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;

and

EQT PRODUCTION COMPANY,

Petitioners/Respondents Below,

vs. Docket No. 11-1157

MATTHEW L. HAMBLET,

Respondent/Petitioner Below,

and

WEST VIRGINIA SURFACE OWNERS' RIGHTS ORGANIZATION,

Respondent/Intervenor on Appeal.

INITIAL BRIEF OF RESPONDENT/INTERVENOR WEST VIRGINIA SURFACE OWNERS' RIGHTS ORGANIZATION

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I. CERTIFIED QUESTION AND ASSIGNMENTS OF ERROR

A. Certified question.

The 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 circuit court below answered the question in the affirmative.

WVSORO agrees that the correct answer to the certified question is "yes." However, the facts and procedural history included in the appendix and briefing to date in the instant case have raised other related issues, not specifically included in the language of the certified question or the circuit court's answer, that are important and should be properly addressed by this Court. These issues are addressed herein in the form of two Assignments of Error below.

Based upon the arguments presented herein, this Court should augment/reformulate the certified question presented to read, "Does an owner of surface land upon which an oil or gas well will be drilled, with associated frac'ing and surface disturbance, have the rights under the due process clause of the West Virginia Constitution to an administrative predecisional hearing upon, and to the right to appeal to circuit court from, the actions of the Office of Oil and Gas of the West Virginia Department of Environmental Protection in determining whether to issue,

condition or deny a well work permit for the drilling and associated frac'ing of, and surface disturbance for, an oil or gas well?"

And the answer to that question should be "Yes".

B. First assignment of error.

The circuit court failed to hold that the due process clauses of the Constitutions of West Virginia and the United States require that surface owners be able to appeal the decision of the Director[1] of the Office of Oil and Gas, West Virginia Department of Environmental Protection to issue, condition or deny a well work permit for the drilling of, and associated frac'ing of, and surface disturbance for, an oil or gas well. This issue was raised below although it was not extensively briefed or argued. *App.* 114.

C. Second assignment of error.

The circuit court failed to hold that the due process clauses of the constitutions of West Virginia and of the United States require that surface owners have a right to have predecisional administrative hearings in connection with the decisions of the Director of the Office of Oil and Gas, West Virginia Department of Environmental Protection to issue, condition or deny a well work permit for the drilling of, and associated frac'ing of, and surface disturbance for, an oil or gas well.

This issue is raised by the Intervenor and was not presented to the Circuit Court below. However, "Whether a party has a right to contest an administrative action is largely a question of

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[1]The head of the Office of Oil and gas is officially designated as the "Chief". See W.Va. Code §22-21-4. The term "Director" lingers in some statutes. This brief will continue to use the term "director" that has been used by the parties and is in the caption of the case in order to avoid confusion.

law." *DuLaney v. Oklahoma State Dept. of Health*, 868 P2d. 676 at page 683 (Okla., 1993). Any necessary facts are evident from the record, and this issue within this Court's jurisdiction to decide. And finally, the Petitioner James Martin will not say that the State would have given Mr. Hamblet or any surface owner a hearing on a permit application – even if it had been requested.

This Court should consider this issue. This is a certified question proceeding and not an appeal – where, for example, an unmade objection to an evidentiary ruling below could have been cured if it had been more timely made to the trial judge in order to avoid the prejudice to the opposing party of an appeal and retrial.[2] Even on simple direct appeals, "[I]n the exercise of its power to do so, an appellate court will consider questions not raised or reserved in the trial court when it appears necessary to do so in order to meet the ends of justice or to prevent the invasion or denial of essential rights." 1B M.J., Appeal and Error, §104. This is elsewhere noted to occur when "fundamental" rights are at stake in unassigned errors.[3] The Virginia Supreme Court of Appeals has, in an interlocutory appeal, considered an additional issue not asserted below for guidance of the trial court upon remand. *Medical Center Hospitals v Terzis, M.D.* 367 S.E.2d 728 (Va., 1988).

