

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.

RESPONDENT MATTHEW L. HAMBLET'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. CERTIFIED QUESTION..... 1

II. STATEMENT OF THE CASE..... 2

 A. CONSTITUTIONAL AND STATUTORY
 BACKGROUND..... 2

 B. FACTUAL BACKGROUND..... 4

III. SUMMARY OF ARGUMENT..... 8

IV. STATEMENT REGARDING ORAL ARGUMENT AND
 DECISION..... 9

V. ARGUMENT..... 9

 A. STANDARD OF REVIEW..... 9

 B. *LOVEJOY*'S HOLDING IS CLEAR AND FULLY APPLICABLE TO
 RESPONDENT..... 10

 C. THE CIRCUIT COURT'S AFFIRMATIVE ANSWER TO THE CERTIFIED
 QUESTION WAS CORRECT IN LIGHT OF STATE AND FEDERAL DUE
 PROCESS AND EQUAL PROTECTION
 REQUIREMENTS..... 15

 D. THE DISTINCTION BETWEEN DEEP AND SHALLOW GAS WELLS IS
 NOT PERTINENT TO THE *LOVEJOY* DECISION..... 23

VI. CONCLUSION..... 23

TABLE OF AUTHORITIES

CONSTITUTION

United States Constitution, Amend. XIV, §1	2, 7, 11, 15, 16
West Virginia Constitution, Article 3, Section 10.....	2, 7, 11, 15, 18

CASES

<i>Buskirk v. Civil Service Com'n of West Virginia</i> , 175 W.Va. 279, 284, 332 S.E.2d 579, 584 (W.Va. 1985).....	16
<i>Clark v. Kansas City, Missouri School Dist.</i> , 375 F.3d 698, 702 (8th Cir. 2004).....	20
<i>Clarke v. West Virginia Bd. of Regents</i> , 166 W.Va. 702, 710-711, 279 S.E.2d 169, 175 (W.Va. 1981).....	16, 21
<i>Gallapoo v. Wal-Mart Stores, Inc.</i> , 197 W.Va. 172 475 S.E.2d 172 (1996).....	9
<i>Hutchison v. City of Huntington</i> , 198 W.Va. 139, 154, 479 S.E.2d 649, 664 (1996).....	15
<i>Jordan v. Roberts</i> , 161 W.Va. 750, 246 S.E.2d 259 (1978).....	20
<i>Lynch v. Household Finance Corp.</i> , 405 U.S. 538, 552, 92 S.Ct. 1113, 1122 (1972).....	20
<i>McLaughlin v. Florida</i> , 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed.2d 222, 228 (1964)....	3, 21
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976).....	2, 16
<i>Memphis Light, Gas and Water Division v. Craft</i> , 436 U.S. 1, 19, 98 S.Ct. 1554, 1565 (1978).....	17
<i>North v. West Virginia Board of Regents</i> , 160 W.Va. 248, 256, 233 S.E.2d 411, 417 (W.Va. 1977).....	16, 19
<i>Rankin v. Independent School Dist. No. I-3, Noble Co., Okla.</i> , 876 F.2d 838, 840.....	21
<i>Rinaldi v. Yeager</i> , 384 U.S. 305, 309, 86 S.Ct. 1497, 1499 (1966).....	3, 21
<i>Smith v. State Workmen's Compensation Com'r</i> , 159 W.Va. 108, 119, 219 S.E.2d 361, 367 (W.Va. 1975).....	2, 16, 20
<i>Snyder v. Callaghan</i> , 168 W.Va. 265, 284 S.E.2d 241 (W.V. 1981).....	15, 17, 18, 19

<i>State ex. Rel. Lovejoy v. Callaghan</i> , 576 S.E.2d 246, 213 W.Va. 1 (2002)....	1, 2, 7, 8, 9, 10, 14, 15, 20, 21, 22
<i>Waite v. Civil Serv. Comm’n</i> , 161 W.Va. 154, 241 S.E.2d 164 (1977).....	2, 15, 16, 18, 19
<i>Women’s Health Center of West Virginia, Inc. v. Panepinto</i> , 191 W.Va. 436, 441-42, 446 S.E. 658, 663-64 (W.Va. 1993).....	17
<i>Woodring v. Whyte</i> , 161 W.Va. 262, 274, 242 S.E.2d 238, 245 (W.Va. 1978).....	3, 21

STATUTES

W.Va. Code §22-6-1 <i>et seq.</i>	passim
W.Va. Code § 22-6-6.....	3, 11, 13, 19
W.Va. Code § 22-6-6(c)(12).....	11
W.Va. Code § 22-6-6(d).....	11
W.Va. Code § 22-6-7.....	13
W.Va. Code § 22-6-9.....	3
W.Va. Code § 22-6-10.....	3, 5, 7
W.Va. Code § 22-6-11.....	3
W.Va. Code § 22-6-11(2).....	13
W.Va. Code § 22-6-15.....	4, 10
W.Va. Code § 22-6-17.....	4
W.Va. Code § 22-6-40.....	4, 10
W.Va. Code § 29A-5-4.....	4, 10, 23
W.Va. Code § 29A-5-4(b).....	10

RULES

W. Va. Rev. R. App. P. 20.....	9
--------------------------------	---

REGULATIONS

W. Va. CSR §§ 35-4-1 *et. seq.*.....passim

OTHER AUTHORITY

W.Va. Admin. Reg., Ch. 20-1, S. XIV, § 6.06(a) (DNR, 1979).....18

West Virginia Erosion and Sediment Control Field Manual, Section II.A.1. a(1).....5, 11, 12

West Virginia Erosion and Sediment Control Field Manual, Manual Table II-4.....12

West Virginia Erosion and Sediment Control Field Manual, Manual Table II-5.....12

West Virginia Erosion and Sediment Control Field Manual, Manual Table II-7.....12

I. CERTIFIED QUESTION

The Certified Question, certified by the Doddridge County Circuit Court, which is currently before this Court is:

Does the West Virginia Supreme Court of Appeals opinion in *State ex. Rel. Lovejoy v. Callaghan*, 576 S.E.2d 246, 213 W.Va. 1 (2002) interpret the relevant statutes, when read in *para materia*, to permit a surface owner to seek judicial review of the West Virginia Department of Environmental Protection, Office of Oil and Gas's issuance of a well work permit for a horizontal Marcellus well?

