

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 22-ICA-74

**Appeal from Final Order of the
West Virginia Environmental Quality Board**

**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.**

RESPONDENT'S SUMMARY RESPONSE

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SUMMARY RESPONSE

The Respondent, Harold D. Ward, Cabinet Secretary, West Virginia Department of Environmental Protection ("WVDEP"), hereby summarily responds to the Petitioner's Brief filed in the above-styled matter by the Petitioner, DD Oil Company, a West Virginia Corporation. WVDEP so responds pursuant to the provisions of Rule 10(e) of the West Virginia Rules of Appellate Procedure and in accordance with its requirements.

By tendering a summary response, WVDEP waives oral argument.

RESPONSE TO STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The relevant facts and procedural history are:

- 1) WVDEP issued Notices of Violation ("NOVs") Nos. 11778, 11779, 11780, and 17781 to the Petitioner (D.R. 0067-70);
- 2) The Petitioner requested that the NOVs be reviewed and annulled (D.R. 0071, 0073);
- 3) WVDEP issued Order 2022-6 denying the annulment request (D.R. 0075-77);
- 4) The Petitioner appealed Order 2022-6, presenting arguments as to why that order was erroneous and should be vacated (D.R. 0005-07, D.R. 0092-107);
- 5) WVDEP vacated Order 2022-6 (Order 2022-9, Supplement to Designated Record); and,
- 6) The EQB issued its Final Order ruling that because the subject order was vacated, no order remained to consider and it lacked jurisdiction to proceed further (D.R. 0445-46).

The Petitioner's Statement of the Case in its brief submitted to this Court requests review by this Court of the Final Order entered by West Virginia Environmental Quality Board ("EQB") in Appeal No. 22-01-EQB (Petitioner's Brief, p. 1). The Petitioner's memorandum accompanying its Notice of Appeal below, styled Appeal from Order and Annulment Review, acknowledges that the subject matter of the appeal below was Order 2022-6 (D.R. 0092).

Pursuant to W. Va. Rules of App. P. 10(b)(4), this Court has appellate jurisdiction over final judgments, orders, or decisions of an agency or an administrative law judge. Therefore, the proper subject matter of this appeal is the EQB's Final Order. As in the proceedings below, the Petitioner's Statement of the Case and procedural history consist chiefly of superfluous narrative and characterizations that are irrelevant to the proper subject matter of this appeal. The Petitioner recites a litany of alleged grievances outside of the purview of the appeal below and this appeal. While WVDEP disputes the Petitioner's allegations, they are immaterial to this appeal.

The sole issue before this Court is whether the EQB erred in entering its Final Order dismissing the appeal below for mootness and lack of subject matter jurisdiction (D.R. 0445-47). This dismissal was predicated on the fact that the order complained of, Order No. 2022-6, was vacated and accordingly there was no matter for the EQB to take up. The Final Order declines to address any other issues. *Id.*

With the caveat that WVDEP disputes the Petitioner's characterization of events and the relevance thereof in both the proceedings below and the matter before this Court, WVDEP is in substantial agreement with the timeline of events.

RESPONSE TO FIRST ASSIGNMENT OF ERROR

In its first assignment of error, the Petitioner alleges that the EQB's Final Order dismissing the appeal below was erroneous because the EQB is authorized to grant injunctive and other relief.

The Final Order under appeal makes no ruling regarding, nor mention of, the EQB's authority or lack thereof to grant injunctive relief or modify permits. It states only that the EQB lacks subject matter jurisdiction to take up an appeal of an order when there is no order left to

appeal (D.R. 445-47). The Final Order contains no erroneous ruling regarding the EQB's authority to grant injunctive or declaratory relief, nor any ruling at all, nor even a mention of the matter. Accordingly, as the Final Order addresses only subject matter jurisdiction and not relief, there is no corresponding ruling in the Final Order to be addressed by this Court as to the bounds of the EQB's authority to grant relief.

RESPONSE TO SECOND ASSIGNMENT OF ERROR¹

In its second assignment of error, the Petitioner alleges that the EQB erred in its Final Order by ruling that the matter was outside of the EQB's subject matter jurisdiction as there was no action left to appeal. This assignment of error is incorrect as the EQB is an administrative body vested with specific limited powers and lacks authority outside of those parameters. Without subject matter jurisdiction, the EQB could not take up the controversy.

