IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA LAND RESOURCES, INC., and MARION COUNTY COAL RESOURCES, INC.,

Petitioners,

vs. **No. 21-0845**

AMERICAN BITUMINOUS POWER PARTNERS, LP, WEST VIRGINIA DEPT. OF ENVIRONMENTAL PROTECTION, and WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD,

Respondents.

AND

AMERICAN BITUMINOUS POWER PARTNERS, LP,

Petitioner,

vs. **Nos. 21-0885, 21-0893**

WEST VIRGINIA LAND RESOURCES, INC., MARION COUNTY COAL RESOURCES, INC., WEST VIRGINIA DEPT. OF ENVIRONMENTAL PROTECTION, and WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD,

Respondents.

RESPONSE BRIEF ON BEHALF OF WEST VIRGINIA LAND RESOURCES, INC. AND MARION COUNTY COAL RESOURCES, INC.

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I. INTRODUCTION.

The Court should summarily deny any relief to Petitioner American Bituminous Power Partners, LP ("AMBIT") in either of its appeals for multiple reasons. First, AMBIT filed these appeals pursuant to the administrative appeal provisions found at *W.Va. Code* § 22B-1-9(a) and *W.Va. Code* § 29A-5-4(a). These statutes authorize any person who is "adversely affected" by a decision rendered by the Environmental Quality Board ("Board") to seek judicial review. AMBIT, however, has not attempted to demonstrate or even alleged that it is "adversely affected" by the Board's September 29, 2021 Final Order ("Final Order") that is the subject of its appeals.

Second, the judicial review provision found in the West Virginia Administrative Procedures Act permits any reviewing court to "reverse, vacate or modify the order or decision [under appeal]," based on one or more types of errors identified in that statute, if "the substantial rights of the . . . petitioners have been prejudiced" by an administrative agency order. *W.Va. Code* § 22B-1-9(g). In this case, AMBIT has not identified any prejudice to its substantial rights, and has not requested that the Court reverse, vacate, modify, or remand the Final Order. To the contrary, the AMBIT Brief does not mention *W.Va. Code* § 22B-1-9(g).

Third, the penultimate sentence of the AMBIT Brief suggests that AMBIT wishes for this Court to make a determination regarding Respondents' standing to challenge the subject UIC Permit before the Board. AMBIT Brief, p. 33. However, AMBIT is asking this Court to make such a ruling *without* requesting that the Court take any specific action pertaining to the Final Order that AMBIT has appealed. AMBIT merely requests "the relief this Court deems just." AMBIT Brief, p. 33. In other words, AMBIT seeks no specific change to the Final Order under review, and otherwise fails to specify "the relief to which [AMBIT] believes [itself] to be entitled," as required by W. Va.

R.A.P. 10(c)(8). Under the controlling law set forth above and W. Va. R.A.P. 27(b), it would be entirely appropriate to dismiss or deny the AMBIT appeals on this basis alone. *Id.*

At best, AMBIT might be contesting the Board's jurisdiction to hear Respondents' appeal of the UIC Permit based on Respondents' purported lack of standing to challenge it (although AMBIT does not squarely say so in its brief). AMBIT's arguments on standing, however, amount to nothing more than bald conclusory assertions that not only lack any citation to the record, but incredibly lack any discussion of the Board's findings of fact and conclusions of law addressing Respondents' standing.

In short, AMBIT fails to articulate how it is "adversely affected" by the Final Order, how its "substantial rights" have been prejudiced, or what specific relief AMBIT requests from this Court. To the extent AMBIT challenges Respondents' standing to commence an appeal of the UIC Permit in the first instance before the Board, that challenge falls flat because AMBIT has not requested that the Board's ruling on the issue be set aside, and Respondents clearly had standing to challenge the UIC Permit (as the Board found). As a result, the Court should decline to grant any relief in either of AMBIT's appeals.

II. CORRECTIONS TO PETITIONER'S STATEMENT OF THE CASE.[1]

There are many inaccuracies and omissions found throughout AMBIT's Brief, and they begin with AMBIT's "Statement of the Case." For the convenience of the Court and in the interest of judicial efficiency, the corrections set forth below by Respondents West Virginia Land Resources, Inc. ("West Virginia Land") and Marion County Coal Resources, Inc. ("Marion

[1] AMBIT's "Statement of the Case" violates W. Va. R.A.P. 10(c) because much of it constitutes argument rather than procedural or factual statements. In compliance with the Rules, Respondents address arguments that are included in AMBIT's "Statement of the Case" in their responses to AMBIT's Assignments of Error.

Resources")[2] address only the more significant of AMBIT's numerous misstatements and half-truths.

A. Respondents Have Never Requested That AMBIT Be Ordered to Pay Fees or Any Monetary Amounts to Them as a Part of this Proceeding and Have Never Requested a "Change in the Law."

Among the more glaring misrepresentations in AMBIT's Brief are its repeated assertions that, by appealing the DEP's reissuance of the UIC Permit, Respondents were seeking an award of monetary damages or were asking for an order requiring "the payment of fees" by AMBIT. *See, e.g.*, AMBIT Brief, pp. 6, 12, 24. All such statements are untrue.

The Notice of Appeal filed with the Board requested that it rescind or vacate the UIC Permit. JA000027, JA000031. It is indisputable that Respondents never asked for anything more than that. *See also* JA000995-JA000996 (Petitioners' Response Brief before the Board, pp. 6-7) (Section B, "[Petitioners] Never Requested that the Board Award Compensatory Damages"); Evidentiary Hearing Tr. p. 130 (Respondents' counsel states, "[T]his isn't a damage action. We recognize that.").

