IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOS. 21-0893, 21-0885

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
a Delaware limited partnership,

Intervenor Below, Petitioner,

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

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

Respondents.

BRIEF OF PETITIONER

Appeal from the Environmental Quality Board
20-07EQB
Appeal Nos. 21-0893, 21-0885

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IV. STATEMENT OF THE CASE

Factual Background

The West Virginia Department of Environmental Protection (WVDEP) oversees the Underground Injection Control (UIC) program, including applications for and issuance of UIC permits. *See* 47 CSR 9, 47 CSR 13, 47 CSR 55. On March 5, 2020, American Bituminous Power Partners, LP (AMBIT) completed more than a year's work with WVDEP on its application for the third reissuance (JA000038) of the 1984 underground injection control (UIC) permit number 394-01-049, which permit governs the injection of fluids with properties consistent with acid mine drainage (AMD) into an approved abandoned mine void that is part of the Fairmont Mine Pool system, "a flooded complex of closed underground mines near Fairmont, West Virginia." (JA000574)

UIC permit number 394-01-049 had been issued originally in 1984 to Eastern Associated Coal (JA000169), and AMBIT had inherited the permit and the responsibility for the permit, the property and the AMD at issue through a lease it entered with Horizon Ventures of West Virginia,

Inc. (Horizon) (owner of the parcel and thereby the injectate). (JA000193) After AMBIT's considerable data collection and application submission process, and after WVDEP's extensive and thorough review and revisions,[1] the proposed third reissuance of permit 394-01-049 went out for public comment on or about April 23, 2020. No comments were received, and the reissuance was granted on May 29, 2020 (JA000039), with one modification not at issue here on June 12, 2020. (JA000035)

West Virginia Code Section 22-11-21 provides appeal rights to "[a]ny person adversely affected by an order made and entered by the director [of WVDEP] in accordance with the provisions of this article, . . .or aggrieved by the terms and conditions of a permit granted under the provisions of this article[.]" On June 26, 2020, Murray American Energy, Inc. (MAEI)[2] filed Administrative Appeal No. 20-07-EQB with the West Virginia Environmental Quality Board ("Board" or "EQB") (JA000026), challenging this third reissuance of UIC permit number 394-01-049, which application and permit had been once again reviewed, revised, approved, submitted for public comment and finally issued as approved by WVDEP – all without comment from MAEI at any time prior to the administrative appeal.

Pursuant to West Virginia law (in pertinent part),

> [i]n order to have standing to sue, a party must allege an injury in fact, either economic or otherwise, which is the result of the challenged action. To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized. For an injury to be particularized, it must affect the plaintiff in a personal and individual way. To be a concrete injury, it must actually exist. The injury must also be actual or imminent, not conjectural or hypothetical. Injury in fact is easily established when a litigant demonstrates a direct, pocketbook injury.

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[1] JA000680, JA000698.

[2] During this process, Murray American Energy, Inc. (MAEI) has been MAEI, American National Coal Resources (ANCR), West Virginia Land Resources, Inc. (WVLRI) and Marion County Coal Resources, Inc. – all of which was the subject of motions practice relative to standing. (JA000464) Because the underlying pleadings are largely in the name of MAEI, AMBIT has adopted that name here to stand for all of the entities collectively.

SER WVUH v. Hammer, No. 21-0095)___ W. Va. ___, ___ S.E.2dd ___ at 11 (Nov. 19, 2021) at 15, quoting *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 243, 800 S.E.2d 506, 510 (2017). *See also* Syl. pt. 6, *Corliss v. Jefferson City Board of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003), expressly identifying 'aggrieved' as mandating standing. Because MAEI failed to identify a basis for injury (a statute, a regulation, a contract that demonstrated it had a personal, concrete invasion of a legally protected interest), failed to identify, let alone prove, a concrete, actual, non-conjectural injury of any sort, and failed to demonstrate any commensurate redress available before the EQB, MAEI never had standing for its administrative appeal, such that EQB erred in failing to grant and/or in denying AMBIT's repeated dispositive motions based in standing, as follows.

In the EQB administrative appeal, MAEI alleged in pertinent part that the permitting process was flawed and improper in that "[i]t will cost MAEI hundreds of thousands of dollars to handle and treat the Injectate that is *authorized to be injected by ABPP under the UIC Permit* and treated at the Dogwood Lakes AMD Treatment Plant. Because ABPP *has not entered into any agreement* with MAEI to allow for the handling and treatment of the Injectate, the application for the UIC Permit was incomplete and the UIC Permit should not have been issued." (JA000028 (emphasis added)). MAEI further alleges that AMBIT was allowed to inject "without any authorization or approval by MAEI to allow such injectate to be received and treated at its facilities." (JA000028)

It is imperative to note at this juncture that no regulation, statute, ordinance, contract or other provision identified at any time before the EQB mandates, references or even suggests that MAEI would, should or could have 'authorization or approval' rights relative to injection into the Fairmont Mine Pool system. Indeed, even now, MAEI has identified no legal, contractual or other

authority for that proposition or for the proposition that it should be compensated for its role in and responsibilities for the management of the Mine Pool – MAEI has failed to identify an invasion of a legally protected interest. The fact that MAEI incurs costs relative to the Mine Pool does not equate to standing before EQB, where monetary damages are unavailable, and does not equate to standing as against AMBIT absent some contract, agreement, regulation, or other rationale by which AMBIT or any one of the other permittees would be mandated or agree to participate in Mine Pool costs. The Injectate's path and final destination remain unknown. As the EQB found finally, "the flow path of the Injectate has not been established by reasonable degree of hydrogeological certainty. No current or updated reliable flow path has been established."[3] Beyond that, MAEI itself admits that AMBIT was authorized to do by its permit; by the express terms of MAEI's administrative appeal, AMBIT acted at all times as it was permitted to act per WVDEP's UIC program. To the extent that MAEI seeks financial support for its role in the Mine Pool, no monetary damages are available before the EQB, and EQB cannot force AMBIT to enter a contract with MAEI relative to the corporations' each performing as they contracted to do: AMBIT to maintain Horizon's permit, MAEI to operate the treatment plants. MAEI failed to demonstrate standing. MAEI failed to demonstrate injury-in-fact.

MAEI voluntarily accepted responsibility for the Dogwood Lakes AMD Treatment Plant and management of the Mine Pool as part of its purchase of CONSOL's assets in West Virginia in 2013. Evidentiary Hearing Tr. at 68, 86, 118. While this has proven to be an unfortunate business decision for MAEI, that does not translate into the EQB's having jurisdiction over permittees relative to expenses. The EQB's jurisdiction is the permit alone. Beyond that, once again, however, nothing in the UIC program or the permitting process requires that permittees

[3] JA001046.

seek permission from the treatment facility operator (whether CONSOL or MAEI or WVLRI) before injecting, and nothing sets out a notice process or payment or other protocol for any permittee for injection into the Mine Pool. Once again, no evidence exists that the Joanna injectate even reaches MAEI's/WVLRI's treatment facilities, and MAEI and its expert admitted that they have done no testing or investigation of any sort to determine whether the Injectate leaves the Joanna Mine void at all. Evidentiary Hearing Tr. at 103, 181, 187. The evidence as adduced is that MAEI has no legal basis for requiring pre-approval of injection, no legal basis for demanding reimbursement, and no legal basis to challenge a lawfully granted permit. These legal bases would require passage of legislation or adoption of regulations or negotiation of a contract, none of which is available before EQB.

