

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

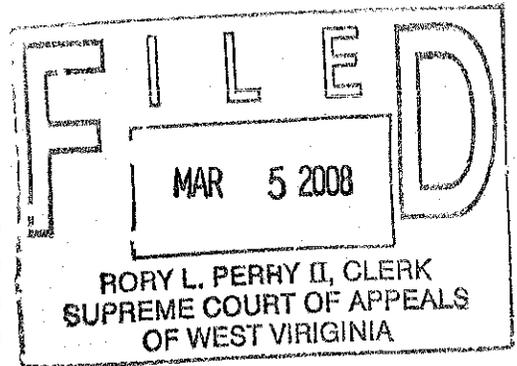
BLUE EAGLE LAND, LLC, a West Virginia limited liability company, COALQUEST DEVELOPMENT, LLC, a foreign limited liability company, CONSOLIDATION COAL COMPANY, a foreign corporation, HORSE CREEK LAND AND MINING COMPANY, a West Virginia corporation, NATIONAL COUNCIL OF COAL LESSORS, INC., a West Virginia corporation, PENN VIRGINIA OPERATING COMPANY, LLC, a foreign limited liability company, POCAHONTAS LAND CORPORATION, a foreign corporation, WEST VIRGINIA COAL ASSOCIATION, a West Virginia non-profit corporation, WPP LLC, a foreign limited liability company, and WOLF-RUN MINING COMPANY, a West Virginia corporation,

Petitioners,

v.

WEST VIRGINIA OIL & GAS CONSERVATION COMMISSION, a state agency, CHESAPEAKE APPALACHIA, LLC, a foreign limited liability company, EASTERN AMERICAN ENERGY CORPORATION, a West Virginia corporation, and PETROEDGE RESOURCES (WV), LLC, a foreign limited liability company,

Respondents.



Case No.: 33705

PETITIONERS' REPLY BRIEF

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## I. INTRODUCTION

The West Virginia Legislature made it clear that the Shallow Gas Well Review Board is the sole agency that is to regulate gas wells that only produce from the Marcellus formation, or above. In addition, the rules of statutory construction mandate an interpretation that a well must be drilled and completed in a formation at, or below, the top of the Onondaga before it is categorized as a “deep well.” Finally, a writ of mandamus is the proper remedy as the Petitioners are challenging the Commission’s assertion of jurisdiction and are not challenging the Commission’s granting of Special Field Rules on their merits.

## II. THE LEGISLATIVE INTENT IS THAT GAS WELLS PRODUCING ONLY FROM THE MARCELLUS FORMATION ARE SHALLOW WELLS THAT ARE TO BE REGULATED BY THE SHALLOW GAS WELL REVIEW BOARD.

The ascertainment of legislative intent is the cardinal rule of statutory construction. State v. Richards, 206 W.Va. 573, 526 S.E.2d 539 (1999). This is because the intention of the lawmakers constitutes the law. Snider v. West Virginia Dep’t of Commerce, 190 W.Va. 642, 441 S.E.2d 363 (1994). As such, the primary object in construing a statute is to ascertain and give effect to the intent of the legislature. Id.

The West Virginia Legislature has clearly and succinctly expressed its intent on three separate issues affecting this case. First, the Legislature made it clear that wells that produce gas from shallow sands are to be regulated under a different framework than wells that produce gas from deep sands. Secondly, the Legislature declared that the regulation of wells producing gas from shallow sands shall ensure the “fullest practical recovery of coal and gas.” Finally, the Legislature declared that it is the public policy of West Virginia that its regulations should prevent the waste of oil and gas resources. The

Legislature's expressed intent on these three issues clearly mandates a finding that the wells producing from only the Marcellus formation are "shallow wells." This is especially true given the consequences that will occur if the Respondents' position is adopted. By changing the language of the deep well statute by substituting in the word "or", the Respondents will be affecting over one million acres of land in over twenty-seven (27) counties in West Virginia. The ramifications of the Respondents' position are tremendous and far reaching. As such, this Honorable Court should not adopt the Respondents' position unless and until, the Legislature clearly expresses its intent that it be done.

**A. Wells that Produce from Shallow Sands are to be Regulated Differently than Wells that Produce from Deep Sands.**

The deep well statute clearly contemplates that wells that produce gas from deep sands are to be regulated differently than wells that produce gas from shallow sands.

