

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 22-ICA-74

**DD OIL COMPANY,
A WEST VIRGINIA CORPORATION, Petitioner,**

v.

**STATE OF WEST VIRGINIA, EX REL.,
HAROLD D. WARD, CABINET SECRETARY,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, Respondent.**

(Appeal from a final order of the Environmental Quality Control Board, 22-01-EQB)

PETITIONER'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ASSIGNMENTS OF ERROR.....	1
STATEMENT OF THE CASE.....	1
a. Relevant Procedural History and Administrative Actions by the WVDEP.....	3
SUMMARY OF ARGUMENT.....	6
STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	7
STANDARD OF REVIEW.....	7
ARGUMENT.....	9
I. THE EQB’S RULING THAT IT LACKED AUTHORITY TO MODIFY DD OIL’S PERMITS UNTIL WV CODE §22B-1-7 WAS CLEARLY ERRONEOUS AND SUBSTANTIALLY PREJUDICED DD OIL’S PERMIT RIGHTS.....	9
A. The EQB’s Final Order was in violation of constitutional or statutory provisions.....	9
B. The EQB’s Final Order was clearly wrong in view of the reliable, probative and substantial evidence on the whole record.....	12
II. THE EQB’S FINAL ORDER DISMISSING DD OIL’S APPEAL OF ORDER AND ANNULMENT REVIEW FOR LACK OF SUBJECT MATTER JURISDICTION AND MOOTNESS WAS A CLEAR ABUSE AND UNWARRANTED EXERCISE OF DISCRETION THAT SUBSTANTIALLY PREJUDICED DD OIL’S PERMIT RIGHTS.....	13
A. The EQB’s Final Order dismissing the matter for lack of subject matter jurisdiction was arbitrary or capricious or characterized by a clear abuse and unwarranted exercise of discretion.....	14
B. The EQB’s Final Order dismissing the matter as moot was erroneous because there are sufficient collateral consequences that would result from a determination of the question presented to justify relief and this matter is likely to be repeated in the future.....	16
CONCLUSION.....	18

TABLE OF AUTHORITIES

West Virginia Cases

<i>Dale v. Painter</i> , 765 S.E.2d 232, 234 (W. Va. 2014).....	9, 10
<i>Hart v. National Coll. Athletic Ass'n</i> , 209 W.Va. 543, 548, 550 S.E.2d 79, 84 (2001) (per curiam).....	16
<i>Monongahela Power Company v. Chief, Office of Water</i> , 211 W. Va. 619, 627 (W. Va. 2002).....	9, 15
<i>State ex Rel. Bluestone Coal v. Mazzone</i> , 226 W. Va. 148 (W. Va. 2010).....	18
Syl. pt. 1, <i>Israel v. Secondary Schs. Activities Comm'n</i> , 182 W. Va. 454, 388 S.E.2d 480 (1989).....	16, 17
Syl. pt. 1, <i>Muscatell v. Cline</i> , 196 W.Va. 588, 474 S.E.2d 518 (1996).....	8
Syl. pt. 1, <i>State ex rel. Lilly v. Carter</i> , 63 W. Va. 684, 60 S.E. 873 (1908).....	16
Syl. pt. 1, <i>State ex rel. M.C.H. v. Kinder</i> , 173 W. Va. 387, 317 S.E.2d 150 (1984).....	17
Syl. pt. 5, <i>State v. Snyder</i> , 64 W.Va. 659, 63 S.E. 385 (1908).....	10

Federal Cases

<i>Firefighters Local Union No. 178b v. Stotts</i> , 467 U.S. 561, 585 (1984)(O'Connor, J., concurring).....	17
<i>Friends of the Earth, Inc v. Laidlaw Env'tl Servs. (TOC), Inc.</i> , 528 U.S. 167, 189 (2000).....	18

State Cases

<i>State v. Gleason</i> , 404 A.2d 573 (Me.1979).....	16
--	----

West Virginia Statutes

W. Va. Code §22B-1-7.....	<i>passim</i>
W. Va. Code §22-6-4.....	3
W. Va. Code § 22-6-39.....	4
W. Va. § 29A-5-4.	7, 8
W. Va. Code § 51-11-1, et seq.,.....	7
W. Va. Code § 22B-1-9.....	7
W. Va. Code §29A-1-2(a).....	8, 9, 14
West Virginia Administrative Procedure[s] Act,	

Chapter 29A, Article 5, Section 4(g).....8
W. Va. Code §22B-1-7(g)(1).....10, 11, 13, 14

West Virginia Rules of Procedure

W. Va. Rules of App. P. 20(a).....7

ASSIGNMENTS OF ERROR

1. THE EQB'S RULING THAT IT LACKED AUTHORITY TO MODIFY DD OIL'S PERMITS UNTIL WV CODE §22B-1-7 WAS CLEARLY ERRONEOUS AND SUBSTANTIALLY PREJUDICED DD OIL'S PERMIT RIGHTS.