> [T]he party attempting to establish standing must have suffered an "injury-in-fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and 15 not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.,* 213 W. Va. 80, 576 S.E.2d 807 (2002). 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. Specifically, West Virginia Code Section 22-11-8(b)(7) provides that it is unlawful to operate a disposal well, unless permitted to do so:

> (b) It is unlawful for any person, **unless the person holds a permit therefor from the department**, which is in full force and effect, to:
>
> * * *
>
> **(7)** Operate any disposal well for the injection or reinjection underground of any industrial wastes, including, but not limited to, liquids.

Indeed, West Virginia law allows AMBIT to perform just as it had pursuant to the terms of its

UIC permit.

MAEI's administrative appeal raised as its primary concern – indeed, listed first and numbered one – that "[i]t will cost MAEI hundreds of thousands of dollars to handle and treat the Injectatethat is authorized to be injected by [AMBIT] under the UIC Permit and treated at the Dogwood Lakes AMD Treatment Plan[, and AMBIT] has not entered into any agreement with MAEI to allow for the handling and treatment of this Injectate[.]" Therefore, MAEI alleged that because it was not part of the approval process (including granting its permission to inject and imposing fees), the application process was incomplete, ***yet neither of these factors is part of the regulatory process as it exists***. Further, MAEI alleged that the application for the UIC Permit was incomplete and the UIC Permit should not have been issued because the application *in its estimation* (as distinguished from the regulatory agency's estimation) failed to address adequately numerous other requirements.[4] WVDEP, the agency charged with approval and oversight, was satisfied with the application as revised and approved same. MAEI, who had no standing to challenge the process or outcome, was allowed to challenge both. Not only did MAEI fail to participate in the public comment period, but it appeared upon

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[4] *See, e.g.,* legal right to inject (which is outside the provisions of the related West Virginia law. Evidentiary Hearing Tr. at 250-51), identification of an alternative process or work-around (which was included but not in sufficient detail for MAEI), failure to explain assumptions in the application (to MAEI's satisfaction) and failure of the notice process (upon which MAEI admits it never relied). JA000026. *See, e.g., Corliss v. Jefferson City Board of Zoning Appeals*, 214 W. Va. 535, 541, 591 S.E.2d 93, 99 (2003), requiring that plaintiff identify precisely how s/he is aggrieved by any alleged inadequacy. MAEI objected to AMBIT's permitted levels for injectate – not that AMBIT exceeded its levels, but that it had been permitted at too high a level. Evidentiary Hearing Tr. at 20. AMBIT sought and received a renewal of its second permit, which had been issued under a 'report-only' standard:

12 Q Is it true that number two had a report
13 only requirement instead of an actual number
14 requirement?
15 A Yes.
16 Q What does report-only mean?
17 A There's not a limit on it, that it's just a
18 reportable amount.

Evidentiary Hearing Tr. at 384. Because there was no limit, no violations were possible *But see* JA001046.

appeal, explaining its lack of diligence in failing to participate earlier in the process. (JA000026) EQB erred in allowing this administrative appeal process to proceed. That is, regardless of whether the application could have been more specific or supported differently, whether the notice could have been more particularized or the maps more colorful, at the end of the day, MAEI did not have the standing to bring AMBIT, its application and its permit before EQB.

""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., LLC v. Stucky, 239 W. Va. 239, 243, 800 S.E.2d 506, 510 (2017)] (quoting Findley v. State Farm Mut. Auto. Ins. Co., 213 W. Va. 80, 95, 576 S.E.2d 807, 822 (2002)). "The burden for establishing standing is on the plaintiff." Id." *SER WVUH v. Hammer,* No. 21-0095)___ W. Va. ___, ___ S.E.2dd ___ at 11 (Nov. 19, 2021). MAEI could produce no evidence of standing and no injury-in-fact to form the basis of its administrative appeal.[5] In its response to the challenge, MAEI recounted its estimation of the permitting shortcomings and alleged costs set forth in its appeal. (JA000413) For all of that, MAEI has yet to demonstrate that it has standing, that it is the appropriate party to bring these issues into court.

Whereas MAEI elected in 2020 to challenge a lawful permittee who had applied for, been properly vetted relative to, and was granted a third reissuance (Hearing Tr. at 69), the evidence adduced at hearing was not of violations and renegade behaviors that injured MAEI. The evidence at hearing was that AMBIT acted within the UIC and Mine Pool regulated systems as intended.

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[5] As this Court has recently re-emphasized, "Article VIII, Section 6 of the West Virginia Constitution establishes that there must be a justiciable case or controversy—a legal right claimed by one party and denied by another—in order for the circuit court to have subject matter jurisdiction. In part, this means the party asserting a legal right must have standing to assert that right. State ex rel. Healthport Techs., LLC v. Stucky, 239 W. Va. 239, 242, 800 S.E.2d 506, 509 (2017) (footnote omitted). "This Court has defined standing as [a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Tabata v. Charleston Area Med. Ctr., Inc., 233 W. Va. 512, 516, 759 S.E.2d 459, 463 (2014) (per curiam) (quotations and citation omitted)."

In appeared more likely that MAEI was challenging the UIC program and permitting process generally and, presumably, the injection practice itself – and maybe even the management of the Fairmont Mine Pool itself – all of which was wrongfully before the EQB as a challenge to AMBIT's lawfully granted permit. MAEI's concerns were and are systemic, legislative, regulatory, global – and their relief is unavailable before the EQB and/or as against AMBIT.

Further, while EQB adopted MAEI's position in its Final Order, the Board further erred by failing to preserve AMBIT's evidence, arguments, and objections, and MAEI's admissions against interest. EQB also made direct factual errors in its Final Order, information directly contradicted by the evidence, and, once informed of these errors, failed to revise those entries or reflect AMBIT's objections to same. A final order is to be the reflection of the proceedings generally and particularly, and it is incumbent on the EQB to not only accept input from counsel, but also to ensure that its order reflects its rulings and provide clear notice to all parties and any reviewing court of the rationale behind the findings. *See Taylor v. West Virginia DHHR,* 237 W. Va. 549, 558, 788 S.E.2d 295, 304 (2016), *quoting State ex rel. Erlewine v. Thompson,* 156 W. Va. 714, 718, 207 S.E.2d 105, 107 (1973); *Fayette Cty. Nat'l Bank v. Lilly,* 199 W. Va. 349, 354, 484 S.E.2d 232, 237 (1997), *overruled on other grounds by Sastaric v. Marshall,* 234 W. Va. 449, 766 S.E.2d 396 (2014). EQB erred in failing to include AMBIT's evidence, arguments, and objections in the Final Order, even if the Board were then to discount them. EQB erred in including factual errors and/or contested evidence in the Final Order without appellation or explanation, and EQB erred in failing to recount AMBIT's motions and to provide rulings on same, in the Final Order or otherwise.