AMBIT's various claims that the Respondents were seeking "legislative, regulatory or governmental remedies on a systematic scale" (*see, e.g.*, AMBIT Brief, pp. 6, 14) are equally baseless. By their appeal to the Board, Respondents asked that DEP be required to comply with *existing* law, which would necessarily entail the reversal of DEP's decision to reissue the UIC Permit. No filing by Respondents nor any testimony presented by them ever suggested that they were requesting that the Board make some "change in the related law" (AMBIT Brief, p. 9).

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[2] The AMBIT Brief erroneously identifies Murray American Energy, Inc., as a party to this appeal. AMBIT Brief, p. 2, n.2. After a pre-hearing conference held on October 29, 2020, the Environmental Quality Board granted a motion to add West Virginia Land Resources, Inc. and Marion County Coal Resources, Inc. as new Appellants, since those entities are now the owners of the mining operations and treatment facilities involved in this appeal. JA001044 (Final Order at 1). Murray American Energy, Inc. is not a party to any appeal pending before the Court. All references in the AMBIT Brief to Murray American Energy, Inc. or "MAEI" should be disregarded or interpreted to refer only to Respondents.

AMBIT's assertions to the contrary were repeatedly refuted before the Board. *See, e.g.,* Pre-Hearing Conference Tr. p. 17 (Respondents' counsel states, "We are not challenging the UIC permitting process in any way. We are not generally challenging or seeking to change the law. I have no idea what [AMBIT's counsel] was referring to...."). Like AMBIT's statements that Respondents were seeking monetary payments through their Board appeal, AMBIT's claims about some alleged effort by Respondents to change the law should be disregarded.[3]

B. Either to Keep Their Mines in Operation or to Comply with DEP Permits, the Respondents Are Required to Pump and Treat All of the Polluted Mine Water Injected by AMBIT Under the UIC Permit.

AMBIT proclaims that "no evidence exists" that its injected AMD reaches Respondents' treatment facilities, and thus Respondents cannot suffer an "injury in fact" from the DEP's decision to reissue the UIC Permit. AMBIT Brief, p. 5. This unsupported assertion serves as a premise (albeit a false one) for AMBIT's standing arguments. AMBIT's representation to this Court on this issue is wholly contradicted by the Board's findings and evidence presented to the Board.

Respondents incur costs to pump and treat water from the Fairmont Mine Pool. JA001050 (Final Order at 7). Those costs vary depending on which of the Respondents is doing so. Water that reaches the northern and eastern portion of the Fairmont Mine Pool is pumped and treated at the Dogwood Lakes acid mine drainage ("AMD") Plant owned by West Virginia Land, as required by DEP permits. JA001050 (Final Order at 7); Evidentiary Hearing Tr. pp. 49-50. Water flowing into the southern and western portion of the Fairmont Mine Pool is pumped and treated by Marion

[3] Related to this argument, AMBIT insists that it had no obligation to identify any contractual or other arrangement allowing its operations. AMBIT Brief, pp. 3, 18, In doing so, AMBIT ignores the requirement expressly imposed by Part XIII.G of the DEP UIC Permit application that a UIC Permit applicant establish its "legal right to inject into the proposed mine void, including any and all down dip workings likely to receive water from the target void," and the DEP's admonition that "without proper documentation [of such a right], [the] application will be refused," JA000101 (Certified Record, p. 67*); see also W.Va. Code* §22-3-9(a)(9).

Resources in order to protect workers underground in the Marion County Mine. JA001051 (Final Order at 8). In either case, there is no question that some of the water treated by the Respondents comes from AMBIT's injection operations authorized by the UIC Permit. *See* JA000054 (Final Order at 18) (Regardless of which way the AMD water injected by AMBIT flows, it causes an increase in "the volume of water that [Respondents] have to pump and treat from the Fairmont Mine Pool at their expense.").

Despite this, AMBIT repeatedly asserts that "*no evidence exists* that the [AMBIT] injectate even reaches [the Respondents'] treatment facilities...." AMBIT Brief, p. 5 (emphasis added); *see also*, AMBIT Brief, p. 19 ("...it is unclear even now...whether [AMBIT's injected water] ...travels outside the [Joanne] mine void at all...."); AMBIT Brief, p. 30 ("The Final Order fails to reflect the inescapable fact that...no evidence exists that the Injectate even leaves the Joanna (sic) Mine Void"). Given the evidence of record, it is difficult to understand how such statements could be made in good faith.

Indeed, AMBIT itself stated in its application for reissuance of the UIC Permit that its injected water travels to the Dogwood Lakes treatment facility that is operated by West Virginia Land. *See* JA000090 (Section VIII.E of AMBIT permit application, stating that injected water "enters the abandoned Joanne Mine, and travels eastward through [various abandoned underground mines] ..." until it is ultimately "pumped via the Hagan Shaft to the Dogwood Lakes AMD Treatment Plant") (Certified Record, p. 56); *see also* JA000098 (Section X.F of AMBIT permit application, stating that "the Joanne Mine is completely flooded and is surrounded by abandoned, flooded mines that are all hydraulically connected through barrier seepage. This co-mingled mine water... discharges at the Dogwood Lakes AMD Plant.") (Certified Record, p. 64).