2. THE EQB'S FINAL ORDER DISMISSING DD OIL'S APPEAL OF ORDER AND ANNULMENT REVIEW FOR LACK OF SUBJECT MATTER JURISDICTION AND MOOTNESS WAS AN ABUSE AND UNWARRANTED EXERCISE OF DISCRETION THAT SUBSTANTIALLY PREJUDICED DD OIL'S PERMIT RIGHTS.

STATEMENT OF THE CASE

DD Oil Company, hereinafter ("DD Oil") prays that the Intermediate Court of Appeals review the subject Final Order, hereinafter ("Final Order") entered on the 25th day of July, 2022 by the Environmental Quality Board, hereinafter ("EQB"). (D.R. 0445). In the Final Order, the EQB granted the West Virginia Department of Environmental Protection's, hereinafter ("WVDEP"), motion entitled Vacation of Subject Order, Annulment of Underlying Notice of Violation, and Motion to Dismiss, hereinafter ("Motion to Dismiss"). (D.R. 0380). DD Oil's Appeal of Order and Annulment Review hereinafter ("Appeal") was thereby dismissed. (D.R. 0092-0108). DD Oil contends that the dismissal of its Appeal for lack of subject matter jurisdiction and mootness as ruled in the Final Order was improper because there was additional relief that EQB should – and has the authority to – grant DD Oil (namely an extension of its permits due to the WVDEP's conduct).

To provide context, DD Oil filed its Appeal after the WVDEP denied DD Oil's request to annul certain Notices of Violation, hereinafter ("NOVs") issued by the WVDEP against DD Oil by Order No. 2022-6. (D.R. 0113-0115). DD Oil has maintained the position that 1) the NOVs were improperly issued by the WVDEP and 2) that DD Oil has been deprived of its due process rights in challenging said NOVs and such a deprivation has resulted in DD Oil being damaged.

As described in more detail below, DD Oil has been deprived of the right to conduct any well work under its permits due the actions of the WVDEP beginning in July of 2021 when the first cease and desist was issued until present and now must suffer the cost and burden of renewing said permits.

DD Oil asserts that it has never had the opportunity to challenge or abate the NOV's due to the WVDEP's tactics to deny DD Oil its due process rights. The WVDEP has taken many steps to preemptively and unlawfully revoke DD Oil's permits without due process. If the WVDEP was not issuing frivolous NOV's, it was creating procedural hurdles that denied DD Oil a hearing on the merits of the alleged violations. DD Oil never had a hearing on the merits before their permits came to their natural end. The WVDEP, through its frivolous and unlawful regulatory actions against DD Oil, has demonstrated its malicious intent to revoke DD Oil's permits. DD Oil has alleged that the WVDEP's intent in depriving it of its permit rights was to unjustly raise additional permit fees from DD Oil for the purpose of preventing layoffs in the agency due to the downturn of oil and gas permitting in West Virginia.¹ DD Oil's permit rights have been substantially prejudiced by the WVDEP's actions and the EQB's ruling in the Final Order which denied any additional relief based on these compelling circumstances.

To further illuminate the prejudice to DD Oil's permit rights, just six (6) days prior to the appeal hearing, the WVDEP reversed its position on annulling the NOV's in direct contradiction to Order No. 2022-6 denying DD Oil's request for annulment. The WVDEP subsequently ordered annulment of the underlying NOV's by Order No. 2022-9 (D.R. 0450) and requested that the EQB dismiss DD Oil's appeal based on lack of subject matter jurisdiction in its Motion to

¹ See Email from Scott Rodeheaver expressing their concerns about harm to the state, arguing that a number of people had to find other jobs in the past year because permit fees were down. (D.R. 0043-0044).

Dismiss. (D.R. 0380). DD Oil believes the intent of changing its position after almost a year of litigation was to further deprive DD Oil of its opportunity to address the merits of the NOV's in its appeal hearing.