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[2]"The primary purpose of the contemporaneous object rule is to advise the trial judge of the action complained of so that the court can consider the issue intelligently and, if necessary, take corrective action to avoid unnecessary appeals, reversals and mistrials." 1B M.J., Appeal and Error, §103

[3]"However characterized, all courts when confronted with a situation involving the fundamental personal rights of an individual, have considered assigned errors, if meritorious and prejudicial, as jurisdictional, or have noticed them as 'plain error'. In either event, the rule is fashioned and applied to meet the end of justice or to prevent the invasion of or denial of fundamental rights." 1B M.J., Appeal and Error, §103.

II. STATEMENT OF THE CASE

WVSORO concurs in and relies upon the Statement of the Case included in the Respondent Matthew L. Hamblet's Brief.

III. SUMMARY OF ARGUMENT

WVSORO agrees with Petitioner Hamblet that surface owners have a right to a hearing on, and an appeal of, a decision of the Director of the Office of Oil and Gas, West Virginia Department of Environmental Protection, to issue, condition or deny a well work permit for the drilling of, and associated frac'ing of, and surface disturbance for, an oil or gas well – based on State and Federal constitutional due process and equal protection grounds -- even though there may be no explicit statutory authority granting such a hearing.

WVSORO emphasizes that while Lovejoy only provided for an appeal after a decision has been made, State Constitutional due process and equal protection rights as held in *Snyder v. Callaghan*, 168 W.Va. 265, 284 S.E.2d 241 (W.Va 1981), plus federal due process and equal protection rights, mandate also that surface owners be able to request predecisional hearings on drillers applications for well work permits for work that will occur on their land. This result is required because the large numbers of decisions made by the State in connection with the issuance or conditioning of a single well work permit are of immense importance to surface owners as immediately affected members of the public, and as owners of individual private rights that are very often in inherent tension with the drillers' activities.

Absent a predecisional hearing there is a high risk of erroneous effects on interests of surface owners as members of the general public for whom the State protections are primarily

focused, and there is also a high risk of erroneous effects on private property rights of surface owners by the issuance of a permit that affects those property rights. Under the current regime surface owners cannot ask questions of the driller or of the inspector or other state agent making determination of the permit application's compliance with permit requirements where, as in the Hamblet's case, state requirements are disregarded, and the State's exercise of unfettered discretion to waive the requirements occurred without any apparent reasoning. The right to a predecisional hearing and an appeal from an adverse decision are procedures to safeguard surface owners from an erroneous effect on their interests. This important result should not fail when balancing the benefits of the deprivation avoided against only some administrative and fiscal burdens that allowing those procedures will impose on the State.

Surface owners should also have rights to predecisional hearing and appeal on equal protection grounds because other interested parties have those rights. Even if equal protection did not apply, the State's granting of rights and even private boards to other interested parties illustrates the seriousness of the effects of the drilling of an oil or gas well and the associated frac'ing and surface disturbance.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

WVSORO agrees with the petitioner James Martin, with the Petitioner EQT, and with the Respondent Hamblet that this case should be selected for oral argument under Rule 20. The case presents issues of fundamental public importance, constitutional questions, issues in which Circuit Courts below have differed – and to the extent the issue is the right to a due process hearing on well work permits, it presents an issue of first impression.

V. 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. Answer to question certified by Circuit Court.

WVSORO fully concurs with the Respondent Hamblet's brief that the answer to the question certified by the Circuit Court is "yes". We concur that Lovejoy gives surface owners the right to appeal permit decisions – and that the result in *Snyder* was right, though it might better be based on constitutional due process or even equal protection grounds.

C. Surface owners have a constitutional right to a pre-decisional hearing on, in addition to an appeal of, the issuance, conditioning or denial by the State of a well work permit for the drilling of, and associated frac'ing of, and surface disturbance for, an oil or gas well upon surface owners' land. That hearing should be pursuant to the Administrative Procedures Act unless otherwise provided.