Section 22C-9-1 of the West Virginia Code reads in part:

(b) The Legislature hereby determines and finds that oil and natural gas found in West Virginia in shallow sands or strata have been produced continuously for more than one hundred years, that oil and gas deposits in such shallow sands or strata have geological and other characteristics different than those found in deeper formations; and that in order to encourage the maximum recovery of oil and gas from all productive formations in this state, it is not in the public interest, with the exception of shallow wells utilized in a secondary recovery program, to enact statutory provisions relating to the exploration for or production from oil and gas from shallow wells, as defined in section two [§22C-9-2] of this article, but that it is in the public interest to enact statutory provisions establishing regulatory procedures and principles to be applied to the exploration for or production of oil and gas from deep wells, as defined in section two. (emphasis added).

This legislative declaration sets forth two very salient and important points. First, shallow gas deposits have different geological characteristics than do deep gas deposits.

Secondly, because of these different geological characteristics, it is not in the public interest to regulate wells that produce gas from shallow formations under the same framework as wells that produce gas from deep formations. It is critically important to note that the Legislature intended that the deep well statute be applied to the “exploration for or production of oil and gas” from deep sands or strata. Id. Again, this point is so important that it must be restated; the Legislature expressly found that it is not in the public’s interest for wells that produce gas only from shallow sands to be regulated under the deep well statute.

In this case, the Respondents are offering an interpretation of the statute that directly conflicts with the State’s declared public policy. First, all Respondents openly acknowledge that the Marcellus Formation is a shallow formation. Secondly, the Respondents acknowledge that none of the wells in issue will produce gas from deep formations. They will only produce gas from shallow formations. As such, the Respondents are then forced to admit that these wells are producing gas from formations that have different geological characteristics than do deep formations. This leads to the inescapable conclusion that because these wells produce gas from formations that have different geological characteristics than do deep formations, they must be regulated differently. If a well produces gas from only shallow formations, it is not to be regulated as a deep well. This is the mandate from the Legislature, and as such, it is law.

Finally, §22C-9-15 requires that the deep well statute be “liberally construed” so as to “effectuate the declaration of public policy set forth in section one [§22C-9-1] of this article. Therefore, this Honorable Court is to liberally construe the deep well statute to ensure that wells producing only from shallow sands are not regulated as deep wells.

**B. Wells Producing Gas From Shallow Formations Must be Regulated in a Manner that Ensures the Fullest Practical Recovery of both Gas and Coal.**

The Legislature has declared it to be the public policy of this State that wells producing gas from shallow formations are to be regulated in a manner that ensures the maximum production of the State's gas and coal resources. Section 22C-8-1 reads in pertinent part:

(b) The Legislature hereby determines and finds that gas found in West Virginia in shallow sands or strata has been produced continuously for more than one hundred years; that the placing of shallow wells has heretofore been regulated by the state for the purpose of ensuring the safe recovery of coal and gas, but that regulation should also be directed toward encouraging the fullest practical recovery of both coal and gas... it is in the public interest to enact new statutory provisions establishing a shallow gas well review board which shall have the authority to regulate and determine the appropriate placing of shallow wells when gas well operators and owners of coal seams fail to agree on the placing of such wells ...

(emphasis added). In addition, the deep well statute states that it is the public policy of this State to "prohibit waste of oil and gas resources..." W.Va. Code §22C-9-1.

Thus, the Legislature created the Shallow Gas Well Review Board to regulate wells that produce gas from shallow sands or strata. As mentioned *supra*, the Respondents do not dispute that the wells in question will produce gas solely from shallow formations. As such, the Legislature has expressed its intent that these wells be regulated in a manner that ensures the maximum practical recovery of both the gas and coal estates. However, the Respondents position that the wells in question are deep wells again directly conflicts with the State's declared public policy.

The original Petition for Writ of Mandamus sets forth in detail the impact the Special Field Rules will have on the coal estate. By lowering the distance between the

wells from two thousand feet (2,000') to one thousand feet (1,000'), the gas operators will be able to drill approximately 215% more wells than they would if the wells were classified as shallow wells. Per federal law, the Petitioners are prohibited from mining within one hundred and fifty feet (150') of these additional wells. Also, by lowering the spacing distance between wells to one thousand feet (1,000'), the mineable space between each well is decreased by fifty-nine percent (59%). As detailed in Exhibit V of the original Petition, this will result in the sterilization of millions of tons of coal and the loss of tens of millions of dollars in the State's coal severance tax.

