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November 14, 2011

Via Hand Delivery

Rory L. Perry, II, Clerk
Supreme Court of Appeals of West Virginia
State Capitol Building, Room E-317
1900 Kanawha Blvd., E.
Charleston, WV 25305

**Re: James Martin, et al. v. Hamblet
W. Va. Supreme Court of Appeals No. 11-1157**

Dear Mr. Perry:

Enclosed please find an original and five (5) copies of *Petitioner EQT Production Company's Response in Opposition to Motion to Intervene as a Respondent by West Virginia Surface Owners' Rights Organization* in the above-captioned matter.

Thank you for your attention in this matter. If you or your office have any questions or comments, please advise.

Very truly yours,

Valerie H. Raupp

VHR/dc
Enclosure

cc: David McMahon, J.D. (via US Mail)
Joseph L. Jenkins, Esq. (via US Mail)
Cynthia Loomis, Esq. (via US Mail)
Thomas J. Hurney, Jr, Esq. (via US Mail)
EQT Production Company (via US Mail)

No. 11-1157

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES MARTIN, IN HIS OFFICIAL CAPACITY AS DIRECTOR,
OFFICE OF OIL AND GAS, WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION; OFFICE OF OIL AND GAS,
WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION;
AND EQT PRODUCTION COMPANY,

Respondents Below/Petitioners,

vs.

Docket No. 11-1157

MATTHEW L. HAMBLET,

Petitioner Below/Respondent.

PETITIONER EQT PRODUCTION COMPANY'S
RESPONSE IN OPPOSITION TO MOTION TO INTERVENE AS A RESPONDENT BY
WEST VIRGINIA SURFACE OWNERS' RIGHTS ORGANIZATION

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Counsel for EQT Production Company

**Petitioner EQT Production Company’s Response in Opposition to the Motion of
West Virginia Surface Owner’s Rights Organization to Intervene
as a Respondent in this Certified Question Proceeding.**

COMES NOW Petitioner EQT Production Company (“EQT”) pursuant to Rule 32 of the West Virginia Revised Rules of Appellate Procedure and responds in opposition to the West Virginia Surface Owner’s Rights Organization’s (“WVSORO”) Motion to Intervene as a Respondent in this Certified Question Proceeding (“WVSORO Motion”). WVSORO is not itself a surface owner and has no independent interest other than advancing the agenda of its members. In this proceeding, the interests of individual surface owners, including those that are members of WVSORO, are adequately represented by existing parties. WVSORO will not be bound by any judgment in this certified question proceeding. In further opposition to the WVSORO Motion, EQT states:

1. The central issue addressed by the certified question is whether Respondent, as a surface owner, has a direct right to appeal the issuance of a horizontal shallow gas well work permit based on the Legislative scheme enacted to address objections and appeals of the issuance of well work permits.

2. The Respondent in this proceeding is Matthew Hamblet, a surface owner. Petitioners in this proceeding are James Martin, in his official capacity as Director, Office of Oil and Gas, West Virginia Department of Environmental Protection; Office of Oil and Gas, West Virginia Department of Environmental Protection (collectively “OOG”); and Petitioner EQT Production Company.

3. WVSORO filed a Motion to Intervene as a Respondent in this certified question proceeding on November 4, 2011.

4. Rule 32 of the West Virginia Revised Rules of Appellate Procedure provides for a two prong analysis of motions to intervene in cases such as this, where the proposed intervenor, WVSORO, is not entitled by statute to an unconditional right to intervene. WVSORO must establish both that “the representation of the applicant’s interest by existing parties is or may be inadequate, **and** the applicant is or may be bound by the judgment in the action.” W. Va. Rev. R. A. P. 32 (emphasis added).

5. WVSORO asserts that it wishes to intervene in this certified question proceeding to “represent the interests of the many additional surface owners who will be affected by this ruling; and in order to assist the Court by providing fuller perspective and fuller articulation of the issues.” WVSORO Motion at Paragraph 9.

6. The Respondent in this case is a surface owner and has pursued his appeal only as a surface owner. Respondent commented on the well work permit, the well work permit was issued, and Respondent filed a Petition to Appeal the issuance of the well work permit. Petitioners moved to dismiss the Petition for Appeal.

7. The Respondent is not in a unique position or status that would require he be treated differently than any other surface owner attempting to appeal a well work permit. Therefore, Respondent’s interests are identical to other surface owners, including those who may be members of WVSORO.

