and subsequently have those comments reviewed by an independent third-party. See App at pp. 131-132 (EQT leases that do not provide for notice, comment and review). However, the Legislature did provide those rights as part of its balancing between the private rights and interests of both surface and mineral owners. See W.Va. Code § 22-6-9 to -11; *Lovejoy*, 213 W.Va. 1, 7 576 S.E.2d 246, 252 (2002)(Albright concurring).

⁴ WVDEP wants to make it abundantly clear that it does not advocate for deregulation of drilling operations. It only provides this hypothetical as an example to clearly show why due process does not provide the relief Respondent seeks.

Notably missing in the expansion of the rights is the surface owner's right to an appeal of the well work permit, because no such right existed prior to the passage of the oil and gas regulatory framework that would necessitate the inclusion therein. In providing those rights, 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.").

Respondent's rights in his surface estate are diminished because Respondent's predecessors in title bargained those rights away through prior conveyance(s). It is this lack of absolute right to the surface estate that is fatal to Respondent's argument that due process applies. 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'.

Since EQT already has the authority to interfere with Respondent's property and WVDEP's permit is not the authority allowing interference with Respondent's property, Respondent's argument that due process mandates a hearing and judicial review fails. See *Queen* 179 W.Va. 95, 103, 365 S.E.2d 375, 383 (constitutional guarantee of due process protects the individual from deprivations by the state, but not from actions of private persons).

B. Equal Protection

Respondent's concerns regarding equal protection are unfounded. It was reasonable for the Legislature to deliberately and intentionally create a framework whereby surface owners were given one distinct set of rights and coal owners were given another distinct set of rights. This Court has held:

In due recognition of fundamental principles relating to the separation of powers among the legislative, executive and judicial branches of government, **courts recognize the power of the legislature to make reasonable classifications for legislative purposes.** Courts are bound by a **presumption that legislative classifications are reasonable, proper and based on a sound exercise of the legislative prerogative.** If a statute enacted by the legislature applies throughout the state and to all persons, entities or things within a class, and if such classification is not arbitrary or unreasonable, the statute must be regarded as general rather than special. In making classifications for legislative purposes, a wide range of discretion must be conceded by the courts to the legislature. In any case of doubt, courts must favor a construction of a statute which will result in a statute being regarded as general rather than special. A statute must be regarded as general rather than special when it operates uniformly on all persons, entities or things of a class. A law which operates uniformly upon all persons, entities or things as a class is a general law; while a law which operates differently as to particular persons, entities or things within a class is a special law.

Syl. pt. 7, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965) (emphasis added). In light of the above, the Legislature's separation of surface owners and coal owners into different classes with differing rights was reasonable.

The Legislature specifically found that it was in the public interest to "ensure the safe recovery of coal and gas" and "foster, encourage and promote the fullest practical exploration, development, production, recovery and utilization of this State's coal and

gas.” W.Va. Code § 22C-8-1(a)(1)-(2). In the statutes governing the appeal rights of coal owners, the safe and efficient recovery of coal, oil and gas is repeated:

The director shall take into consideration upon decision:

(A) Whether the drilling location is above or in close proximity to any mine opening or shaft, entry, traveling, air haulage, drainage or passageway, or to any proposed extension thereof, in any operated or abandoned or operating coal mine, or coal mine already surveyed and platted, but not yet being operated;

(B) Whether the proposed drilling can reasonably be done through an existing or planned pillar of coal, or in close proximity to an existing well or such pillar of coal, taking into consideration the surface topography;

(C) Whether a well can be drilled safely, taking into consideration the dangers from creeps, squeezes or other disturbances, due to the extraction of coal; and

(D) The extent to which the proposed drilling location unreasonably interferes with the safe recovery of coal, oil and gas.

W.Va. Code §§ 22-6-15, -16 and 22C-8-7. “A legislative declaration of purpose, while not conclusive, is entitled not only to respect but to a *prima facie* acceptance of its correctness.” Syl. pt. 6, *State ex rel. W. Virginia Hous. Dev. Fund v. Waterhouse*, 158 W. Va. 196, 212 S.E.2d 724 (1974).

It is reasonable for the Legislature to classify surface owner and coal owners differently for several reasons. First, there is a presumption that the classification is reasonable. Syl. pt. 7, *Gainer*, 149 W. Va. 740, 143 S.E.2d 351. Respondent has failed to put for any argument that overcomes this presumption, especially in light of the stated reasonable public interest in providing for the safe and efficient recovery of both *coal and gas*. Second, the stated legislative purpose calling for the safe and efficient recovery of both coal and gas is entitled to not only respect but to a *prima facie* acceptance of its correctness. Syl. pt. 6, *Waterhouse*, 158 W. Va. 196, 212 S.E.2d 724. Respondent has also failed to provide any convincing argument that the *prima facie*

acceptance of the Legislature's purpose is incorrect. Given the deference provided to the Legislature in matters of classification, this Court should decline to accept Respondent's conclusory statements to the contrary.