At hearing, Respondents presented testimony by James A. Kilburg, Ph.D., who was the only expert in hydrogeology to testify before the Board. Dr. Kilburg, who the Board found presented the "more credible" testimony on the issue of how AMBIT's injectate flows, presented a detailed map of the Groundwater Basin in the relevant portion of the Fairmont Mine Pool and made it clear that all the AMBIT injectate travels beyond the Joanne Mine into other mine voids. *See* JA000049, JA000055 (Final Order at 13, 19); Evidentiary Hearing Tr. pp. 159, 163-164. Likewise, DEP Geologist Josh Bonner agreed that after it is injected into the abandoned Joanne Mine, AMBIT's AMD leaves that mine void, because it is a part of the Fairmont Mine Pool. Evidentiary Hearing Tr. p. 543. After receiving this and other relevant evidence, the Board (which is comprised of qualified professionals with training and experience in addressing the State's water resources[4]) specifically found that the "Joanne Mine is part of the Fairmont Mine Pool, and thus injection of water into the Joanne Mine constitutes injection of water into the Fairmont Mine Pool." JA001060 (Final Order at 17).

In short, the record demonstrates that all of AMBIT's injected AMD, which is authorized by the UIC Permit, becomes part of the Fairmont Mine Pool that Respondents are required to pump and treat. AMBIT has not challenged these factual findings by the Board as being "clearly wrong." Thus, any assertions by AMBIT to the contrary should be disregarded.[5]

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[4] See *W.Va. Code* § 22B-3-1.

[5] AMBIT's effort to create confusion by claiming that the Respondents "conceded against interest" that water in the area of the Harrison County Mine will flow east, away from "allegedly downdip mines" (AMBIT Brief, p. 28) is also in error. The referenced flow diagram addressed during the cited testimony was one that was prepared for the purpose of showing where the Fairmont Mine Pool water would flow "once *all mining is complete* at Harrison County Coal Mine, and all pumping is stopped, *when that mine is allowed to flood*, anticipated flow directions, you know, decades from now...." Evidentiary Hearing Tr. p. 97 (emphasis added). Obviously, the focus of this appeal is where the Fairmont Mine Pool flows currently and during the term of the UIC Permit that allows AMBIT's injection of AMD water into it.

C. Respondents Were Never Aware of the Publication of the Legal Advertisement of the Draft UIC Permit and Did Not Knowingly Fail to Comment Upon It.

AMBIT's Brief asserts that Respondents "failed to participate" in the public comment process regarding the draft UIC Permit. AMBIT Brief, p. 6. Yet as AMBIT concedes, Respondents were never aware of the published newspaper advertisement of the draft permit. AMBIT Brief, p. 30. Moreover, there was no evidence that any representative of the Respondents was otherwise given notice of the DEP's decision to prepare a draft reissued permit. Even if the submission of comments upon a draft permit application was a prerequisite for appealing its issuance (which it is not[6]), it was impossible for Respondents to comment upon an application of which they had no knowledge.[7]

The record reflects that two of Respondents' employees were contacted in early February 2020 by DEP Mining UIC Manager Robert Hudnall with questions concerning the Fairmont Mine Pool that were raised in connection with an earlier version of the AMBIT UIC Permit application. Evidentiary Hearing Tr., pp. 259 – 262.[8] No draft permit was prepared based on that application, no newspaper advertisement was published, and there was never any comment period for it. The final version of AMBIT's application (that was eventually approved) was not submitted to DEP until March 5, 2020. C.R., p. 25. Mr. Hudnall never contacted anyone with the Respondents to inform them of AMBIT's new application or of the DEP's decision to prepare a draft permit based

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[6] *W.Va. Code* § 22-11-23 ("Appeal to Environmental Quality Board") provides that any person who is "adversely affected" by a DEP order, including the issuance of a permit under the West Virginia Water Pollution Control Act, *W.Va. Code* § 22-1-1, et seq, may appeal that order to the Board. There is no requirement that the appellant prove that it submitted comments on the application for the permit under appeal. Nor do the DEP legislative rules include such a requirement.

[7] AMBIT also baldly asserts that Respondents "never looked for" the legal advertisement of this draft permit. AMBIT Brief, p. 30. There is no basis in the record for such a claim.

[8] This previous version of the permit application was not included by the DEP as part of the Certified Record in the Board appeal. Evidentiary Hearing Tr. at pp. 282-283.

upon that new application. Evidentiary Hearing Tr., pp. 360 – 361. Again, having no knowledge of a draft permit, it is hardly surprising that Respondents did not comment upon the draft permit.

III. SUMMARY OF ARGUMENT.

AMBIT's Brief is a jumbled presentation of various disjointed and unfounded arguments that are unrelated to the actual issues raised by these appeals. Just as it did before the Board, AMBIT disregards the record or manufactures facts as needed to support its theories, hoping to hide its inability to identify any true basis for challenging the findings and conclusions made in the Board's Final Order.

Consistent with its submissions below, AMBIT's primary strategy is to make confusing, nearly unintelligible arguments about a purported need for "systemic changes" to the "Fairmont Pool System." AMBIT does so while falsely claiming that Respondents sought from the Board not a reversal of the DEP's decision to reissue the UIC Permit, but an undescribed "change in the Mine Pool system." AMBIT Brief, pp 3, 23-24. Further, AMBIT portrays Respondents' challenge to the UIC Permit as driven at once by "money" only, and at the same time, argues that Respondents have no "concrete, actual interest" in that permit. AMBIT Brief, pp. 12-13. The entire point of these and similar spurious assertions found throughout the AMBIT Brief is to divert attention from a permit that obviously should not have been reissued. Notably, AMBIT does not challenge the Board's conclusion that DEP erred in multiple ways by reissuing the UIC Permit.