Appendix 197-198 (hereinafter "App.")

The answer to the question is: Yes, the *Lovejoy* opinion holds that a property owner can seek and obtain judicial review of a well permit issued by the Office of Oil and Gas of the West Virginia Department of Environmental Protection (hereinafter referred to as "WVDEP" collectively with James Martin, Director, Office of Oil and Gas) under the laws of West Virginia.

Accordingly, the Circuit Court of Doddridge County answered the question affirmatively, finding that the *Lovejoy* case ruled that "any party to this article adversely affected by the order of the issuance of a drilling permit or to the issuance of a fracturing permit or the refusal of the director to grant a drilling permit or fracturing permit is entitled to judicial review." *App.* 319. Therefore, the Circuit Court denied the Petitioners' Motions to Dismiss Mr. Hamblet's Appeal "upon the grounds that [the *Lovejoy* case] states that there is a right to appeal." *App.* 195. It is the denial of those Motions to Dismiss which are the impetus for the Petitioners' filings now before this Court despite the fact that both the Circuit Court of Doddridge County and this Court have found that a property owner has the right to seek judicial review of the West Virginia Department of Environmental Protection's issuance of a well permit to address a landowner's environmental and similar concerns for his land and publicly owned resources.

Neither reformulated question proposed by Petitioner EQT Production Company (hereinafter referred to as “EQT”) in its brief appropriately encompasses and addresses the ruling of the Circuit Court of Doddridge County. The ruling of the Circuit Court of Doddridge County in denying the Motions to Dismiss of the Respondents’ Below/Petitioners herein relied solely on the *Lovejoy* statement of the law and not on an analysis of statutes; and, the *Lovejoy* ruling did not create a new right for surface owners, as EQT suggests, but instead *Lovejoy* described an appropriate procedure for review of state action regarding a surface owner’s interests in the environmental and similar impacts of gas production to his lands, both in the permitted areas and the areas that are not covered by the permit, that is required by the Constitution if not in the statutes.

I. STATEMENT OF THE CASE

a. Constitutional and Statutory Background

Article 3, Section 10 of the West Virginia Constitution provides: “No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” W. Va. Const., Art. 3, § 10. This provision requires procedural safeguards against State action which affects a property interest. *Waite v. Civil Serv. Comm’n*, 161 W.Va. 154, Syllabus Pt. 1, 241 S.E.2d 164 (1977). Due process requires that one aggrieved by a ruling have the opportunity to protest the ruling. *Smith v. State Workmen’s Compensation Com’r*, 159 W.Va. 108, 119, 219 S.E.2d 361, 367 (W.Va. 1975).

The United States Constitution likewise includes a due process clause that requires similar procedural protections for liberty and property interests. U.S. Const., Amend. XIV, § 1. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976).

The equal protection doctrine imposes a requirement of some rationality in the nature of a class singled out, no matter the class. *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S.Ct. 1497, 1499 (1966). In assessing whether the equal protection clause is satisfied, the courts must reach and determine whether the classifications drawn in a statute are reasonable in light of its purpose. *Woodring v. Whyte*, 161 W.Va. 262, 274, 242 S.E.2d 238, 245 (W.Va. 1978) (citing *McLaughlin v. Florida*, 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed.2d 222, 228 (1964); *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S.Ct. 1497, 1499-1500, 16 L.Ed.2d 577, 580 (1966)).

Under the pertinent statutes, it is unlawful for any person to commence any oil or gas well work without a permit from the WVDEP. W.Va. Code § 22-6-6. A permit applicant must deliver copies of the permit application, well plat and an erosion and sediment control plan to, among others, the owner of record of the surface of the tract on which the well is to be located. W.Va. Code § 22-6-9. The surface owner has the statutory right to file comments on the proposed well work within fifteen days of the filing of the permit application. W.Va. Code § 22-6-10.

WVDEP must review each permit application and determine whether the permit shall be issued. W.Va. Code § 22-6-11. The agency may inspect the well location to ensure adequate review of the application. *Id.* The permit “shall not be issued” or “shall be conditioned” if the WVDEP determines that:

- (1) The proposed well work will constitute a hazard to the safety or persons; or
- (2) The plan for soil erosion and sediment control is not adequate or effective; or
- (3) Damage would occur to publicly owned lands or resources; or
- (4) The proposed well work fails to protect fresh water sources or supplies.

W.Va. Code § 22-6-11.

