

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTRODUCTION..... 1

STATEMENT OF THE CASE..... 3

STATEMENT REGARDING ORAL ARGUMENT 3

REPLY ARGUMENT 3

I. THE COURT SHOULD NOT CONSIDER ARGUMENTS NOT RAISED BELOW OR
CONTAINED IN THE CERTIFIED QUESTION..... 3

II. THE STATUTORY SCHEME ENACTED BY THE LEGISLATURE IS PRESUMED
CONSTITUTIONAL AND IS ENTITLED TO DEFERENCE..... 4

III. THERE IS NO DUE PROCESS REQUIREMENT FOR A PREDECISIONAL HEARING
OR APPEAL FOR SURFACE OWNERS..... 7

 A. *Snyder is not applicable to this case or these statutes.*..... 8

 B. *The Oklahoma Supreme Court has held a similar statute constitutional.*..... 10

 C. *The process offered is sufficient under West Virginia law.*..... 13

IV. EQUAL PROTECTION DOES NOT REQUIRE A PREDECISIONAL HEARING OR
APPEAL..... 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

<i>Adkins v. United Fuel Gas Co.</i> , 134 W. Va. 719, 724-25 61 S.E.2d 633 (1950)	passim
<i>Buffalo Mining Co. v. Martin</i> , 165 W. Va. 10, 267 S.E.2d 721 (1980).....	7, 10
<i>CBC Holdings, LLC v. Dynatec Corp., USA, et al.</i> , 224 W. Va. 25, 680 S.E.2d 40 (2009)	19
<i>Carvey v. West Virginia State Bd. of Educ.</i> , 206 W. Va. 720, 727, 527 S.E.2d 831, 838 (1999)...	4
<i>Clarke v. West Virginia Bd. of Regents</i> , 166 W.Va. at 710, 279 S.E.2d 175.....	8, 13
<i>Coal & Coke Ry. Co. v. Conley</i> , 67 W. Va. 129, 67 S.E. 613 (1910).....	5
<i>DuLaney v. Oklahoma State Department of Health</i> , 868 P.2d 676 (Okla. 1993).....	10, 11
<i>Foster v. Cooper</i> , 155 W. Va. 619, 186 S.E.2d 837 (1972).....	4
<i>Gaston v. Mace</i> , 33 W. Va. 14, 23, 10 S.E. 60, 63 (1889)	9
<i>Hutchison v. City of Huntington</i> , 198 W. Va. 139, 154, 479 S.E.2d 649, 664 (1996).....	10
<i>Justice, et al. v. Pennzoil Co.</i> , 598 F.2d 1339 (4 th Cir. 1979).....	7
<i>King v. Lens Creek Ltd. Pshp.</i> , 199 W. Va. 136, 143, 483 S.E.2d 265, 272 (1996).....	4
<i>Kremer v. Chemical Constr. Corp.</i> , 456 U.S. 461, 483, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982)	13
<i>Marfork Coal Co. v. Callaghan</i> , 215 W. Va. 735, 742, 601 S.E.2d 55, 62 (2004)	13
<i>McGrady et al. v. Callaghan, et al.</i> , 161 W. Va. 180, 186, 244 S.E.2d 793, 796 (1978).....	15
<i>Porter v. Mack Mfg. Co.</i> , 65 W. Va. 636, 64 S.E. 853 (1909).....	passim
<i>Rohrbaugh v. State</i> , 216 W. Va. 298, 306-307, 607 S.E.2d 404, 412-414 (W. Va. 2004)	6, 14
<i>Robinson v. Charleston Area Med. Ctr., Inc.</i> , 186 W. Va. 720, 725, 414 S.E.2d 877, 882 (1991) 4	
<i>Sharon Steel Corp. v. City of Fairmont</i> , 175 W. Va. 479, 334 S.E.2d 616 (1985).....	14
<i>Slider v. State Farm Mut. Auto. Ins. Co.</i> , 210 W. Va. 476, 557 S.E.2d 883 (2001).....	3, 4

<i>Snyder v. Callaghan</i> , 168 W. Va. 265, 284 S.E.2d 241 (W. Va. 1981).....	8, 9, 10
<i>Squires v. Lafferty</i> , 95 W. Va. 304, 121 S.E. 90 (1924)	7
<i>State ex rel. Appalachian Power Co. v. Gainer</i> , 149 W. Va. 740, 143 S.E.2d 351 (1965)	6
<i>State ex Rel. Lovejoy v. Callaghan</i> , 576 S.E.2d 246, 213 W. Va. 1 (2002).....	1, 19
<i>Turley v. Flag Redfern Oil Co.</i> , 1989 OK 144; 782 P.2d 130, 135-37 (1989)	11, 12, 13, 18, 19
<i>Walker v. Doe</i> , 210 W. Va. 490; 558 S.E.2d 290 (2001).....	19
<i>Willis v. O'Brien</i> , 151 W. Va. 628, 153 S.E.2d 178 (1967).....	4, 5, 6

