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.

MATTHEW L. HAMBLET,

Petitioner Below/Respondent.

PETITIONER EQT PRODUCTION COMPANY'S REPLY BRIEF

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INTRODUCTION

Petitioner EQT Production Company ("Petitioner EQT") submits this Reply Brief in support of its position that the Circuit Court of Doddridge County ("Circuit Court") erred as a matter of law in finding that a surface owner has a right to administrative appeal for the issuance of a horizontal shallow gas well work permit under the *per curiam* decision in *State ex Rel. Lovejoy v. Callaghan*, 213 W.Va. 1, 576 S.E.2d 246 (2002) or the relevant statutes, when read in *para materia*. No such right exists for surface owners by statute. Respondent concedes this point in his Brief. *See e.g.* Respondent's Brief ("R.B.") at 8.

Recognizing that there is no explicit right to an administrative appeal of a surface owner, Respondent has presented a new argument in his Brief, that the *per curiam* decision of *Lovejoy* must have implicitly relied on constitutional due process principles under Article III, Section 10 of the West Virginia Constitution, not statutory language, in discussing a surface owner right of appeal. *See e.g.* R. B. 15. This is mere supposition, unsupported by the language of the *per curiam Lovejoy* opinion.

Respondent's constitutional arguments of due process and equal protection deficiencies in the unambiguous and comprehensive statutory scheme enacted by the Legislature further fail on their merits. There is nothing in the due process or equal protection clause that entitles a surface owner to a hearing or administrative appeal of the issuance of a well work permit because the property rights at issue have been leased to the mineral owner. In the alternative, this Court should find that the process provided by statute is more than adequate to protect the diminished property rights of surface owners when the mineral rights have been severed by deed or lease. While Respondent implies that without the highest of due process protections, an administrative hearing or appeal, surface owners are without remedies, that is a fallacy. Surface

owners have other remedies including common law actions such as injunction proceedings, declaratory judgment proceedings, actions for damages, and statutory actions for damages. *See* W. Va. Code §§ 22-7-3 (providing for surface owner compensation); 22-7-4 (preserving common law actions).

In addition to presenting arguments on legal issues not contained in the certified question, Respondent makes a myriad of assertions in his Brief as if they are established facts. However, argument by counsel are not established facts. There has been no evidentiary hearing. No such factual findings were made or relied on by the Circuit Court and they are not relevant to this certified question. Nevertheless, Petitioner EQT responds that no notices of violation have been issued to it on the previously permitted well locations on the subject property. Further, the actions taken by, or proposed by, Petitioner EQT were all approved by West Virginia Department of Environmental Protection, Office of Oil and Gas ("OOG") and are within OOG's authority and expertise to approve in the permit.

For these and other reasons apparent on the face of the record, the question certified by the Circuit Court should be answered in the negative and this Court should hold that surface owners do not have a statutory right of administrative appeal of the issuance of a well work permit and further that Respondent's constitutional arguments are in error. The statutory scheme enacted by the Legislature should be affirmed as enacted and this Court should hold that surface owners do not have the right to appeal the issuance of a well work permit.

ARGUMENT

I. THERE IS NO STATUTORY RIGHT OF APPEAL OF A WELL WORK PERMIT BY A SURFACE OWNER AND THE PER CURIAM LOVEJOY DECISION DOES NOT CREATE THAT RIGHT

The certified question is based on the purely legal issue of the right, or lack thereof, of an

administrative appeal of the issuance of a well work permit by a surface owner. It is undisputed that no such explicit statutory right exists. Indeed, Respondent has conceded this point. R.B. 8. Petitioner EQT Production Company's Brief filed on October 21, 2011 ("Br."), the initial brief of the OOG, and the *Amicus Curiae* Brief of West Virginia Oil and Natural Gas Association ("WVONGA Brief") all provided detailed analysis of the comprehensive Legislative scheme governing the issuance of well work permits. That analysis demonstrated that there is no right, explicit or read in *pari materia*, within those statutes to a surface owner appeal of the issuance of a well work permit. *See* W. Va. Code §§ 22-6-15; 22-6-16; 22-6-17; 22-6-40; 22-6-41; 22C-8-7.