As recounted above, AMBIT challenged whether MAEI had an injury-in-fact or standing to bring this claim, including filing a motion to dismiss, a renewed motion to dismiss, motions *in limine*, an opposition to substitution of parties on the basis *inter alia* of standing – all without

decision. AMBIT raised an objection to proceeding based upon standing and injury-in-fact on the record, prior to inception of the evidentiary hearing (Evidentiary Hearing Tr. at 16) and again at the close of MAEI's evidence (Evidentiary Hearing Tr. at 559). AMBIT repeatedly questioned whether this was too systemic an issue to be addressed between two corporate entities before the EQB. Because no contract, regulation, statute or other allowed MAEI to raise systemic concerns or seek relief relative to a lawful participant in the UIC program operating as intended, the logical conclusion had to be that MAEI is seeking a change in the related law, a change in the permitting program, a change in the regulation of the Mine Pool system, a systemic-level change that needs to be addressed on a legislative or regulatory level. Repeatedly, even unto its proposed final order, AMBIT addressed these realities. Additionally, AMBIT challenged the administrative appeal as procedurally flawed, including challenging whether MAEI is an entity "authorized by statute to seek review of an order, permit or official action" (42 CSR 4.2(b)) or whether MAEI's failure to respond during the notice and comment phase barred its filing an administrative appeal. Over the course of the appeal process and into the evidentiary hearing itself, AMBIT challenged MAEI's appeal as substantively and/or procedurally moot (given the lack of an available remedy) or premature or misplaced, filing repeated dispositive and other motions that ***went without rulings by or orders from the Board.*** Despite the number of motions AMBIT had and has pending, over the course of the appeal process, EQB issued only three orders: Order Granting Motion to Intervene (8.24.20) (JA000392), Order Granting Joint Motion to Continue (8.24.20) (JA000394) and Final Order (9.29.21) (JA001044). *But see* Transcript of Proceedings at 559 (verbally denying 'directed verdict,' which is also not reflected substantively or procedurally in the Final Order). Despite AMBIT's efforts to include same in its proposed final order, EQB erred in not including the motions and providing rulings in its Final Order or otherwise. EQB further erred in failing to

provide post-judgment relief on this same issues upon AMBIT's motions.

AMBIT seeks review of the arguments to standing it raised repeatedly in its dispositive motions and a recognition of the administrative appeal itself as moot, premature, unnecessary or unfounded. In the alternative, AMBIT seeks revision of the Final Order such that it reflects its defenses and evidence. Finally, AMBIT seeks rulings and/or inclusion of rulings in EQB's Final Order. AMBIT seeks the relief this Court deems just.

VI. SUMMARY OF ARGUMENT

West Virginia Code Section 22-11-21 governing appeals to the Environmental Quality Board (EQB) provides appeal rights to "[a]ny person adversely affected by an order made and entered by the director in accordance with the provisions of this article, . . .or aggrieved by the terms and conditions of a permit granted under the provisions of this article[.]" This Court has held that "[s]tanding is comprised of three elements:

> First, the party attempting to establish standing must have suffered an "injury-in-fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and 15 not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.,* 213 W. Va. 80, 576 S.E.2d 807 (2002). For standing to attach, the party attempting to establish standing must demonstrate an "injury separate and apart from that which the general citizenry might experience as a result of the same ruling." Syl. pt. 6, *Corliss v. Jefferson City Board of Zoning Appeals*, 214 W. Va. 535, 541, 591 S.E.2d 93, 99 (2003), expressly equating 'aggrieved' and standing (and requiring that plaintiffs identify precisely how they are injured by any inadequacies in administrative action). The EQB erred in allowing MAEI to proceed with its administrative appeal without having the requisite concrete, actual injury necessary to challenge AMBIT's lawfully granted UIC permit renewal.

Specifically, MAEI appeared at evidentiary hearing by and through Kevin Rakes who, in response to EQB's direct questioning on standing, testified as follows:

> 23 MR. CAPELLI: Mr. Rakes, it seems like
> 24 there's a disagreement on the water flow through the
> 1 connecting mines and which direction. Why should the
> 2 Board be -- why would that matter to how we're looking
> 3 at this case? Why is it significant which way the water
> 4 flows?
> 5THE WITNESS: It's significant to us for a
> 6 number of reasons. One, financially. Regardless of
> 7 where the water goes, we're paying to treat it. We
> 8 shouldn't have to pay to treat other people's things
> 9 without compensation.
> 10 Two, if it goes the way that I believe it
> 11 does, our damages are significant. We're talking a half
> 12 a million dollars a year and this has been ongoing for
> 13 well over a decade. That's significant.
> 14 Also, we also turned in UIC permits
> 15 ourselves. You know, I feel like we undergo a much
> 16 higher degree of scrutiny on some of the permits that
> 17 we've turned in, at least, you know, by information that
> 18 I've received from other people in Murray, not my direct
> 19 experience. And those standards should be, you know,
> 20 applied equally to everybody.
> 21 When we turn information in, people review
> 22 it and they scrutinize it for accuracy, and I don't see
> 23 why that did not or could not have taken place in this
> 24 time and in other times.[6]

When questioned directly by EQB on standing, Kevin Rakes, Manager of Engineering in West Virginia and MAEI's corporate representative for the EQB proceedings, identified no salient or actionable basis for standing before this tribunal that does not issue damages and does not equalize or even consider relative levels of WVDEP scrutiny. No regulation, statute, contract, or other mandates permission by or payments to MAEI, and EQB cannot order introduction, passage or negotiation of them. After all, no evidence was adduced relative to scrutiny directed toward MAEI's permitting applications and/or processes.

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[6] Evidentiary Hearing Tr. at 126-27.

Even assuming MAEI had standing and then had proven standing (which it did not), nonetheless, the relief it sought was unavailable before the EQB such that its administrative appeal should have been dismissed on the basis that MAEI did not have standing because, even assuming *arguendo* it suffered an injury and that the injury was causally connected to AMBIT's lawful actions under its permit (neither of which is true), still any such injury is unavailable for redress by a favorable decision before the EQB. The systemic changes MAEI sought, the permission, the money, would require legislative or regulatory input and action, or contractual negotiations with AMBIT, neither of which is available before the EQB.

The EQB erred in allowing this administrative appeal to proceed; in failing to acknowledge AMBIT's arguments and evidence in the Final Order; erred in failing to acknowledge and account for the facts adduced at hearing regardless of the source; and erred in failing to rule upon AMBIT's motions or even reflect them in the Final Order. Beyond those direct errors, EQB erred in denying AMBIT's motions to alter or amend the final judgment and order.

VI. STATEMENT REGARDING ORAL ARGUMENT

On information and belief, oral argument is unavailable on this administrative appeal. However, to the extent the Court would elect to hear same, pursuant to West Virginia Appellate Rule 19(a), this matter is suitable for oral argument in that the assignments of error arise from EQB's extension and potential disruption of settled law; EQB's deviation from settled law beyond the rubrics established by this Court is unsustainable because it obviates an otherwise known right under West Virginia law. This appeal involves foundational areas of West Virginia law – standing, injury-in-fact, preservation of arguments, court orders – transplanted into an administrative tribunal, an area of relatively little jurisprudence but with broad repercussions. For these reasons, AMBIT, by counsel, requests an opportunity to be heard, should oral argument be considered part of this

process.

VII. ARGUMENT

A. Introduction

AMBIT is challenging whether MAEI had standing to bring the appeal before the Environmental Quality Board ("Board" or "EQB"), given that it has demonstrated no injury-in-fact but rather a generalized annoyance or discontent with the UIC process and its voluntarily assumed responsibility for the Mine Pool system. 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. Syl. pt. 2, *SER Healthport Techs.*, 239 W. Va. 239, 800 S.E.2d 506 (2017). Specifically, "[s]tanding is comprised of three elements: First, the party attempting to establish standing must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical.

> Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court."

Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002). MAEI has failed to identify a legally protected, concrete, actual interest tied to AMBIT's lawful application for and actions under its UIC permit. While MAEI alleged in pertinent part that the permitting process was flawed and improper in that "[i]t will cost MAEI hundreds of thousands of dollars to handle and treat the Injectate that is *authorized to be injected by ABPP under the UIC Permit* and treated at the Dogwood Lakes AMD Treatment Plant. Because ABPP *has not entered into any agreement* with MAEI to allow for the handling and treatment of the Injectate, the application for the UIC Permit was incomplete and the UIC Permit should not have been issued"

JA000028 (emphasis added), MAEI admits that AMBIT was acting at all times as permitted. Whereas MAEI further alleges that AMBIT was allowed to inject "without any authorization or approval by MAEI to allow such injectate to be received and treated at its facilities" (JA000028), MAEI failed to identify any basis for AMBIT's seeking authorization or approval from MAEI. Indeed, none exists.

Beyond that, AMBIT challenges whether the relief MAEI sought was even available before the EQB and whether the EQB erred in discounting AMBIT's arguments and motions that the administrative appeal should be dismissed and MAEI directed to legislative, regulatory or governmental remedies on a systemic scale – or attempt contractual negotiations with AMBIT.

Further, AMBIT challenges the Final Order as failing to reflect its evidence, objections and motions in any way and failure even to note (so as to preserve – even if then to discount) AMBIT's issues raised through the administrative hearing and appeal process. Finally, AMBIT challenges the EQB's refusal to issue orders or rulings on AMBIT's motions before the Board. Because the Board speaks through its orders and because these issues may well recur between these litigants, AMBIT is appealing in part to ensure the preservation of the proceedings, the arguments and the rulings, whether for appeal or otherwise. *State v. Redman,* 213 W. Va. 175, 178, 578 S.E.2d 369, 372 (2003).

B. Standard of Review

As set out in *WVDEP v. Kingwood Coal Co.,* 200 W. Va. 734, 490 S.E. 2d 823 (W.Va. 1997), the Supreme Court reviews findings of fact by the EQB under a deferential standard, such that the EQB's findings of fact will not be set aside or vacated unless clearly wrong. While this Court has held that administrative interpretation of the law will be afforded sound consideration, this Court has further held that it will review questions of law arising from an administrative body

de novo. *Martin v. Randolph Cty. Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). *See also* West Virginia Code Section 29A-5-4.

C. Assignment of Error Number 1: The Environmental Quality Board erred in allowing the subject administrative appeal to proceed when appellant had no standing or injury in fact.

On June 26, 2020, MAEI filed its administrative appeal of WVDEP's approval and issuance of UIC permit 394-01-049, responsibility for which permit currently rests with AMBIT. (JA000026) On August 24, 2020, AMBIT filed its motion to intervene, which was granted by EQB order on the same date. (JA000389, JA000392) Six days later, on August 31, AMBIT filed its motion to dismiss or for more definite statement, challenging MAEI's standing before the EQB on its administrative appeal. (JA000397)

In moving to dismiss MAEI's appeal, AMBIT argued that the appeal raised "issues that are substantively and/or procedurally moot or that are inappropriate for appeal at this time. AMBIT noted that "the only standard [MAEI raised] is its individual expectations and estimations of how the process could operate more beneficially for Murray itself." (JA000398) AMBIT noted (as had MAEI itself) that AMBIT was complying with its permit as it was authorized to do:

> Not unlike a citizen who protests a 70 mile an hour speed limit by filing a protest against a compliant driver, Murray seeks to challenge the underground injection control(UIC) permitting process generally and, presumably, the injection practice itself, by challenging a lawful permittee who has applied for and received its third reissuance of an UIC permit.

(JA000399) In its administrative challenge to AMBIT's permit reissuance, MAEI alleged *inter alia* that the UIC permit allowed AMBIT to inject what MAEI considered inappropriate amounts of injectate the Fairmont Mine Pool system. (JA000028) However, West Virginia law sets no injection limits generally but rather controls levels by *inter alia* setting permitted injection limits. By West Virginia law, as a holder of an approved permit, AMBIT is allowed to inject into the

designated mine void within pre-approved conditions, and the undisputed evidence at hearing was that the Mine Pool levels had remained unchanged over time, regardless of the volume of AMBIT's permitted injections. (Evidentiary Hearing Tr. at 75ff.) MAEI responded to the motion to dismiss by recounting and amplifying the bases raised initially in its administrative appeal and citing regulatory provisions that do not provide a cause of action or relief to other permittees or any relief relative to the Mine Pool itself. (JA000413) MAEI failed to identify an injury-in-fact, a legally protected interest that was violated, any contract or agreement between the parties, anything that would give it approval rights and reimbursement.

Motions practice continued into late September 2020, when MAEI moved to substitute two new corporate entities into the administrative appeal process. Once again, AMBIT raised the issue of standing in the instance of the two new corporate entities, neither of which even existed at the times at issue:

> AMBIT is challenging whether Murray American Energy, Inc. (Murray) has standing to bring the instant appeal, given that it has demonstrated no injury whatsoever but rather a generalized annoyance or discontent with the UIC process. Murray has identified not one particularized fact that could be found to constitute an injury-in-fact, which pursuant to West Virginia law is the necessary predicate to its action here. Syl. pt. 2, *SER Healthport Techs.*, 239 W. Va. 239, 800 S.E.2d 506)2017). Specifically, "[s]tanding is comprised of three elements: First, the party attempting to establish standing must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical." Murray has yet to identify any such injury and now proposes to introduce two other entities, neither of which was even in existence at the time the last of the two permits – the modified permit -- was approved (i.e., June 12, 2020). . . . Murray has opposed AMBIT's efforts to learn of its alleged injury-in-fact, even while Murray is diluting this process further with the suggestion of Marion County Coal Resources and West Virginia Land Resources.[7]

AMBIT argued further on surresponse, "'the party attempting to establish standing must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and

[7] JA000465-66.

particularized and (b) actual or imminent and not conjectural or hypothetical.' Murray has yet to identify any such injury and now proposes to introduce two other entities, neither of which was even in existence at the time the last of the two permits – the modified permit -- was approved (i.e., June 12, 2020), regardless of the proposed reason for their inclusion here." (JA000483)

On October 7, 2020, AMBIT supplemented that pleading to place MAEI's discovery responses before EQB, noting that MAEI could not and did not identify an actionable injury in discovery responses. (JA000483) AMBIT moved to dismiss the claim anew based upon MAEI's failure in discovery to recount a single particularized injury or any basis for proceeding. Specifically, in informal discovery, AMBIT requested that MAEI "[d]isclos[e ...] the identity of each person expected to be called as a witnessat the hearing and, at a minimum, a statement setting forth with specificity the facts alleged, the anticipated testimony and the identity of any documents relied upon in support of the anticipatedtestimony of each witness and whether that witness will be called as an expert." (JA000494-95) MAEI cited the following as in response:

1. the issues set forth in MAEI's Notice of Appeal
2. hydrology of the subject mine pool;
3. operations and associated costs to pump and treat liquids in the subject mine pool;
4. the nature of the substances injected by Intervenor into the subject mine pool;
5. the impact of Intervenor's injection activities on operations and associated costs by MAEI and others to pump and treat liquids in the subject mine pool;
6. documents in the Certified Record.