STATUTES

W. Va. Code §§ 22-6-1 <i>et seq.</i>	7, 19
W. Va. Code § 22-6-6	18
W. Va. Code § 22-6-9	14
W. Va. Code § 22-6-10	14
W. Va. Code § 22-6-11	14, 16, 18
W. Va. Code § 22-6-15	1, 3, 7, 18, 19
W. Va. Code § 22-6-16	1, 3, 7, 19
W. Va. Code § 22-6-17	1, 3, 7, 18, 19
W. Va. Code § 22-6-40	1, 3, 7, 19
W. Va. Code § 22-6-41	1, 3, 7, 19
W. Va. Code §§ 22-6A-1 <i>et seq.</i>	2
W. Va. Code § 22-6A-11(c) and (d)	5
W. Va. Code § 22-6A-11(c)(2).....	6
W. Va. Code §§ 22-7-1 <i>et seq.</i>	7, 11, 14
W. Va. Code § 22-7-3	8

W. Va. Code § 22-7-4	8
W. Va. Code § 22C-8-1	5, 14, 15, 18
W. Va. Code § 22C-8-1(a)(1) and (2).....	17
W. Va. Code §§ 22C-8-1 <i>et seq</i>	7, 19
W. Va. Code § 22C-8-7	18, 19
W. Va. Code § 22C-9-1	5, 14, 15, 18
W. Va. Code §§ 22C-9-1 <i>et seq.</i>	7, 19

OTHER AUTHORITIES

Enrolled H.B. 401, http://www.legis.state.wv.us/bill_status/bills_text.cfm?billdoc=hb401%20enr.htm&yr=2011&sesstype=4X&i=401	6
http://www.legis.state.wv.us/legisdocs/2011/committee/interim/marcellus/marcellus_20111118150002.pdf	6
http://www.wvsoro.org/resources/what_to_do.html	17

INTRODUCTION

Petitioner EQT Production Company (“EQT”) submits this Reply Brief in response to the Initial Brief of Intervenor West Virginia Surface Owners’ Rights Organization (“WVSORO” and “WVSORO Brief”). WVSORO, like Respondent,¹ concedes that there is no explicit statutory right for a surface owner to appeal the issuance of a well work permit. WVSORO Br. at 7; R.B. at 8. EQT’s Initial Petitioner’s Brief filed on October 21, 2011 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. The *per curiam* decision in *State ex Rel. Lovejoy v. Callaghan*, 213 W.Va. 1, 576 S.E.2d 246 (2002) cannot expand existing statutory rights or create new rights of appeal to include surface owners.

WVSORO has avoided almost entirely a discussion of the actual certified question in this case, instead making constitutional due process and equal protection arguments that were not decided by the Circuit Court or included in the certified question. In addition, WVSORO has asserted an argument not raised by Respondent below in briefing or in argument to the Circuit Court: that a “predecisional hearing” is required to provide due process protections to surface owners. This argument fails because of the nature of the relationship between the surface and mineral estates. Further, WVSORO’s position regarding surface owner rights has been considered and rejected by the Legislature, most recently in the consideration of the recently

¹ EQT uses the following abbreviations from its Initial Brief filed October 21, 2011 and Reply Brief filed December 6, 2011: Respondent Matthew Hamblet (“Respondent”); James Martin, in his official capacity as Director, Office of Oil and Gas, West Virginia Department of Environmental Protection; Office of Oil and Gas, West Virginia Department of Environmental Protection (collectively “OOG”); Joint Appendix (“App.”); Circuit Court of Doddridge County (“Circuit Court”); EQT’s Initial Brief (“Br.”); and Respondent’s Brief (“R.B”).

enacted Natural Gas Horizontal Well Control Act, W.Va. Code §§ 22-6A-1 *et seq.* WVSORO's arguments to this Court represent a blatant attempt to advance its failed legislative agenda through the judiciary. This Court should refuse to consider such arguments in this certified question proceeding because they were not decided below and because the issue of a "predecisional hearing" was not raised by Respondent below and is not a part of this case.

If this Court does consider WVSORO's constitutional arguments, however, it should find that surface owners are not entitled to a predecisional hearing or an administrative appeal on either due process or equal protection grounds. The Legislature has created a comprehensive and unambiguous statutory scheme that balances the panoply of interests involved in the development of a mineral estate. The Legislature's decision as to how to balance all of these interests is entitled to substantial deference by this Court.

WVSORO ignores the property rights of the mineral estate and the relationship between the mineral and surface estates in its analysis. The property right of the mineral owner in the surface is to use the surface to explore for and develop minerals; mineral owners and mineral lessees² are not guests on the surface owner's estate and they are not "infringing" on the surface, they have a valid, bargained for and recognized legal right to be present on and make use of the surface. In fact, West Virginia law is clear that for the purposes of mineral development – be it for coal, oil or gas - the surface estate is servient to the dominant mineral estate. This property right of the mineral owner to disturb the surface, which the Respondent and WVSORO term an "infringement," is not granted by permit or state action, but by common law, lease or deed.