Coal operators, coal seam owners and coal seam lessees must also be served with the permit application and also may file written objections to both deep and shallow wells. W.Va. Code § 22-6-15 (regarding deep wells), 22-6-17 (regarding shallow wells). Upon the receipt of objections from coal interests, WVDEP must set a hearing at which the objections will be considered, including consideration of evidence and testimony. *Id.* Any party to proceedings under W.Va. Code § 22-6-15 adversely affected by the issuance of a drilling permit or by the refusal of the WVDEP to issue a permit is entitled to judicial review. W.Va. Code § 22-6-40. The adversely affected party must file according to the provisions of W.Va. Code § 29A-5-4, including the provision that a petition be filed in the appropriate circuit court within thirty days of the party's receipt of the agency's final decision. W.Va. Code § 29A-5-4.

b. Factual Background

Respondent Matthew L. Hamblet (hereinafter "Mr. Hamblet") is a surface owner of a 442.6-acre parcel of property in West Union Magisterial District, Doddridge County, West Virginia. Mr. Hamblet is a fractional interest owner in the coal underlying the property, but does not own any of the oil or gas rights. The minerals underneath Mr. Hamblet's property are part of a leasehold that encompasses 2,654 acres of mineral estate. The controlling lease under which EQT is operating on Mr. Hamblet's land is a one-page document dated August 17, 1905. *App.* 131. It is worthy of note that, setting aside the distinct issue of the State's procedural protections for surface owners before the Court in this proceeding, it is impossible to conclude that the parties to a 1905 lease were able to imagine or foresee the size, scope and environmental impact of a Marcellus well, such as the 20-acre or larger clearing on Matthew Hamblet's property (*App.* 175, 282-290), at the time the lease was signed.

Prior to the issuance of the permit challenged in this action, several other EQT wells for the same location had been permitted on Respondent's property. The resulting damage and disturbance was substantial. Respondent had been in and out of hospital while the other permits were pending and consequently was physically unable to investigate or exercise his right to comment within the short fifteen (15) day comment period allowed under W.Va. Code § 22-6-10. Sometime shortly after March 22, 2010, Mr. Hamblet was served with Notice and Application for a Well Work Permit for a Marcellus shale natural gas well to be drilled by Petitioner EQT. The notice included a construction plan along with a half-page Reclamation Plan for Well API #047-017-0595. *App.* 30-46.

By counsel, Respondent submitted timely and detailed comments to WVDEP on April 2, 2010. *App.* 52-71. The comments noted numerous instances of existing surface damage caused by EQT as a result of wells permitted for the same well pad while Mr. Hamblet was sick and noted deficiencies in the pending permit application. For example, the proposed permit allowed for, among other things, 400 feet of access roadway to be constructed at a grade of 25%. *App.* 43. Under the West Virginia Erosion and Sediment Control Field Manual (hereinafter "Manual"), at page 7, Section II.A.1. a(1), 20% is the maximum allowable grade, except for those granted a waiver by the inspector. Respondent commented on this erosive road and the damage that had already been wrought (*App.* 52 – 71) and specifically on the excessive road grade (*App.* 70). The State did not require any change to the road grade in response to the comments. Respondent commented that the erosion and sediment control plan was inadequate. *App.* 53. Respondent commented that several obligations undertaken by EQT were not reflected in the permit, or were contradicted by the permit. *App.* 52. Respondent also commented on the lack of a low water bridge, the lack of sufficient drainage ditches and culverts, and the lack of

maintenance on existing structures. *App.* 52. Respondent commented that the proximity of drilling waste to surface waters presented failure to protect fresh water sources. *App.* 52. Respondent also noted the applicant's previous failed attempts at revegetation and irresponsible handling of timber on Respondent's property pursuant to the earlier permits. *App.* 52.

EQT's construction under those earlier permits had created a substantial mess out of the Hamblet property. Mr. Hamblet was devastated the first time he observed the heavily eroded and rutted access roads, the silted stream, the felled timber left in inaccessible hillside locations, the windrowed stumps that were shoulder-height and the sheer difference in size of the location as projected on Form WW-9 of the permit application on paper at 7 acres (*App.* 42) versus the actual disturbance size of over 20 acres (*App.* 175, 282-290).

Despite Respondent's specific concerns and objections, on April 22, 2010, the West Virginia Department of Environmental Protection, Office of Oil and Gas (hereinafter "OOG") issued a Well Work Permit to EQT Production Company to drill Marcellus well, API # 47-1705951, on the property. *App.* 29. On the same date, Michael Moore of the permitting section of the Office of the WVDEP OOG wrote Mr. Hamblet a letter which indicated that in reference to Mr. Hamblet's objections, the "inspector inspected the site to ensure compliance with all applicable requirements of Article 6, Chapter 22 of the West Virginia Code and Legislative Rule Title 35, Series 4" and further stated that "[a]fter considering [Mr. Hamblet's] comments, the applicant's response, and the inspector's findings, the OOG has determined that the application meets the requirements set forth in the above statute and legislative rule. Consequently, the OOG is issuing the permits today." *App.* 25. The decision did not make any findings as to which of Respondent's concerns the inspector reviewed and which he did not, what date the inspector reviewed the conditions, what problems were corrected, if any, nor whether the

findings of the WVDEP OOG were based on a second inspection after reviewing the comments. The letter did not indicate why the permit was allowing a road grade in excess of 20%, and did not address adequate erosion and sediment control measures needed, such as whether the proper culverts were installed or lacking. The letter did not address risks to surface waters. In short, the letter was conclusory and it did not address the substance of Respondent's comments at all. Even more importantly, the permit was not changed in any way to address Respondent's concerns.

Furthermore, in review by the Office of Oil and Gas, Respondent was never afforded an opportunity to be heard in person, present evidence, or to question EQT or the State. The OOG did not refer to any procedural mechanism for questioning or challenging the permit.