Indeed, the actual appeal of the UIC Permit filed by the Respondents, and the record of the Board's consideration of that appeal, bears little resemblance to the story AMBIT attempts to tell. AMBIT, however, is undeterred by this disconnect between its defense strategy and the factual record. As a result, the Court is presented with not just the Respondents' well justified original appeal (Appeal No. 21-0845) (challenging the limited form of relief granted by the Board), but also

two (2) appeals by AMBIT, purportedly challenging: (1) the Board's refusal to revise the Final Order to include language that AMBIT believed would have been helpful to it in some unexplained way, and (2) the Board's alleged failure to rule on its standing defense.

Missing from the AMBIT Brief is any acknowledgement that in the Final Order that is at issue in all these appeals, the Board found that the DEP's decision to reissue the UIC Permit was "*arbitrary, capricious, and in violation of applicable statutory and legal provisions.*" JA001061-JA001062 (emphasis added). Among other determinations that led to this conclusion, the Board noted that DEP regulations prohibit that agency from acting on any UIC permit application that is not both accurate and complete. It then specifically found that AMBIT's permit application was both inaccurate and incomplete. JA001061. In prosecuting its appeals to this Court, AMBIT does not mention – let alone question – *any* of these findings and conclusions. It is therefore not surprising that (in violation of the Appellate Rules) AMBIT does not identify any particular relief that it seeks with respect to the Final Order, instead merely asking the Court to grant "the relief this Court deems just." AMBIT Brief, p. 33.

Given the facially meritless nature of the AMBIT appeals, and because the AMBIT Brief is so thoroughly saturated with inaccuracies, omissions, and half-truths, Respondents have not attempted to identify and correct them all. Instead, Respondents addressed above the more significant and repeated factual misrepresentations that are made in the AMBIT Brief. Respondents discuss below the application of the few legal principles that AMBIT mentions.

In the final analysis, the AMBIT Brief – like its two appeals – does not deserve this Court's serious attention because AMBIT has no serious issue to raise. As a result, the Court should decline to grant any relief to AMBIT in either of its appeals.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

The Court's November 12, 2021 Amended Scheduling Order indicates that AMBIT's two appeals (Nos. 21-0885 and 21-0893) are consolidated with Respondents' appeal (No. 21-0845) "for purposes of briefing, consideration, and decision." In light of this consolidation (and consistent with their opening brief in Appeal No. 21-0845), Respondents maintain that the Court should grant Rule 19 oral argument because of the issues raised in Respondents' appeal (No. 21-0845) rather than anything described in AMBIT's appeals.

The issues presented in Respondents' appeal involve application of existing law to largely undisputed facts; an unsustainable exercise of discretion or clear error of law by the Board where the law governing the discretion is settled; and relatively narrow legal issues governing permit issuance. The appeals do not present legal issues of first impression, issues of fundamental public importance, constitutional issues, or inconsistencies or conflicts in decisions by lower tribunals (all of which are appropriate for Rule 20 argument). Because the Respondents' appeal seeks reversal of the Board's decision, and because the question of the appropriate limits on the Board's discretion to grant partial relief will be of importance to many regulated entities and others affected by DEP permitting decisions, Respondents do not believe resolution of these appeals is appropriate via a memorandum decision.

V. RESPONSES TO AMBIT'S ASSIGNMENTS OF ERROR.

A. The Board Correctly Ruled That Respondents Had Standing to Appeal the DEP's Reissuance of the UIC Permit to AMBIT.

Aside from the rambling and repetitive nature of the standing arguments set forth in AMBIT's Brief, the most striking feature of that brief is what is absent: a discussion of the Board's reasoning and decision on the issue of Respondents' standing to pursue an appeal before the Board

of DEP's decision to reissue the UIC Permit to AMBIT. Nowhere in the Statement of the Case or in the Argument sections of its brief does AMBIT acknowledge, much less discuss, the Board's detailed and cogent explanation of why it determined that Respondents had standing to mount such a challenge. A reading of AMBIT's Brief suggests that the Board simply refused to rule on the issue of standing despite AMBIT's multiple requests to do so. In fact, the Board devoted a full two and one-half pages in its Final Order to a discussion of standing and how Respondents satisfied each element. JA001059-JA001061 (Final Order at 16 – 18). In its Brief, AMBIT does not attempt to convince this Court that the Board erred in either its factual findings or legal conclusions on standing. Rather, AMBIT's Brief simply ignores what the Board had to say on that issue, and proceeds to advance a number of arguments that are not only unsupported by the factual record and the law but are often directly contrary to both (as demonstrated below).

1. The Board's Ruling on Standing.

The very first legal issue addressed in the "Conclusions of Law" section of the Final Order is standing. JA001059 (Final Order at 16). The Board began its discussion by recognizing the statutory requirement that only persons who are "adversely affected" by a final order by DEP have standing to pursue an appeal before the Board. *Id.* The Board next observed that the phrase "adversely affected" is not defined in the West Virginia Water Pollution Control Act, and thus the Board has previously relied on the judicial principles of standing to determine whether an appellant is "adversely affected." *Id.* (discussing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180 - 81 (2000)).