Conversely, the Respondents have offered no evidence whatsoever that gas will be lost or wasted unless the wells are drilled on one thousand foot (1,000'), two thousand foot (2,000'), or even three thousand foot (3,000') spacing. Also, as acknowledged by the West Virginia Surface Owner's Rights Organization ("WVSORO") in its Amicus Curiae Brief, as the number of wells increase, the reservoir pressure decreases. This lower reservoir pressure results in less gas ultimately being produced despite there being more wells. As such, there is actually a greater possibility that gas will be lost or wasted if the wells are drilled as deep wells under the Special Field Rules instead of being drilled as shallow wells. If adopted, the Respondents' position will result in the loss of both coal and gas. This is in express conflict with the Legislature's mandate that wells producing gas from shallow formations be regulated to ensure the "fullest practical recovery" of the coal and the gas. As such, public policy requires that that the wells in question be regulated as shallow wells.

**III. THE RULES OF STATUTORY CONSTRUCTION REQUIRE THAT THE WELLS IN QUESTION BE CATERGORIZED AS SHALLOW WELLS.**

When construing a statute, a court is not to focus solely on the statute in dispute, but is to consider all of the provisions in the statutory scheme. Belt v. Cole, 172 W.Va. 383, 305 S.E.2d 340 (1983); Mills v. VanKirk, 192 W.Va. 695, 453 S.E.2d 678 (1994). In addition, it is the duty of the court to avoid a construction of a statute that leads to inconsistent results or is in conflict with another statute. Expedited Transp. Systems, Inc. v. Vieweg, 207 W.Va. 90, 529 S.E.2d 110 (2000); Ebbert v. Tucker, 123 W.Va. 385, 15 S.E.2d 583 (1941). Finally, wherever a statute is capable of two constructions, one of which would work a manifest injustice, and the other would work no injustice, it is the duty of the court to adopt the latter. Lawson v. County Commission, 199 W.Va. 77, 483 S.E.2d 77 (1996). This is because there is a presumption against the legislature enacting unjust statutes. Id.

**A. The Statutory Scheme Regulating All Oil and Gas Production Sustains the Petitioners' Interpretation that the Wells in Question are Shallow Wells.**

The terms "shallow well" and "deep well" are defined three separate times in §22-6-1, §22C-8-2, and §22C-9-2. In each of those sections, the terms are defined identically as such:

"Shallow well" means any gas well drilled *and completed* in a formation *above* the top of the uppermost member of the "Onondaga Group." Provided, that in drilling a shallow well the operator may penetrate into the 'Onondaga Group' to a reasonable depth, not in excess of twenty feet, in order to allow for logging and completion operations, but in no event may the 'Onondaga Group' formation be otherwise produced, perforated or stimulated in any manner.

"Deep well" means any well other than a shallow well, drilled *and completed* in a formation at or *below* the top of the uppermost member of the "Onondaga Group."

(emphasis added). Thus, according to all three statutory definitions, a shallow well is a well that is drilled and completed above the Onondaga, and a deep well is a well that is “drilled and completed” in, or below, the Onondaga. Thus, even the Respondents have to agree that at this point, a well is not a deep well unless it is drilled and completed in or below the Onondaga.

However, the Respondents base their entire argument on §22C-9-2(b) of the deep statute, which states, “Unless the context clearly indicates otherwise, the use of the word ‘and’ and the word ‘or’ shall be interchangeable, as for example, ‘oil and gas’ shall mean oil or gas or both.” Based upon this provision, the Respondents argue that a deep well is a well that is drilled or completed in or below the Onondaga.

What the Respondents fail to admit is that the context, as well as the overarching statutory scheme regulating oil and gas production, preclude the use of the word “or” instead of “and” with respect to the §22C-9-2 definition. First, it must be noted that the other two sections that define deep wells and shallow wells contain no provision stating that “and” and “or” are interchangeable. Therefore, under the statutes regulating the Office of Oil and Gas and the Shallow Gas Well Review Board (§22-6-1 and §22C-8-2) a well would have to be drilled and completed in or below the Onondaga before it would be deemed a “deep well.” However, under §22C-9-2, the well would only have to be drilled or completed in or below the Onondaga to be considered a deep well. The statutory scheme is consistent, in all three sections of the West Virginia Code defining “deep wells” there is the requirement that the well be drilled and completed in or below the Onondaga.

More importantly, the context of the deep well definition does not support the use of the word “or” instead of the word “and.” That is because the word “or” is a disjunctive particle that allows one to choose between several persons, things, or situations. The word “and” is a conjunctive particle that does not allow one to choose between several options, but instead, requires a combination of all persons, things or situations.