As more fully set forth below and in prior briefing, surface owners have no statutory right

² Throughout its briefing in this matter, EQT refers to the mineral estate interest, whether it be mineral owners or lessees, as "mineral owner" or "mineral interest" interchangeably. The rights granted to the mineral estate interest with regard to the surface estate and at issue in this certified question are identical in this administrative context with regard to the issuance of a well work permit regardless of whether the mineral estate is owned or leased by the permit applicant.

to an administrative appeal or predecisional hearing.³ This appears to be uncontested. WVSORO Br. at 7. Accordingly, there should be no dispute that the answer to the question, as certified, is “no” and the new arguments and legal theories raised by WVSORO should not be considered. However, if those constitutional issues are considered, this Court should find that due process and equal protection principles under the West Virginia Constitution are not violated by the reasonable, unambiguous and comprehensive statutes enacted by the West Virginia Legislature governing the issuance of well work permits and that surface owners do not have a right to predecisional hearings or administrative appeals from the issuance of a well work permit.

STATEMENT OF THE CASE

EQT relies on the statement of the case presented in its Initial Brief at pages 3 through 7. EQT further specifically incorporates its rebuttal of Respondent’s unproven and untrue allegations in its Reply Brief filed December 6, 2011 (“EQT R.B.”) at pages 16-19.

STATEMENT REGARDING ORAL ARGUMENT

EQT incorporates herein its statement regarding oral argument set forth in its initial Brief, filed October 21, 2011, at page 9 and reasserts its request for argument under Rule 20 of the West Virginia Revised Rules of Appellate Procedure for the reasons set forth therein.

REPLY ARGUMENT

I. THE COURT SHOULD NOT CONSIDER ARGUMENTS NOT RAISED BELOW OR CONTAINED IN THE CERTIFIED QUESTION.

The certified question should not be reformulated as requested by WVSORO to encompass constitutional arguments not decided or addressed by the Circuit Court, not set forth in the certified question, and not raised by the parties below. *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

³ W. Va. Code §§ 22-6-15; 22-6-16; 22-6-17; 22-6-40; and 22-6-41.

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). WVSORO cites not one West Virginia case in support of its argument that the Court should not only reformulate but substantially broaden the focus of the certified question to decide issues not reached or raised below. In fact, West Virginia case law supports the opposite conclusion. See *Slider, supra*, *King, supra*. Accordingly, this Court should refuse to reformulate the certified question as requested by the Intervenor WVSORO.

II. THE STATUTORY SCHEME ENACTED BY THE LEGISLATURE IS PRESUMED CONSTITUTIONAL AND IS ENTITLED TO DEFERENCE.

WVSORO has failed in its attempts to advance its agenda through the Legislature and is now asking this Court to do what the Legislature has refused to do: provide surface owners with predecisional hearings and administrative appeals of the issuance of well work permits. This Court should refuse to preempt the reasonable and rational statutory scheme enacted by the Legislature. Acts of the Legislature are presumed constitutional and entitled to substantial deference. See e.g. Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967).

In addressing claims that legislation is unconstitutional, this Court has held that it starts "with the fundamental precept that the powers of the legislature are almost plenary." *Carvey v. West Virginia State Bd. of Educ.*, 206 W. Va. 720, 727, 527 S.E.2d 831, 838 (1999). It is well settled that the legislature has the authority to enact any measure not inhibited by the Constitution of West Virginia. *Id.* (citing *Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 725, 414 S.E.2d 877, 882 (1991)(quoting Syl. pt. 1, *Foster v. Cooper*, 155 W. Va. 619, 186 S.E.2d 837 (1972)(footnote omitted)). Accordingly, "when the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the

legislative enactment." Syl. Pt. 3, *Willis, supra*. This Court has further recognized and reaffirmed many times its holding in Syl. Pt. 29, *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S.E. 613 (1910):

In this regard, courts will never impute to the legislature intent to contravene the constitution of either the state or the United States, by construing a statute so as to make it unconstitutional, if such construction can be avoided, consistently with law, in giving effect to the statute, and this can always be done, if the purpose of the act is not beyond legislative power in whole or in part, and there is no language in it expressive of specific intent to violate the organic law.

It is within this deferential framework and comprehensive statutory scheme governing the permitting process for shallow gas wells that this Court must view WVSORO's arguments. As set forth extensively in prior briefing, the Legislature has created an ambiguous and comprehensive statutory scheme that does not provide for a predecisional hearing or an administrative appeal by a surface owner of the issuance of a well work permit. *See* Br. 10-18. This is undisputed. *See* R.B. 8; WVSORO Br. 7. This was clearly a choice made by the Legislature in balancing competing interests as set forth in W. Va. Code §§ 22C-8-1; 22C-9-1.