As a matter of law, the right to administrative appeal is limited to coal owners, operators and lessees ("coal interests") of workable coal seams that underlie a proposed well location. *See* W. Va. Code §§22-6-1(c); 22-6-15; 22-6-16; 22-6-17; 22-6-40; 22-6-41. The statutes are plainly written and should be applied as enacted. *See Concept Mining, Inc. v. Helton*, 217 W.Va. 298, 303, 617 S.E.2d 845, 850 (2005)(*per curiam*)(citing *DeVane v. Kennedy*, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999)("Where the language of a statutory provision is plain, its terms should be applied as written and not construed.")); *Ashby v. City of Fairmont*, 216 W.Va. 527, 531, 607 S.E.2d 856, 860 (2004) (when reviewing a statutory provision the "Court is bound to apply, and not construe, the enactment's plain language.").

To circumvent this clear and unambiguous statutory scheme, Respondent argued below that the *per curiam* opinion in *Lovejoy* grants him the right to appeal the issuance of a well work permit. That argument must fail given the lack of statutory authority or support for the "right" Respondent alleges is created by that opinion. As a *per curiam* opinion, *Lovejoy* cannot create a new point of law or establish a right that did not previously exist. *See* Syl, Pt. 2, *Walker v. Doe*, 210 W. Va. 490; 558 S.E.2d 290 (2001). The statutes are clear: there is no statutory right for a

surface owner to an appeal of the issuance of a well work permit. *See* W. Va. Code §§ 22-6-15; 22-6-16; 22-6-17; 22-6-40; 22-6-41; 22C-8-7. *See also* R.B. at 8. It is well settled that limitations on the right to appeal set by the Legislature are exclusive and cannot be enlarged by the court. *See e.g.* Syl Pt. 2, *Crea v. Crea*, 222 W. Va. 388, 664 S.E.2d 729 (2008)("'Where the Legislature has prescribed limitations on the right to appeal, such limitations are exclusive, and cannot be enlarged by the court.'")(internal citations omitted).

For these reasons and as more fully set forth in Petitioner EQT's initial brief, this Court should find that there is no statutory right to a surface owner appeal of the issuance of a well work permit and the certified question should be answered in the negative. To the extent that Lovejoy holds or implies otherwise, it should be held in error and overruled.

II. THE *PER CURIAM LOVEJOY* DECISION DOES NOT APPLY TO THIS HORIZONTAL SHALLOW GAS WELL PERMIT

Even if this Court finds that under the *per curiam Lovejoy* decision there is a right for a surface owner to appeal the issuance of a deep well work permit, there is no such right for a surface owner to appeal the issuance of a shallow gas well work permit. The Legislature has made a definitive distinction between the treatment of deep gas wells and shallow gas wells and the rules and regulations governing the same are based on stated and substantial public policy. *See* W. Va. Code §§ 22C-8-1; 22C-9-1. Nevertheless, Respondent contends that the distinction between types of wells is not pertinent to the *per curiam Lovejoy* decision because the well at issue in that case was a discovery well. As set forth in Petitioner EQT's Brief, Respondent is incorrect based on the plain language of the *per curiam Lovejoy* opinion. *See* Br. 21-23.

It was explicitly recognized by this Court in the *per curiam Lovejoy* opinion that the deep well consent and easement provision was at the center of the relief sought and a necessary background its discussion and analysis. *Lovejoy, supra,* at 3-4; 248-49. The same provision

could not possibly apply to this horizontal shallow gas well. *Compare* W. Va. Code § 22C-8-11(f) with W. Va. Code § 22C-9-7(b)(4). Further, as discussed in the initial briefs, there is no comparable provision that applies to this shallow gas well. *See* W. Va. Code § 22C-8-3(b)(3).

For these reasons, and as more fully set forth in its initial brief, this Court should decide the certified question on the more narrow question of whether a surface owner has the right to appeal the decision to issue a horizontal shallow gas well work permit when there has been no objection by a coal interest. As there is no "consent and easement" provision at issue for horizontal shallow gas wells, this Court should find that *Lovejoy* does not apply to horizontal shallow gas wells and that there is no right to administrative appeal by surface owners.

III. THE STATUTORY FRAMEWORK IN PLACE IS CONSTITUTIONAL

Respondent focuses his Brief not on the issues raised in the certified question or initial briefing, but rather on due process and equal protection grounds under the West Virginia Constitution. Respondent alleges that the *per curiam* opinion in *Lovejoy* "likely" came from a deference to due process considerations under Article III, Section 10 of the West Virginia Constitution and that this is "implicit" in that *per curiam* opinion. R.B. at 11; 15. This argument must fail because *Lovejoy* makes no such constitutional findings or analysis. *See generally, Lovejoy, supra.* Respondents assumptions cannot be substituted for the express language of the *per curiam Lovejoy* decision. There is no implicit constitutional analysis or underpinning in *Lovejoy* and this Court should reject this unfounded argument.