Understanding this tactic by the WVDEP, DD Oil requested the EQB extend its permits under its authority of W. Va. Code §22B-1-7. This was critical relief as DD Oil's permits naturally expired during these proceedings due to multiple requests for a continuance by the WVDEP. DD Oil believes that EQB's denial to grant such relief after the WVDEP entered Order No 2022-9 annulling the underlying notice of violation was clear error and an abuse and unwarranted exercise of discretion that substantially prejudiced its permit rights as argued more fully herein.

a. Relevant Procedural History and Administrative Actions by the WVDEP

This case begins with a Finding of Imminent Danger and Cease Operations Order that was issued by Inspector James on or about July 16th, 2021. (D.R. 0037). The Finding of Imminent Danger and Cease Operations Order contained a provision that DD Oil had a right to apply for a formal hearing within 15 days to contest such order pursuant to W. Va. Code §22-6-4. *Id.* Before DD Oil could apply for a formal hearing to contest the Finding of Imminent Danger and Cease Operations Order, the WVDEP issued a Notice of Violation on July 20, 2021. (D.R. 0038). It should be noted that violations of the Cease Operations Order from July 16, 2021 and the Notice of Violation from July 20, 2021 issued by the WVDEP include both civil and criminal penalties.²

² Failure to abate the violation by that date may result in assessment of civil penalties, filing of misdemeanor charges and/or an action for injunctive relief (D.R. 0037) "Failure to abate the violation by that date will result in bond forfeiture and may result in assessment of civil penalties, filing of misdemeanor charges and/or an action for injunctive relief (D.R. 0038).

The July 20, 2021 Notice of Violation provided DD Oil seven days to abate the alleged violation, which would have expired on July 27, 2021. On July 23, 2021, the WVDEP filed its Application for Injunctive Relief Pursuant to W. Va. Code § 22-6-39 against DD Oil in the Circuit Court of Ritchie County before a response or attempt to abate could be made by DD Oil. (D.R. 0008-0019).

Pending the hearing on the Temporary Restraining Order, on August 5, 2021, WVDEP Enforcement Chief Scott J. Rodeheaver emailed Producer Services (one of DD Oil's well service providers) advising that DD Oil did not possess valid permits to frac the subject wells. (D.R. 0039). Upon a hearing on the WVDEP's Motion for Preliminary Injunction, the Circuit Court ruled that the WVDEP did not provide sufficient evidence of irreparable harm as alleged in their motion and the Order Denying Motion for Preliminary Injunction and Dissolving Temporary Restraining Order which was entered on August 24, 2021, (D.R. 0046-0050).

Despite the outcome of the hearing, the WVDEP undermined the court and emailed Reliance Well Services to inform them that DD Oil still did not have a valid permit and not to engage in a frac that was scheduled. (D.R. 0052-0053). Due to the WVDEP's correspondence with Producer Services and Reliance Well Services before any official ruling had been made with respect to its permits, DD Oil lost its well service providers. By Letter dated August 23, 2021, Reliance Well Services indicated that it would not conduct any further well work for DD Oil until it obtained necessary permits. (D.R. 0191). WVDEP's tortious interference with DD Oil's existing service contracts made it impossible for DD Oil to finish its permitted well work.

Subsequent to the adverse ruling from the Circuit Court, the WVDEP then issued its September 9, 2021 letter to DD Oil demanding that forms WR-34 and WR-35 were required. (D.R. 0054). DD Oil submitted form WR-34 for the subject well nos. 10399, 10400, 10400, and

10402 on September 30, 2021 and maintained that form WR-35 was premature for these wells because permitted well work had not been completed. (D.R. 0055-0066). However, the WVDEP contended the permits for these wells had expired due to the well's inactivity for the period of time for which DD Oil abided by the Cease Operations Order and now both the WR-34 and WR-35's were due. (D.R.0205). The WVDEP further contended DD Oil must obtain new fracking permits to continue drilling of the subject wells, incurring additional expenses, fees, and lost revenue. (D.R. 0205). DD Oil maintained its position that the WR-35's were premature for submission and that it had a right to continue its well work to completion. (D.R. 0071).

On February 1, 2022, WVDEP Oil and Gas Inspector Supervisor Douglas C. Newlon, issued Notice of Violation Nos. 11778, 11779, 11780, and 11781 stating that WR-35's are required to be submitted within 90 days of completion of well work.³ (D.R. 0067-0070). On February 14, 2022, Inspector supervisor Douglas C. Newlon, issued Order to Cease Operations for Failure to Abate Violation despite DD Oil filing its WR-34s and objecting to WR-35s. (D.R. 0068-0071).