1. Federal due process.

Respondent Hamblet's initial brief does an excellent job showing why surface owners of land being affected by state-permitted drilling are entitled generally to federal constitutional due process rights in the State issuance, conditioning or denial of a well work permit to drill an oil or gas well and do the frac'ing and surface disturbance associated with the drilling. This WVSORO brief will defer to and rely upon Hamblet's initial brief for the federal constitutional due process analysis.

2. State due process generally.

WVSORO will emphasize herein the constitutional right is not only to an appeal of an agency decision, but to a predecisional hearing before the agency. In doing so WVSORO will rely most heavily on *Snyder* which applied West Virginia's State due process clause. *Snyder* is a unanimous decision of this Court. *Snyder* concluded the neighboring surface owners were entitled to a predecisional administrative hearing, not just an appeal of the State's decision, and directed the State to provide such a hearing. *Snyder* at p. 253.

In *Snyder,* the Army Corps of Engineers wanted to build what is now the Stonewall Jackson Lake and its surrounding recreational area and facilities on the West Fork River in Lewis County. In order to do that, the Corps needed "an assurance on the part of the State that the activity contemplated will comply with federal and state pollution control requirements . . ." *Snyder* at 244.

Note that the state action in *Snyder* was called the issuance of a "certificate" and not a "permit". The two are, however, in essence the same. The certificate is, as quoted above, an assurance by the State that the activity contemplated will comply with relevant laws. A permit is the same thing. In a "permit" the State is not telling the driller where they are required or might most successfully drill. The State is not giving the driller a property right to do so. A permit is the State's mechanism for assuring that if the operator does drill, the well work will be done "subject to the provisions of Chapter 22 of the West Virginia Code of 1931, as amended, and all rules and regulations promulgated thereunder, and to all conditions and provisions outlines in the pages attached hereto." *App.* 29. The *Snyder* decision itself said that it did not matter whether

the action was outright approval of the action, or merely an assurance. For due process purposes, all that mattered is that the state action was a prerequisite to construction. *Id.* at 247, n.2.

3. Under Snyder, only infringement of or effect upon property rights is required.

While federal case law might use the word "deprivation", "state action" under *Snyder* occurs if the action "affects" a citizen or only constitutes an "infringement" of citizens' property interest. *Snyder* at Syllabus Point 1.

The citizens' organization in *Snyder* did not represent the people upon whose land the dam and its appurtenances would be constructed. The citizens' organization represented people who were downstream from the land where the dam was to be built – downstream riparian owners. They submitted comments on the environment effects of the proposed construction. *Snyder* at 244. The State's certification was about "water quality standards". As riparian owners they were concerned about effects on reasonable use of their land and the river as riparian owners and users. Syllabus Point 1 of *Snyder* reads:

> When the State authorizes the introduction of foreign material into the flow of a natural watercourse which passes through or past the land of a lower riparian owner, such state action directly *affects* the interest of the lower riparian owner in the watercourse and constitutes an *infringement* of a property interest for purposes of article 3, section 10 of the state constitution. [Emphasis added.]

The *Snyder* Court went on, "It is apparent to use that the nature of the property rights asserted by the petitioners and the extent to which they are affected by the state action in this case differ substantially from [other circumstances]. [Emphasis added]" *Snyder* at 246-247.

And finally the *Snyder* Court's holding was,

> We dispose of the underlying substantive issue by determining 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 entitle the holder of riparian rights to a due process hearing under the Department's regulations. [Emphasis added.]

Snyder at 248.

4. *Snyder* explicitly held that a hearing is required.

The recitation of facts in *Snyder* points out that the citizen group, in addition to raising the substantive issues in its comments, "requested both a public hearing and an evidentiary hearing on the issues involved," and that the State subsequently notified the citizens' group that its request for even a hearing had been denied. *Snyder* at 244.

The citizens' group appealed the denial of the hearing. The State denied the appeal, and the citizens' group advised the State that it intended to file the writ of mandamus in the Supreme Court. *Ibid.* at 245.