The Respondent's constitutional arguments should further be rejected by this Court because the arguments ignore both the Circuit Court's ruling and the question as certified. *See* Joint Appendix ("*App.*") 319 (Circuit Court stating "I'm not getting to due process at this point."); App. 197-98 (Order of Certification). This Court has long held that it will not enlarge

certified questions or appeals to decide issues not certified or decided by the lower court. *See Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W. Va. 476, 557 S.E.2d 883 (2001) at fn 5 (declining to address or decide alternate arguments not addressed by the lower court)(internal citations omitted); *King v. Lens Creek Ltd. Pshp.*, 199 W. Va. 136, 143, 483 S.E.2d 265, 272 (1996)(declining to expand the certified question to facts or issues not contained in the certified question). On this basis, this Court should not address the constitutional arguments advanced by the Respondent. Furthermore, even if this Court were to consider the Respondent's constitutional arguments, as will be discussed below, they are entirely without merit.

Due process concerns arise when someone is deprived of a property or liberty interest by state action without adequate procedural safeguards. *See* U. S. Const. Amend. XIV; W. Va. Const., Art. III § 10. The amount of process due varies and is based on a balance of factors. Syl. Pt. 5, *Waite v. Service Comm'n*, 161 W.Va. 156 (1977); Syl Pt. 2, *North v. West Virginia Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977). In *Marfork Coal Co. v. Callaghan*, 215 W. Va. 735, 742, 601 S.E.2d 55, 62 (2004) this Court recognized that due process in the civil context "is a flexible concept which requires courts to balance competing interests in determining the protections to be accorded one facing a deprivation of rights." *Clarke v. West Virginia Bd. of Regents*, 166 W.Va. 702, 710, 279 S.E.2d 169, 175 (1981). *Clarke* quoted from *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 483, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982) that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Id.*

This Court in Syllabus Point 6 of *Sharon Steel Corp. v. City of Fairmont, 175 W. Va. 479, 334 S.E.2d 616 (1985), appeal dismissed by 474 U.S. 1098 (1986)*, recognized that the legislature has wide discretion to determine the extent of due process protections to be afforded:

> The legislature is vested with a wide discretion in determining what the public interest requires, the wisdom of which may not be inquired into by the courts; however, to satisfy the requirements of due process of law, legislative acts must bear a reasonable relationship to proper legislative purpose and be neither arbitrary nor discriminatory. Syllabus Point 1, *State v. Wender, 149 W. Va. 413, 141 S.E.2d 359 (1965), overruled on other grounds, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., 174 W. Va. 538, 328 S.E.2d 144 (1984).*

The statutes at issue satisfy these requirements and are neither arbitrary nor discriminatory, as discussed below. In this case, however, Respondent now argues that if the statutes do not afford him with a hearing before the permit is issued and a right to appeal the granting of the permit to the Circuit Court, then there is a denial of due process. This argument must fail for two reasons: 1) Respondent does not have a sufficient property right at issue to warrant application of the due process clause; and, 2) even if Respondent has a property interest at stake, the legislature has afforded sufficient procedural protections under the statute to protect his rights.

In *Clarke, supra,* the Supreme Court held that the "threshold question in any inquiry into a claim that an individual has been denied procedural due process is whether the interest asserted by the individual rises to the level of a 'property' or 'liberty' interest protected by Article III, Section 10 of our constitution." *Clarke, supra* at 709, 175. In several cases, this Court has applied this standard and denied procedural due process claims when a party did not have a legitimate property interest under state or federal law. For instance, this Court has held that secondary school students did not have a property interest in their extracurricular activities. *See e.g. State ex rel. West Virginia Secondary Schools Activity Commission v. Webster*, 2011 W. Va. LEXIS 10 (W. Va. Feb. 24, 2011); *Mayo v. West Virginia Secondary Schools. Activities Commission*, 223 W. Va. 88, 672 S.E.2d 224 (2008); *Bailey v. Truby*, 174 W. Va. 8, 33 321 S.E.2d 302 (1984). In *Collins v. City of Bridgeport*, 206 W. Va. 467, 525 S.E.2d 658 (1999) this Court determined that there was no denial of due process as Bridgeport police officers had no

property interest in having hours not worked included in overtime compensation. Finally, in *State ex rel. Anstey v. Davis*, 203 W. Va. 538, 509 S.E.2d 579 (1998) this Court held that prison inmates had no property right in computers necessitating due process prior to their removal.