DD Oil Company applied for an annulment of the NOVs on February 18, 2022 and February 25, 2022, again asserting that it had not completed drilling and/or hydraulic fracturing work and that form WR-35 was premature. (D.R. 0071, D.R. 0073). The WVDEP issued Order No. 2022-6 on March 9, 2022 denying DD Oil's application to annul the NOVs (D.R. 0075-0077). DD Oil filed its Appeal of Order No. 2022-6 on March 23, 2022. (D.R. 0092-0108).

After discovery and pre-trial motions were completed, including multiple requests for continuances by the WVDEP, the appeal hearing was set before the EQB for July 14 and 15, 2022. On July 8, 2022 the WVDEP filed its Motion to Dismiss based on vacating Order No.

³ Notices of Violation 1178, 11779, 11780, and 11781 are the NOVs subject to DD Oil's Appeal and referred to herein as NOVs, which exclude the July 20, 2021 notice of violation.

2022-6 and annulment of the NOV's subject of DD Oil's Appeal. (D.R. 0380-0385). On July 12, 2022, DD Oil Company filed DD Oil Company's Response to WVDEP's Vacation of Subject Order, Annulment of Underlying Notices of Violation, and Motion to Dismiss. (D.R. 0386-0391). On July 13, 2022, the WVDEP issued Order No 2022-9 in which the NOV's were annulled, and Order 2022-6 issued on March 9, 2022 was vacated. (D.R. 0448-0451).

On July 14, 2022, this matter was heard by the Environmental Quality Board and on the 25th day of July 2022, the EQB entered a Final Order granting the WVDEP's motion to dismiss and dismissed DD Oil's appeal over DD Oil's objections with prejudice.

SUMMARY OF ARGUMENT

DD Oil asserts that the EBQ's dismissal of its appeal in its Final Order for lack of subject matter jurisdiction and mootness based on its conclusion that it lacked statutory authority to grant DD Oil additional relief was erroneous and a clear abuse and unwarranted exercise of discretion. Under the West Virginia Code, review boards, such as the EQB, have the authority to grant modification of permits, and, shall grant such relief when substantial rights of the Petitioner have been prejudiced by administrative findings, inferences, conclusions, decisions or orders. (W. Va. Code §22B-1-7). As explained herein and throughout, DD Oil's substantial permit rights have been prejudiced by administrative findings, inferences, conclusions, decisions, and orders by the WVDEP and the EQB.

DD Oil requested a modification of its permits in its Appeal because its permits expired during the Appeal of the NOV's that the WVDEP annulled in the 11th hour before an evidentiary hearing was set. Specifically, DD Oil requested that the EQB extend its permits because the WVDEP annulled the underlying NOV's that deprived DD Oil of all well work for a period of 13 months. The EQB clearly had the authority to extend permits under W. Va. Code §22B-1-7 but

declined to do so stating that it lacked such authority under statute, which was clearly erroneous and an abuse and unwarranted exercise of discretion. (D.R. 0439). Very simply, DD Oil requests that this Court find that its substantial rights in its permits were substantially prejudiced and enter an Order extending its permits to allow for the completion of permitted well work as the EQB should have done.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appeal of WVDEP's Order No.2022-6 was dismissed for lack of subject matter jurisdiction and mootness in the EQB's Final Order after the underlying NOV's contained therein were annulled by subsequent Order No. 2022-9 by the WVDEP just six (6) days prior to the Final Hearing and after the expiration of DD Oil's permits.

Upon an extensive review of previous case law, Counsel is unable at this time to find any precedent which examines the authority and jurisdiction of the EQB in regards to permit modification. A plain reading of the W. Va. Code grants the Board such authority, however, the EQB declined to take any action on modification of DD Oil's permits. The Appellant seeks guidance from this Court on this question. Accordingly, as this is a case of first impression for this Court, the Appellant respectfully requests oral argument pursuant to W. Va. Rules of App. P. 20(a).

STANDARD OF REVIEW

Judicial review of final orders or decisions in contested cases issued after June 30, 2022 must be instituted by filing an appeal with the Intermediate Court of Appeals as provided in W. Va. § 29A-5-4. W. Va. Code § 51-11-1, et seq., describes the functions, purpose, jurisdiction, and authority of the West Virginia Intermediate Court of Appeals referenced in W. Va. § 29A-5-4. W. Va. Code § 22B-1-9 provides for judicial review of orders made and entered by the EQB,

incorporating the provisions of W. Va. Code § 29A-5-4. Current W. Va. Code § 29A-5-4 provides for judicial review of administrative orders and decisions in general.