A review of the process the Legislature undertook in enacting new legislation related to horizontal Marcellus Shale wells is instructive in demonstrating the balancing of interests by the Legislature. Specifically, the Legislature recently considered and rejected specific language addressing the very issue that WVSORO raises in its brief. Significantly, while this new legislation is not before this Court, the provisions pertaining to surface owner rights are the same in all material respects. It is very significant that the Marcellus Draft Bill dated November 18, 2011, as reported out of the Joint Select Committee on Marcellus Shale, contained language which would have provided surface owners with the right to intervene in a discretionary predecisional public hearing on well work applications. *See* Proposed W. Va. Code § 22-6A-11(c) and (d)(providing the Secretary with discretion to hold a public hearing and providing for

discretionary intervenor status), http://www.legis.state.wv.us/legisdocs/2011/committee/interim/marcellus/marcellus_20111118150002.pdf.

The enrolled and enacted bill, however, specifically rejected the proposed language, and WVSORO's proposed predecisional hearing and administrative appeal for surface owners:

Any objections of the affected coal operators and coal seam owners and lessees shall be addressed through the processes and procedures that exist under sections fifteen, seventeen and forty, article six of this chapter, as applicable and as incorporated into this article by section five of this article. The written comments filed by the parties entitled to notice under subdivisions (1), (2), (4), (5) and (6), subsection (b), section ten of this article shall be considered by the secretary in the permit issuance process, **but the parties are not entitled to participate in the processes and proceedings that exist under sections fifteen, seventeen or forty, article six of this chapter, as applicable ...**

W. Va. Code §22-6A-11(c)(2)(emphasis added); Enrolled H.B. 401, http://www.legis.state.wv.us/bill_status/bills_text.cfm?billdoc=hb401%20enr.htm&yr=2011&scstype=4X&i=401.

Clearly, in considering the Natural Gas Horizontal Well Control Act, the Legislature carefully evaluated whether surface owners were entitled to predecisional hearings or administrative appeals and it determined that surface owners are not entitled to either administrative process. The Legislature made a similar determination that surface owners were not entitled to a predecisional hearing or administrative appeal in the statutes at issue in this case. Those statutes must be presumed constitutional and the legislative process afforded deference. *See Rohrbaugh v. State*, 216 W. Va. 298, 306-307, 607 S.E.2d 404, 412-414 (W. Va. 2004)(citing numerous cases discussing the presumption in favor of constitutionality of legislative acts); Syl. Pt. 3, *Willis, supra*("When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment."); Syl. pt. 1, in part, *State ex rel. Appalachian Power Co. v. Gainer*, 149

W. Va. 740, 143 S.E.2d 351 (1965)("[I]n considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers.... Every reasonable construction must be resorted to by the courts in order to sustain constitutionality...).

While not before this Court in this case, the newly enacted Natural Gas Horizontal Well Control Act demonstrates that the Legislature is aware of and is carefully balancing the interests and rights of all parties. It is entitled to deference with regard to its decision regarding the process due when utilizing that required balance. This Court should defer to the balance struck by the Legislature in W. Va. Code §§22-6-1 *et seq.*, 22-7-1 *et seq.*, 22C-8-1 *et seq.*, and 22C-9-1 *et seq.* and find that the same do not violate the West Virginia Constitution.

III. THERE IS NO DUE PROCESS REQUIREMENT FOR A PREDECISIONAL HEARING OR APPEAL FOR SURFACE OWNERS.

Despite the presumption of constitutionality and deference to the Legislature required by West Virginia law, WVSORO asserts that this Court should hold W. Va. Code §§ 22-6-15, 22-6-16, 22-6-17, 22-6-40, and 22-6-41 unconstitutional. This argument fails because surface owners lack the requisite property right to require due process protections under the permitting statutes.

As a matter of law, the surface estate is servient to the dominant mineral estate for the purpose of oil and gas development.⁴ WVSORO's position that surface owners are due the highest of due process rights under the state and federal constitution fails to recognize or discuss this fundamental issue of the surface owner's diminished and limited rights. Surface owners do not have the necessary affected property right to invoke the highest form of due process protections. In addition, as a matter of law, the balance of competing interests required under a

⁴ See *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 S.E.2d 721 (1980); *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 724-25 61 S.E.2d 633 (1950); Syl. Pt. 1, *Squires v. Lafferty*, 95 W. Va. 304, 121 S.E. 90 (1924); *Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 64 S.E. 853 (1909); *Justice, et al. v. Pennzoil Co.*, 598 F.2d 1339 (4th Cir. 1979).

due process analysis does not support WVSORO's extreme position.

In *Clarke v. West Virginia Bd. of Regents*, 166 W.Va. 702, 710, 279 S.E.2d 169, 175 (1981), this 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 order to require a due process analysis, therefore, a recognized property or liberty right must be at stake. *See* EQT R.B. 6-9.

In this case, no property right sufficient to trigger due process requirements is at issue because surface owners do not own the entire "bundle" of property interests. *See Porter, supra; Adkins, supra*. As such, there is no property interest for surface owners that is destroyed, directly affected, infringed on or otherwise changed by the issuance of a well work permit. Accordingly, there is no due process protection due to surface owners in the context of the permitting statutes. This does not mean that surface owners are without remedy; surface owner damage compensation is provided for by statute and common law remedies remain available. *See* W. Va. Code §§ 22-7-3 (providing for surface owner compensation); 22-7-4 (preserving common law actions). The forum for these actions, however, is not this administrative permitting process.

