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.

REPLY 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 ON REPLY

Factual Background

American Bituminous Power Partners, LP (AMBIT) renews its position that underground injection control (UIC) permit number 394-01-049 allows for the injection of fluids with properties consistent with acid mine drainage (AMD) into the approved abandoned mine void that is part of the Fairmont Mine Pool (FMP) system, "a flooded complex of closed underground mines near Fairmont, West Virginia." (JA000574) Indeed, in its administrative appeal, MAEI admits expressly that "[t]he UIC Permit allows ABPP to inject." (JA000028) Integral to both of these statements is that AMBIT is a permittee under a government program, which program authorized AMBIT to inject into an approved mine void. Beyond acknowledging that AMBIT acted only as permitted, MAEI's administrative appeal references only treatment costs incurred, not property ownership or trespass.[1] MAEI's administrative appeal questions whether AMBIT "entered into any agreement with MAEI to allow for the handling and treatment of the Injectate," but, in so alleging, MAEI has

[1] Response Brief of WVLR, Inc., and MCCR, Inc. (Response Brief) at 14.

stopped far short of providing any authority that mandates that AMBIT enter such an agreement or that any other participants enter such agreements. Further, the evidence adduced was that no such agreements are in place at this time with any permittees. Respondent fails to provide a basis for its assertion that, absent an agreement with MAEI to allow for the handling and treatment of the Injectate that is authorized to be injected by the UIC Permit, the Director acted arbitrarily, capriciously, contrary to law or abused his discretion in issuing the UIC Permit to AMBIT.[2] MAEI fails to identify how its permission and any sort of treatment options are predicates to the regulatory review that AMBIT underwent upon the third renewal of its legacy permit. Even now, nothing has been adduced that would indicate how or why the Fairmont Mine Pool system as created by the Office of Surface Mining (OSM) and the UIC Program regulated by WVDEP would include permission of or payments to MAEI absent a contract, statute, regulation or other instrument or mechanism. In the instance of what MAEI admits was authorized injection, the source of the 'legally protected interest' is key to this determination, and, even after months of litigation, no such source has come to light. In a nutshell, all of its rhetoric aside,[3] Respondent has failed to identify, even now at the close of briefing, a legal basis for any invasion of a legally protected interest occasioned by AMBIT's performing as permitted.

By MAEI's own admission, the UIC Permit allows AMBIT to inject. Whereas MAEI alleges trespass, that issue was not before the Environmental Quality Board (EQB) and, as such, is not available for discussion or review here.[4] Beyond that impropriety, it bears noting that no evidence was adduced relative to MAEI's ownership interests nor was it included in MAEI's administrative appeal. Respondent has not disputed that it voluntarily accepted responsibility for

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[2] JA000030.

[3] *Tanner v. Rite Aid,* 194 W. Va. 643 n.5, 461 S.E.2d 149 n.5 (1995).

[4] *See Jefferson Cty. Vision, Inc., v. City of Ranson,* ___ W. Va. ___, *9, ___S.E.2d ___ , *9 (2021) (WV Lexis 522) (Oct. 6, 2021), *quoting State v. Costello,* 245 W. Va. 19, ___, 857 S.E.2d 51, 58 (2021).

the FMP treatment facilities at issue, and Respondent has yet to dispute the evidence that dozens of permittees inject into the Mine Pool without "authorization or approval by MAEI to allow such injectate to be received and treated at its facilities." (JA000028) Respondent has yet to identify any requirement or mechanism for one private company to obtain "authorization or approval" from another private company in order to perform as permitted under West Virginia law. MAEI fails to address that disconnect, fails to address its voluntary acceptance of the treatment facilities as part of the CONSOL contract, and fails to address how and why this permit, this permittee, this process are responsible for or responsive to its voluntarily accepted responsibility.

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) Even if both of those statements are true, neither one constitutes an injury, absent more.