The Final Order next reflects an analysis of each standing element to determine whether Respondents had demonstrated the right to bring the appeal: (1) an actual injury in fact; (2) that is fairly traceable to DEP's reissuance of the UIC Permit; and (3) that will be redressed by a favorable decision of the Board. *Id.* With respect to the injury element, the Board found that Respondents

"established a injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." JA001060 (Final Order at 17). This injury stems from Respondents' status as "former and current owners/operators of multiple underground mines and associated water treatment facilities within the Fairmont Mine Pool." JA001060 (Final Order at 17). These include mines directly adjacent to the Joanne Mine into which AMBIT injects its untreated AMD, and surface facilities that pump and treat water from the Fairmont Mine Pool. JA 001060 (Final Order at 17).

The Board reasoned that AMBIT's injection into the Joanne Mine constitutes injection in to the Fairmont Mine Pool since the Joanne Mine is part of the Fairmont Mine Pool. *Id.* The Board noted that Respondents are the only entities that maintain the Fairmont Mine Pool at an elevation that prevents a surface discharge of untreated AMD, and also pump water to prevent their active underground operations from being flooded with water. *Id.* The Board also found that Respondents incurred costs in pumping and treating water from the mine pool. In short, the Board determined that Respondents suffered an "injury in fact" through AMBIT's injection of untreated AMD into the Fairmont Mine Pool, which then becomes Respondents' obligation to pump and treat instead of AMBIT incurring the cost to treat and manage its untreated AMD on the surface.

The Board found that Respondents' injury was fairly traceable to DEP's reissuance of the UIC Permit for the following reasons:

> AMBIT's injection of water into the Fairmont Mine Pool is authorized by the UIC Permit. The AMBIT UIC Permit not only authorizes AMBIT to continue injecting water into the Fairmont Mine Pool, but also allows AMBIT to increase the volume of water injected into the Fairmont Mine Pool up to 102,200,000 gallons per year. Once water is injected into the Fairmont Mine Pool, [Respondents] bear the responsibility of pumping and treating the water at [Respondents'] expense.

In short, Respondents' injury of incurring the time and cost to pump and treat AMBIT's injected AMD is traceable to DEP's reissuance of the UIC Permit that authorizes AMBIT's injection.

Lastly, the Board ruled that Respondents' injury would likely be redressed by a favorable decision for the following reasons. JA001061 (Final Order at 18). Respondents requested the Board to vacate the UIC Permit. *Id.* Without the UIC Permit, AMBIT would not be authorized to inject its untreated AMD into the Fairmont Mine Pool. *Id.* Instead, AMBIT would have to incur the costs to manage and treat its untreated AMD on the surface or face enforcement action from the DEP. *Id.* A reduction in the volume of water injected in the Fairmont Mine Pool accomplished through elimination of AMBIT's injection would reduce the volume of water that Respondents have to pump and treat from the Fairmont Mine Pool at their expense. *Id.*

For all these reasons, the Board concluded Respondents demonstrated standing to pursue an appeal before the Board – i.e. that Respondents were "adversely affected" by the reissuance of the UIC Permit.

2. AMBIT's Argument that Respondents Lack Standing to Challenge the UIC Permit Is Untenable.

As noted above, AMBIT's Brief reflects no discussion of the Board's detailed findings addressing Respondents' standing. Rather than attempt to fashion a coherent argument to challenge the Board's reasoning on standing, AMBIT sidesteps the Board's findings. AMBIT engages in a pattern of repeating, over and over again, without explanation or citation to the record, the conclusory statement that Respondents (who AMBIT incorrectly labels as "MAEI") lack any redressable injury from the UIC Permit. Below are just some examples of this tactic in AMBIT's Brief:

- "MAEI was unable to identify any 'legally protected interest,' unable to identify any concrete and particularized invasion, unable to identify anything beyond the conjectural arrival of AMBIT's Injectate at a MAEI treatment facility, which the Injectate was expressly permitted to do by law, even if it had." *AMBIT Brief* at 5.
- "MAEI could produce no evidence of standing and no injury-in-fact to form the basis of its administrative appeal." *AMBIT Brief* at 7.

- "MAEI identified not one particularized contract, statute, regulation, or even incursion that could constitute an injury in fact, which pursuant to West Virginia law is the necessary predicate to filing the administrative appeal." *AMBIT Brief* at 13 and 21.

- "MAEI has no standing to challenge AMBIT's UIC Permit before the EQB because it cannot and has not demonstrated that it is likely or even possible that MAEI's alleged injury can or will be addressed through a favorable EQB decision." *AMBIT Brief* at 24.

AMBIT does so as if its proclamation will somehow become true if AMBIT repeats it enough times. Each of these examples lacks any explanation or citation to the factual record of the proceedings before the EQB, much less the provisions of the Final Order addressing standing. AMBIT offers no argument to challenge the Board's specific findings on standing. As the Board ruled, Respondents satisfied each standing element.

a. Injury in Fact.

Respondents demonstrated an "injury in fact" through evidence that they own or control the underground mine voids into which AMBIT's injected AMD flows and thus must be managed by Respondents at their expense. This conduct "injures" Respondents in at least two ways. First, AMBIT is causing untreated AMD to flow into real property owned or controlled by Respondents. This constitutes a trespass. "Trespass is defined in its limited sense as: '* * * an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property.'" *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 591-92, 34 S.E.2d 348, 352 (1945). Second, Respondents incur financial costs associated with managing and treating water that flows into their mine voids. JA001050 (Final Order at 7). This Court has recognized that "[i]njury in fact is easily established when a litigant demonstrates a direct, pocketbook injury." *State ex rel. Healthport Techs.*, 239 W. Va. 239, 243, 800 S.E.2d 506, 510 (2017).