A. Snyder is not applicable to this case or these statutes.

WVSORO, like Respondent, relies heavily on this Court's decision in *Snyder v. Callaghan*, 168 W. Va. 265, 284 S.E.2d 241 (W. Va. 1981), a case involving the riparian rights of adjoining landowners, to support its position. However, *Snyder* is inapplicable on its face based on the nature of the property rights at issue. Riparian owners have the right to have water pass through his land in its natural course. *Id.* at 272, 246 (internal citations omitted). Riparian owners have a right to enjoy the water flow without disturbance or interference. *Id.* at 246, 272

(quoting *Gaston v. Mace*, 33 W. Va. 14, 23, 10 S.E. 60, 63 (1889)). Surface owners have no such right to uninterrupted and undisturbed use of the surface. Common law supports the exact opposite conclusion in this case – that the surface owners must honor the property right of the mineral owner to enter on the surface and make reasonable use of the surface to access its mineral rights. See *Porter, supra*; *Adkins, supra*.

In its analysis, WVSORO has ignored the determinative fact that without the permitting statutes EQT would still have the unquestionable right to enter and disturb the surface of the subject property. *Snyder* is thus distinguishable because there was no common law right, lease or deed granting the upper riparian users the right to affect their riparian rights, that was solely granted by the certification at issue.

This Court stated in *Snyder* that 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. This makes clear that the certification granted a right to the upper riparian user that did not exist prior to the certification. The right to change and use the surface in the gas permitting context is yielded by the severance of the mineral estate from the surface, not the permit. A well work permit, unlike the certification in *Snyder*, does not grant rights to the surface that did not exist prior to the issuance of the permit. See e.g. App. 36 (Form WW-2A-1 disclosing right to develop gas estate).

While EQT does not concede that only an “affect or “infringement” on property rights is required to invoke due process protections, it simply is irrelevant in this case, where there is no property right at issue. Thus, even using WVSORO’s terminology, the “infringement” and “direct affect” of a well work permit is not a yielding of the right to mineral owners to modify the property of the surface owner. That was done by lease in this case, and in other cases by

lease, deed or common law.

Further, the common law clearly supports the mineral owners' right to disturb the property- the alleged infringement or effect on surface owners relied on by WVSORO. This is the opposite legal position than was faced in *Snyder*, where the common law regarding riparian rights supported the Snyder's position. In this case, unlike in *Snyder*, there is a lease and common law in place authorizing the mineral owner to make use of the surface estate. See discussion *infra*. The property right that is regulated by the permit is the mineral owner's right to enter the surface, not the surface owner's property right. 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).

The surface owner, or his predecessor, sold or leased the right to exclusive use of the surface and granted both an explicit and implied easement to use the surface to the mineral owner at the time of severance. App.131-32. This makes the surface estate servient to the dominant mineral estate for the purposes of mineral development and provides for the very infringement and affect WVSORO alleges results from the permitting statutes. See *Porter, supra*; *Buffalo Mining Co., supra*; *Adkins, supra*. For purposes of these permitting statutes, the surface owner has no affected property interest and due process protections are not applicable.

B. The Oklahoma Supreme Court has held a similar statute constitutional.

In addition to the *Snyder* case, WVSORO cites to *DuLaney v. Oklahoma State Department of Health*, 868 P.2d 676 (Okla. 1993) as allegedly supporting its position. *DuLaney* like *Snyder, supra*, is inapplicable given the fact that it deals with adjacent landowners, not landowners subject to a contract, severed estate and limited property rights. WVSORO's

reliance on *DuLaney*, like its reliance on *Snyder*, is misplaced. However, there is an Oklahoma Supreme Court decision that decided almost identical issues as those raised in the instant case, *Turley v. Flag Redfern Oil Co.*, 1989 OK 144; 782 P.2d 130, 135-37 (1989). *Turley* held that surface owners have no constitutional right to notice and opportunity to be heard on drilling and spacing applications for gas wells. See *Turley*, 782 P.2d at 133. *Turley* further held that a legislative scheme treating mineral interests differently from surface owners did not violate equal protection principles. *Id.* at 137. The Oklahoma court in *DuLaney* specifically held that the *Turley* decision remains good law. *DuLaney, supra* at 684, fn 25. Oklahoma recognizes, as does West Virginia, that “[i]n the realm of oil and gas law, it has long been recognized that the surface estate is servient to the dominant mineral estate for certain purposes.” *Id.*

The *Turley* case involved a review of a surface owner's claim that a statute was unconstitutional because he was not entitled to notice and a right to be heard by the Corporation Commission with regard to spacing issues in a drilling unit. The Oklahoma statute at issue provided that only mineral owners or owners of the right to drill a well for oil or gas within the area of the application, or the owners of correlative rights, were proper parties to protest applications to reform spacing units. *Id.* at 136.