(JA000494-95) Nothing in the discovery response identified an actionable injury. Once again, whereas MAEI alleges "impact . . on operations and associated costs," no statute, regulation, contract or other exists or has been cited by MAEI to support its position that, by complying with the regulatory rubric, AMBIT somehow had a duty to MAEI and that the unknown, so-far baseless duty is enforceable before the EQB. MAEI has not identified a basis for any legally protected interest, let alone a legally protected interest that is concrete, particularized, actual or imminent and

not conjectural or hypothetical. Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.,* 213 W. Va. 80, 576 S.E.2d 807 (2002). MAEI had an express duty under the law to prove standing, and EQB failed to hold MAEI accountable on that duty.

The standing and substitution issues came before the Board on October 29, 2020, at which time AMBIT by counsel raised its arguments relative to standing. AMBIT argued, as here, that MAEI failed to identify any legally protected interest that had been violated, any concrete, particularized injury-in-fact, any basis for either, whether statute, regulation, contract, agreement. MAEI responded as follows:

> 17 Again, Ms. Green says that there was absolutely no basis
> 18 for harm, injury, whatever, to MAEI from the issuance and use
> 19 of this permit. Well, the application itself says this water
> 20 is going into these voids, will be treated at that plant
> 21 operated by this other party, and they have no arrangement.
> 22 They have no legal authority, and basically are forcing MAEI
> 23 to treat that water without reimbursement or any arrangement
> 24 to compensate us.

(Evidentiary Hearing Tr. at 20.) While MAEI repeatedly has argued that its injury is that it has incurred the costs of operating the Mine Pool system and the treatment plants and that AMBIT has 'no arrangement' with MAEI for doing so, no arrangement is required by law. MAEI's voluntary purchase and assumption by contract of CONSOL's duties does not produce an injury-in-fact before the EQB, and MAEI has identified no duty AMBIT or any other permittee has to compensate MAEI, where no contract exists between the parties, no statute or regulation mandates participation in costs, and where the UIC program operates without compensation to the Mine Pool system generally. Indeed, Mr. Rakes testified that, of all of the participants in the Mine Pool system who treat at Dogwood Lakes, only two had agreements, which are no longer in effect. (Evidentiary Hearing Tr. at 68, 109-10) Where MAEI argues that AMBIT has no legal authority to inject without

agreement with MAEI and payments to it, by MAEI's admission, AMBIT performed as "*authorized . . . under the UIC Permit*" (JA000028) (emphasis added).

Additionally, MAEI identified no regulation, statute or policy that would allow citizens or citizen corporations or other permittees to step in and act, as it were, as volunteer prosecutors, policing the UIC program and enforcing their estimation of how the permit application should be prepared, submitted, approved – and whether and how permittees should pay MAEI for its voluntarily assumed duty relative to the Mine Pool. (Evidentiary Hearing Tr. at 68, 361.) Absent a violation of a legally protected right, absent a concrete, actual, particularized injury-in-fact, the system does not allow random disgruntled companies to come forward to direct regulatory, governmental focus on other companies whom they've selected for scrutiny. 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. MAEI failed to demonstrate an "injury separate and apart from that which the general citizenry might experience as a result of the same ruling." Syl. pt. 6, *Corliss v. Jefferson County Board of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003). Standing and its requisite injury-in-fact are predicates to the EQB administrative appeal process, and MAEI failed to demonstrate either.

Beyond the fact that AMBIT performed at all times as permitted (Evidentiary Hearing Tr. at 292), it also bears noting that MAEI could not and did not prove that the Injectate reached any of its facilities; it is unclear even now where AMBIT's injectate travels from the Joanna Mine void or even if it travels outside the mine void at all, including whether the Injectate ever reaches any MAEI facility: "Also, the flow path of the Injectate has not been established by reasonable degree of hydrogeological certainty. No current or updated reliable flow path has been established.

(JA001046) However, as a matter of law, the Injectate from the Joanna Mine void has been and is now permitted to travel through dedicated mine voids and permitted, also by law, ultimately to reach and enter Dogwood Lakes AMD Treatment Plant, although, once again, no evidence exists that it does so. Assuming *arguendo* that it does, it is permitted to do so.

MAEI assumed responsibility for the Mine Pool assets with no agreements in place for reimbursement or payment from governmental or corporate entities involved with injectate and permitting, such that injury could not and did not arise from breach of any agreement or even reasonable expectation. (Evidentiary Hearing Tr. at 68.) Injectate from perhaps dozens of current and previous UIC permit holders travels to the Dogwood Lakes AMD Treatment Plant and potentially other plants that MAEI operates, but, at hearing, MAEI conceded that only a few entities had entered agreements with it, including payments. Further, MAEI admits that it has no contract or agreement with AMBIT relative to fees or approval for injection or treatment, nor has it sought one. (Evidentiary Hearing Tr. at 69, 109.) Once again, MAEI voluntarily assumed these responsibilities by contract with CONSOL, such that any remedy it seeks must start there.[8]

At the close of MAEI's evidence, AMBIT moved for judgment, citing MAEI's failure even then to show a legally protected interest that was violated, a concrete particularized injury in fact. (Evidentiary Hearing Tr. at 545) Relying upon the general EQB appeal statute (W. Va. Code Section 22-11-21) MAEI argued that it was not subject to 'injury-in-fact' analysis:

> 6 So the injury in fact requirement, it's not
> 7 applicable to begin with, but beyond that, you know,
> 8 clearly, we've shown, I don't think there's any question
> 9 that one or more of the Appellants have shown that they

[8] "'It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.' Syllabus Point 3, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962)." Syllabus point 1, *Hatfield v. Health Management Associates of West Virginia*[, *Inc.*], 223 W. Va. 259, 672 S.E.2d 395 (2008) (per curiam).

10 are adversely affected.

(Evidentiary Hearing Tr. at 557) AMBIT argued conversely that West Virginia's Supreme Court, this Court, had applied 'injury-in-fact' analysis even where the inquiry is administrative and the test 'aggrieved'; for standing, injury is the *sine quo non. See, e.g.,* Syl. pt. 6, *Corliss v. Jefferson City Board of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003). Once again, by its own admission, MAEI has failed to track the sources of materials entering the Dogwood Lakes AMD Plant and therefore cannot be certain the extent to which (or if at all) the AMBIT injectate reaches and/or impacts the treatment plant. Indeed, once again, "the flow path of the Injectate has not been established by reasonable degree of hydrogeological certainty. No current or updated reliable flow path has been established." (JA001046)

EQB declined to grant and/or rule upon all of AMBIT's dispositive motions, from its initial Motion to Dismiss or For More Definite Statement (8.31.21) (JA000397) all the way through the motion for judgment as a matter of law (made at the close of WVLRI's case). EQB's failure to rule and to issue written orders on those rulings impairs meaningful review[9] and complicates any further action between these parties. AMBIT sought rulings and orders during the proceedings and at and after Final Order. AMBIT challenges EQB's failure to provide same.