Thus, in order for the word “or” to be appropriately used, there must be several distinct choices from which to choose. The fatal flaw with the Respondents’ argument is that the terms “drilled” and “completed” are not mutually exclusive, and as such, there are not two alternatives to choose from. For example, an operator can drill to a formation without completing it. However, the operator cannot complete a formation without drilling to it. Therefore, it does not make sense to say a deep well is a well drilled *or* completed in a deep formation because a well cannot be completed in a deep formation without first being drilled. Thus, the Respondents’ interpretation is erroneous and illogical because in the context of the deep well definition, the use of the word “or” does not provide one with the ability to choose between several alternatives. Since the context indicates otherwise, the word “and” and the word “or” are not interchangeable in regards to the deep well definition.

**B. When a Statute is Capable of Two Constructions, a Court is to Adopt the Construction that Avoids an Irreconcilable Conflict with Another Provision or Statute.**

It is a well settled maxim of law that when a court is to choose between two interpretations of a statute, it is to choose the interpretation that does not conflict with

other provisions or statutes. Ebbert v. Tucker, 123 W.Va. 385, 15 S.E.2d 583 (1941); Expedited Transp. Systems, Inc. v. Vieweg, 207 W.Va. 90, 529 S.E.2d 110 (2000).

As noted earlier, the statutes regulating the Office of Oil and Gas and the Shallow Gas Well Review Board (§22-6-1 and §22C-8-2) define a deep well as one that is drilled *and* completed in or below the Onondaga. However, according to the Respondents' interpretation, a well only need be drilled into the Onondaga in order for the Conservation Commission to deem it a deep well.

The inconsistency between the statutes is clear. For example, assume that a permit application is filed wherein the operator wishes to produce gas from only the Marcellus formation, but needs to drill more than twenty feet into the Onondaga. If that permit application is processed under the Shallow Gas Well statute, the proposed well will not be deemed a deep well because it is not going to be drilled and completed in or below the Onondaga. However, if that same permit application is processed under the deep well statute, it will be considered a deep well because it will be drilled into or below the Onondaga. Therefore, under the Respondents' theory, the same well will be subject to regulation as a "shallow well" and a "deep well" depending under which provision it is reviewed. The Petitioners' interpretation avoids any such confusion and ensures that all gas wells will be defined according to the same criteria.

**C. When a Statute is Capable of Two Constructions, A Court is to Choose the Construction that does not Create a Manifest Injustice.**

Finally, wherever a statute is capable of two constructions, one of which would work a manifest injustice, and the other would work no injustice, it is the duty of the court to adopt the latter. Lawson v. County Commission, 199 W.Va. 77, 483 S.E.2d 77

(1996). This is because there is a presumption against the legislature enacting unjust statutes. Id.

If the Court adopts the Respondents' position, millions of tons of coal will be sterilized. This will result in lost production, lost jobs, and lost tax revenues for the State. In addition, if these wells are categorized as deep wells, there is no requirement that affected coal owners and operators receive notice of applications for special field rules. This fact is evidenced by the fact that Eastern American Energy Corporation ("EAEC") was able to obtain its Special Field Rules with one thousand foot (1,000') spacing without providing notice to any of the Petitioners. Thus, EAEC was able to deprive Petitioners of their right to object upon spacing grounds without giving the Petitioners the opportunity to be heard.

Conversely, there is no injustice or detriment to the gas operators if these wells are classified as shallow wells. Therefore, the rules of statutory construction require that the wells be so classified so as to avoid a significant injustice to the affected coal owners and operators.

**D. Gas Operators Are Precluded From Drilling a Shallow Well Deeper than Twenty Feet into the Onondaga.**

EAEC makes the nonsensical argument that, "Under Petitioners' interpretation of the definition of a shallow well there is no limitation as to drilling depths." (EAEC Response, Page 9). EAEC further states that an oil and gas operator could drill a well to any depth so long as the well was not completed in a formation below the top of the Onondaga. (Page 9).

First, it is absolutely clear that an operator cannot drill a shallow well deeper than twenty feet (20') into the Onondaga. If the operator does drill a shallow well more than

twenty feet (20') into the Onondaga, the well is not magically transformed into a deep well. The result is that the well is still a shallow well and the operator is in violation of its shallow gas well permit.