The citizens' group did indeed file the writ of mandamus. The result was the unanimous *Snyder* decision, with Syllabus Point 1 quoted above, stating that the citizens' group was entitled to state constitutional due process protections. And the further result was the holding quoted above that the Supreme Court required that the citizens' group be given a predecisional evidentiary hearing.

5. At least one other state supreme court, in facts more on point, has agreed with *Snyder*.

In a decision that is even closer to the present facts than *Snyder*, the Supreme Court of Oklahoma found that the due process clauses of both its state constitution and the federal constitution require individuals and citizens' groups to have a hearing on a state permit application. In *DuLaney*, a 1993 decision of the Supreme Court of Oklahoma, the issue was

whether neighbors were entitled to a hearing on the state issuance of a solid waste disposal site permit. The Court stated,

> Both mineral interest owners and property owners whose residences may be affected by a solid waste management disposal facility have legally protected rights sufficient to require the application of due process privileges guaranteed the United States and Oklahoma Constitutions. However, in reaching the conclusion that mineral interest opportunity to be heard, we recognize that the Oklahoma Constitution, in itself, provides bona fide, separate, adequate and independent grounds upon which to rest our holding.

DuLaney, at page 685.

Like *Snyder*, the Oklahoma Supreme Court did not require an actual "deprivation". "Here, the adjacent landowner['s] . . . concerns include the potential for harmful contaminates in both the air and in ground water underlying their property, odor, property devaluation, and safety hazards – all arising from the landfill site. [Emphasis added]" *DuLaney*, at page 682.

Importantly, the *DuLaney* Court specifically pointed to the placing of chemicals into the ground as a distinguishing characteristic that triggered constitutional protections. The court distinguished cases holding that there was no due process right for a hearing in the placement of a group home in a neighborhood by saying that , "There is a qualitative difference between placement of a group home in a neighborhood, and the infusion of waste with potential ecological harm." *DuLaney*, at page 682. OF course to "complete" the drilling of an oil or gas well, tons of chemicals are transported across surface owners' land and pumped down a gas well to frac' the gas bearing formation – and much of that returns to be disposed of. The *DuLaney* Court further stated:

> Here evidence was presented that drilling operations, which the mineral interest owners are entitled to engage in on the landfill site, could potentially contaminate the ground water supply – the same supply underlying the adjacent landowners' property and which they use for drinking purposes. It is a problem which must be explained. These landowners' water-related property interest alone requires that

> they be given notice and an opportunity to participate in a hearing whose outcome would affect their constitutionally protected rights.

DuLaney, at page 683. It should be noted that it was "potential" contamination that gave rise to the protected right.

DuLaney stated that even, "This nation's highest court has recognized that aesthetic and environmental well-being, like economic prosperity, are important ingredients of the quality of life in our society [citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 685-86, 93 S. Ct. 2405, 37 L.Ed2d. 254, 268-69 (1973)]." *DuLaney*, at page 684.

So, the West Virginia Supreme Court itself, and at least one other state supreme court ,have held that individual and citizen groups with property interests have a constitutionally guaranteed right to a hearing when the state grants a permit that is not even on their land, but on neighboring property. And of course the issue in the instant case involves activities that are actually on surface owners' property.

6. The effects upon, and risk of harm to, surface owners from the State's issuance, conditioning or denial of a permit to drill a gas well directly upon surface owners' property is much greater than the effects and risks in *Snyder* or *DuLaney* and raise questions for which a predecisional hearing is needed.

The facts in *Snyder* involved construction of a dam and recreation area that is now called the Stonewall Jackson Lake and its surrounding recreational area and facilities. It involved road relocation, bridge building, stream channelizing – and of course the dam itself. *Snyder* at p, 244. It would have permanent effects on changes in stream flow. It would also have temporary potential effects as construction occurred.

Similarly, the drilling of, and production from, an oil or gas well has both temporary and virtually permanent effects on the land.

One difference in the instant case it that is the gas drilling, frac'ing and surface disturbance in question has potential effects not just on streams flowing quickly across citizens land, but on the groundwater underlying citizens' land.