Perhaps the disconnect is that MAEI believes that its voluntary acceptance of the FMP responsibility by and through its purchase of CONSOL's assets is somehow directly actionable against one entity who applied for and was granted an injection permit. MAEI has yet to identify a basis in law or fact for that claim. MAEI does not dispute that it voluntarily accepted FMP responsibility, but it fails to translate that acceptance into a legally protected interest that WVDEP

or AMBIT invaded.[5] This same disconnect is reflected in the Final Order that failed to address the precise source of the injury and how it related to the UIC Program by law. That is, to the extent that MAEI errs in finding its voluntary assumption of duties is somehow an actionable 'injury' by WVDEP or AMBIT, EQB falls into that trap as well. (JA001059-60) Both MAEI and EQB find MAEI's voluntary acceptance (indeed, voluntary purchase of) the responsibility for the FMP, the pumping and treating, an injury. (JA001060) Repeatedly, AMBIT moved the Board for a finding that AMBIT's injection was permitted by law and that MAEI had accepted FMP responsibilities voluntarily. Absent a statute, regulation, contract that provided some other arrangement, mandated additional charges or negotiations (and none exists), AMBIT was acting lawfully. MAEI failed to prove that it could be or was 'injured' by AMBIT's behaving as permitted to behave. AMBIT applied for and was granted the legal right to inject, just as it was doing. MAEI and CONSOL entered a contract that shifted the FMP responsibility from CONSOL to MAEI. To the extent that MAEI needs or wants assistance in fulfilling that responsibility, that sharing of burden is systemic, requires additional process, and is not available as against a lawful permittee. MAEI seeks to vacate AMBIT's permit, yet no evidence was adduced that AMBIT causes the injury or that elimination of AMBIT's permit changes MAEI's burden. The evidence before the EQB was that AMBIT's injection levels do not change FMP levels.[6] After all, the FMP has dozens of permittees, dozens of mine voids[7] – the process continues with or without AMBIT.

Perhaps MAEI would have had a cause of action against CONSOL for misrepresenting the scope of the duties. Perhaps MAEI should have sought regulatory relief, working with WVDEP (as opposed to against it) to include some fee or participation in the process. The

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[5] *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).
[6] Evidentiary Hearing Tr. at 75ff; Response Brief at 4.
[7] JA000711ff.

evidence at hearing was that MAEI's deal with CONSOL was costing MAEI money and that, for whatever reason, AMBIT had been selected by MAEI for this appeal. AMBIT has had to defend its lawful acts as a permittee within the UIC Program. AMBIT's permit has been modified unnecessarily by an improperly brought and maintained administrative action.[8] AMBIT has experienced injury-in-fact as a result of this improper administrative claim, which has been without legal foundation from inception. The Final Order must be vacated and the matter below dismissed with prejudice to refiling. After all, 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. Pursuant to West Virginia Code Section 22-11-8(b)(7), AMBIT was acting lawfully:

> (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.

MAEI cannot and does not deny that its ground for its appeal, the issue it listed first and numbered as one, is 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[.]" (JA000028) 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. Y***et, even now, Respondent has provided no support whatsoever for the proposition that either of these factors is part of the regulatory process as it exists.***

""The focus of a standing analysis is not on the validity of the claim but instead is 'on the

[8] JA001062; Permit number 394-01-049, Modification Number 2 (19.19.21).

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)).[9] Therefore, the focus of this standing analysis is whether MAEI had standing to challenge it, not whether the underlying application process was flawed. MAEI has failed to demonstrate that standing, that is, has failed to demonstrate how acceptance of duties pursuant to contract with CONSOL could result in an actionable injury by AMBIT.

EQB has failed to detect the legal and factual flaw, misapprehended the concept of 'standing' and the clear distinction between a voluntarily acceptance of what turns out to be an unfortunate deal as opposed to injury: MAEI may have been injured by the CONSOL deal, but, at all times at issue, AMBIT acted as permitted by State law. If the operation of State law as it is intended to operate somehow injures MAEI, then the Environmental Quality Board and AMBIT's permit are the wrong venue and respondent for that claim. Logically, if AMBIT's lawful actions per its permit 'injure' MAEI, then MAEI's concerns are systemic, legislative, regulatory, global – and its relief is unavailable before the EQB and/or as against AMBIT. If the law injures MAEI, it needs to challenge the law, not those abiding by its terms lawfully.