W. Va. Code §29A-1-2 defines the term “agency” for the purposes of the code. Specifically, the code states, “(a) ‘Agency’ means any state board, commission, department, office, or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches.” *See*, W. Va. Code §29A-1-2(a) (emphasis added).

Upon judicial review of a contested case under the West Virginia Administrative Procedure[s] Act, Chapter 29A, Article 5, Section 4(g), the intermediate court may affirm the order or decision of the agency (or board) or remand the case for further proceedings. The intermediate court shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions, or order are

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

“On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va.Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syl. pt. 1, *Muscatell v. Cline*, 196

W.Va. 588, 474 S.E.2d 518 (1996). *Dale v. Painter*, 765 S.E.2d 232, 234 (W. Va. 2014). The newly created Intermediary Court of Appeals would similarly review final orders of an agency under the same standards.

ARGUMENT

I. THE EQB'S RULING THAT IT LACKED AUTHORITY TO MODIFY DD OIL'S PERMITS UNDER WV CODE §22B-1-7 WAS CLEARLY ERRONEOUS AND SUBSTANTIALLY PREJUDICED DD OIL'S PERMIT RIGHTS.

In its Appeal, DD Oil Company requested several types of relief. Most importantly at the final hearing, DD Oil argued that, despite the underlying NOV's being annulled by Order No. 2022-9, that the EQB clearly had authority to modify its permits and extend the expiration date for the period of time that was lost due to the WVDEP's frivolous regulatory actions. The WVDEP's actions and the failure of the EQB's Final Order to grant any relief to DD Oil have prejudiced its substantial rights to a drilling permit. As of the filing of this Petition, DD Oil has been deprived of its permit rights, causing staggering financial losses in a time where oil and gas prices are at an all time high. As discussed below, the EQB's ruling in its Final Order was clearly erroneous and resulting in prejudice to DD Oil's substantial rights to its drilling permit for the following reasons:

A. The EQB's Final Order was in violation of constitutional or statutory provisions.

In the State of West Virginia, a state board is authorized by law to make rules and adjudicate cases under the Administrative Procedures Act.⁴ As an administrative agency is created by statute and has the authority for which is granted to it by the statute. *Monongahela Power Company v. Chief, Office of Water*, 211 W. Va. 619, 627 (W. Va. 2002).

⁴ W. Va. Code § 29A-1-2(a)

The EQB has the authority to issue rulings that modify an order, permit, or official action of the WVDEP or enter an order modifying the terms and conditions of any permit pursuant to statutory law in the state of West Virginia. W. Va. Code §22B-1-7 states, in relevant part:

“(1) [The Board], as the case may be, shall make and enter a written order affirming, modifying or vacating the order, permit or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered, or shall make and enter an order approving or modifying the terms and conditions of any permit issued;...” See, W. Va. Code §22B-1-7(g)(1) (emphasis added).

When interpreting the statutory provisions of W. Va. Code §22B-1-7, the statute should be read and applied according to the purpose of the general system of law applicable to the subject matter:

“A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.” Syl. pt. 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908). *Dale v. Painter*, 765 S.E.2d 232, 234 (W. Va. 2014).

Based on a plain reading of the statute, it is clear that the Legislature intended to grant the EQB the authority to make and enter written orders regarding official actions of state agencies. DD Oil requested that the EQB modify the terms of conditions of its permit based on the undisputed fact that the WVDEP annulled the alleged notices of violation only after its permits had expired following a period of thirteen months of which the sites sat idle while the permits were valid. (D.R.0418). DD Oil appealed the WVDEP’s Order No 2022-6 on the basis that the WVDEP had taken enforcement action against it with the intent to deprive it of its valid permit rights. While the EQB recognized that DD Oil was without any remedy for the loss of its permits pending the

ruling on the WVDEP's Motion to Dismiss, it still dismissed the case for lack of subject matter jurisdiction without providing any relief to DD Oil. (D.R. 0445);

“I mean I know that the DEP put you, Scott, in a difficult position because all of the sudden out of nowhere the day before the hearing, they wipe their hands of everything like nothing ever happened. . . you know, if you go back before - - if they're wiping out the notice of violations, then if you go back from the time when those were issued, and then work your way forward, look at all the stuff that happened to DD Oil and what they had to go through at the time. That's what's concerning.” (D.R. 0437).

The attorney for the EQB further stated:

“I went to the University of Tennessee, and they used to have a saying, “The big orange screw” is when the school screwed you, whether it would be register for classes or whatever, but that was - - you know, it was in the '80s, and that's what they called it, the big orange screw. This looks like the DEP screw.” (D.R. 0437).