What most distinguishes the facts of *Snyder* from the present case is that the temporary and permanent effects on the land in *Snyder* came from work that did not occur on the property that is owned by the Snyders or the citizens' group. It only occurred on land upstream from the Snyders and the citizens' group. In the facts in the instant case, the decisions of the State permit process will authorize actions that will take place actually, directly upon the surface land that is owned by the citizens!

The actions required to drill a well, and the frac'ing and surface disturbance associated with it, are very numerous and have the potential to have devastating effects on the surface owners' land and groundwater and its use and enjoyment.

Drillers must first build well pads on the surface owners' land and access roads across the surface owners' land to get to the well pads. The State permit process controls the driller's actions in that regard by requiring a surface "erosion and sediment control plan" to accompany the permit application and be approved as part of the permit. W.Va. Code §§ 22-6-6(c)(12) and 22-6-6(d). *App* 42-44. This plan has to comply with the West Virginal Erosion and Sediment Control Field Manual (hereinafter "Manual") adopted by the State. W.Va. Code §22-6-6(d), http://www.dep.wv.gov/oil-and-gas/GI/Forms/Documents/Erosion%20and%20Sediment%20Control%Field%20Manual2.pdf.

Two of the purposes of this requirement can be derived from its name. Those purposes are to prevent erosion of soil (an object of police power since the "Dust Bowl" days) and to prevent the resulting sediment from silting up streams. The State's approval of the plan includes a 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 both while early drilling activity on the land is occurring, and after the well has been completed and is in production phase. *App.* 42. A comment was made on this issue in the present case.

An important consideration in deciding that surface owners should have a right to a predecisional hearing on the permit applications is that the State's approval of the plan also determines the steepness of the slope allowed for the access roads. The State's Manual has a maximum allowable grade of 20%. Manual Section II.A.1. a(1). Grades nearing this steepness are in fact, very difficult to maintain successfully in a way that can prevent the road deteriorating and causing erosion and sedimentation and becoming impassible. The State's Manual requires maintenance by the drillers, but over the years most surface owners with such roads on them over their land have never seen it. And the Manual allows an inspector, who had to have worked in the industry for at least three years in order to get his job (W.Va. Code §22C-7-2(a) (2007)), to waive the requirement entirely – with no further slope limitation on how steep of a slope he will allow. In the case of Mr. Hamblet this waiver was granted in the face of comments that the same road being used for previously issued permits was a serious problem. *App.* 18 and 19.

Here are some of the reasonable questions that would have been raised by surface owners generally, and Mr. Hamblet in particular, at a hearing prior to the final agency decision: What was the driller's stated reason for being unable to build a road less likely to erode? Why couldn't

a longer, less steep road have been built with curves or a switchback? Were there things like fibre matting or special graveling or paving or water control, or other things that the driller could do to ameliorate the problems with the steep slope? What was the inspector's rationale for granting the wavier? Why didn't he require things to ameliorate the problems with the slope? Was it just a cost argument from the driller? Did he even know that he was approving a slope waiver? (There is no indication from the Inspector's approval of the permit at the bottom of Appendix page 42 that he was even aware he was approving such a waiver for the slopes on Appendix page 43!)

These questions and the need for answers illustrate why surface owners need the right to a hearing. Here are some more examples.

The Manual has requirements for roads to prevent erosion and sedimentation. The permit as granted in the present case did not comply with several of the requirements set out in the Manual. Why not? 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. Why was that allowed?

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. 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. Was the driller really planning on three instead of six? Why did the inspector sign off on the Plan to be included as part of the permit application with half of the required culverts?

Additionally, the approval of 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 instant case there is no indication of how many or how close together waterbars will be placed anywhere on the access road. Why not? Were they going to use more even if the State did not require it? What employee or contractor or subcontractor of the driller was going to make that decision? Did he know how many the Manual required? Did he even know there was a Manual? The plan was prepared by a surveyor. What does he know about soil hydrology and the nature of the soils present where the road was planned?