8. By contrast, WVSORO is not a surface owner. It is a non-profit organization advancing a specific agenda. If WVSORO is permitted to intervene as a party to advance that agenda, then other associations such as West Virginia Oil and Gas Association (“WVONGA”) and Independent Oil and Gas Association of West Virginia (“IOGA”) would by analogy also be entitled to intervene as a party to advance their positions in all cases involving issues related to

permitting, development and production of oil and gas. Such a process is clearly not what is intended by the West Virginia Revised Rules of Appellate Procedure and is unwieldy and inefficient. Instead, such broader interests are properly advanced through amicus curiae briefs. WVONGA is currently seeking leave to file such a brief.

9. In reviewing adequacy of representation issues in motions to intervene arising under West Virginia Rules of Civil Procedure 24, this Court recognized that:

...generally courts compare the interests asserted by the proposed intervenor with the interests of the existing party. ... if the interests are identical, intervention should be denied unless there is a compelling showing as to why the existing representation is inadequate. *See* 26 Fed. Proc. L. Ed. Parties § 59:303. A compelling showing may include, but is not limited to, adversity of interest, the representative's collusion with an opposing party, or nonfeasance by the representative. 26 Fed. Proc. L. Ed. Parties § 59:304.

State ex rel. Ball v. Cummings, et al., 208 W. Va. 393, 404, 540 S.E. 2d 917, 928 (1999). West Virginia Rule of Civil Procedure 24 has a significantly different structure than Rule 32 of the West Virginia Revised Rules of Appellate Procedure. However, the analysis of adequacy of representation is persuasive authority and it should be considered by this Court in evaluating this issue under Rule 32 of the West Virginia Revised Rules of Appellate Procedure.

10. As set forth above, Respondent's interests are identical to the "additional surface owners" on whose behalf WVSORO purports to intervene. WVSORO Motion at Paragraph 9. Therefore, absent a compelling showing of inadequacy of representation, intervention should be denied.

11. WVSORO has made no such compelling showing of inadequacy in its Motion, nor could it. There is no allegation that Respondent has colluded with Petitioners, has some interest adverse to other surface owners, or omitted some act he was required to perform.

Respondent's comments and Petition for Appeal were timely filed and pursued by his counsel. Respondent stands in an identical posture to any other surface owner who appeals the issuance of a well work permit. Upon information and belief, Respondent has no interest adverse to other surface owners.

12. For these reasons, WVSORO cannot establish that surface owners' interests are not adequately represented and the WVSORO Motion should be denied.

13. WVSORO also avers that it may be bound by judgment in the action. This is not accurate. WVSORO would not be bound by any decision entered in this certified question proceeding because it is not a surface owner who may ever appeal the issuance of a well work permit. While its members, as surface owners, may potentially be bound by a decision in this matter, those interests are adequately represented as set forth above.

14. Therefore, WVSORO also cannot meet the second factor permitting it to participate as a party Respondent in this certified question proceeding and the WVSORO Motion should be denied.

15. For the reasons set forth above, there is no basis under Rule 32 or the West Virginia Revised Rules of Appellate Procedure to allow WVSORO to intervene and participate as a party in this certified question. At most, it should be allowed to participate as an amicus curiae under West Virginia Revised Rule of Appellate Procedure 30.

16. As an additional matter, EQT asserts that WVSORO's position that it represents and can provide a broader perspective is better addressed, if at all, through an amicus curiae brief. As discussed above, in this proceeding, WVONGA is seeking leave to file an amicus curiae brief. WVSORO, however, rejects this option outright as inadequate based on the desire to participate in oral argument. WVSORO's desire to participate in oral argument does not

factor into the analysis set forth in West Virginia Revised Rule of Appellate Procedure 32 and is insufficient to support the WVSORO Motion.

17. Further, if the Court wishes to hear from WVSORO during oral argument, Rule 30(f) of the West Virginia Revised Rules of Appellate Procedure provides that option upon motion and for extraordinary reasons. W. Va. Rev. R. A. P. 30(f).

For the reasons set forth herein, Petitioner EQT Production Company respectfully requests that the *Motion to Intervene as a Respondent by West Virginia Surface Owner's Rights Organization* be DENIED.

**EQT PRODUCTION COMPANY,
By Counsel,**

LEWIS, GLASSER, CASEY & ROLLINS, PLLC



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CERTIFICATE OF SERVICE


I hereby certify that on this 14th day of November, 2011, true and accurate copies of the foregoing *Petitioner EQT Production Company's Response in Opposition to Motion to Intervene as a Respondent by West Virginia Surface Owners' Rights Organization* were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all parties to this appeal as follows:

David McMahon, J.D.
Attorney at Law
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Counsel for West Virginia Surface Owners' Rights Organization

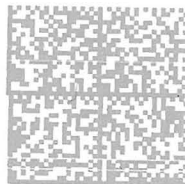
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