The Board specifically stated that it lacked the authority to grant the relief requested by DD Oil, despite being advised of the statutory provisions of W. Va. Code §22B-1-7(g)(1);

The Chairman stated “[w]ell, we just don't feel - - the Board doesn't feel it has the authority to grant the relief that you're requesting, and that the fact that all NOV's have been withdrawn, you know, that's what we're here for in the first place, understanding all the circumstances and procedural history in this matter.” (D.R. 0441).

“[t]here's not an action left to be appealed. The complaint of action has been vacated and no longer exists. And as a matter of practice, the Board can't take any action to vacate, modify or affirm the official action, as its been - as it's been vacated.” (D.R. 0411).

The EQB's rationale for denying the requested relief and dismissing the Appeal is clearly in violation of the statutory provisions of W. Va. Code §22B-1-7. The code section provides that the board “shall make and enter a written order affirming, modifying or vacating the order, permit or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered, or shall make and enter an order approving or modifying the terms and conditions of any permit issued”. *Id.* Rather than issuing a ruling on the relief requested as

required by code, the EQB simply punted on the permit issue and dismissed the action. It is clear from the record that the EQB considered the fact that DD Oil was strung out for approximately a year in time over alleged notices of violation that the WVDEP then abandoned just six (6) days prior to the final hearing, and that such action severely prejudiced DD Oil's permit rights.

The EQB clearly has authority granted by statute to modify DD Oil Company's permits under the West Virginia Code and had the obligation to do so given the circumstances in this case, and declining to enter a written order on the issue of extension of DD Oil's permits was clearly in violation of constitutional or statutory provisions.

B. The EQB's Final Order was clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

The EQB's ruling in the Final Order is clearly wrong given the reliable, probative, and substantial evidence on the whole record. While there is not much guidance on this standard in West Virginia case law, this Court must consider the overwhelming amount of evidence in the record that DD Oil's substantial rights to its permit were prejudiced by the EQB's Final Order. After litigating this issue for a year and incurring substantial losses in the oil and gas industry, DD Oil leaves with nothing more than an expired permit and dismissed appeal, despite the underlying NOV's resulting in the suspended permit being dismissed by the WVDEP. As eloquently stated by the EQB, DD Oil got the "DEP Screw" yet the Board provided no relief for DD Oil, which it clearly had the authority to grant pursuant to W. Va. Code §22B-1-7.

The WVDEP's strongest argument for dismissal of the appeal and denial of any permit extension as requested by DD Oil is that DD Oil was only aggrieved by the NOV's described in Order No 2022-6, and that due to said NOV's being annulled, there is no longer an action to be complained of. (D.R. 0408). This is an absurd argument by the WVDEP resulting in a clearly wrong conclusion by the EQB. To consider that the only item that aggrieved DD Oil were the

underlying NOV's is naive. DD Oil was mainly aggrieved by the effect of the NOV's, which include complete suspension of its license under threat of civil and criminal penalties. The failure of the EQB to consider the prejudice of DD Oil's substantial rights to its drilling permit caused by its conclusions in the Final Order can be construed only as a clear error in light of the entire record. The EQB clearly knew of the prejudice caused to DD Oil as a result of the WVDEP's actions as demonstrated by its statements referenced above. Failure to act upon such prejudice was a clear error.

Because the Board has the authority under §22B-1-7(g)(1) to grant the relief sought by DD Oil Company and shall grant such relief when substantial rights have been prejudiced in its Final Order, dismissal of the Appeal citing lack of subject matter jurisdiction and mootness was clearly erroneous. DD Oil therefore requests that this Court find that the rulings contained within the EQB's Final Order prejudiced substantial permit rights and that it must modify DD Oil's permits as requested herein.

II. THE EQB'S FINAL ORDER DISMISSING DD OIL'S APPEAL OF ORDER AND ANNULMENT REVIEW FOR LACK OF SUBJECT MATTER JURISDICTION AND MOOTNESS WAS A CLEAR ABUSE AND UNWARRANTED EXERCISE OF DISCRETION THAT SUBSTANTIALLY PREJUDICED DD OIL'S PERMIT RIGHTS.

The EQB is granted subject matter jurisdiction, by statute, to hear appeals brought by any party who has been adversely affected by any order by the WVDEP. In stating as having a lack of such subject matter jurisdiction in their Final Order, the EQB acted arbitrarily, capriciously, and with a clear abuse and unwarranted exercise of discretion. Although the NOV's were annulled, DD Oil requested, through appeal to the EQB, that the Board right the wrong by extending the drilling permits, which had now expired due to the actions of the WVDEP – a power clearly granted to the EQB by statute.