In this case, Respondent has no property rights under the constitution or statutes that entitle him to due process protections. As conceded by the Respondent, it is clear that he has no rights under the statutes at issue in this case. As this Court recently recognized in *Lamar Outdoor Advertising v. W. Va. Dept. of Transportation, Div. of Highways*, Docket No. 101285, 2011 W. Va. LEXIS 63, (September 29, 2011)(*per curiam*) at footnote 5, if a statutes is not applicable under the facts of the case, there are no due process rights under the statute. That decision certainly applies under the facts in this case.

In addition, Respondent does not have a full property right in the surface as a result of the 1905 mineral conveyance by Lease. He does not own the entire "bundle" of property interests. In addition to the leasehold right to disturb and use the surface, Respondent's interests in the surface are diminished in this State as a matter of common law. *See Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 64 S.E. 853 (1909); *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 S.E.2d 721 (1980). *See also Justice, et al. v. Pennzoil Co.*, 598 F.2d 1339 (4th Cir. 1979) (applying West Virginia law, holding that surface owners "have no 'veto power' over the mineral operator's decision to drill."). Given these common law rights and the property interest transferred to the mineral estate in 1905, this Court should find that Respondent does not have a property interest that is affected by the issuance of a well work permit. To the extent that the surface owner's property rights are affected, the affect is a result of the lease, not the permitting statute. Therefore, there is neither a "property" interest nor "state action" that triggers due process protections and this Court should reject the constitutional arguments of the Respondent.

Respondent's property interests in the well work permits are further diminished when one examines what is in fact being permitted by OOG. Permits granted by OOG are a regulation of Petitioner EQT's operations on the surface, not a grant of right to use the surface and its rights to access its mineral estate. *See e.g. Hutchison v. City of Huntington*, 198 W. Va. 139, 154, 479 S.E.2d 649, 664 (1996)(discussing the flexible standard of due process in permitting situations and noting that permits, in that case building permits, are a restraint on the permittee's property rights). It is the rights of the mineral owners, not surface owners, that are affected and regulated by the permitting process. The well work permit at issue does not grant rights to the surface that did not exist prior to the issuance of the permit. *See* App. 36 (Form WW-2A-1 requiring disclosure of right to develop the oil and gas).

In addition, the right to use the surface was granted in a 1905 Lease when there were no oil and gas permitting regulations. App. 131-32. The permitting statute in place today cannot be retroactively applied by courts to curtail or hinder those property rights to use the surface granted by Lease to the mineral owner prior to the enactment of the statute to use the surface because it impairs an existing property and contractual right. W. Va. Code § 2-2-10(bb). *See also Mildred L.M. v. John O.F.*, 192 W. Va. 345, 351, 452 S.E.2d 436, 442 at n. 10 (2004) (internal citations omitted)(discussing the strict application of the rule of presumption against retroactivity of statutes and noting "[i]t has been stated repeatedly that new legislation should not generally be construed to interfere with existing contracts, rights of action, suits, or vested property rights.").

For these reasons, this Court should decline to consider Respondent's constitutional arguments. Due process was not a ground for or considered by the Circuit Court in its certified question. App 131-32. Further, due process was not considered in the *per curiam Lovejoy* opinion. Finally, the right to use the surface to access minerals is, in this case, granted by a 1905

contract, the Lease, not the permit. As such there is no "property" interest or "state action" at issue. Respondent's constitutional arguments are unfounded in this case and they should be rejected by this Court.

A. THE STATUTE IN PLACE SATISFIES DUE PROCESS RIGHTS

To the extent this Court is not in agreement that the Respondent has no property interests at stake under these statutes because of the rights granted to the mineral estate and that he is entitled to some due process protections, it must still determine how much protection should be afforded. The extent of process due under a statute is based on a consideration of three factors:

> ...first the private interest that will be affected by state action; second, the risk of an erroneous deprivation of the protected interest through the procedures used, and the probable value, if any of the additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Major v. DeFrench, et al., 169, W. Va. 241, 286 S.E.2d 688 (1982) (citing *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976) and Syl. Pt. 5, *Waite, supra*). *See also* Syl. Pt. 2, *North v. West Virginia Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977) (holding that the more valuable the right sought to be deprived, the more safeguards will be interposed; due process must generally be given before the deprivation occurs unless compelling public policy dictates otherwise; and a temporary deprivation of rights may not require as a large a measure of procedural due process as a permanent deprivation).