Moreover, in the soil erosion and sediment control plan included with the permit application in Mr. Hamblet's case, the surveyor said that WVDEP inspector may require more structures and devices than are shown on an applicant's soil erosion and sediment control plan. *App.* 43. The surveyor should have to make the plan comply with the Manual, but he did not. Why not? In the face of chaotic and facially insufficient t of permit applications like this, surface owners desperately need a hearing.

Even more importantly when evaluating the need for a predecisional hearing, the Manual says, "It is recognized that some of the following standards for [erosion and sediment control] 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." Manual

page 6. In the instant case nothing in the application clarifies when the reclamation will occur on a pad where six wells (*App.* 43) are going to be drilled. Does that mean that not until the sixth and final well is drilled and frac'ed are the water bars, and culverts and broad-based dips going to be put in? If they are going to harden the road with gravel to get the hundreds and hundreds and hundreds of tractor-trailer sized loads necessary for a horizontal Marcellus Shale well in, why can't they harden the road and put in the culverts etc. before they excavate and prepare the well pad for even the first well? Nothing is said about that in the permit application in the instant case, so without a hearing, that surface owner will never know.

The soil erosion and sediment control plan requirements are the easiest for laymen to understand, and they the most obvious need for a hearing in the Hamblet case. But there are other determinations involved in the State's issuance, conditioning or denial of a permit that are no less importance to the interests of the surface owner.

In addition to the "erosion and sediment control plan", the permit application must have another plan attached. If the driller wants to dispose 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 to soak into the 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, and General Water Pollution Control Permit GP-WV-1-88 at http://www.dep.wv.gov/oil-and-gas/GI/Documents/General%20Water%20Pollution%20Control%20Permit%20.pdf, and WVDEP Industry Guidance, Gas Well Drilling/Completion, Large Water Volume Fracture

Treatments at http://www.dep.wv.gov/oil-and-gas/GI/Documents/Marcellus%20Guidance%201-8-10%20Final.pdf. Why was the location for spraying the treated pit water chosen over another location on the surface owner's land? Soil conditions? Convenience?

The permit application also must include the down-hole plan for steel casing holding and held in place by cement that is supposed to protect the surface owners' and neighbors' 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 during the drilling process. 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.

The permit application in the instant case includes an addendum indicating that the driller intends to use 150,000 barrels of water for its frac' job. *App.* 40. That's 6 Million gallons. An Olympic swimming pool contains 600,000 gallons. And we know that chemicals will be added to that water. What chemicals? How much? It does not say.

In sum, the decision to issue, condition or deny a permit involves numerous determinations that affect surface owners' property, and more importantly, as illustrated by the Hamblet's case, the determination raises a number of questions that the surface owners must have the right to ask in a predecisional hearing in order for the requirements of due precess to be satisfied.

Whether the WVDEP denies a permit application, or issues or conditions a sufficiently protective permit, is of enormous importance to the surface owner's interest in the surface of his land and his groundwater, now and in the future. All of these determinations are not for what may occur next door or upstream, as in the case of *Snyder* and *DuLaney*. They are determinations of things that the State is about to make for events that will occur right on, and in, the surface owner's land – right outside their door, and even on the road they have to use to get in and out of their houses! There is even more state action and state effect and risk of serious harm and deprivation to surface owners like the Hamblets, then there is for neighbors of landfills or owners of land downstream from a dam. The situation cries out for a due process predecisional hearing.

7. The fiscal and administrative burden on the State will not be so burdensome that the right to a predecisional hearing and appeal should be denied.

The third factor in the constitutional analysis of whether surface owners have a due process right to a pre-decisional hearing on the State determination to issue, condition or deny a well work permit for the drilling of, and associated frac'ing of, and surface disturbance for, an oil or gas well is the government's interest. The government's interest includes 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).