While recognizing that the spacing order at issue could result “in an eightfold increase in the number of oil wells, roads and support facilities” located on the surface, the Court found that the surface owner's argument that this made him an aggrieved party “unpersuasive because of the nature of the relationship” between the surface and mineral estates. *Id.* at 135. Oklahoma, like West Virginia, provides for surface damages by statute. *Id.* at 133. See also W. Va. Code §§ 22-7-1 *et seq.* The *Turley* court recognized this as significant and sufficient remedy for surface owners. *Turley, supra* at 133; 137.

Turley specifically held that surface owners hold no interest which entitles them to protest applications to establish, reestablish, or reform drilling and spacing units and that it was not unconstitutional to fail to provide surface owners with notice and an opportunity to be heard at protest hearings. *Turley, supra* at 133. *Turley* further addressed equal protection arguments and held that the exclusion of surface owners from those parties entitled to protest drilling and spacing applications did not violate equal protection. *Id.* Finally, *Turley* held that the surface owner's remedy arose under the Oklahoma Surface Damages Act and found that sufficient. *Id.*

In reaching its conclusions, the *Turley* court looked carefully at the relationship between a surface owner and a mineral owner. The Court held:

Although the two estates may be of equal dignity for some purposes, the surface estate is servient to the dominant mineral estate for the purposes of oil and gas development. Ownership of an oil and gas interest carries with it the right to enjoy that interest by entering and making reasonable use of the surface to explore and extract mineral deposits. The right to enter the surface for exploration purposes is in the nature of a property right.

Id. (internal citations omitted). West Virginia takes the identical legal position with regard to the relationship between the surface and mineral estates when the exploration and development of the mineral estate. *See Porter, supra; Adkins, supra.*

The *Turley* Court further specifically addressed issues of due process and found:

Due process requires adequate notice and a realistic opportunity to appear at a meaningful time and in a meaningful manner. However, one who has no interest may not insist on receiving notice. Therefore, *Turley's* assertion that failure to afford surface owners notice of drilling and spacing applications brought pursuant to § 87.2 violates due process is dependent upon surface owners having an interest subject to protection. When *Turley* took title to the surface in Section 9, he did so with the knowledge that it was burdened with an outstanding mineral estate which was subject to the State's power to regulate development of oil and gas resources through the valid exercise of its police power. *Section 87.2*, providing actual notice only to those parties owning an interest in the mineral estate, does not invade any property right in the surface. The rights of surface owners are protected by the Surface Damages Act which guarantees that oil and gas

development is not undertaken at the expense of agricultural or other industries interested in surface development.

Id. at 136-37 (internal citations omitted).

The major underpinning of the *Turley* decision is the lack of a property right affected by the issuance of a drilling permit and spacing of wells. *Turley* held that the surface owner purchased the property “subject to the outstanding rights held by those parties with an interest in the mineral estate.” *Id.* at 136. West Virginia law recognizes this same principle. *See Adkins, supra* at 724-25, 636 (“[W]e can see no violation of the rights of plaintiff [surface owner], ... when [plaintiff] bought the land, he bought it subject to the rights of the owner of the minerals, who by virtue of owning such minerals also possessed the rights necessary to produce and transport the same as an incident to such ownership. The damages to plaintiff are *damnum absque injuria*.”)(internal citations omitted)). Therefore, *Turley* found, as this Court should, that the permit application process at issue did not divest the surface owner of any property right and no due process considerations were at issue. *Id.*

C. The process offered is sufficient under West Virginia law.

If this Court no longer concludes that the surface estate is servient to the mineral estate by virtue of common law for the purpose of mineral development and that the issuance of a well work permit constitutes a state action requiring due process rights for surface owners, it must still determine what degree of due process is required to protect the surface owners’ right to interfere with the mineral estate’s property interests in accessing its minerals through permit applications and entry to the surface. In the civil context, due process is flexible and requires a balancing of competing interests. *See Marfork Coal Co. v. Callaghan*, 215 W. Va. 735, 742, 601 S.E.2d 55, 62 (2004); *Clarke, supra* at 710, 175; *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 483, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982). Given the limited property rights in the surface, the

servient nature of the surface estate, and the predominately temporary nature of the damages at issue in this context, if any process is due to surface owners, the existing process is sufficient. EQT relies on its discussion of this balancing of interests set forth in its Reply Brief filed December 6, 2011. EQT R. B. 10-14.