Furthermore, the discussion regarding a surface owner's diminished rights in relationship to the minerals is instructive. As mentioned, a mineral owner has the right to use the surface as expressly provided for in the conveyance documents or as reasonably necessary to extract the minerals. Without access to the surface (or access through an adjacent property's surface), the mineral estate would be essentially worthless because there would be no way to access the minerals without a way to get them to the surface and to market. Inherent in mineral severances and leases is the general concept that the surface will typically be burdened by the mineral estate's right of extraction to the extent reasonably necessary. See Syl. pt. 3, *Buffalo Mining Co.*, 165 W.Va. 10, 267 S.E.2d 721 ("In order for a claim for an implied easement for surface rights in connection with mining activities to be successful, it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner.").

There is no such concept with regards to the relationship between coal and gas because you do not need the coal to extract gas and you do not need the gas to extract coal. Additionally, coal and gas are generally severed or leased separately and at different times. This tends to provide ambiguity as to which estate is the dominant and which is the serviant with respect to each other. Furthermore, gas has historically been a significant safety concern with regards to mining coal. As such, coal and gas's relationship with each other differs from the relationship between surface and mineral to such an extent that a differing classification is reasonable.

In light of the Legislative findings and the historical relationship between coal and gas and surface and minerals, the Legislature was reasonable in classifying coal owners and surface owners differently. As such, the classification does not run afoul of equal protection.

III. **The Distinction Between Well Work Permits for Deep Wells and Well Work Permits for Shallow Horizontal Marcellus Wells is Pertinent to the Lovejoy Decision**

Respondent in his response makes a bold assertion that the distinction between deep and shallow wells was not pertinent to the *Lovejoy* decision. This assertion inexplicably fails to recognize that *Lovejoy* specifically stated:

At the center of relief sought by Petitioners is a statutory provision located in [W.Va. Code §§ 22C-9-1 to -16]...We identify the 'consent and easement' provision as **necessary** background to this matter and its correlation to the administrative rule which Petitioners challenge, preferring to leave for another day a full discussion of this provision and its application.

213 W.Va. 1, 3 576 S.E.2d 246, 248. Although the Court declined to address the "consent and easement" provision itself, it was nonetheless at the center of the relief Petitioners sought and was necessary background to the Court's decision. Nothing can be clearer than the statement within *Lovejoy* that the "consent and easement" provision was necessary to the decision. Respondent would have this Court ignore a discussion in *Lovejoy* that is clearly present and noted as necessary, and instead adopt a discussion regarding due process and equal protection that is not even remotely present. This strains credibility.

The "consent and easement" provision is important for two reasons: 1) *Lovejoy* says it is; and 2) the provision is not applicable to shallow wells. See W.Va. Code §

22C-9-3(b)(1) (specifically excludes shallow wells from Article 9, Chapter 22C).⁵ Therefore, WVDEP reasserts its arguments found within Section II, E of its brief addressing the distinction between shallow and deep wells and urges this Court in the alternative not to extend the *Lovejoy* decision beyond the case to apply to anything but deep well work permits.

CONCLUSION

Respondent's arguments that due process and equal protection are to be read into the *Lovejoy* decision, or mandate a hearing and judicial review because Respondent's right in his property is affected by state action, fall short. First, *Lovejoy* clearly did not address due process in its decision. Second, 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.

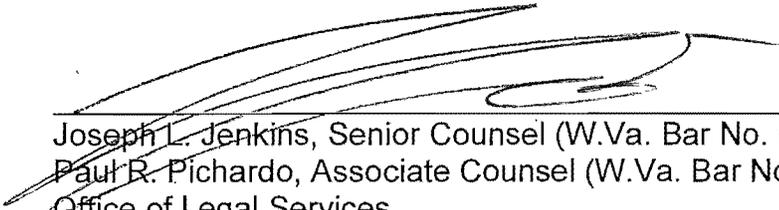
For the reasons stated above, WVDEP respectfully requests this Honorable Court to disregard Respondent's due process and equal protection arguments and answer the Certified Question in the negative, by overruling *Lovejoy*, or in the

⁵ 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.

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 Respondent’s Response Brief”** on the **6th day of December, 2011**, via U.S. Mail to the following:

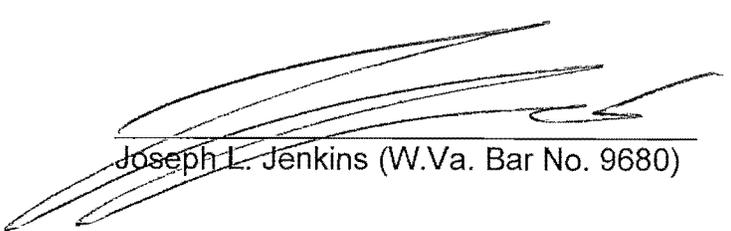
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