Also, the law is absolutely clear that Respondents are precluded from drilling a shallow well more than twenty feet into the Onondaga. As a result, they attempt to create their own exception to the statute so that they can exceed the twenty foot (20') limitation. It needs to be stated for the record, the wells in question are shallow wells and the determination that they are deep wells is nothing more than an attempt to circumvent the twenty foot (20') limitation.

The Amicus Curiae brief summed up this issue very succinctly when it stated that the wells in question are “not literally deep wells.” (Page 9). “They are literally shallow wells, and shallow wells cannot have a rat hole more than twenty feet into the Onondaga.” *Id.* “The most literal reading of the statute is that the wells that the drillers want to drill *are not legal to drill.*” (Page 9) (emphasis added).

**IV. THERE WILL BE SUBSTANTIALLY LESS WELLS AND A SMALLER IMPACT ON THE ENVIRONMENT IF THESE WELLS ARE DRILLED AS SHALLOW WELLS.**

The WVSORO sends a mixed message in its Amicus Curiae Brief. It states that it supports the finding that the wells in question are deep wells, but then proceeds to list a litany of problems associated with the wells being classified as deep wells. The group correctly asserts that under the special field rules the operators will be able to drill at least twice as many wells as they would otherwise be allowed to drill under the shallow well statute.

The considerable increase in the number of wells creates several significant issues. First, the numerous wells will more quickly diminish the reservoir pressure that drives the gas to the surface. The result is that there will be less gas produced than there would have been if there were less wells drilled. This results in economic waste to the operators and a loss in royalty payments to the mineral owners. The group further claims that there will be “twice the risk of environmental harm to the water aquifers as the wells are drilled. And surface owners will have twice as many wells drilled on them as are necessary.” (Amicus Curiae Brief, Page 2).

All of these concerns expressed by WVSORO will be alleviated by categorizing the wells in question as shallow wells instead of deep wells. If classified as shallow wells, there will be less economic waste, less environmental harm, fewer well sites on the surface, and an increased royalty payment to the mineral owner. If the WVSORO is truly concerned about the increased number of wells and resulting environmental impact, then it should be supporting the Petitioners’ interpretation that the wells in question are shallow wells.

**V. A WRIT OF MANDAMUS IS THE PROPER REMEDY**

The Respondents make the argument that the Petition should be denied because it is not the proper remedy. Instead, they argue that the proper remedy would be for the Petitioners to appeal the granting of the Special Field Rules. Petitioners will dispense with this argument in short order as it is meritless.

Irrespective of the adequacy or inadequacy of other remedies, prohibition will issue *as a matter of right* when a court or administrative agency is attempting to proceed

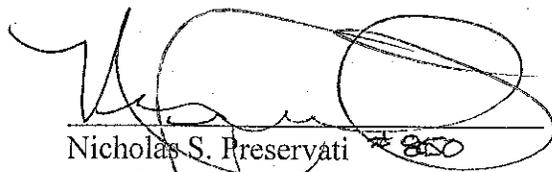
in a cause without jurisdiction. Norfolk & W. Ry. v. Pinnacle Coal Co., 44 W. Va. 574, 30 S.E. 196, 41 L.R.A. 414 (1898); Weil v. Black, 76 W. Va. 685, 86 S.E. 666 (1915); Jennings v. McDougle, 83 W. Va. 186, 98 S.E. 162 (1919) (emphasis added). Therefore, whether or not there are other remedies available to Petitioners is irrelevant. The Petitioners are challenging the Conservation Commission's assertion of jurisdiction. They are not challenging the granting of the Special Field Rules on their merits. As such, a writ of mandamus is clearly the appropriate remedy.

## VI. CONCLUSION

The legislative intent, as well as the statutory rules of construction, requires that the wells in question be deemed "shallow wells." As such, they are to be regulated by the Shallow Gas Well Review Board and not the Conservation Commission. As a result, the Conservation Commission lacks jurisdiction to regulate the wells.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

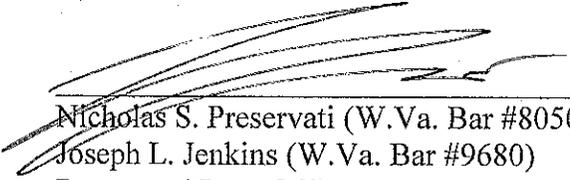
I, Joseph L. Jenkins, do hereby certify that I have served a true and exact copy of the foregoing **Petitioners' Reply Brief** upon all counsel of record by having delivered the same to their office on the 5<sup>th</sup> day of March, 2008, addressed as follows:

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