Respondent alleges that surface owners are not afforded appropriate due process in the statutes governing the issuance of well work permits because they are not afforded the highest level of due process protection: an official administrative hearing or a right to appeal. However, surface owners' property rights, as limited by contract, deed or common law, are appropriately protected by procedure set forth in the statutes.

Under the statute as enacted, surface owners are provided with notice and the opportunity to comment on a proposed permit prior to its issuance. *See* W. Va. Code §§ 22-6-9; 22-6-10. The statute specifically notes that such comments are for the benefit of the director, who must promptly review the comments and the application and may then cause inspections to be made prior to taking action on the permit application. W. Va. Code § 22-6-11.[1] Surface owners are thus provided a meaningful right to participate in the permitting process prior to the issuance of any permit. In *O'Brien v. Martin, et. al.*, Civil Action No. 07-Misc-304 (Circuit Court of Kanawha County West Virginia), Judge Bloom examined the amount of process due a surface owner in this exact situation and found, as this Court should, that the statute as enacted "affords adequate protective measures...and satisfies the requirements of due process." App. 166.

Considering the factors set forth in *Waite, supra*, and *North, supra* the process outlined above is sufficient to protect the non-exclusive property interests of surface owners by the issuance of a well work permit. This is especially true when there is a recognized public interest in the development of West Virginia's natural gas resources and when the institution of the requested added protections would have significant financial and practical impact on existing contracts between the surface owners and the mineral owners and on the OOG's permitting and regulatory functions. *See e.g.* W. Va. Code §§ 22C-8-1; 22C-9-1 (recognizing public policy in development of minerals).

First, in this case, the private interest affected by state action in this case is limited as is the value of Respondent's property right at issue. This is due to the fact that the ownership interest in mineral estates carries with it the right to use the surface to access that estate. *See* App. 131-32. *See also Porter, supra, Buffalo Mining Co., supra.* As set forth *supra*, surface

[1] By clerical error a direct quotation from this section this was mistakenly cited as W. Va. Code § 22-6-10 on page 13 of Petitioner EQT's initial brief.

owners cannot veto or prohibit development of the mineral estate that was granted by contract despite the disturbance to their property. *See e.g. Justice, supra.* That right was given up when the estate was severed. Respondent is not a fee simple owner of the entire bundle of real property rights associated with the property, or even the surface. In this case, the act that triggers Petitioner EQT's right to use of the surface of the property is not the state action of issuance of a permit, it is the Lease. The well work permit is not the source of Petitioner EQT's property interest and the ability to disturb the surface. Ownership disputes or disputes over extent of use are not within the authority of OOG. *See e.g. CBC Holdings, LLC v. Dynatec Corp., USA, et al.*, 224 W. Va. 25, 680 S.E.2d 40 (2009); W. Va. Code § 22-6-2. This first factor as described in both *Waite, supra* and *North, supra*, demonstrates a need for limited process, based on the limited right of the surface owner to prohibit disturbance related to the mineral estate.

Second, there is not significant risk of an erroneous deprivation of the protected interest through the procedures used. Again, Petitioner EQT has the right to use the surface of the property at issue by contract and common law. *See* discussion *supra*. Respondent does not have the right by contract or law, to bar Petitioner EQT from the property or to interfere with the Lease. *See* discussion *supra.* As required by *North, supra*, Respondent is permitted under the statute to notice and the right to provide written comments prior to the issuance of a well work permit. The OOG has independent specialized inspectors familiar with both the operations and environmental safeguards necessary to protect the public and private interests at issue and analyze the comments and responses provided. Thus there would be little, if any, probable value, in providing surface owner the requested additional protections

Third, a consideration of the third factor set forth in *Waite, supra,* demonstrates that the government's interest weighs in favor of following the Legislative scheme as enacted and not in

favor of expanding that statutory right to appeal to include an appeal by surface owners. The fiscal and administrative burdens in providing a hearing for each and every commenting surface owner would be substantial and result in an administrative catastrophe. The OOG would have to pull in inspectors from the field to testify at these hearings. The administrative burden of holding formal hearings would be both fiscally and practically taxing for the OOG. The permitting process would likely grind to a halt. With regard to the third factor of *North, supra*, the majority of the construction and area used for these wells are temporary and will be reclaimed. Further, there is a process in place to compensate surface owners for all types of surface damage. W. Va. Code §§ 22-7-1 *et seq.*