WVSORO suggests additional process, both a pre-decisional evidentiary hearing and an appeal, are required to satisfy and protect the interests of surface owners. This was not raised below and is an untenable position given the well settled law in West Virginia and the specific rights granted to EQT by lease in this matter. As set forth *supra*, surface owners do not hold the requisite property interest to invoke due process protections in a permitting statute and certainly they may not argue that they are entitled to the maximum benefits under due process. See EQT R. B. 10-14. The Legislature has balanced what interest the surface owners have against the interests of mineral owners and provided for surface owner compensation and for notice and the opportunity for meaningful comment on a well work application by surface owners. See W. Va. Code §§ 22-6-9, 22-6-10, and 22-6-11. See also W. Va. Code §§ 22-7-1 *et seq.* This balance is reasonably related to the stated legislative purpose and recognized public interest. See W. Va. Code §§ 22C-8-1, 22C-9-1. Based on this reasonable relationship, WVSORO cannot overcome the presumption of constitutionality and deference to the Legislature that is required by well-settled case law. See *e.g. Rohrbaugh, supra at 306-307, 412-13*. Further, the Legislature has a wide discretion to determine the extent of due process protections due. *Syl. Pt. 6, 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). This Court should uphold the statutes as enacted.

The process enacted by the Legislature in this instance is sufficient to satisfy any due process considerations at issue in the issuance of a well work permit based on three factors that

are required to be considered in evaluating the extent of process due. See EQT R. B. at 10. EQT discussed at length the balancing of these three factors in its response to Respondent Hamblet's Brief and relies primarily on that discussion here. See EQT R. B. at 10-14. However, EQT notes that WVSORO's position that a predecisional hearing for surface owners is required to satisfy due process results in an exponential increase in the administrative and fiscal burden to the State and an additional burden on the property rights of the mineral owner.

The fact of the matter is that such hearings will seriously delay gas production and constitute a significantly higher burden on both the mineral owner and the State. See e.g. *McGrady et al. v. Callaghan, et al.*, 161 W. Va. 180, 186, 244 S.E.2d 793, 796 (1978) ("To afford any and all who desire to object to an application for surface mining a constitutional right to a full evidentiary hearing prior to the issuance of the permit could and probably would result in an administrative catastrophe. ... This would create chaos and could virtually grind surface mining to a halt."). This is a serious consideration in light of the stated public interest in the development of natural resources and the established private property rights of the mineral interest, both of which WVSORO completely ignores in its argument. See W. Va. Code §§ 22C-8-1; 22C-9-1. In this context it bears repeating: the surface owner does not have the right to exclude the mineral interest from entering and disturbing the surface for the purpose of developing the mineral estate. See discussion *supra*. It is an untenable and unsupportable position that the unquestionable right of the mineral interest under common law, and the lease in this case, to make use of the surface and to disturb the surface should become subject to additional regulation and justification to surface owners who have contracted away the very property right upon which they now rely to invoke due process protections.⁵

⁵ EQT recognizes that in some cases, such as this, the surface owners' predecessors in interest made the lease and contract at issue. As a legal matter, this is irrelevant, as subsequent conveyances are subject to

In terms of the fiscal burden of a predecisional hearing on the State, the expense associated with convening a hearing, employing a court reporter, and the time of State employees devoted to such a hearing would be immense. Inspectors would be testifying at hearings instead of inspecting property. The inspectors already offer input to the director in evaluating permit applications. *See* App. 42; W. Va. Code § 22-6-11. The many factors listed by WVSORO such as the number of culverts, cross-ditches, and casing programs are all decisions that must be based on specialized knowledge and are required to be signed off on by a trained OOG inspector. *See e.g.* App.42-45. It is a duplicative waste of resources that does not provide substantial benefit to the surface owner to require a predecisional hearing on these very technical requirements when a trained OOG inspector, not a representative of the mineral interest, must review and approve the plan proposed prior to the issuance of a well work permit.

WVSORO further posits that administrative hearings would not be burdensome based on an unsupported argument that many West Virginians are likely to be fooled, charmed, intimidated or unwilling to request a hearing. WVSORO Br. at 22-25. WVSORO's argument paints both mineral owners and West Virginia surface owners in an untrue and unflattering light, without any support or evidence. *Id.* In fact, WVSORO advocates that surface owners use the existing comment process to delay permitting and use it as leverage:

You have a right to comment to the State on the driller's application for a permit to drill a well, ... If you think the driller is doing more than is fairly necessary under your common law rights (and if you think there really are problems with the driller's plans), you can file comments with the State ... In addition, you can use this right to comment to get some leverage to get the driller to do what you want under your common law rights. The reason this is true is that if you file comments, that will most likely delay the issuance of the permit by the State, and your comments may result in a State inspector coming out and trying to get you and the driller to work out

that existing severance and lease. As a practical matter, severed surface estates can often, if not always, be bought for less money as a consideration of the limited estate. In either event, the mineral owner has tendered consideration for the property rights received.

your differences. The driller knows all of this, and they are often in a hurry, so they will try to get you to sign a waiver [sic] of your right to comment. Before you do that, get what it is that you want....

http://www.wvsoro.org/resources/what_to_do.html. Thus, WVSORO itself recognizes the delay associated with the comment process currently in place and advocates using it as leverage for that very reason. Adding a predecisional hearing to this process will only add further tactical opportunities for surface owners to cause significant and unwarranted additional delay.