Additionally, because of this erroneous exercise of discretion, the EQB dismissed this matter as moot. DD Oil has been deprived of its permit rights due to their expiration during this matter, causing staggering financial losses in a time where oil and gas prices are at an all time high. Moreover, a matter which may be moot at the time is permitted to receive review by the Board if it is capable of repetition in the future. As this is a case of first impression, the dispute over the Board's authority to modify permits requires guidance from this Court to aid in the resolution of future matters.

As discussed below, the EQB's dismissal for lack of subject matter jurisdiction and mootness in its Final Order was clearly an abuse and unwarranted exercise of discretion for a matter that was in fact entitled to review because it had the statutory obligation to enter a written order due to the clear prejudice to DD Oil's substantial rights to its drilling permits.

A. The EQB's Final Order dismissing the matter for lack of subject matter jurisdiction was arbitrary or capricious or characterized by a clear abuse and unwarranted exercise of discretion.

The Board clearly had the authority to modify DD Oil Company's permits under the West Virginia Code. Specifically, W. Va. Code §22B-1-7 states, in relevant part, "(1) [The Board], as the case may be, shall make and enter a written order affirming, modifying or vacating the order, permit or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered, or shall make and enter an order approving or modifying the terms and conditions of any permit issued;..." See, W. Va. Code §22B-1-7(g)(1) (emphasis added). Furthermore, W. Va. Code §29A-1-2(a) grants any state board the authorization to adjudicate cases so long as they are not before the legislative or judicial branches.

These statutes were specifically designed by the legislature to confer such authority on the Board in adjudicating these types of administrative disputes. The West Virginia Supreme Court

has affirmed such subject matter jurisdiction in defining the EQB as a statutorily created state agency whose powers include the authority “to hear appeals of certain decisions made by the Director of the DEP.” *Monongahela Power Company v. Chief, Office of Water*, 211 W. Va. 619, 627 (W. Va. 2002).

DD Oil Company requested such relief both in its Appeal and at the hearing before the Board on July 14, 2022. During the hearing, the Board’s representative stated several times that he did not believe the Board had authority to grant such relief despite arguments from DD Oil Company that W. Va. Code §22B-1-7 clearly authorized modification of permits. (D.R.0439). The Board did encourage the WVDEP to work with DD Oil Company on extending its permits due filing the annulment after DD Oil Company’s permits had expired. *Id.* However, the WVDEP claimed that it also lacked the authority to modify or extend DD Oil Company's permits and therefore declined to do so. *Id.*

Through its Final Order, the Board has stated the “WVDEP action which is the subject of the appeal has been vacated.” (D.R. 0445). However, it was the actions of the WVDEP that caused the expiration of the permits, and which has now damaged DD Oil. Since filing its appeal, DD Oil Company sought relief from the Board as it relates to its permits. Specifically, DD Oil Company asked the Board for “[t]he entry of an Order declaring that DD Oil’s permits shall be extended to allow completion of the permitted well work[.]” (D.R. 0092- 0107). Nothing in the code section cited by the parties expressly prevents the Board from granting the sought relief. Rather, a plain language reading of the statute leads to the opposite conclusion.

As such, DD Oil is asking this Court to find that the EQB’s dismissal of the matter for lack of subject matter jurisdiction was arbitrary or capricious or characterized by a clear abuse and unwarranted exercise of discretion.

B. The EQB’s Final Order dismissing the matter as moot was clearly erroneous because there are sufficient collateral consequences that would result from a determination of the question presented to justify relief and this matter is likely to be repeated in the future.

Although the NOV’s were ultimately annulled prior to a review by the Board, this matter is not moot because the damages suffered by DD Oil were due to the actions of the WVDEP and such damages are sufficient to justify relief. Furthermore, it is highly probable that such a scenario regarding the EQB’s authority to modify permits will be presented in the future to the EQB and guidance from this Court is necessary when such an event occurs.

Cases are generally moot if the decision of the court would avail nothing in the determination of the rights of persons or of property and are not properly cognizable by a court or board. Syl. pt. 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908). However, a court – or board – may consider a case which may otherwise be moot based on the nature of the issues raised. See Syl. pt. 1, *Israel v. Secondary Schs. Activities Comm’n*, 182 W. Va. 454, 388 S.E.2d 480 (1989); *See also Hart v. National Coll. Athletic Ass’n*, 209 W.Va. 543, 548, 550 S.E.2d 79, 84 (2001) (per curiam) (“[T]he simple fact of apparent mootness, in and of itself, does not automatically preclude our consideration of [a] matter.”). This state has adopted the *Gleason*⁵ test which permits a court to decide a matter that would otherwise be moot if “there remain sufficient practical effects flowing from the resolution of this litigation to justify the application of limited judicial resources.” *See also Israel v. Secondary Schools Act. Com’n*, 182 W. Va. 454 (W. Va. 1989)⁶.