W. Va. Code § 22B-1-7 governs the procedure for appeals to, and the jurisdiction of, the EQB, and states that any person authorized by statute to seek review of an *order, permit, or official action* of WVDEP may appeal to the EQB. Additionally, the EQB's procedural rule, W. Va. Code R. § 35-4-12.2 generally, and specifically at 2.1, 2.2b, and 2.2.d, affirms that appeals to the EQB are made from orders, permits, or official actions with written notifications. The EQB derives its jurisdiction from this regulatory framework.

The Petitioner acknowledged from the outset that the subject matter of the appeal below was Order 2022-6 (D.R. 0092). Prior to the EQB's ruling on the appeal and its entry of the Final Order, WVDEP vacated Order 2022-6 and annulled the underlying notices of violation

¹ To the extent that the Petitioner's argument in its second assignment of error implicates the subject matter before this Court or the EQB's authority to grant relief, WVDEP incorporates by reference its response to the Petitioner's first assignment of error.

("NOVs")², per DD Oil's request for annulment (D.R. 0071; Order 2022-9, Supplement to Designated Record). Accordingly, no order existed to be appealed.

Under West Virginia law, "to enable a court to hear and determine an action, suit or other proceeding, it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal." *State ex. rel Dale v. Stucky*, 232 W. Va. 299, 303, 752 S.E. 2d 330, 334 (2013) (per curiam).

Subject matter jurisdiction is conferred on the EQB by W. Va. Code § 22B-1-7 and W. Va. Code R. § 35-4-12.2. When a court lacks jurisdiction, it "must take no further action in the case other than to dismiss it from the docket." *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 158 W. Va. 492, 495, 211 S.E.2d 705, 707 (1975).

In deciding an appeal, the EQB is given authority to "make and enter a written order affirming, modifying or vacating the order, permit, or official action of [WVDEP], or shall make and enter such order as the chief or secretary should have entered[.]" W. Va. Code § 22B-1-7 in relevant part. Because WVDEP vacated Order 2022-6 and annulled the underlying NOVs, there was no order or official action in controversy, and none over which the EQB had jurisdiction.

When a controversy no longer exists, the general rule is that the appeal is moot and must be dismissed. Syl. Pts. 2 & 3, *Butler v. Price*, 212 W. Va. 450, 574 S.E.2d 782 (2002) (per curiam). No controversy existed for the EQB to adjudicate, as the EQB has jurisdiction only to hear appeals from orders, permits, or official actions. WVDEP agreed to vacate Order 2022-6 as requested by the Petitioner (Order 2022-9, Supplement to Designated Record). Accordingly, the EQB had no jurisdiction and the appeal was properly dismissed as moot.

The appealable WVDEP order at issue before the EQB was Order No. 2022-6, denying the Petitioner's request for annulment of the underlying NOVs. Notwithstanding the premature

² Only Order 2022-6 denying the annulment of the NOVs was legally subject to appeal, not the NOVs themselves.

and incorrect editorialization by the EQB's counsel, the EQB could not indulge the Petitioner's piggybacking of an assortment of allegations and demands which were properly subject matter for other tribunals. The EQB does not adjudicate tort matters, nor any matters outside of the order being appealed. It does not delve into the history of a case in other venues and rule by fiat as to a party's general grievances. The Petitioner may take up these matters before other tribunals, and is in fact currently doing so. With no order left to appeal, the EQB properly concluded that the matter was moot and that it had no jurisdiction.

CONCLUSION AND PRAYER FOR RELIEF

The Petitioner's first assignment of error is misplaced because the Final Order does not rule upon, nor mention, whether the EQB has the authority to grant any specific type of relief. It states only that the EQB did not take the matter up further because it lacked subject matter jurisdiction to further consider the appeal.

The Petitioner's second assignment of error is misplaced because the EQB could not address the matter beyond the order being complained of, Order 2022-6. If an order has been annulled as requested by the Petitioner, it does not exist and there is nothing to adjudicate.

WVDEP therefore moves this Honorable Court for entry of an order denying the Petitioner's appeal and for such other relief as is deemed just and appropriate.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the attached WVDEP's Request for Inclusion of Additional Material in the Record was served on the following persons by electronic filing on January 13, 2023, with hard copies served by United States Postal Service mail, first class, on the same date.

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