AMBIT is challenging whether MAEI has standing to bring the instant appeal, given that it has demonstrated no injury whatsoever but rather a generalized annoyance or discontent with the UIC process. MAEI has identified not one particularized fact that could be found to constitute an injury-in-fact, which pursuant to West Virginia law is the necessary predicate to its action here. Syl. pt. 2, *SER Healthport Techs.,* 239 W. Va. 239, 800 S.E.2d 506)2017). Specifically, as an initial imperative, "the party attempting to establish standing must have suffered an 'injury-in-fact'—an

[9] *See, e.g., Louden v. W. Va. Div. of Envtl. Prot.,* 209 W. Va. 689, 551 S.E.2d 25 (2001).

invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical."

The EQB erred in allowing the subject administrative appeal to proceed when MAEI demonstrated no standing or injury in fact – indeed, had no standing or injury in fact. AMBIT seeks a finding from this Court that standing is a necessary predicate to administrative appeals before the EQB, a re-affirmation from *Corliss* that EQB's statute, W. Va. Code 22-11-21 that identifies an 'aggrieved party' is mandating just that -- standing and injury-in-fact, and that EQB erred in failing to dismiss MAEI's administrative appeal as a matter of law.

D. Assignment of Error Number 2: The Environmental Quality Board erred in allowing the subject administrative appeal to proceed when the relief sought was unavailable through the appeal process

In its administrative appeal before the EQB, MAEI sought relief that was unavailable under West Virginia law. As MAEI stated in its EQB administrative appeal, "[i]t will cost MAEI hundreds of thousands of dollars to handle and treat the Injectate that is *authorized to be injected by ABPP under the UIC Permit* and treated at the Dogwood Lakes AMD Treatment Plant. Because ABPP *has not entered into any agreement* with MAEI to allow for the handling and treatment of the Injectate, the application for the UIC Permit was incomplete and the UIC Permit should not have been issued." JA000028 (emphasis added). West Virginia law allows permittees to inject through boreholes into dedicated abandoned mine voids and allows permittees to do so without charges to Mine Pool operators. Therefore, by MAEI's admission, AMBIT acted at all times as it was permitted to act. Additionally, MAEI admitted that it has no agreement or contract with AMBIT that would require AMBIT to seek approval or to pay any fee. Beyond the fact that MAEI failed to identify the source of any duty AMBIT might have to MAEI relative to its permit or otherwise, EQB found as a matter of law that "the flow path of the Injectate has not been established by

reasonable degree of hydrogeological certainty. No current or updated reliable flow path has been established." (JA001046) Therefore, MAEI did not prove that Injectate reached either of its facilities or that it even left the Joanna Mine void. As a result, MAEI was unable to demonstrate any expense attributable to AMBIT's Injectate, even assuming *arguendo* that MAEI had identified any basis for permission or payment of fees. MAEI could demonstrate no increase in volume or cost associated with AMBIT's alleged increases in injection,[10] and MAEI admitted that it had done no dye testing or smoke testing or other process to monitor or track the Injectate.[11]

MAEI assiduously denied that it is seeking payments (despite the express terms of its administrative appeal and its evidence at hearing, *see, e.g.,* Evidentiary Hearing Tr. at 58ff). However, by the express terms of its appeal and its arguments at hearing, MAEI does seek a change in how the regulation of the Mine Pool system operates. After all, MAEI introduced evidence of its treatment costs relative to the Mine Pool system generally (Evidentiary Hearing Tr. at 57), which would be germane only to a discussion of legislative or regulatory change, not to permit review in the absence of either.

The Mine Pool system and the monitoring and control of the Mine Pool system was initiated by federal and state government mandates that predate these parties, permits and appeal, and the program itself does not provide rights or remedies between these participants.[12] AMBIT emphasized the relative financial and other responsibilities undertaken voluntarily by each of the participants before the Board[13] and urged the Board to consider that any remedy it could apply here would not extend to the other individuals and entities affected by or involved in the Mine Pool but who were not included in this process before the Board (which is the vast majority of participants).

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[10] Evidentiary Hearing Tr. at 165.
[11] Evidentiary Hearing Tr. at 180-81.
[12] JA000573.
[13] Evidentiary Hearing Tr. at 695-96.

No existing law or contract provides monetary damages or other relief for MAEI under its Mine Pool obligations. No existing law or regulation limits the amount of Injectate any permit holder may inject beyond the scope of the permit itself. Regardless of whether MAEI seeks monetary relief or a change in the Mine Pool system and its burden thereunder, neither is available before the EQB. Therefore, again, 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 redressed through a favorable EQB decision. Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.,* 213 W. Va. 80, 576 S.E.2d 807 (2002).

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. The Mine Pool system was created by OSM and has been in existence for decades.[14] While AMBIT opposes any suggestion that MAEI is entitled to compensation for maintaining a responsibility it accepted voluntarily, indeed, paid money to obtain, AMBIT suggests that any potential remedy is larger than either independent business and requires study and intervention on a governmental level.

The EQB erred in allowing this administrative appeal to proceed when the relief MAEI seeks is unavailable through this process. The EQB erred in allowing the subject administrative appeal to proceed when MAEI demonstrated no relief available in the process, such that MAEI had no standing to proceed. EQB erred in failing to grant AMBIT's dispositive motions.

E. Assignment of Error Number 3: The Final Order is factually flawed and failed to preserve AMBIT's evidence, AMBIT's arguments and objections, and MAEI's admissions against interest.

[14] JA000173.

Pursuant to West Virginia law, it is incumbent upon litigants to request the type of order necessary to preserve their rights. Syl. pt. 4, 8, *SER Vanderra Res. LLC v. Hummel,* 242 W. Va. 35, 829 S.E.2d 35 (2019). Also pursuant to West Virginia law, "'[a] litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error" as a defense or upon appeal or arguably use as other defense or affirmation under the law. Syl. pt. 2, *Hopkins v. DC Chapman Ventures,* 228 W. Va. 213, 719 S.E.2d 381 (2011), quoting Syl. Point 1, *Maples v. West Virginia Dep't of Commerce,* 197 W. Va. 318, 475 S.E.2d 410 (1996). In recognition of this duty, AMBIT has challenged the Final Order as failing to reflect AMBIT's arguments, evidence, objections, along with AMBIT's motions and the Board's rulings (or the lack of same). Conversely, in its Final Order, the Board included a footnote that states that

> [a]ll proposed findings submitted by the parties have been considered and reviewed in relation to the record developed in this matter. All argument of counsel, proposed findings of fact and conclusions of law have been considered and reviewed with reference to the evidentiary record before the Board, as well as applicable law. To the extent that the proposed findings of fact, conclusions of law and arguments advanced by the parties are in accordance with these findings of fact, conclusions and legal analysis of the Board and are supported by the evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions, and arguments are inconsistent herewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or lecessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credible.[15]

However, in terms of preserving AMBIT's case for appeal or preserving its objections/ exceptions/evidence for any subsequent civil action, the Board failed to prepare an order that preserved AMBIT's evidence, arguments, and objections, and MAEI's admissions against interest. EQB also made direct factual errors in its Final Order, including information directly contradicted by the evidence, and failed to revise those entries upon AMBIT's post-verdict motion or even to

[15] JA001046 at n.5.

reflect AMBIT's objections to same. A final order is to be the reflection of the proceedings generally and particularly, and it is incumbent on the EQB to not only accept input from counsel, but also to ensure that its order reflects its rulings and provide clear notice to all parties and any reviewing court of the rationale behind the findings. *See Taylor v. West Virginia DHHR,* 237 W. Va. 549, 5558, 788 S.E.2d 295, 304 (2016), *quoting State ex rel. Erlewine v. Thompson,* 156 W. Va. 714, 718, 207 S.E.2d 105, 107 (1973); *Fayette Cty. Nat'l Bank v. Lilly,* 199 W. Va. 349, 354, 484 S.E.2d 232, 237 (1997), *overruled on other grounds by Sastaric v. Marshall,* 234 W. Va. 449, 766 S.E.2d 396 (2014).