AMBIT appears to argue Respondents did not demonstrate an injury because (1) there is no proof in the form of a "dye test" that AMBIT's injected AMD actually reaches Respondents

treatment facilities; and (2) the injected AMD "is permitted to travel to those areas." *AMBIT Brief* at 5, 20, 30. There are multiple problems with this argument.

First, to demonstrate standing in environmental cases, a party is not required to prove that the underlying alleged violations are definitively true. "[A] court is not required to determine the merits of the environmental violations alleged when deciding if standing exists." *Ohio Valley Envtl. Coal. v. Foal Coal Co., LLC*, 274 F. Supp. 3d 378, 385 (S.D. W. Va. 2017) (citing to *Ohio Valley Envtl. Coal. v. Maple Coal Company*, 808 F. Supp. 2d 868, 882 (S.D. W. Va. 2011). "The focus of a standing analysis is not on the validity of the claim but instead is 'on the appropriateness of a party bringing the questioned controversy to the court.'" *State ex rel. Healthport Techs.*, 239 W. Va. 239, 243, 800 S.E.2d 506, 510 (2017). All that is required is a demonstration that if the alleged violations are true, the impacts of the violations adversely affect the party bringing the action. *Ohio Valley Envtl. Coal. v. Foal Coal Co., LLC*, 274 F. Supp. 3d 378, 385 (S.D. W. Va. 2017) ("What [standing] does require is a demonstration that if the allegations of Clean Water Act violations are true, the impacts of the alleged violations are felt in an area with which the plaintiffs have 'a direct nexus.'"). Respondents certainly alleged a number of violations that if true (which the Board ultimately found to be the case) amount to an adverse impact on Respondents. Respondents are not required to prove the actual flow path of the injectate to establish standing to challenge the UIC Permit.

Second, the evidence presented to the Board indicates that AMD injected by AMBIT into the Joanne Mine flows either to the east and north (as AMBIT's permit renewal application states) or to the west and either north or south as stated in testimony by the only qualified expert witness who testified, Dr. Kilburg JA001050-JA001053 (Final Order at 7 – 10). The Board found that in either case the AMD reaches areas owned or controlled by Respondents and is ultimately pumped

and treated by Respondents at their expense. "Regardless of which way the untreated AMD flows, once AMBIT injects it into the Joanne Mine, either [West Virginia Land] or [Marion Resources] incurs costs to pump and treat the water." JA001053 (Final Order at 10). This injures Respondents by causing a trespass into Respondents private property and causing Respondents to incur additional costs to manage the injected AMD, which DEP authorized to be increased by nearly five-fold – from a daily average of 52,120 gallons up to a daily average of 266,400 gallons. JA000023-JA000025. Both of these are "concrete and particularized" injuries to Respondents.

Third, AMBIT cites to nothing in the record or the law to support its bald assertion that AMBIT's injected AMD was permitted to travel to Respondents treatment facilities. AMBIT Brief at 5, 20, 30. AMBIT has absolutely no support for this statement, which is patently false. Respondents presented evidence that they own multiple mine voids through which AMBIT's injected AMD flows and the treatment facilities that pump and treat that water. (Kevin Rakes Testimony at Evidentiary Hearing at Tr. 36, 45, 53 – 55). Respondents also presented evidence that they had not consented to receiving this water or otherwise granted permission to AMBIT to inject their water into Respondents mine voids. (Kevin Rakes Testimony at Evidentiary Hearing at Tr. 66 – 67). AMBIT presented no evidence to the contrary and has not cited any such evidence in its brief.

For all these reasons, AMBIT has wholly failed to disprove the "injury in fact" to Respondents that the Board found to exist.

b. Injury Traceable to the Challenged Action.

Although AMBIT disputes the existence of any injury to Respondents, AMBIT does not appear to contest that the injuries Respondents have identified (discussed above) are traceable to DEP's reissuance of the UIC Permit. That permit authorizes AMBIT's injection, and without a

permit, AMBIT would lack legal authority to inject AMD into the Fairmont Mine Pool. *See W.Va. Code* § 22-11-8(b) (permit required to operate an underground injection well).

c. Injury Capable of Redress by Board Decision.

AMBIT's Brief is peppered with various statements that Respondents' alleged injuries cannot be redressed by a favorable Board decision. *AMBIT Brief* at 3, 12, 24, 33. The only argument AMBIT offers on this issue is that Respondents are seeking a change in the law through their appeal, which the Board cannot grant. "Because West Virginia law does not provide for the payment of fees or approval rights for one permittee over another, the relief MAEI seeks requires a change in the law. Alternatively, the relief MAEI seeks requires that the Mine Pool and/or UIC regulation undergo systemic review and revision." *AMBIT Brief* at 24. "It is a fair assumption that the relief MAEI seeks is a change in the regulation and management of the Mine Pool system globally, a legislative or regulatory revision or a contract/agreement with individual Mine Pool users, neither of which is available through the EQB appeal process." *AMBIT Brief* at 19.