In that regard we expect the Petitioners or their associated *amici curiae* to predict that the sky will be falling in if surface owners have the right to a predecisional hearing on the state's issuance of a permit to drill gas well and its appurtenant frac'ing and surface disturbance on their land. They will speculate that the volume of time-consuming hearings and appeals will "drag the drilling of gas wells to a halt".

First, any complaints about the process delaying their work by a time calculated in months is particularly irking to surface owners. Many gas wells operate on surface owners' land – or even just remain played out and unplugged but not operating – not for months or years, but decades and even generations of successive surface owners. Yet the drillers want an immediate permit process!

WVSORO has a number of other responses to that assertion.

The surface owners most likely to have problems with the proposals that would prompt them to request a hearing and appeal are those individuals who actually live or farm on their land. Great expanses of West Virginia are owned not by those who live on the land, but by land

holding companies and timber companies and coal companies, and by other large entities who will not have the same level of concern for muddy roads etc.

Even when land is owned by individuals, it is far from the universal rule that the individual lives on the land. Many individuals own land, often in heirship, and the land is viewed just as timber or other commercial land.

Even among individual landowners, many are not residents of the State.

Many West Virginians, sadly too often, are not willing to kick up a fuss even when one is badly needed. Others do not have the money for the help they would need advocating for their interests. Others do not have the confidence/willingness to embarrass themselves by trying to advocate for their interests on their own in an unfamiliar setting with issues they are only just learning about. Some are just not like that. And a reluctance to kick up a fuss is particularly true if a relative works in the industry. This is also particularly true if burley guys in big trucks are driving, or are going to be driving, up and down their roads to well sites.

As pointed out below and in other parties' briefs, coal operators and owners have the right to object and have predecisional hearings – sometimes before a board with a member of the industry as a member or members of the board. And these entities can file appeals. Why has this not caused the gas industry's drilling of wells to grind to a halt already? The gas industry often has more financially serious conflicts with the coal industry than it does with surface owners. The coal owner's right to appeal has not caused drilling to grind to a halt because in most cases reasonable people, or any people who have some incentive to sit down at a table and work out their differences, can work things out. There ought to be that same incentive for the gas company

to avoid a hearing with surface owners on their legitimate concerns that there is to avoid a hearing with coal owners on their legitimate concerns.

Another objection will be that there will be frivolous hearing requests and appeals. But there will probably be fewer frivolous hearing requests and appeals than there are examples currently of gas drillers' sneaking out onto surface owners' land and surveying well sites and planning pads and roads with no consultation with the surface owner. And procedures can be enacted to deal with frivolous complaints.

Finally, the number one reason why there will not be the overwhelming number of these hearings and appeals is the long tradition of oil and gas (and previously coal) landmen. West Virginians naive to the issues, or fatalistic about any outcome, will be charmed or intimidated into unadvisedly signing documents giving up the right to hearings and appeals. The tradition started when coal rights were purchased for a dollar an acre, and continues through our sad history. Even today landmen persuade West Virginians to "statements of not objection" to drilling permit applications (See W.Va. Code §22-6-11) and to sign "standard form" oil and gas leases containing waivers of rights to full development, containing overreaching pooling and unitization clauses, and containing provisions contracting for the surface owners to defend law suits against third parties if the gas company's title search is faulty. And the remuneration for these signatures continues to reflect the value of the transaction to the seller instead of the buyer of the rights.

There will of course be some additional costs and burdens. Almost all constitutional requirements do have such costs. This one is particularly worth whatever the cost may be. We are talking about the reason that West Virginia has value as a place to live. There are downsides

to being a West Virginian, and to living here. A big upside for many, many West Virginians is the land, and living on the land. And if someone has legitimate concerns about what the State is about to permit a driller to do on their home place, they should be heard in a meaningful way – including in particular the right to a predecisional hearing where they can ask the driller and the State their questions.

One source of income for the State is the severance tax on oil and gas production. In Fiscal Year 2011 the State collected $60 Million.[4] That amount is about three times the $20 Million collected in fiscal year 2000. That is more than plenty of money for the State to pay, out of the benefit it receives from oil and gas production, any small costs of the responsibility that comes with the benefit.