On May 21, 2010, Respondent filed a Petition for Appeal of the Office of Oil and Gas's issuance of the Permit in the Circuit Court of Doddridge County. The Petition named James Martin, director of OOG, and permittee EQT as Defendants. The Petition specifically cited *Lovejoy* and the statutes cited by *Lovejoy* as the legal basis of the Petition. *App.* 2. On June 14, 2010, the OOG filed a Motion to Dismiss the Petition. *App.* 82-106. On October 26, 2010, EQT filed a Motion to Dismiss and Joinder in OOG's Motion to Dismiss. *App.* 107-113. Both Motions to Dismiss were predicated on the basis that the statutes cited in *Lovejoy* do not provide a specific statutory right to a surface owner to contest a well permit, on the basis of concern for environmental surface damage; Respondents below claimed that Mr. Hamblet's rights are limited solely to his right to file comments pursuant to W.Va. Code § 22-6-10. On November 12, 2010, Mr. Hamblet filed a response to the motions to dismiss defending his right to a hearing pursuant to the West Virginia Constitution, the Constitution of the United States (*App.* 114) and *State ex. Rel. Lovejoy v. Callaghan*, 576 S.E.2d 246, 213 W.Va. 1 (2002) noting that the West Virginia

Supreme Court had expressly acknowledged a surface owner's "clear right to appeal the decision to issue the working well permit." *Id.* at 249, 11.

The Circuit Court of Doddridge County held a hearing on the motions to dismiss on November 23, 2010. At the hearing, the court examined the import of *Lovejoy* and the statutory structure relied upon in *Lovejoy*. *App.* 199-293. On July 5, 2011, the court denied the motions to dismiss. *App.* 193-196, 319-320. The Court relied specifically *Lovejoy's* holding. *App.* 195. And, the WVDEP and EQT requested to challenge the Circuit Court's ruling by submission of a Certified Question to the West Virginia Supreme Court of Appeals for decision.

By Order of Certification, entered August 9, 2011, the Circuit Court of Doddridge County certified the following question which is now before this Court:

Does the West Virginia Supreme Court of Appeals opinion in *State ex. Rel. Lovejoy v. Callaghan*, 576 S.E.2d 246, 213 W.Va. 1 (2002) interpret the relevant statutes, when read in *para materia*, to permit a surface owner to seek judicial review of the West Virginia Department of Environmental Protection, Office of Oil and Gas's issuance of a well work permit for a horizontal Marcellus well?

App. 197-198.

By order of the circuit court and by agreement of the parties, proceedings in the lower tribunal were stayed pending a ruling on the certified question. *App.* 198.

Pursuant to this Court's scheduling Order of August 22, 2011, Mr. Hamblet now submits this brief in response to Petitioners' briefs received by Counsel for Mr. Hamblet on October 24, 2011.

II. SUMMARY OF ARGUMENT

There exists no explicit statutory right in West Virginia for a surface owner to appeal the issuance of a well permit. However, the opinion in *Lovejoy* acknowledged that there clearly

exists a right of surface owners to be heard regarding their concerns of the issuance of a well permit and to have judicial review of such WVDEP decision to issue a permit.

Essentially, even if this Court was to find that *Lovejoy* relied upon or made reference to inappropriate authorities, the result of *Lovejoy* was still correct and should be upheld. Indeed, anything less would not satisfy either the state or federal constitutional requirements of due process and equal protection. Under the safeguards of due process, surface owners must be entitled to an evidentiary hearing and appeal that provides meaningful review of government decisions that directly affect their lands.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent requests oral argument under the provisions of Rule 20 of the Revised Rules of Appellate Procedure. This case presents questions of fundamental public importance, as it will almost certainly affect the Constitutional rights of the many surface owners in West Virginia. The security of West Virginia's citizens in their real property is a fundamental public policy concern. The State's strength (or absence) of procedural safeguards regarding oil and gas permits will have a profound effect on surface owners. The rapid growth of natural gas development in the State underscores the urgency and impact of this decision. Further, there is conflict on the question presented among the lower tribunals.

IV. ARGUMENT

a. Standard of Review

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172 475 S.E.2d 172 (1996).

b. *Lovejoy*'s holding is clear and fully applicable to Respondent

The West Virginia Supreme Court in *State ex. Rel. Lovejoy v. Callaghan*, 576 S.E. 2d 246, at 249 (W.Va. 2002) expressly acknowledged a surface owner's "clear right to appeal the [Office of Oil and Gas's] decision to issue the working well permit" and describes the process which the Petitioner in this matter has himself followed with due care and in a timely manner. The *Lovejoy* decision repeats a number of times that a landowner aggrieved by the issuance of a well permit has the right to appeal that decision.

In *Lovejoy*, the Petitioners sought a writ of mandamus to contest the issuance of a well permit that had already been issued and later released. In considering the Petitioners' rights in the *Lovejoy* case, the Supreme Court not only enunciated a clear right to appeal, but admonished the Petitioners/Appellants for sitting on those appeal rights. The Petitioners had filed comments objecting to the permit based on certain concerns, but had not appealed the WVDEP's issuance of the permit. The decision in *Lovejoy* centered on the Supreme Court's finding that the Petitioners/Appellants in that case had a right to judicial review of a well permit but failed to exercise that right within the timeframe guidelines of W. V. Code §29A-5-4(b). In this case, Mr. Hamblet did follow those time parameters.

The *Lovejoy* opinion is also a *per curiam* opinion. While the *Lovejoy* opinion references codified statutory law, it is implicitly keeping in mind that there exists a method of review. *Lovejoy* stated that surface owners have the right to appeal the issuance of an oil or gas well permit utilizing the procedure set forth in W.Va. Code §29A-5-4.

Lovejoy may have loosely relied on a statute that prescribed appeal rights for coal owners, but not surface-only owners. *See* W.Va. Code § 22-6-40, § 22-6-15. The WVDEP in its brief concludes that "[t]he Legislature deliberately and intentionally created a framework

whereby surface owners were given one distinct set of rights and coal owners were given another distinct set of rights.” But, it is the Supreme Court and not the Legislature that decides whether there is a constitutional right to hearing and appeal of a state action.