EQB erred in failing to include AMBIT's evidence, arguments, and objections in the Final Order, even if the Board were then to discount them. EQB erred in including factual errors and/or contested evidence in the Final Order without appellation or explanation, and EQB erred in failing to recount AMBIT's motions and to provide rulings on same, in the Final Order or otherwise. AMBIT appeals the Final Order as failing to reflect its evidence, arguments, process and procedure, and appeals the EQB's denial of its motion seeking clarification and redress. To the extent that EQB denied AMBIT's post-hearing motion to alter or amend or its supplement the Final Order embedded therein, submitted to preserve AMBIT's evidence, objections, motions, AMBIT was injured by the Board's refusal to provide an order that fully and fairly reflected the full process before it.

Of note, AMBIT prepared and submitted an initial proposed order and prepared and submitted the following list (abbreviated here) of under-reflected and/or unpreserved evidence, arguments, process, procedure in the Final Order as entered.

1. The Final Order does not reflect that MAEI voluntarily assumed responsibility for the management of the Fairmont Mine Pool, the Paw Paw Siphon, Dogwood Lakes AMD Treatment Plant, and other active and abandoned mines in the areas by purchasing the assets of the

CONSOL group of companies in 2013. (Evidentiary Hearing Tr. at 68, 86, 115)

2. The Final Order does not reflect that MAEI's concerns could only be addressed systemic relief, mandating inclusion of other indispensable parties (legislature, for instance). Further, the Final Order should have reflected that, as a matter of law and fact, no existing law provides monetary damages or relief, and no existing law or regulation limits the amount of Injectate any permit holder may be permitted to inject. West Virginia laws and regulations do not contain a legal limit as to the gallons of water that can be injected under a UIC permit, but the Final Order did not reflect this key fact. (Evidentiary Hearing Tr. at 240) *See also* 47 CSR 13, generally.

3. The Final Order does not reflect that the appeal before the Board involves the third reissuance of AMBIT UIC Permit 0394-01-049 and that MAEI was in control of the same portions of the mine pool system when Intervenor's permit last underwent renewal but did not challenge that process. (Evidentiary Hearing Tr. at 69, 186)

4. The Final Order does not reflect the admission adduced at the evidentiary hearing that MAEI does not have agreements with any companies or agencies to treat waters in the Dogwood Lakes AMD plant or its subparts, nor has it attempted to locate any responsible parties for any of the intervening mind voids that contribute to Dogwood Lakes or the mine pools. (Evidentiary Hearing Tr. at 66, 68, 109)

5. The Final Order does not reflect that MAEI identified no regulatory or statutory support for any monetary payments or reimbursement. (Evidentiary Hearing Tr. at 59)

6. The Final Order does not reflect that MAEI has made no changes to its pumping, treatment or other practices as a result of this permit renewal, the alleged increases in injection or otherwise. (Evidentiary Hearing Tr. at 79-80)

7. The Final Order does not reflect MAEI's failure to introduce evidence (e.g., industry

standards, processes in place, options for treatment, invoices) to support any of the particularized numbers placed into evidence. (Evidentiary Hearing Tr. at 79-80) The Final Order should concede the 'soft' numbers or exclude them.

8. The Final Order does not reflect the history of the Fairmont Mine Pool as beyond either litigant before the EQB.

9. The Final Order does not reflect that MAEI conceded against interest that one of the allegedly downdip mines from the Joanna Mine, the Harrison County Coal Mine, ***will flow east*** toward Dogwood Lakes (and, allegedly, uphill) once pumping ceases, nor does it capture the evidence of pressured inflows. (*See, e.g.,* Evidentiary Hearing Tr. at 97, 455, 490-91. *See also* JA000705)

10. The Final Order does not reflect the extensive evidence adduced by and through all parties relative to 'head' or pressure levels at or about the Joanna Mine that affect direction of flow. (Evidentiary Hearing Tr. at 101, 158-59, 206, 263, 455-56)

11. The Final Order does not reflect the evidence as adduced in that it improperly represents the input of expert witnesses before the Board, maligning some and inflating others. (Evidentiary Hearing Tr. at 103-04, 183, 415, 521)

12. The Final Order does not accurately represent the evidence relative to direction of flow, including a coal barrier downdip, head pressures and the interconnectedness of the voids. (Evidentiary Hearing Tr. at 384, 424-27, 451ff)

13. The Final Order does not reflect the evidence adduced that the Injectate never leaves the Joanna Mine void. (*See* Appellee JA000703, JA000704; Evidentiary Hearing Tr. at 483-85)

14. The Final Order does not reflect WVDEP's evidence on mine pool levels generally and their implications for the Joanna. (Evidentiary Hearing Tr. at 444, 449ff)

15. The Final Order does not reflect the evidence adduced relative to interconnections (or "punch throughs") between mine voids and the effect of drawdowns at the Siphon. (Evidentiary Hearing Tr. at 447)

16. The Final Order does not reflect the evidence adduced relative to the flow of underground water as a complicated process shaped by numerous factors including the interplay of liquids, solids, gases and mechanical, thermal, chemical and hydrologic processes as well as dissimilar coal barriers that are in place. (Evidentiary Hearing Tr. at 532)

17. The Final Order does not reflect that lack of any scientific testing to establish that water potentially leaving the Joanne mine void is "commingling" with waters from MAEI's operations for treatment at either of its treatment facilities. (Evidentiary Hearing Tr. at 103, 181, 187)

18. The Final Order does not reflect MAEI's failure to conduct testing to prove its arguments on direction of flow. (Evidentiary Hearing Tr. at 180-81, 204-05)

19. The Final Order does not reflect accurately WVDEP's regulatory stance generally and as relates to the Joanna on surface water incursion or even the status of same at the Joanna. (Evidentiary Hearing Tr. at 327-31, 669-70)

20. The Final Order fails to reflect accurately the permitted levels relative to 'report only,' setting no limits in Injectate levels. (Evidentiary Hearing Tr. at 288-89, 288-89, 292, 384-85)

21. The Final Order fails to reflect accurately that AMBIT **leases** but does not own the property covered by the permit at issue. (Evidentiary Hearing Tr. at 658, 662)

22. The Final Order fails to reflect that both MAEI and AMBIT were before the EQB on responsibilities they 'inherited' from other corporate entities by contract. (Evidentiary Hearing

Tr. at 695-96)

23. The Final Order fails to reflect the inescapable fact that, because no testing has been done and because no evidence exists as to direction of flow, no evidence exists that the Injectate even leaves the Joanna Mine void. (Evidentiary Hearing Tr. at 325-26, 384, 410)

24. The Final Order fails to reflect that, because there is no reliable evidence of where the Injectate travels and no objective evidence whatsoever that it reaches either of Appellant's treatment facilities (no smoke or dye testing, or other effort to objectify any travel path or destination), it remains unproven that MAEI has an injury in fact on any basis, given that the Injectate is permitted to travel to those treatment facilities.

