

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 REPLY BRIEF

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ASSIGNMENTS OF ERROR

1. **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.**
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.**

SUMMARY OF ARGUMENT

The Petitioner, DD Oil Company (hereinafter "DD Oil") asserts that the Environmental Quality Board's (hereinafter "EQB") dismissal of its appeal in its *Final Order* for lack of subject matter jurisdiction and mootness based on a simple conclusion that there is no order left to appeal and in doing so failing 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 in detail throughout the *Petitioner's Brief* and this reply brief, DD Oil's permit rights have been substantially prejudiced by administrative findings, inferences, conclusions, decisions and orders by the West Virginia Department of Environmental Protection (hereinafter "WVDEP") and the EQB.

This appeal hinges extensively on DD Oil's request to the EQB for a modification of its permits following their expiration. Specifically, DD Oil requested that the EQB extend its permits because the WVDEP egregiously annulled the underlying Notices of Violation ("NOV's") just prior to the scheduled evidentiary hearing, ultimately depriving DD Oil of all well work for a period of 13 months and rendering the permits useless. 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 continues to request this Court find that its 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.

In their *Summary Response* while addressing DD Oil's first assignment of error, the Respondent, WVDEP, has unequivocally failed to address the specific argument made by DD Oil as to the authority granted to the EQB under WV Code §22B-1-7. The WVDEP chose to focus on the contents of the *Final Order*, an argument that is irrelevant here. It is DD Oil's position that the EQB is granted the authority, by statute, to not only rule on orders by the administrative agencies within this state, but is also permitted to "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). DD Oil does not argue the EQB's position that there are no orders pending to rule upon. Rather, DD Oil has based its argument on the relief it has sought and what the EQB has failed to do in issuing its *Final Order*, an argument that the WVDEP failed to address within their response.

In addressing the Petitioner's second assignment of error, the WVDEP again makes a similarly rudimentary argument which ultimately falls short of addressing the true crux of this issue. In making their argument for a proper assertion of subject matter jurisdiction and mootness by the EQB, the WVDEP continues to rely on a mistaken belief as to the necessary presence of an active order from an administrative agency to justify EQB intervention. However, the WVDEP seemingly ignores the language from the statute in its totality which authorizes one to seek review of and the EQB to rule on any "order, permit, or official action¹" made by the

¹ See e.g. W. Va. Code § 22B-1-7; W. Va. Code R. § 35-4-12.2 generally

WVDEP – language they quote specifically, with emphasis, in their *Summary Response*. The WVDEP proceeds to acknowledge that the EQB is granted such authority under § 22B-1-7 to “make and enter a written order affirming, modifying or vacating the order, permit, or official action of [WVDEP]...” Using this language, the WVDEP has acknowledged in their *Summary Response* that the EQB is granted the necessary authority under the statute to modify the permits as requested by DD Oil.

Ultimately, DD Oil prays that this Court finds that, in issuing its *Final Order*, the EQB failed to offer any relief for which it is granted to do so under West Virginia Code and because the actions of the EQB and the WVDEP were substantially prejudicial, DD Oil’s permits should be extended in order to rightfully complete the well work they were intended. Such a finding is justified because the Respondent’s *Summary Response* has failed to provide this Court with any arguments to the contrary.

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 Petitioner seeks guidance from this Court on this question. Accordingly, as this is a case of first impression for this Court, the Petitioner respectfully requests oral argument pursuant to W. Va. Rules of App. P.

20(a).

ARGUMENT

I. 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.

II. 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.

DD Oil’s position in this matter is that, despite the underlying NOV’s being annulled by Order No. 2022-9, 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 and by not doing so, DD Oil has been substantially prejudiced in its rights to a drilling permit. DD Oil continues to make such an argument now before this Court and, in their *Summary Response*, the WVDEP has failed to provide any argument to the contrary.

The basis of the WVDEP’s *Summary Response* in regard to the Petitioners first assignment of error is that, in the *Final Order*, the EQB “makes no ruling regarding, nor mention of [their] authority or lack thereof...” and simply that the EQB acted the way it did because there

was “no order left to appeal².” However, that completely misses the argument of DD Oil that the absence of such a ruling was a clear erroneous exercise of discretion by the EQB, who has been granted such authority by the statute.

DD Oil has illustrated to this Court extensively through its *Petitioner’s Brief*, and now this *Reply Brief* that the EQB has the authority to issue rulings that modify not only an order but also a permit or official action of an administrative agency pursuant to W. Va. Code §22B-1-7. This Court need only make a plain reading of the statute to come to the conclusion that the Legislature intended to give such authority to the administrative agencies in this State. Contrary to the Respondent’s *Summary Argument*, it is not the argument of DD Oil that the EQB should have ruled on the now annulled NOV’s, but rather that the EQB should have provided relief by modifying the expiration dates of the permits, making them once again valid and allowing DD Oil to reap their benefits, which they have been denied through no fault of their own.