Although it is not mentioned explicitly in the Court’s decision, the assumption of a right to appeal a permit likely came from the Court paying deference to the Fourteenth Amendment of the United States Constitution and the Article 3, Section 10 of the West Virginia Constitution. Considering that surface owners such as the Respondent face State permitted destruction and/or deprivation of valuable and important real property interests, procedural due process mandates that he is at least entitled to adequate notice, a substantive hearing and neutral judicial review.

The State’s action in issuing the required permit governs a multitude of activities by the driller that very directly affects the surface owner in addition to the general public. The risk to his property is enormous if one of these activities as approved by the State in the issuance of the permit is done wrong.

The permit application submitted for approval must include a surface “erosion and sediment control plan.” W.Va. Code §§ 22-6-6(c)(12) and 22-6-6(d). *App* 42-44. This plan includes large number of determinations: whether appropriate soil testing has been done and therefore whether appropriate amounts of lime and fertilizer will be used for re-vegetating the surface owner’s land; also, whether appropriate seed types will be used for re-vegetating the land. *App*. 42. A comment was made on this issue in the present case. The plan also determines whether road slopes exceed the maximum allowable (without a variance) 20% grade. *See App*. 43-35, and West Virginia Erosion and Sediment Control Field Manual (hereinafter “Manual”) page 7, Section II.A.1. a(1).

Indeed, the permit as granted in the present case did not comply with several of the

requirements set out in the Manual. The application set out that for one 270-foot section of “20-25% Grade” two “broad-based dips” are proposed to be used. *App.* 43. The Manual shows that broad-based dips may only be used on grades up to 10%. Manual Table II-5. The use of broad-based dips on this steep of a grade creates an even steeper, erosion-prone road slope before and after the bottoms of the dips.

Another determination is whether there were enough culverts under the road to carry the water from the ditch that will run along the uphill/highwall side of the road to carry water to the downhill side of the road to prevent the ditch water from flooding and eroding the road. And again, in this case there were not. For example, on Appendix page 43 the permit application shows a length of access road of 680 feet, plus or minus, with three planned culverts. For roads with a slope of 16 to 20%, the Manual page 19, Table II-7: “Spacing of Culverts” states that culverts are needed every 100 feet for this 600+ foot section. The application shows only three, roughly half the required number. *App.* 43.

The plan also determines whether there are enough “Cross-ditches” (Manual §II.A.1.a.(7)), often called “water bars” as required by Table II-4: “Spacing of Cross Drains”. In the present case there is no indication of how many or how close together waterbars will be placed anywhere on the access road. Given the violations of the Manual regarding culverts and slope/broad based dips, this is a serious concern.

The WVDEP inspector may require more structures and devices than are shown on an applicant's soil erosion and sediment control plan. *App.* 43. This authority alone, however, does not cure a plan that is deficient and violates the Manual's guidelines. Surface owners are entitled to a plan that depicts how the driller will comply with the law. In this case the inspector did not address the shortcomings on the plan before the permit was granted. Without a response, the

surface owner is at a loss to even exercise his rights under the current statutory comment regime. (W.Va. Code § 22-6-11(2) (allowing comment on whether "[t]he plan for soil erosion and sediment control is not adequate or effective."). The issuance of the permit with indiscernible and/or conclusory attempts at compliance highlights the need for an appeal.

Finally, the Manual says, "It is recognized that some of the following standards for structures may not be utilized during the actual drilling operation, while a large amount of heavy equipment traffic is occurring, but rather will be utilized during the reclamation phase." Nothing in the application clarifies the delineation on a pad where six wells (*App.* 43) are going to be drilled.

In addition to the "erosion and sediment control plan", if the driller wants to get rid of the water left in its drilling pit (in the Hamblet's case "Drill water, frac blow back and various formation cuttings") by spraying the treated pit wastewater onto the surface owner's land, then the permit also contains an application for the driller's activities to fall under a further permit, an existing "general permit" for the discharge or disposition of any pollutant by land application or offsite disposal. *App.* 38-41. *See* W.Va. Code §22-6-7, <http://www.dep.wv.gov/oil-and-gas/GI/Documents/General%20Water%20Pollution%20Control%20Permit%20.pdf>, and <http://www.dep.wv.gov/oil-and-gas/GI/Documents/Marcellus%20Guidance%201-8-10%20Final.pdf>.

The permit application also must include the down-hole plan for steel casing and cement to protect the surface owner's and neighbor's groundwater. W.Va. Code §22-6-6(8) and *App.* 31-34. The driller's proposed borehole casing and cementing program is supposed to protect fresh groundwater from contamination not only from the gas produced from the target formation, but also from other gas producing formations the driller encounters as it drills through on the

way down to the target formation, and from the drilling fluids and frac'ing fluids that will be used. The casing and cementing program also has to be good enough to protect from surface pasture water runoff coming down the casing into the groundwater, and to protect the groundwater from being contaminated by other water already in the ground such as local septic system leachate, iron-water and deeper saltwater.