Further, EQB adopted MAEI's position in its Final Order, recounting its ruling on standing just as had MAEI below, both in error as a matter of law and fact. (JA001059-61) The Board further erred by failing to preserve AMBIT's evidence, arguments, and objections, and MAEI's admissions

[9] 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)."

against interest. After all, it would be naïve to assume that this process stops here for MAEI, with their alleged bad bargain and significant costs. The Board's Final Order reflects factual errors as well. Regardless of the tribunal or the procedural stance, West Virginia law requires that the parties work to ensure that the tribunal's order reflects the proceedings. The Final Order as crafted fails to fairly and fully reflect AMBIT's presence, arguments, defenses below – even failing to reflect that the objections and exceptions of any aggrieved party are noted and preserved (despite AMBIT's motion to that very end).[10]

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 and/or unfounded, with the Final Order vacated and the administrative appeal dismissed. 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 on its motions below in EQB's Final Order. AMBIT seeks the relief this Court deems just.

VI. SUMMARY OF REPLY 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[.]" MAEI alleged nonsensically, without attribution, that "[b]ecause ABPP has not entered into any agreement with MAEI to allow for the handling and treatment of this Injectate, the application for the UIC Permit was incomplete and the UIC Permit should not have been issued." (JA000028) EQB did not question the source of any duty to enter an agreement, did not see the disconnect in MAEI's

[10] JA001081.

admission that AMBIT performed as permitted, did not question what the real issue was before the Board. Once again, 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. EQB did not question the source of any alleged duty and failed to determine that MAEI was the wrong party to bring the questioned controversy before it. Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.,* 213 W. Va. 80, 576 S.E.2d 807 (2002). EQB erred in allowing MAEI to proceed with its administrative appeal without its having the requisite concrete, actual injury necessary to challenge AMBIT's lawfully granted UIC permit renewal. EQB cannot order introduction, passage or negotiation of any statute, regulation or contract that would change outcome here.

Nothing Respondent has argued changes the fact that EQB erred in allowing this administrative appeal to proceed; in failing to acknowledge AMBIT's arguments and evidence in the Final Order; in failing to acknowledge and account for the facts adduced at hearing regardless of the source; and 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. RENEWED STATEMENT REGARDING ORAL ARGUMENT

AMBIT renews is position on oral argument as set forth in Petitioner's Brief.

VII. ARGUMENT ON REPLY.

A. Introduction

AMBIT is challenging whether MAEI had standing to bring the appeal before the Environmental Quality Board ("Board" or "EQB"), given that MAEI has demonstrated no legal basis for an 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 the violation of which could constitute the basis 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). MAEI has failed to identify a legally protected, concrete, actual interest tied to AMBIT's lawful application for and actions under its UIC permit. MAEI testified to having to treat AMD at its plants, but it is undisputed that that was the responsibility it voluntarily accepted through its contract with CONSOL. 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 has 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 to it before the EQB and asserts that EQB erred in discounting AMBIT's arguments and motions seeking 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 as failing 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. Because the Board speaks through its orders and because these issues may well recur between these litigants, AMBIT raised this appeal 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

AMBIT renews its position that, as set out in *WVDEP v. Kingwood Coal Co.,* 200 W. Va. 734, 490 S.E. 2d 823 (W.Va. 1997), this Honorable 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 on Reply Number 1: The Response Brief clarifies even further that the Environmental Quality Board erred in allowing the subject administrative appeal to proceed when appellant had no standing or injury in fact.

Now, at the close of briefing, the undisputed fact is that AMBIT holds an approved permit and is allowed to inject into the designated mine void within pre-approved conditions. Nothing has changed the undisputed evidence at hearing that the Mine Pool levels have remained unchanged over time, regardless of the volume of AMBIT's permitted injections. (Evidentiary Hearing Tr. at 75ff; Response Brief at 4) MAEI and EQB recount the same voluntarily accepted duties that MAEI accepted from CONSOL as somehow creating a duty upon AMBIT, yet MAEI has provided no evidence whatsoever of the source of any duty. MAEI even now has cited no statute, no regulation, no contractual clause that would require AMBIT to seek permission from MAEI and arrange

payments, as MAEI has argued.[11] MAEI repeatedly has argued that its injury is that it has incurred the costs of operating the Mine Pool system and the treatment plants. MAEI repeatedly has argued that AMBIT has 'no arrangement' with MAEI for acting within its permit. Yet no arrangement with MAEI is required by law in order to participate in the UIC Program. To the extent that MAEI wants to identify imprecisions in the permitting process, it must first demonstrate standing.[12]