Respondent's arguments that surface owners are entitled to the highest level of due process are based on the erroneous assumption that the mineral interest have no property rights to use the surface without a well work permit. Respondent further designates the surface owner's interest as the highest in the property bundle, superior to the bargained for rights of the mineral owner. This is both presumptuous and incorrect as a general proposition under the law. *See e.g. Justice, supra; Porter, supra; Buffalo Mining Co., supra.*

Respondent relies heavily on the decision in *Snyder, et al. v. Callaghan*, 168 W. Va. 265, 284 S.E.2d 241 (1981) to support his position that surface owners must be provided with a right of appeal of the issuance of a well work permit despite the Lease between the parties and the mineral owner's right to disturb the surface. Respondent's reliance on *Snyder* is misplaced. First, in *Snyder*, the issue was who had an interest that was infringed upon by the issuance of a certification based on a specific regulation granting such a hearing. *Id.* at 269-70; 244-46. There is no such regulation or statutory provision for hearing in the instant case. Second, riparian rights of adjoining landowners are distinctly different from the surface rights at issue in this case,

which have been limited by contract. Riparian owners have the right to have water pass through his land in its natural course. *Id.* at 272, 246 (internal citations omitted). The certification at issue was for construction upstream and "yields to an upper riparian user the power to influence or to modify the property right of the petitioners in the natural flow and integrity of the watercourse." *Id.* at 273, 247. In this case, however, the right to change and use the surface was yielded by the severance of the minerals from the surface, not the permit at issue.

For all of these reasons and those apparent on the face of the record, this Court should find that the process in place as enacted by the Legislature is more than adequate to protect surface owners, whose rights are limited by deed, contract or common law. Under the factors set forth by this Court in *Waite, supra* and *North, supra*, a right to an administrative appeal, undisputedly not granted by the unambiguous language of the relevant statutes, is not required.

B. THE ADMINISTRATIVE APPEAL AFFORDED TO COAL INTERESTS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Equal protection is guaranteed by West Virginia Constitution Article III, Section 10, implicated "when a classification treats similarly situation persons in a disadvantageous manner." Syl. Pt. 11, in part, *Marcus, et al. v. Holley, et. al.*, 217 W. Va. 508, 618 S.E.2d 517 (2005)(citing Syl Pt. 2, *Israel v. West Virginia Secondary Schools Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989)). When economic rights are at issue, the legislative classification will be upheld if it is "reasonably related to the achievement of a legitimate state purpose." *Id.* at 524, 533.

Respondent has alleged that equal protection is an issue because coal interests are treated differently under the permitting statutes and regulations than surface owners. R.B. 21-23. Surface owners and coal interests, in fact, are not similarly situated with regard to the concerns

addressed by the administrative review boards created by these statutes. *See* W. Va. Code §§ 22-6-15; 22C-8-7. That right to appeal is clearly based on stated public policy of safely maximizing the recovery of both coal and natural gas. *See e.g.* W. Va. Code § 22C-8-1(a)(1) and (2). The administrative review at issue is based primarily on these safety issues, not technical issues that are dealt with at the OOG review level. *See* W. Va. Code §§ 22-6-6; 22-6-11. Thus, there is no equal protection issue presented by the classifications at issue.

Further, only a coal interest involving a workable coal seam underlying the proposed well is granted an administrative appeal of the issuance of a well work permit by statute. *See* W. Va. Code §§ 22-6-1(e); 22-6-15; 22C-8-7. The explicit list of factors for a review board to consider in such an appeal is focused primarily on promoting safe development of both gas and coal interests. *See* W.Va. Code §§ 22C-8-7(c)(listing twelve factors for consideration in evaluating shallow well permits); 22-6-15(listing four factors for consideration in evaluating deep well permits). Not one of those enumerated factors deals with the more technical issues raised by Respondent. *Id.* It is clear that the appeal process is rationally and reasonably set up to deal with safety issues in maximizing the recovery of coal and gas, pursuant to stated and substantial public policy. *See* W. Va. Code §§ 22C-8-1; 22C-8-7; 22-6-15.

As a matter of law, only coal interests whose workable coal seams underlie the proposed well locations are entitled to a hearing under the relevant statutes. *See* W. Va. Code §§ 22-6-1(e); 22-6-15; 22-6-16; 22-6-17. The Legislature clearly created this narrow administrative review process to support the policy of coal and gas production co-existing safely and in a manner benefiting West Virginia. *See e.g.* W. Va. Code §§ 22C-8-1; 22C-9-1. The categorization at issue is reasonable and rationally related to the stated government objective.