When considering the interests at stake to surface owners, the possible administrative and fiscal burden on the State is not so great that this fundamental constitutional right of surface owners should be denied. And because the possible impact on surface owners is so great, even the greatest burden should be borne by the State.

D. Equal protection also requires surface owners to have a right to predecisional hearing and appeal of the State's issuance, conditioning or denial of a well work permit to drill, frac and disturb the surface of surface owners' land.

WVSORO would augment the equal protection arguments made in Respondent Matthew L. Hamblet's Brief on pages 21 through 23 with a few paragraphs.

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[4] Oil & Gas Severance, Distribution of Oil & Gas Taxes at see http://www.wvsto.com/dept/Admin/Tax/Pages/OilandGas.aspx for the amount of recent distributions to local government, and then multiply that by 10 (W.Va. Code §11-13A-5a) to get approximate total severance tax collections.

In the case of a decision made on an application to drill a statutory deep well pursuant to W.Va. Code §22-6-15, not only is the coal operator given the right to a hearing if the proposed gas well is objectionably too close to another gas well, but the coal owner, and even the driller also is in effect given a right to a hearing on the coal interests' objections -- and to appeal. W.Va. Code 22-6-40. Decisions for well spacing are made by a commission with two government employees, one member of the oil and gas industry, a licensed professional from the oil or gas or the coal industry, and finally one member of the public. W.Va. Code 22C-9-4.

In the case of a decision made on an application to drill a statutory "shallow well" when a workable coal seam owner objects, a conference and then a hearing is required. W.Va. Code §22C-8-7 and W.Va. Code §22-6-40. And that hearing is conducted not by the State, but by a three-person board which has to have a mining engineer as one member. W.Va. Code §22C-8-4 Again no surface owner right to a hearing etc.

Also the coal owner or the coal owner's lessee has a right to a hearing when they have concerns and object to the drillers' applications for permits to drill new wells or convert existing oil or gas wells for waste disposal or for secondary recovery projects. In these processes substances are injected down some wells to force oil or gas out of other wells nearby (W.Va. Code §22-6-14, 16(d) and 25). Underground injection for secondary recovery or just to dispose of waste is a huge interest to surface owners across whose land the injectate will be transported, and into whose land the substances will be injected. But again no hearing for the surface owner.

E. Allowing surface owners to have predecisional hearings on, and appeals of, permit applications does not require the State administrative agency to enforce surface owners' common law rights arising out of deeds or leases.

The *amicus curiae* brief of the West Virginia Oil and Natural Gas Association takes the position that granting surface owners the right to an appeal, and presumably to hearings as argued in this brief, would be requiring the State to enforce surface owners' common law rights arising out the deeds or leases involved. WVSORO disagrees strongly with this position, but WVSORO will make most of the argument against that issue in its response to the amici briefs provided in the November 14, 2011, order of this Court. For the purposes of whether issuance of a permit is state action, WVSORO would note here that one way in which the State's issuance of the permit affects the interest of surface owners is that issuance of a permit can be offered into evidence in cases in which the surface owner sues on the grounds that the driller did more than is fairly necessary to the surface owner's interest. See Syllabus Point 9, *In re Flood Litigation*, 607 S.E.2d 863, 216 W.Va. 534 (2004)

VI. CONCLUSION

This Court should augment the question presented to read, "Does an owner of surface land upon which an oil or gas well will be drilled, with associated frac'ing and surface disturbance, have the rights under the due process clause of the West Virginia Constitution to an administrative predecisional hearing upon, and to the right to appeal to circuit court from, the actions of the Office of Oil and Gas of the West Virginia Department of Environmental Protection in determining whether to issue, condition or deny a well work permit for the drilling and associated frac'ing of, and surface disturbance for, an oil or gas well?"

And the answer to that question should be "Yes".

Respectfully Submitted
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2011, true and accurate copies of the foregoing was deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all parties to this proceeding as follows:

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