The EQB clearly has the statutory authority 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 the Respondent here has drastically failed to make any argument to the contrary.

III. 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.

The EQB’s dismissal for lack of subject matter jurisdiction and mootness in its *Final Order* was a clear abuse and unwarranted exercise of discretion for a matter that was in fact entitled to review. This honorable Court should reach the same conclusion and find that the EQB had the statutory obligation to enter a written order in the matter due to the clear prejudice to DD Oil’s substantial rights to its drilling permits. Contrary to the *Final Order*, the EQB is granted

² Citing D.R. 445-47.

subject matter jurisdiction, by statute, to hear appeals brought by any party who has been adversely affected by any order of the WVDEP³. Further, the EQB erroneously dismissed this matter as moot simply because the NOV's had been annulled at the time of the evidentiary hearing, ignoring the fact that they were required to offer relief as well as the likelihood this same egregious conduct was likely to be repeated by the WVDEP in the future, rendering this matter far from moot.

In their *Summary Response*, the WVDEP establishes the jurisdiction of the EQB based on the statutory language of W. Va. Code § 22B-1-7 and W. Va. Code R § 35-4-12.2 and acknowledges such statutes afford the EQB the authority to hear appeals from “orders, permits, or official actions...” and that the EQB cannot hear and determine an action on matters that fall outside the parameters of this jurisdiction. The Respondent further notes that the EQB has authority under the same statutes to “make and enter a written order affirming, modifying or vacating the order, permit, or special action of [WVDEP], or shall make and enter such order as the chief or secretary should have entered[.]”

The WVDEP has focused their argument exclusively on an erroneous belief that the statute grants the agency no authority, absent a valid order, rather than taking into account the statutory language as a whole, language they quoted within their argument. Specifically, the WVDEP states, but fails to acknowledge that the EQB is also authorized under the statute to modify permits and/ or enter orders such as the chief or secretary of that agency could and offer no arguments as to why the statute should not be interpreted as such. The fact that the NOV's were annulled is not determinative here. The statute authorizes the EQB to right the wrongs

³ See W. Va. Code §22B-1-7.

caused by the reckless actions of the WVDEP and frivolous NOV's and coming to a conclusion simply because there were no orders to rule on is clear error by the EQB⁴.

The Respondent further contends that the EQB was correct in finding this matter moot simply because “[n]o controversy existed for the EQB to adjudicate” once the NOV's were annulled by the WVDEP. Again, the WVDEP has erred in making such an argument.

A matter is not in fact moot simply because a bad actor has acquiesced. As DD Oil notes in its *Petitioner's Brief*, cases are generally only 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). Furthermore, “[t]he simple fact of apparent mootness, in and of itself, does not automatically preclude our consideration of [a] matter.” *Hart v. National Coll. Athletic Ass'n*, 209 W.Va. 543, 548, 550 S.E.2d 79, 84 (2001) (per curiam). Matters that may appear facially moot may otherwise be considered by a tribunal if “there remain sufficient practical effects flowing from the resolution of this litigation to justify the application of limited judicial resources.”⁵ Syl. Pt. 1, *Israel v. Secondary Schools Act. Com'n*, 182 W. Va. 454 (W. Va. 1989). Lastly, a case is not 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).

The “the heavy burden” of persuading the court that the matter has been rendered moot lies with the party who raises the issue. *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 see an assertion that the NOV's were annulled – a minimal argument at best by the WVDEP – could justify mootness here and satisfy such a burden.

⁴ See *Monongahela Power Company v. Chief, Office of Water*, 211 W. Va. 619, 627 (W. Va. 2002) which granted the EQB authority to review not only orders of the WVDEP, but also decisions made by the agency.

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

As mentioned extensively herein, DD Oil was not seeking only an annulment of the NOV's in its appeal to the EQB, but also relief from the injuries it had sustained – relief that the EQB is statutorily authorized to grant. Therefore, the EQB not only had the subject matter jurisdiction to rule on this appeal, but it also lacked any determinative facts to render it moot.

CONCLUSION

The WVDEP has made no arguments to the contrary in its *Summary Response* and has failed to address – or cannot do so – the major arguments made in the *Petitioner's Brief*. Accordingly, this Court should find that the EQB has the authority to extend permits under W. Va. Code §22B-1-7 and that the dismissal of DD Oil's appeal for lack of subject matter jurisdiction and mootness was an abuse and unwarranted exercise of discretion by the EBQ. DD Oil simply 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.

Respectfully submitted:

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

Respondent.

CERTIFICATE OF SERVICE

I, J. Morgan Leach, hereby certify that I have served a true and correct copy of the foregoing *Petitioner's Reply Brief* upon the following parties of record via the File and Serve Express system this 5th day of March, 2023.

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