The process in place demonstrates that the Legislature considered and balanced all competing interests, including a recognized public interest in the development of West Virginia's natural gas resources, and presents a reasonable and practical system for dealing with concerns, comments and objections. 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. For all of these reasons and as set forth in prior briefing, this Court should find that surface owners are not entitled to predecisional hearings or administrative appeals.

IV. EQUAL PROTECTION DOES NOT REQUIRE A PREDECISIONAL HEARING OR APPEAL.

WVSORO alleges equal protection is an issue under the well permitting statutes because surface owners are not given the right to a pre-decisional hearing or an appeal. EQT relies primarily on its previous brief to address the equal protection arguments of WVSORO in this regard. As set forth in EQT's Reply to Respondent's brief, equal protection is not a concern under this statutory scheme because surface owners and coal interests are not similarly situated and because the right to appeal is clearly based on a public policy of safely maximizing the recovery of both coal and 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; 22-6-17; 22C-8-7. Thus, there is no equal protection issue presented by the classifications at issue.

Further, as discussed at length in EQT's and OOG's Replies to Respondent's Brief, it is clear that the administrative hearing and 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; 22C-9-1; 22-6-15. The Legislature 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 is reasonable and rationally related to the stated government objective and should be upheld.

The Supreme Court of Oklahoma addressed a similar issue in the *Turley* case discussed *supra*. *Turley* examined both Oklahoma and United States Supreme Court decisions and held that the exclusion of surface owners from those entitled to protest drilling and spacing applications did not violate equal protection, stating:

The classification the Legislature chose to make in § 87.1 rests on a real and vital difference--ownership. Section 87.2 along with the Surface Damages Act is part of a consistent statutory scheme whereby the Legislature recognizes the rights of both surface and mineral owners at the point in time when their rights become significant. The statutes allow a balancing of each estate holder's rights so that one does not encroach upon the other. Under § 87.2 only those parties with an interest in the mineral estate are entitled to protest drilling and spacing applications. The Legislature could rationally conclude that surface owners need not be included because of their lack of interest in the development of the natural resources at issue. They could also legitimately conclude that inclusion of the surface owner would result in protests over virtually any well drilled. These contests could thwart the statutory scheme for efficient development of oil and gas fields.

Turley, supra, at 138 (internal citations omitted).

West Virginia's Legislature, like the Oklahoma Legislature, created a statutory scheme

balancing the interests of each estate holder's rights. The statutory scheme created in this case is reasonable and rational. It focuses on safety in developing sometimes competing mineral estates – gas and coal. See W. Va. Code §§ 22C-8-7; 22-6-15. It does not address disputes of ownership or extent of use issues that are appropriately decided in a civil action, not an administrative proceeding. See e.g. *CBC Holdings, LLC v. Dynatec Corp., USA, et al.*, 224 W. Va. 25, 680 S.E.2d 40 (2009).

For these reasons and others apparent on the record, this Court should find that the existing categorization of coal interests as different from surface owners is reasonable and rationally related to the stated public policy and government objective. As such, this Court should find that W. Va. Code §§ 22-6-15; 22-6-16; 22-6-17; 22-6-40; and 22-6-41 are constitutional and that the equal protection clause does not require a right to administrative appeal of the issuance of a well work permit by a surface owner.

CONCLUSION

Both Respondent and WVSORO have conceded that surface owners have no explicit statutory right to a pre-decisional hearing or appeal of the issuance of a well work permit under W. Va. Code §§ 22-6-1 *et seq.*, 22C-8-1 *et seq.*, and 22C-9-1 *et seq.* As a *per curiam* opinion, Lovejoy cannot create such a right. See Syl, Pt. 2, *Walker v. Doe*, 210 W. Va. 490; 558 S.E.2d 290 (2001). Thus, this Court should hold that the answer to the certified question is “no” and should further find conclusively that there exists no right for a surface owner to appeal the issuance of a well work permit. To the extent the *per curiam Lovejoy* opinion holds or implies otherwise, it should be held to be in error for the reasons set forth in EQT's initial brief. This Court should further decline to hear the constitutional issues raised by WVSORO.

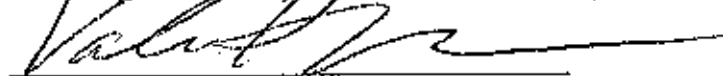
If this Court decides that it should hear and decide the expanded constitutional arguments

made by WVSORO and Respondent, this Court should find that the statutes as enacted are constitutional based on the nature of the relationship between the surface and mineral estates. The right to use the surface is not granted by a well work permit and the surface owner has no property interest affected by the issuance of such a permit. This Court should find that the issuance of a well work permit does not constitute a deprivation, direct affect or infringement on the surface owner's limited 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. 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 and therefore, those provisions do not violate equal protection.

For the foregoing reasons and as set forth in prior briefing, EQT 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 a pre-decisional hearing or an administrative appeal of the issuance of a well work permit and should further rule that the statutory scheme as enacted is constitutional.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st 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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