The granting of the permit in regard to down-hole casing and cementing includes a number of assessments: whether the driller's assessment of the number and depths of the formations containing "fresh" groundwater that needs protected is accurate and so whether elements of the proposed casing and cementing program will run deep enough; whether the program will contain the proper grade (quality) of steel casing pipe; whether the driller will use enough cement to fill the annular space between the outside of the casing pipe and the walls of the bore hole all the way to the surface; whether a metal tube will be run up from the bottom of the gas well in order to protect the production casing from failing due to erosion from sand blasting as the gas is produced; whether there are mined-out coal voids and what the driller will do about them; and whether a blow-out preventer will be used and at what stage of the process. *App 34.*

In sum, the permit makes numerous determinations that affect the surface-owner's property. Whether the WVDEP approves a sufficiently protective permit is of enormous importance to the surface owner. Even if this Court was to find that *Lovejoy* relied upon an inappropriate authority regarding the appeal of the issuance of a permit, the result of *Lovejoy* was still correct and should be upheld. Under the safeguards of due process, surface owners should be entitled to an evidentiary hearing concerning government decisions that will permanently change and affect their lands and the right to appeal that decision.

Lovejoy is direct precedent of the highest Court of the State and it was the *Lovejoy* decision which the Circuit Court of Doddridge County relied on in making its ruling. The Circuit Court certified a Question as to whether or not the result of *Lovejoy* was to acknowledge the right of surface owners to an appeal. That is the clear result of *Lovejoy*. Indeed, the Court admonished the surface owners in *Lovejoy* and explicitly noted that failure to appeal was a fatal error on their part. Respondent cannot now be denied the right that was so crucial to the surface owners' loss of their case in *Lovejoy*.

c. The Circuit Court's affirmative answer to the certified questions was correct in light of state and federal due process and equal protection requirements.

The due process right, which is implicit in *Lovejoy*, is explicit throughout West Virginia case law. The Constitutions of West Virginia and of the United States establish a firm right to due process. The right applies fully to the ownership of real property, and to State permitting procedures such as those at issue in this case. The right requires the State to provide a meaningful hearing and the opportunity to protest a permit's issuance. Without *Lovejoy*, which implicitly rests upon these basic constitutional rights, the Appellees (and surface owners generally) would be left with a summary deprivation of property rights that violates due process. Moreover, without *Lovejoy*, the State's unreasoned distinction between coal seam owners and non-coal seam owners would likely also violate equal protection law.

Article 3, Section 10 of the West Virginia Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." W. Va. Const., Art. 3, § 10. The provision "requires procedural safeguards against State action which affects a liberty or property interest." *Waite v. Civil Serv. Comm'n*, 161 W.Va. 154, Syllabus Pt. 1, 241 S.E.2d 164 (1977). The clause does not create property interests, but protects property and liberty interests created by an independent source. *Hutchison v. City of Huntington*,

198 W.Va. 139, 154, 479 S.E.2d 649, 664 (1996). Protected property includes real property. *Waite*, 161 W.Va 154, Syllabus Pt. 3. West Virginia's issuance of required permits constitutes State action within the meaning of the due process clause. *Snyder v. Callaghan*, 168 W.Va. 265, 284 S.E.2d 241 (W.V. 1981). The degree of process due depends upon the value of the right affected; "the more valuable the right sought to be deprived, the more safeguards will be interposed." *North v. West Virginia Board of Regents*, 160 W.Va. 248, 256, 233 S.E.2d 411, 417 (W.Va. 1977). To determine whether sufficient protections exist, courts consider three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Clarke v. West Virginia Bd. of Regents*, 166 W.Va. 702, 710-711, 279 S.E.2d 169, 175 (W.Va. 1981). Post-permit remedies are irrelevant to the due process analysis as "[d]ue process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise." *Buskirk v. Civil Service Com'n of West Virginia*, 175 W.Va. 279, 284, 332 S.E.2d 579, 584 (W.Va. 1985). Due process requires that one aggrieved by a ruling have the opportunity to protest the ruling. *Smith v. State Workmen's Compensation Com'r*, 159 W.Va. 108, 119, 219 S.E.2d 361, 367 (W.Va. 1975).

The federal Constitution also includes a due process clause that requires similar procedural protections for liberty and property interests. U.S. Const., Amend. XIV, § 1. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976).

Federal due process ordinarily requires an opportunity for “some kind of hearing” prior to the deprivation of a significant property interest. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 19, 98 S.Ct. 1554, 1565 (1978) (regarding property interests in utility service). The federal law rests on very similar principles to the state law. However, the Supreme Court of Appeals of West Virginia has recognized that the West Virginia Constitution’s due process clause is at times even more protective of individual rights than its federal counterpart. *Women’s Health Center of West Virginia, Inc. v. Panepinto*, 191 W.Va. 436, 441-42, 446 S.E. 658, 663-64 (W.Va. 1993).

Against this backdrop, the Supreme Court of Appeals of West Virginia has already analyzed whether the State due process clause applies to the State’s issuance of a permit that affects private property rights. The Court explicitly recognized a due process right to hearing and appeal as to riparian property rights in *Snyder v. Callaghan*, 168 W.Va. 265, 284 S.E.2d 241 (W.Va. 1981). In that case, the U.S. Army Corps of Engineers, in connection with the planned construction of a dam on the West Fork River, had sought a Clean Water Act water quality certification from the State of West Virginia. Construction of the dam could not commence without the certification, which West Virginia granted to the Corps. A group of persons who owned property downstream from the proposed dam site sued the State, asserting that their riparian rights were constitutionally protected property rights within the meaning of article 3, section 10 of the West Virginia Constitution. The Plaintiffs argued that because the State’s issuance of the permit was state action affecting their riparian property rights, they were entitled to the protections of the state’s due process clause. The Court agreed.

The *Snyder* Court held that “a riparian owner who claims to be injured as a result of the State’s approval of upstream construction work which involves the introduction of foreign

material into the watercourse has asserted a property interest which is directly affected by the state action so as to constitute an infringement of that property right and to entitle the holder of riparian rights to a due process hearing under the Department's regulations.” *Id.* at 274-75. In *Snyder*, the state had regulations providing for a hearing, but the Court’s holding was explicitly based upon the constitutional due process analysis. *Id.* at 247. Also, the regulation at issue in *Snyder* merely provided that there shall be a hearing if there is a constitutional right to one.