The claim that Respondents were seeking monetary damages or a change in the law is demonstrably false as explained in section II above (corrections to AMBIT's Statement of the Case). Respondents' Notice of Appeal to the Board very clearly identified the specific relief requested from the Board – to vacate DEP's reissuance of the UIC Permit. JA000031(June 26, 2020 Notice of Appeal at 6). There is no dispute that the Board possesses the power to grant this relief. *See W.Va. Code* § 22B-1-7(g) (authorizing the Board to affirm, modify, or vacate a permitting decision by DEP). As the Board concluded, an order to vacate the UIC Permit would redress Respondents' injury by removing AMBIT's legal authority to inject AMD into the Fairmont Mine Pool. JA001061 (Final Order at 18).

In short, the Board had ample evidence to support its conclusion that Respondents established standing to challenge the UIC Permit. In fact, Respondents are probably the most

uniquely qualified persons to establish standing vis-à-vis the UIC Permit. They own the mine voids that receive AMBIT's AMD and bear the responsibility (and cost) to manage and treat the water. In fact, if Respondents lack standing, then likely no one could establish standing to challenge DEP's decision to issue the UIC Permit. That may be AMBIT's goal: to insulate DEP's UIC permitting decisions from any public scrutiny whatsoever. In order for this Court to find that Respondents lacked standing to challenge DEP's permitting decision, this Court would have to overrule its existing jurisprudence and raise the standing bar so high that DEP's UIC permitting decisions would essentially be immune from Board review. There is absolutely no reason for this Court to make such a fundamental change in its standing jurisprudence.

B. In Seeking to Have the UIC Permit Vacated, the Respondents' Appeal to the Board Requested Relief that the Board Was Authorized to Grant.

AMBIT's Second Assignment of Error is premised upon the erroneous claim that by their appeal the Respondents were seeking to have the Board award monetary damages and somehow "change the law" governing the UIC permitting process. *see, e.g.*, AMBIT Brief, pp. 6, 9, 24). These claims have been thoroughly refuted in section II.A, above, and Respondents direct the Court's attention to that discussion for purposes of addressing this alleged error.

In short, Respondents only asked that the Board rescind or vacate the UIC Permit. JA000027, JA000031 (Notice of Appeal). This is something it has full legal authority to do. *W. Va. Code* § 22B-1-9(a). AMBIT's second assignment of error should therefore be summarily denied.

C. The Board Was Not Required to Include in the Final Order Provisions that Preserved AMBIT's Positions Regarding the Factual Evidence or Legal Arguments.

It is difficult to summarize AMBIT's argument in support of its "Motion to Alter/Amend" the Board's Final Order, but it appears that it is primarily offended because the Final Order allegedly includes "direct factual errors" and "information...contradicted by the evidence" and failed to include "AMBIT's evidence, arguments and objections" and recitations of AMBIT's theories regarding the meaning of certain purported evidence. AMBIT Brief, pp. 25-30; *also see* JA0010658-JA001084 (AMBIT's "Motion to Alter/Amend"). In other words, the Board did not accept the credibility or relevance of much of AMBIT's proffered testimony and evidence, and did not agree with AMBIT's proposed legal conclusions. As is confirmed by the inapplicable authority that AMBIT cites in support of this assignment of error, this is not a sufficient basis upon which to attack the Final Order.

The primary decision upon which AMBIT relies, *SER Vanderra Res. LLC v. Hummel*, 242 W.Va. 35, 829 S.E.2d 35 (2019) addressed a Petition for Writ of Prohibition brought by a defendant in a civil action for breach of contract, challenging the circuit court's failure to make factual findings sufficient to enable meaningful review in its denial of a motion for summary judgment. In denying relief, the Court observed that the general rule requiring findings of fact and conclusions of law in civil actions tried to a court without a jury under W.Va. R. Civ. P. 52(a) does not apply to interlocutory orders denying motions for summary judgment in cases not involving qualified immunity. *Vanderra*, 242 W.Va. at 35, 829 S.E.2d at 44 (citing *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997) (addressing orders granting summary judgment)). It also noted, however, that the appropriate procedure for a litigant seeking to challenge such a ruling through an extraordinary writ is to inform the circuit court of its intent to

make such a challenge and to specifically ask the court for an order setting forth findings and conclusions that will serve as a basis for this Court's consideration of same. *Id.*

Obviously, this matter does not involve a civil action, or a motion for summary judgment. In addition, by statute any party who is adversely affected by a Board order may seek judicial review of it. *W.Va. Code* § 22B-1-9(a); *W.Va. Code* § 29A-5-4(a). More importantly, the Final Order at issue was not interlocutory and included detailed findings of fact and conclusions of law on all material issues raised by AMBIT. Therefore, neither *Vanderra* nor *Lilly* support AMBIT's demand that the Board's Final Order be revised in the manner described in its brief.

Likewise, *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 719 S.E.2d 381 (2011) has no relevance to AMBIT's appeals. *Hopkins* involved a property dispute in which the circuit court issued several post-trial orders, clarifying the descriptions of the proper boundary line between the parties' properties. The petitioners in *Hopkins* had sought such a post-trial ruling more than two years after the trial court's initial order. In rejecting petitioners' efforts to overturn the circuit court's resulting order on procedural grounds, this Court cited the "invited error" rule, which "prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error." *Hopkins,* 228 W.Va. at 219, 719 S.E.2d at 387.

In the case *sub judice*, AMBIT has been unable to identify any error in the Final Order entered by the Board with respect to any evidence that AMBIT introduced or legal arguments that AMBIT made. Although AMBIT surely would have preferred that the Board adopt more of the findings it proposed, AMBIT is unable to show that any of the Board's factual findings were clearly wrong, or that any of the Board's legal conclusions were erroneous as a matter of law. As a result, *Hopkins* provides no support for AMBIT's argument that the Final Order should have been revised or amended.