25. The Final Order does not reflect the questions of fact and law upon appeal, which appear in the Notice of [Administrative] Appeal and were to structure that process). (JA000030)

26. The Final Order does not reflect that MAEI never saw the published notice, never looked for the published notice, and failed to participate in the comment period. (JA000026)

27. In addition, AMBIT has sought and seeks inclusion in the Final Order of the statement that the exceptions and objections of any aggrieved party are noted and preserved.

A final order is to be the reflection of the proceedings generally and particularly, and it is incumbent on the EQB to not only accept input from counsel, but also to ensure that its order reflects its rulings and provide clear notice to all parties and any reviewing court of the rationale behind the findings. *See Taylor v. West Virginia DHHR,* 237 W. Va. 549, 5558, 788 S.E.2d 295, 304 (2016), *quoting State ex rel. Erlewine v. Thompson,* 156 W. Va. 714, 718, 207 S.E.2d 105, 107 (1973); *Fayette Cty. Nat'l Bank v. Lilly,* 199 W. Va. 349, 354, 484 S.E.2d 232, 237 (1997), *overruled on other grounds by Sastaric v. Marshall,* 234 W. Va. 449, 766 S.E.2d 396 (2014). The Final Order in this matter fails to reflect and/or preserve the evidence adduced through AMBIT or otherwise

supportive of AMBIT's defense of this claim and/or reflective of the facts adduced, regardless of their source. Beyond the Board's footnote explanation that "[t]o the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credible," AMBIT seeks a Final Order that reflects, *inter alia,* the arguments and evidence above and attests and avers that EQB erred in not providing same.

> **F. Assignment of Error Number 4:** The Environmental Quality Board erred in denying AMBIT's Supplemental Motion to Alter/Amend, Revise/Correct the Findings of Fact, Conclusions of Law, which denial left AMBIT's dispositive motions without a ruling or appropriate order.

Through the course of the administrative process before EQB, AMBIT raised no fewer than three dispositive motions (along with replies and supplements along the way): Motion to Dismiss or for More Definite Statement (8.31.20) (JA000397), Renewed Motion to Dismiss and for Expedited Ruling (1.6.21) (JA000545) and motion for judgment as a matter of law at the close of Appellant's case in chief. (Evidentiary Hearing Tr. at 545, 553) Further, AMBIT renewed its motion immediately prior to the hearing. (Evidentiary Hearing Tr. at 16) Each of these motions relied in whole or in part on standing and injury-in-fact, but both the initial motion and the renewed motion remain without a ruling. The third, judgment as a matter of law, was denied, but EQB's grounds for doing so appear nowhere in the Final Order or elsewhere. (Evidentiary Hearing Tr. at 559-60) On or about October 25, 2021, AMBIT moved EQB for an order or orders reflecting AMBIT's multiple dispositive motions, setting out the grounds for the one denial and issuing rulings on the other two. (JA001068, JA001085) Further, AMBIT raised standing and injury-in-fact in the proposed findings of fact, conclusions of law it submitted to EQB, and the fact of AMBIT's raising the same issues from an initial motion to dismiss to the final filing (and even upon post-judgment motion) would seem to mitigate in favor of an order (findings of fact, conclusions of law), indeed, any order, reflecting same. (JA000928)

AMBIT moved for "a full and fair representation of the evidence adduced at public hearing or, in the alternative, a statement expressly preserving Intervenor's evidence and objections/exceptions as set forth in part herein." (JA001081-82) Then AMBIT sought "a full and fair representation of the evidence adduced at public hearing and its motions practice and a statement expressly preserving Intervenor's evidence and objections/exceptions as set forth in part herein." (JA001087) In response to AMBIT's post-judgment motions, EQB found that AMBIT's pleading was not part of the record of the case (an unclear reference) (JA001091) and/or that the motions were moot. (JA001094)

Pursuant to West Virginia law, it is incumbent upon litigants to request the type of order necessary to preserve their rights. Syl. pt. 4, 8, *SER Vanderra Res. LLC v. Hummel,* 242 W. Va. 35, 829 S.E.2d 35 (201190. Also pursuant to West Virginia law, "'[a] litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error" as a defense or upon appeal or arguably use as other defense or affirmation under the law. Syl. pt. 2, *Hopkins v. DC Chapman Ventures,* 228 W. Va. 213, 719 S.E.2d 381 (2011), quoting Syl. Point 1, *Maples v. West Virginia Dep't of Commerce,* 197 W. Va. 318, 475 S.E.2d 4410 (1996). EQB has a duty to ensure that its order reflects its rulings and provide clear notice to all parties and any reviewing court of the rationale behind the findings. *See Taylor v. West Virginia DHHR,* 237 W. Va. 549, 5558, 788 S.E.2d 295, 304 (2016), *quoting State ex rel. Erlewine v. Thompson,* 156 W. Va. 714, 718, 207 S.E.2d 105, 107 (1973); *Fayette Cty. Nat'l Bank v. Lilly,* 199 W. Va. 349, 354, 484 S.E.2d 232, 237 (1997), *overruled on other grounds by Sastaric v. Marshall,* 234 W. Va. 449, 766 S.E.2d 396 (2014).

The EQB erred in failing to rule upon AMBIT's dispositive motions and/or failing to reflect those motions and any rulings in the proceedings of the administrative appeal (i.e., EQB's orders.

EQB further erred in denying AMBIT's post-judgment motions attempting to accomplish same.

Conclusion

Under West Virginia law, it is incumbent on plaintiffs to establish standing, that is, to demonstrate an injury-in-fact, invasion of a concrete, particularized, actual legally protected interest that is causally connected to the conduct forming the basis of the lawsuit. Plaintiffs must prove that it is likely that the injury will be redressed through a favorable decision of the tribunal. The Environmental Quality Board erred in allowing Murray American Energy, Inc. (MAEI), American Consolidated National Resources (ACNR), West Virginia Land Resources, Inc. (WVLRI), and Marion County Coal Resources, Inc. (referenced here as MAEI) to proceed without a finding of standing to proceed. The Board erred in failing to produce a full and fair Final Order that accurately reflects the proceedings before the Board. And the Board erred in failing to rule upon AMBIT's dispositive motions or to produce written rulings upon or to reflect the motions and rulings in the existing Final Order. AMBIT appears before the Court, seeking a determination that MAEI did not have standing to bring the underlying action and that EQB erred in failing to so adjudge at any of the times at issue.

American Bituminous Power Partners, LP (AMBIT) seeks the relief this Court deems just.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOS. 21-0893, 21-0885

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
a Delaware limited partnership,

Intervenor Below, Petitioner,

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

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

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I, Roberta F. Green/Christopher D. Negley, have this day, the 30th day of November 2021, served a true copy of the foregoing **Brief of Petitioner** via U.S. first class mail (courtesy copy via email) to the following:

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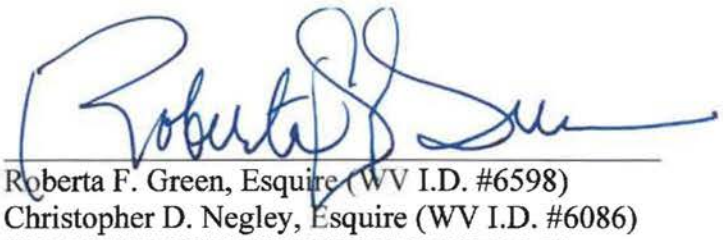

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