Even now, 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, in a key admission against interest, 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). MAEI could demonstrate no increase in volume or cost associated with AMBIT's alleged increases in injection,[13] and MAEI admitted that it had not even done dye testing or smoke testing or other process to monitor or track the Injectate so as to ensure that AMBIT's Injectate even reaches MAEI's plants.[14]

Whereas MAEI disputes the assertion that 'no evidence exists that the [AMBIT] injectate even reaches MAEI's treatment facilities,"[15] the Final Order states precisely that "the flow path of the Injectate has not been established by reasonable degree of hydrogeological certainty. No

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[11] JA000028.
[12] *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))
[13] Evidentiary Hearing Tr. at 165.
[14] Evidentiary Hearing Tr. at 180-81.
[15] Response Brief at 5.

current or updated reliable flow path has been established." (JA001046) Whereas even now MAEI cites injury and seeks revocation of AMBIT's permit, it fails to concede the documented fact that 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. Yet, at hearing, MAEI conceded that only a few entities had entered payment agreements with it ever. MAEI voluntarily assumed these responsibilities by contract with CONSOL, such that any remedy it seeks must start there.[16] A voluntary assumption of duties does not create an actionable injury by a lawful permittee, performing within the regulatory system as permitted. Acting lawfully under a permit does not result in injury that can be addressed as against AMBIT before EQB. If MAEI seeks assistance, approval rights, contribution, all of that is available legislatively, through regulatory channels, by contract.

The EQB erred in allowing the subject administrative appeal to proceed when MAEI demonstrated no standing or injury in fact – indeed, when MAEI had no standing or injury in fact.[17] AMBIT seeks a finding from this Court that standing is a necessary predicate to administrative appeals before the EQB, a re-affirmation from *Corliss*[18], 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.

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[16] "'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).

[17] Syl. pt. 2, *SER Healthport Techs.*, 239 W. Va. 239, 800 S.E.2d 506 (2017).

[18] *Corliss v. Jefferson City Board of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003).

D. Assignment of Error on Reply Number 2: The Response Brief clarifies even further that the Environmental Quality Board erred in allowing the subject administrative appeal to proceed when the relief sought was unavailable through the appeal process.

Respondent asserts repeatedly that it was not seeking monetary damages before EQB, and AMBIT does not dispute that. However, MAEI does not understand that the relief it seeks – the right to approve injection and to assess fess commensurately – cannot be granted by EQB. Regardless of whether AMBIT agrees or disagrees with that plan, MAEI sought relief that was unavailable at this time under West Virginia law and, therefore, unavailable before EQB. 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" (emphasis added). (JA000028) MAEI admitted that it has no agreement or contract with AMBIT (or other entities) that would require AMBIT to seek approval or to pay any fee. (JA000028) MAEI failed to identify the source of any duty AMBIT might have to MAEI relative to its permit or otherwise, and MAEI did not prove that AMBIT's Injectate reached either of its facilities or that it even left the Joanna Mine void.[19] 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 or even standing before EQB.

Nowhere in the Response Brief does MAEI identify a single possible legal source of standing besides trespass, which was never raised below, is unavailable as a claim before EQB and

[19] (*See* Appellee JA000703, JA000704; Evidentiary Hearing Tr. at 483-85)

is illogical in the context of permitted acts. Respondent argues repeatedly to entry into the Joanna Mine void as entry into the FMP – and it may well be. However, whatever it finally might be, AMBIT is permitted to so inject, to enter the Joanna Mine void, to enter the Mine Pool itself. And MAEI acknowledged that authority upon its administrative appeal. (JA000028)

Even moving beyond standing (without waiving that claim), MAEI failed to prove duty, failed to prove it was injured by AMBIT's Injectate and failed to prove that the permitting process injured MAEI directly. Because MAEI never saw the public notice,[20] its arguments to injury there were conjectural and baseless. MAEI concedes that WVDEP contacted two MAEI employees during the application period and asked substantive questions regarding direction of flow (Response Brief at 7), yet Respondent argues that WVDEP never contacted it relative to the final draft permit.[21] Once again, MAEI stops far short of providing the source of any duty WVDEP had to do so.