For these reasons and others apparent on the record, this Court should find that the existing categorization of coal interests and surface owners is reasonable and rationally related to the stated public policy and government objective. As such, this Court should find that there are no equal protection issues related to the lack of a right to administrative appeal of the issuance of a well work permit by a surface owner.

IV. RESPONDENT'S ALLEGATIONS ARE NOT ESTABLISHED FACTS AND ARE UNSUPPORTED BY THE RECORD BELOW

Respondent asserts a number of allegations presented as facts in the Response Brief. Petitioner EQT believes that such unsubstantiated factual allegations are irrelevant given that this is a certified question proceeding with no factual findings made by the Circuit Court. The certified question presents a purely legal issue and Respondent's attempts to insert factually disputed and unsubstantiated allegations are merely a diversionary tactic. To clarify the record, however, Petitioner EQT responds to Respondent's allegations.

On page 4 of his brief, Respondent asserts that there is a "20 acre or larger clearing" on the property. This allegation is repeated throughout the Brief but there is no evidence in the record, other than argument of counsel, that the site at issue is 20 acres. App. 286 (Circuit Court agreeing that there has been no determination as to the size of the disturbance). Those facts have not been developed. *Id.* Respondent also essentially raises severance issues with regard to the Lease. R.B. at 4. Such issues require detailed legal analysis of documents and fact finding related to extent of property rights are not within the jurisdiction of the OOG. *See e.g. CBC Holdings, supra. See also* W. Va. Code §§ 22-6-1 *et seq.* (containing no provision to resolve conflicting claims of ownership or extent of use issues).

On page 5 of his Brief, Respondent again makes allegations not established as facts in the proceedings below. He states, as if established fact, that there was substantial damage and

disturbance arising from construction on other previously issued permits. R. B. at 5, 6. In fact, Respondent made these allegations in his initial comments to the OOG. App. 52-67. The inspector and the Director had knowledge of and considered these allegations prior to the inspection and prior to the issuance of the permit. *Id.* *See also* W. Va. Code § 22-6-11. Petitioner EQT responded and pointed out that there are no notices of violations related to any activity of Petitioner EQT on any well site located on Respondent's surface estate. App. 72-77. Further, surface damages for all disturbances are compensated under a separate statute, W. Va. Code §§ 22-7-1 *et seq.*, or by common law remedies, not through permitting procedures.

Respondent also makes numerous allegations related to the soil and erosion control plan for this and other EQT permits. The soil and erosion control plan for this application was approved by the OOG Inspector. App. 42. It is within the OOG's authority to review and approve the plan. W. Va. Code § 22-6-11. To address a few of Respondent's allegations, the OOG approved construction of an access road at a 25% grade, if necessary. App. 42. As conceded by Respondent in his Brief, this waiver is within the regulatory authority, and expertise, of OOG. *See* R.B. 11. *See also* App. 5. Also on Page 5 and 6 of his Brief, Respondent raises the issue of a lack of a low water bridge and various other technical issues such as sufficient drainage ditches and culverts. Petitioner EQT applied for and received a stream crossing permit, thus negating any need for a low water bridge. App. 23 (citing stream crossing permit LS-09-VI/09-1283); App. 315(discussing same). The number of culverts and ditches were approved in the soil and erosion control plan by the OOG inspector. App. 42 (approved soil and erosion control plan). Petitioner EQT responded to these allegations. App. 21-24.

At page 6 of his brief, Respondent raises issues related to the timber on his property. There is no statutory or regulatory requirement that Petitioner EQT provide the timber cut down for windrowing or clearing for construction to the surface owner. All that is required by statute is that Petitioner EQT compensate the Respondent for any lost timber regardless of whether Respondent sells the timber after it is cut. W. Va. Code § 22-7-3. Further, as a factual matter, EQT avers that the timber cut was left in an accessible location. Finally, the timber referenced by Respondent as left at shoulder height were left for the purposes of soil and erosion control as approved in the reclamation plan on prior permits. App. 72-77.

At page 13, Respondent discusses land application of wastewater. Since this permit application was submitted, the practice of land application for Marcellus returns has been discontinued by policy of the OOG. Petitioner EQT has assured Respondent and the Circuit Court below that, despite the fact that this permit predates the change in policy, it has no intention or plan to utilize land application on Respondent's property. App. 279.