From *Snyder*, 168 W.Va. at 268:

Section 6.06 provides, in material part: Any person entitled to a hearing because of an infringement upon an interest protected by the State Constitution Article 3, Section 10 may request a hearing within 30 days of the Department's issuance of the proposed certification. *Regulations for Procedures Governing the Director's Certification of § 404 and § 10 Permits*, West Virginia Administrative Regulations, Department of Natural Resources, Chapter 20-1 Series XIV, § 6.06(a) (1979).

Clearly, even without the regulation, the state is not at liberty to deny a hearing if there is a constitutional right to one. Thus, the regulation at issue in *Snyder* does not distinguish the analysis from this case: in both *Snyder* and the instant action, the State cannot deprive property owners of valuable rights without constitutionally mandated due process.

Notably, the state issued a “certification” and not a permit to the Corps. The *Snyder* Court said that it did not matter whether the action was outright approval of the action, or merely a water-quality-based “assurance.” For due process purposes, all that mattered is that the state action was a prerequisite to construction. *Id.* at 273, n.2. Here, state action was a pre-requisite to

construction of a well pad and access road and the drilling, casing, and cementing of a 10,000 foot well bore. *App.* 30.

Applying *Snyder* to the instant case, it is apparent that surface ownership of real property entails rights that are at least as well-recognized as riparian rights. *Waite v. Civil Serv. Comm'n*, 161 W.Va. 154, Syllabus Pt. 1, 241 S.E.2d 164 (1977) (noting that real property is protected by the due process clause). It is also apparent that the WVDEP Office of Oil and Gas well work permit is an absolute legal prerequisite to EQT's activity on the Hamblet property. W.Va. Code § 22-6-6 (prohibiting the commencement of oil and gas well work without first securing a well work permit). And, just as the *Snyder* Court noted that the state certification allowed the introduction of foreign materials such as silt into the streams, here the well work permit purports to allow the introduction of far more substantial foreign material onto the Hamblet property: personnel, drilling equipment, drilling waste, trucks, gas wellheads, and earthmoving equipment, for example. Thus, every pertinent element of *Snyder* is more than satisfied because (1) the State action is clearly a prerequisite to the third party's activity, (2) the activity directly affects (and more than that, occupies) the real property owned by Appellee, and (3) the State action purports to allow both surface disturbance and the introduction of foreign materials onto the property.

Further, it is unlikely that any less process than was provided in *Snyder* could pass Constitutional muster in this case. The more valuable the right, the more process must be provided by the State. *North v. West Virginia Board of Regents*, 160 W.Va. 248, 256, 233 S.E.2d 411, 417 (W.Va. 1977). It cannot be that riparian rights, while very important, are more valuable than outright ownership of, and right to use and occupy, the surface of the land. Thus, the procedural safeguards in this case must be at least as substantial as those in *Snyder*. In any case, it is a minimum due process requirement that an aggrieved party have an opportunity to

protest a ruling. *Smith v. State Workmen's Compensation Com'r*, 159 W.Va. 108, 119, 219 S.E.2d 361, 367 (W.Va. 1975). Appellants' untenable position is that no such opportunity is required here.

Snyder's principles are deeply embedded in West Virginia law: those with recognized property and liberty interests must be protected by a substantive and meaningful review process prior to deprivation of those interests. See *Clarke v. West Virginia Bd. of Regents*, 166 W.Va. 702, 716, 279 S.E.2d 169, 178 (W.Va. 1981) (rejecting the State's conclusory pronouncement regarding job termination as a due process violation); *Jordan v. Roberts*, 161 W.Va. 750, 246 S.E.2d 259 (1978) ("Under procedural due process concepts a hearing must be appropriate to the nature of the case and from this flows the principle that the State cannot preclude the right to litigate an issue central to a statutory violation or deprivation of a property interest." The Court also noted that "an orderly hearing is the cornerstone of procedural due process."). Petitioners note the availability of injunctive relief and common law remedies for instances of property damage. Pet.'s Br. at 12. Such availability cannot, however, alter the constitutional analysis. Postdeprivation remedies are generally irrelevant in analyzing the constitutional sufficiency of an established state procedure. *Clark v. Kansas City, Missouri School Dist.*, 375 F.3d 698, 702 (8th Cir. 2004).

Lovejoy explicitly recognizes "a clear right to appeal the decision to issue the working well permit." *State ex rel. Lovejoy v. Callaghan*, 213 W.Va. 1, 4, 576 S.E.2d 246, 249 (W.Va. 2002). Such a right to appeal is not merely in accordance with the due process clause of the West Virginia Constitution. Given that the core civil rights relating to real property ownership is at stake, it is unlikely that any less process than an appeal could satisfy the due process clause. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122 (1972) (noting that

real property ownership is a basic civil right). For that reason, *Lovejoy* should not only be upheld, it should be amplified to make clear that a surface owner's right to appeal and even have a hearing on the issuance of a working well permit is the least the state can do to comply with the West Virginia and United States Constitutions.

Moreover, it is plain that constitutional compliance is not optional. The state may have to spend more money than it does now to comply with *Lovejoy*, but that is only the result of a constitutionally required procedural protection for valuable property rights. *See, e.g., Rankin v. Independent School Dist. No. I-3, Noble Co., Okla.*, 876 F.2d 838, 840 (noting that compliance with due process is the "affirmative obligation" of the state actor).