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, Response Brief at 3). However, by the express terms of its appeal and its arguments at hearing, MAEI does seek a change in how 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 reimbursement or assistance that can only come through legislative or regulatory change. That is, 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

[20] Response Brief at 7.
[21] Response Brief at 7.

in existence for decades.[22] While AMBIT opposes any suggestion that MAEI is entitled to compensation for maintaining a responsibility it accepted voluntarily, indeed, a responsibility it paid money to obtain, AMBIT suggests that any potential remedy is larger than either independent business and requires study and intervention on a governmental or systemic level.

AMBIT renews its position that EQB erred in allowing this administrative appeal to proceed when the relief MAEI seeks requires review and intervention beyond EQB. The EQB erred in allowing the subject administrative appeal to proceed when MAEI demonstrated no relief that could be available in the process. Because the relief MAEI sought was unavailable before EQB, MAEI had no standing to proceed. EQB erred in failing to grant AMBIT's dispositive motions. AMBIT moves this Court to vacate the Final Order and dismiss MAEI's appeal as the relief it seeks is unavailable to it before EQB.

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

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). Regardless of the tribunal or the subject matter, West Virginia law provides that "'[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). Whereas the Response Brief asserts that AMBIT has been "unable to identify any error in the final Order entered by the Board with response to any evidence that AMBIT

[22] JA000173.

introduced or legal arguments that AMBIT made" (Response Brief at 20), AMBIT has listed twenty-seven key procedural and evidentiary elements left out of the Final Order. Among the issues identified were MAEI's voluntary assumption of the Mine Pool (Evidentiary Hearing Tr. at 68, 86, 115), the lack of agreements MAEI has with any entity regarding injection (Evidentiary Hearing Tr. at 66, 68, 109), the lack of relief currently available for MAEI under West Virginia law (Evidentiary Hearing Tr. at 59), the state of the law on injection rates (Evidentiary Hearing Tr. at 240. *See also* 47 CSR 13, generally), and MAEI's admission against interest regarding its direction of flow (uphill) (*See, e.g.,* Evidentiary Hearing Tr. at 97, 455, 490-91. *See also* JA000705), the effect of head pressure on flow (Evidentiary Hearing Tr. at 101, 158-59, 206, 263, 455-56), a downdip coal barrier (Evidentiary Hearing Tr. at 384, 424-27, 451ff), among many others. The fact that MAEI finds these of little demonstrates the importance of their inclusion in the documentation of the proceedings. A final order is to be the reflection of the proceedings generally, for all litigants, and it is incumbent on the EQB to ensure that its order reflects its rulings and provides clear notice to all parties and any reviewing court of the rationale behind the findings.[23] 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 fairly reflective of the facts adduced, regardless of their source. To the extent that the Final Order and this process survive review, AMBIT moves this Honorable Court to modify the Final Order to include the full body of evidence adduced.

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[23] *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).

F. Assignment of Error on Reply Number 4: AMBIT renews its position that 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) AMBIT moves this Court to instruct EQB to rule upon AMBIT's motions and to modify the Final Order, to the extent it survives this process, to reflect AMBIT's procedural challenges and, at a minimum, to modify the Final Order to reflect that AMBIT's objections and exceptions are noted and preserved. 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. EQB further erred in denying AMBIT's post-judgment motions attempting to accomplish same.

Conclusion

American Bituminous Power Partners, LP, appears before this Honorable 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. To that end, American Bituminous moves the Court to vacate the Final Order and dismiss the underlying administrative appeal on its lack of standing. In the alternative, American Bituminous moves this Honorable Court to modify the Final Order to reflect fully and fairly the procedural and evidentiary history of this claim.

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 12th day of January, 2022, served a true copy of the foregoing **Reply Brief of Petitioner** via U.S. first class mail (courtesy copy via email) to the following:

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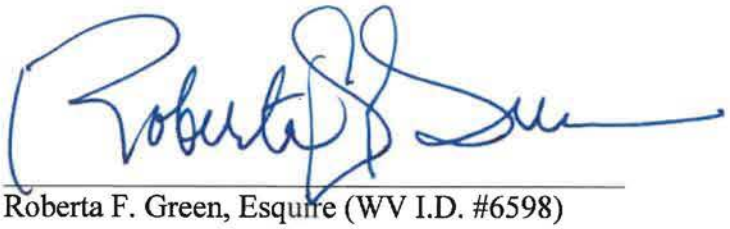

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