⁵ *State v. Gleason*, 404 A.2d 573 (Me. 1979)

⁶ The court may consider three factors in deciding issues of mootness: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided. *Israel v. Secondary Schools Act. Com’n*, 182 W. Va. 454 (W. Va. 1989)

Generally, a change of circumstances is not enough to render a case moot. "When collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot" nor is a case moot if "the parties have a concrete interest in the outcome of the litigation." *Id.* at 156 (quoting *Firefighters Local Union No. 178b v. Stotts*, 467 U.S. 561, 585 (1984) (O'Connor, J., concurring)). A case moot simply because the parties have lost their "adversarial vitality" if such issues are capable of repetition. *Syl. pt. 1, State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984).

Here, DD Oil was forced to cease drilling on its wells because of the frivolous Finding of Imminent Danger and Cease Operations Order, and the issuance of the NOV's by the WVDEP on July 20, 2021. (D.R. 0038). Upon receiving such orders and the legal battles that have ensued which ultimately resulted in the annulment of the NOV's, DD Oil was forced to sit idle for thirteen (13) months with valid permits. Although the NOV's have been lifted, DD Oil is without valid permits because of their subsequent expiration. (D.R. 0205). Now, not only must DD Oil suffer the damages it incurred while it was unable to drill its wells, it must also suffer the cost of renewing the permits which they were unable to utilize while valid for no other reason than due to the tortious interference of the WVDEP. (D.R. 0205). Accordingly, this matter is not moot because, by extending the permits for DD Oil and allowing them to once again drill their wells with the permits they had previously and lawfully obtained but were unable to utilize and without incurring the cost of renewing their permits, the EQB could offer DD Oil justifiable relief from the damages of the actions of the WVDEP.

Furthermore, as this is a case of first impression, this Court needs to offer guidance into its statutory interpretation as to the authority of the EQB, as the matter of permit modification is likely to be an issue in the future. It is the interpretation of DD Oil that, under W. Va. Code §22B-1-7,

the EQB has the authority to modify the drilling permits issued by the WVDEP as requested by DD Oil. (D.R. 0439). Therefore, even though the NOV's were subsequently annulled, this matter is not moot because of the question of authority of the EQB to take such action.

Ultimately, it is the party who raises the issue of mootness who must meet "the heavy burden" of persuading the court that the matter has been rendered moot. *State ex Rel. Bluestone Coal v. Mazzone*, 226 W. Va. 148 (W. Va. 2010) (quoting *Friends of the Earth, Inc v. Laidlaw Env'tl Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). It is difficult to imagine any argument to be made that may meet such a heavy burden to justify this matter moot, given the damages suffered by DD Oil caused by the Final Order of the EQB and the likelihood that such a matter of modifying permits may be presented to the EQB in the future.

CONCLUSION

DD Oil hereby requests that this Court find that the dismissal of its appeal for lack of subject matter jurisdiction and mootness was an abuse and unwarranted exercise of discretion by the EBQ. This is based on DD Oil's request for a modification of its permits in its Appeal to extend its permits after the WVDEP annulled the underlying notice of violation that deprived DD Oil of all well work for a period of 13 months. The EQB has the authority to extend permits under W. Va. Code §22B-1-7 but declined to do so stating that it lacked such authority under statute, which was clearly erroneous. DD Oil requests that this case be remanded to the EQB for further ruling on its request for an extension of its permits.

Respectfully submitted:

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**IN THE INTERMEDIATE COURT OF APPEALS
STATE OF WEST VIRGINIA**

**DD OIL COMPANY,
A WEST VIRGINIA CORPORATION,**

Appellant,

v.

Appeal No. 22-ICA-74

**STATE OF WEST VIRGINIA, EX REL.,
HAROLD D. WARD, CABINET SECRETARY,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Appellee.

CERTIFICATE OF SERVICE

I, J. Morgan Leach, hereby certify that I have served a true and correct copy of the foregoing **Petitioners Brief** upon the following parties of record via the WV E-File system this 21st day of December 2022.

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**/s/ J. Morgan Leach
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