Finally, as the court below recognized, there are serious equal protection questions raised by any procedure that makes unreasoned distinctions. The equal protection doctrine imposes a requirement of some rationality in the nature of the class singled out, no matter the class. *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S.Ct. 1497, 1499 (1966). In assessing whether the equal protection clause is satisfied, the courts must reach and determine whether the classifications drawn in a statute are reasonable in light of its purpose. *Woodring v. Whyte*, 161 W.Va. 262, 274, 242 S.E.2d 238, 245 (W.Va. 1978) (citing *McLaughlin v. Florida*, 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed.2d 222, 228 (1964)); *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S.Ct. 1497, 1499-1500, 16 L.Ed.2d 577, 580 (1966)).

In the proceedings below, Judge Henning referred to the lack of an explicit statutory appeal procedure for surface owners (if *Lovejoy* were not the law), contrasted with a statutory appeal procedure for coal seam owners.

The Court: It is of concern to me that there is the argument that some people have a right – some entities have a right to appeal, but not others. And the Office of Oil and Gas apparently is, as far as I can see, is correctly arguing the

statute in that case because the statute provides that if you own coal you can appeal; if you don't own coal, you can't appeal. And that is of concern to me.

(*App.* 229). Further, the court noted:

[L]et's say the surface owner owns a lot of timber on his property, and the way the statute is written, if he owns a lot of timber at least as far as the statute and as far as the Office of Oil and Gas is concerned, he has no rights except to write a letter to the Office of Oil and Gas and then he can sue for damages later, correct?

Mr. Jones: That's correct.

The Court: But if you own a coal seam, again, you're treated differently. You're not told, "Well, if you're damaged you can sue later." You're told, "You can stop or appeal."

App. 230-231. Judge Henning's concerns were well placed, because they highlight a grave equal protection problem. There is no reasoned justification for providing an appeal procedure for those who own coal seams, but not for those who own (and often live on) the surface of the land. Both are property, and both are subject to potential damage or even destruction as a result of the manner in which the permitted activity is carried out. Judge Henning's concern was essentially an examination of the law as it would be if *Lovejoy* did not exist. But *Lovejoy* does exist, and it explicitly recognizes a surface owner's appeal right. Thus, *Lovejoy* is an implicit rejection of the unreasoned distinction between coal seal owners and surface owners that concerned Judge Henning. As Petitioner also notes, the statutes, read in isolation from *Lovejoy*, treat surface owners as "class of people" entirely differently from coal interest holders. *Pet.'s Br.* at 15. Petitioner notes that treating property owners (whether coal or surface) equally would increase the class, but Petitioner does not note any cogent or rational reason for the distinction, and there is none.

The ultimate end for all of these procedures is not the production of gas or the mining of coal. Those are only means to an end. The ultimate end is quality of life of our citizens, which

includes being secure in our property. Surface owners are entitled to the constitutional protection of their basic civil rights, and their lack of an interest in a coal seam cannot be the basis to deny them the basic procedural safeguards established in *Lovejoy*.

Lovejoy clearly establishes the appeal right asserted by the Appellee. Appellee's understand that the *Lovejoy* Court did not explicitly undertake a constitutional analysis of W.Va. Code § 29A-5-4 and the related provisions. Nevertheless, the holding is clear. Indeed, it was a "fatal" mistake for the surface owners in *Lovejoy* to fail to appeal. *Id.* at 249. Among others, the reason that *Lovejoy* is correct is because the State and federal dictates of due process and equal protection cannot be satisfied otherwise.

d. The distinction between deep and shallow gas wells is not pertinent to the Lovejoy decision.

EQT attempts to distinguish the facts presented in this instant case from the facts as presented in *Lovejoy* on the basis of well depth. However, the Court in *Lovejoy* did not condition its ruling upon whether the well was a deep well or shallow well; the Court simply held that a right to appeal a well permit was present for surface owners who objected to the issuance of a WVDEP permit. However, as noted by the Petitioner at the November 23, 2010 hearing before the lower court, the well in *Lovejoy* in effect is actually more similar to the well in this case than a regular deep well, because the well in *Lovejoy* was a "discovery" well, meaning the State gives the surface owner had no true say in the placement of the well even though it was a deep well. In *Lovejoy*, despite the surface owner's timely comments, the Office of Oil and Gas did issue the permit for the well. The same is true in this case.

V. CONCLUSION

There can be no question that the *Lovejoy* Court interpreted the relevant statutes to provide an appeal right for surface owners. Indeed, the failure to pursue such an appeal was a

fatal error for the surface owners in *Lovejoy*. Given that ruling, Respondent in this action could only ignore *Lovejoy* at his peril. The application of *Lovejoy* to surface owners was clear on its face, and the Circuit Court of Doddridge County was not at liberty to ignore the law.

Respondent fully recognizes that Chapter 22 of the West Virginia Code contains an explicit avenue for judicial review of permits for certain coal seam owners, operators and lessees. Respondent recognizes that no such section explicitly provides such an avenue for surface owners. The statutes alone, however, do not and cannot answer the Certified Question before this Court. Each natural gas permit issued by WVDEP is certain to affect the property where the well is located. As demonstrated by the damage to Respondent's land, the effect can be severe. Given the fundamental importance of the property for surface owners, and the potential for devastating effects, minimal procedural safeguards, such as the writing of a letter, cannot satisfy either federal or state constitutional minimums. A meaningful right to judicial review is literally the least that the State can do to satisfy these minimums. *Lovejoy* implicitly recognizes this, and *Lovejoy* is the law in West Virginia.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1157

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.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2011, true and accurate copies of the foregoing *RESPONDENT'S MATTHEW L. HAMBLET BRIEF* were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all parties to this appeal as follows:

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