Respondent makes general statements based on his interpretation of the Soil and Erosion and Control Manual at pages 11-14 of his Brief. What this highlights, however, is the need for a true environmental expert who specializes in this area to evaluate these issues. That is the role of OOG. *See* W. Va. Code §§ 22-1-1; 22-1-7(4) (protecting the environment is the area of specialized expertise and responsibility of the West Virginia Department of Environmental Protection and the Office of Oil and Gas). To this end, the Legislature further provided the OOG with enforcement authority. Environmental concerns with regard to the actual drilling of the well or compliance of operations on the property with regulations are properly addressed with the OOG through this inspection process. *See* W.Va. Code §22-6-3. Here, the OOG has full authority to address issues of noncompliance and violations of drilling permits, soil and erosion

plans, and environmental regulations, when applicable, throughout the drilling and operational process. *Id. See also* W. Va. Code § 22-6-28.

Significantly, Respondent did have the opportunity to be heard, and was heard, on all of these allegations by the OOG through the submissions of his comments and photographs. *See generally* App. 52-67. They were all included and assessed prior to the issuance of the well work permit. *See* App. 52 (handwritten note indicating that the comments were emailed to the inspector, Scranton); App. 68; W. Va. Code §§ 22-6-10; 22-6-11. In this case, the OOG did not find evidence or merit to Respondent's contentions or allegations, or the permit would not have been issued. Respondent's meritless and disputed factual allegations are nothing more than an attempt to distract this Court from the legal issues raised by this certified question proceeding.

CONCLUSION

Surface owners are not entitled to a hearing or administrative appeal of the issuance of a well work permit. The comprehensive and unambiguous statutory language granting a prescribed group of interests an appeal of the issuance of a well work permit provides only for such an appeal by the owner, operator, or lessee of a workable coal seam which underlies the well site at issue. The Court should not enlarge that clearly defined group to include surface owners. Accordingly, to the extent that the *per curiam Lovejoy* decision suggests that there is a statutory right of appeal of the issuance of a well work permit by a surface owner, it should be overruled. The Court does not have to reach that broad issue, however, because the *per curiam Lovejoy* is inapplicable to the permit application and appeal at issue in the instant case. The *per curiam Lovejoy* decision only discusses and applies to deep well permits and cites as the center of the relief sought the "consent and easement" provision that applies only to statutorily pooled

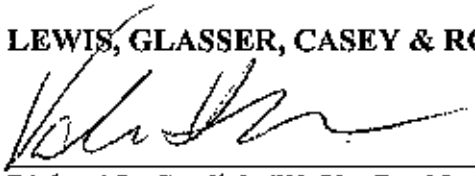
deep wells. That necessary background is not present in this case and so the *per curiam Lovejoy* should not apply and should not be interpreted to create a right that does not exist.

Surface owners do not have unfettered and exclusive use of the surface. Mineral owners have the right to make reasonable use of the surface to access their minerals as granted by common law and, in this case, by lease. The right to use the surface is not granted by a well work permit and this Court should not find that the issuance of such a permit in this context constitutes a deprivation of a property interest. In the alternative, this Court should find that the statutes as enacted provide meaningful and more than adequate due process to protect surface owner rights through the existing notice and comment procedure. Further, any distinction between coal interests and surface owners is reasonable and rationally related to the stated Legislative purpose of safely maximizing recovery of coal and gas.

For the foregoing reasons and for all other reasons on the face of the record, Petitioner EQT Production Company moves this Honorable Court to reject the Circuit Court's answer to the Certified Question and affirm the Legislature's plain and unambiguous statutory mandate that limits administrative appeals of the issuance of well work permits to coal interests. This Court should hold that surface owners are not entitled to an administrative appeal of the issuance of a well work permit and should further rule that the statutory scheme as enacted is constitutional.

EQT PRODUCTION COMPANY,
By Counsel

LEWIS, GLASSER, CASEY & ROLLINS, PLLC



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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 *Petitioner EQT Production Company's Reply Brief* were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all parties to this appeal as follows:

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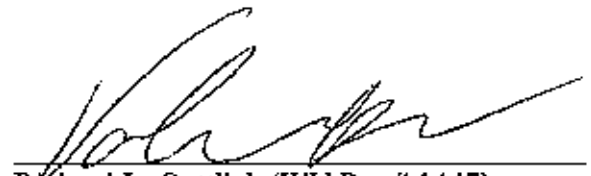

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