AMBIT also cites this Court's decision in *Taylor v. West Virginia DHHR*, 237 W.Va. 549, 788 S.E.2d 295 (2016) in support of its claim that the Board improperly failed to include in the Final Order "AMBIT's evidence, arguments, and objections" and wrongly included " factual errors and/or contested evidence...without appellation or explanation...." AMBIT Brief, p. 26. *Taylor*, however, was issued in the context of a circuit court's entry of summary judgment in a civil action involving claims of qualified governmental immunity. *Taylor* has no apparent relevance to entry of orders by administrative tribunals such as the Board. In addition, the circuit court in *Taylor* merely entered a proposed order that had been provided by the defendants. *Taylor* 237 W.Va. at 557-558, 788 S.E.2d at 303-304. In this case, the Board fashioned its own order reflecting the Board's composition of its findings and conclusions.

Most importantly, however, *Taylor* does *not* stand for the proposition that any party may complain about the content of a final order merely because it does not include that party's "evidence, arguments, and objections." In the administrative context, such orders are required to include the *adjudicatory entity's* findings of fact and conclusions of law that provide the basis for its decision. *W.Va. Code* § 29A-5-3. So long as the reviewing body does not "fail to address an important aspect" of the case, and its findings are "adequately explained and supported by the record" (*In re Queen*, 196 W.Va. 442, 446-447, 473 S.E.2d 483, 487-488 (1996)), there is no requirement that it attempt to incorporate a discussion of all "evidence, arguments, [and] objections" into its final order. To the contrary, in *Taylor* this Court cautioned *against* requesting that a court enter "over-reaching orders which fail to succinctly identify and address the critical factual and legal issues" and contain nothing more than a "scattershot [presentation of] the legal issues presented and concomitant legal analysis." *Taylor* 237 W.Va. at 557-558, 788 S.E.2d at 303-304. As evidenced by the five-page "abbreviated" version of the "under-reflected and/or

unpreserved evidence, arguments, process [and] procedure" that AMBIT requests be included in the Final Order (AMBIT Brief, pp. 26-30), this is precisely the type of order that AMBIT asked the Board to issue. In refusing AMBIT's invitation to do so, the Board properly declined to enter such a "kitchen sink order" that this Court has "strongly disfavor[ed]" as representing "a substantial impediment to comprehensive appellate review." *Taylor* 237 W.Va. at 558, 788 S.E.2d at 304.

D. The Board Properly Denied AMBIT's Supplemental Motion to Amend the Final Order.

AMBIT's "Supplemental Motion to Alter/Amend" the Final Order ("Supplemental Motion") maintained that the Board had never ruled on its motion to dismiss Respondents' appeal on the basis of standing. JA001085-JA001090. In its Fourth Assignment of Error, AMBIT essentially replicates that motion. AMBIT Brief, pp. 33.

The authority cited in the immediately preceding section, discussing the unmeritorious nature of AMBIT's original "Motion to Alter/Amend the Final Order," applies with equal force to AMBIT's Supplemental Motion. Moreover, as described in more detail in Part V.A above, the *very first* legal issue addressed in the Board's "Conclusions of Law" section of the Final Order is standing. JA001059 (Final Order at 16). There is, therefore, no basis for this assignment of error by AMBIT.

* * *

VI. CONCLUSION.

As set forth in the Respondents' opening brief in Appeal No. 21-0845 (in which the Respondents here are the Petitioners), the Environmental Quality Board correctly concluded that DEP's decision to reissue the UIC Permit to AMBIT was "arbitrary, capricious, and in violation of applicable statutory and legal provisions" (JA001063; Final Order at 19), and the Final Order included comprehensive, specific findings of fact in support of that conclusion. AMBIT's unwarranted effort to raise purported procedural objections to a Final Order that it does not truly seek to overturn should therefore be denied.

However, there is one fundamental way in which the Board's September 29, 2021 Final Order *should* be changed: based on the detailed factual findings and legal conclusions set forth in that order, the Board's decision to grant only limited relief to the Respondents (in the form of a reduction in injection rates in the reissued UIC Permit) was either clearly wrong or the result of a clearly unwarranted exercise of discretion. As a result, and in accordance with *W. Va. Code* § 29A-5-4(g) and *W. Va. Code* § 22B-1-7(g)(1), the Final Order should be reversed and this matter should be remanded to the Board with instructions to enter an order vacating the UIC Permit.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA LAND RESOURCES, INC., and MARION COUNTY COAL RESOURCES, INC.,

Petitioners,

vs. No. 21-0845

AMERICAN BITUMINOUS POWER PARTNERS, LP, WEST VIRGINIA DEPT. OF ENVIRONMENTAL PROTECTION, and WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD,

Respondents.

AND

AMERICAN BITUMINOUS POWER PARTNERS, LP,

Petitioner,

vs. Nos. 21-0885, 21-0893

WEST VIRGINIA LAND RESOURCES, INC., MARION COUNTY COAL RESOURCES, INC., WEST VIRGINIA DEPT. OF ENVIRONMENTAL PROTECTION, and WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD,

Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Respondents' Response Brief in Appeal Nos. 21-0885 and 21-0893 on behalf of West Virginia Land Resources, Inc. and Marion County Coal Resources, Inc. was served upon counsel of record for all parties and upon the Clerk of the West Virginia Environmental Quality Board on the 30th day of December, 2021, by 1st Class U.S. Mail addressed as follows:

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