

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**CBC HOLDINGS, LLC, a West Virginia  
Limited Liability Company, in its own  
Behalf on in behalf of the other owners of  
undivided interests in the minerals  
underlying the realty in question,**

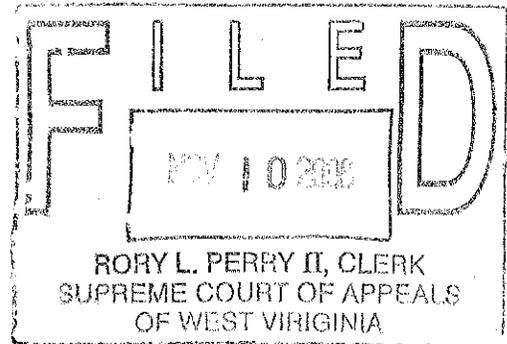
**Appellant,**

**Supreme Court No. 34267**

**v.**

**DYNATEC CORPORATION, USA, a  
foreign Corporation not licensed to do  
business in West Virginia, DYNATEC  
ENERGY, INC., a foreign Corporation  
licensed to do business in West Virginia,  
DYNATEC DRILLING, INC., a foreign  
corporation Licensed to do business in West  
Virginia, NEW GAULEY COAL CORPORATION,  
a West Virginia corporation,**

**Appellees.**



**BRIEF OF APPELLEE**

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**BRIEF OF APPELLEE**

**I. PROCEEDING AND RULING BELOW**

This case represents an attempt by the Appellant to secure a determination of a legal question-its ownership of coalbed methane within certain, but not specified tracts of real estate-in the absence of requisite facts. The decision of this claim by the circuit court was deferred, not dismissed. As such, this Court is asked to review an order of the court below that is interlocutory in nature. In combination, these facts demonstrate that no justiciable controversy exists, and the decision that Appellant seeks is advisory and in violation of Art. 8, § 3 of the West Virginia Constitution.

As stated by the Appellant, this case was filed as a declaratory judgment action in the Circuit Court of Wetzel County. The action named as defendants three affiliated companies-

Dynatec Corporation, USA, Dynatec Energy, Inc., and Dynatec Drilling (hereinafter, the Dyantec Appellees). These companies were engaged in the business of drilling for and developing coalbed methane, sometimes referred to as “CBM,” a gas that consists largely of methane and exists exclusively within coal seams. The suit also names New Gauley Coal Corporation, the owner of the Pittsburgh seam of coal that was expressly leased to two of the Dynatec Appellees for the purpose of developing and extracting the CBM.<sup>1</sup> Collectively, the Dynatec Appellees and New Gauley Coal (“CBM Appellees”) own the complete right to develop the CBM within the Pittsburgh seam of coal beneath the surface of their property. Upon securing a lease of the CBM from New Gauley Coal, the Dynatec Appellees exercised their right of development by securing permits as required by state law (W.Va. Code § 22-21-6(a)).<sup>2</sup>

Following the filing of the action, the CBM Appellees moved to dismiss the case on the grounds that the Appellant neither objected to the well permits nor sought to pool its property with that of the CBM Appellees. As a result it had failed to exhaust its administrative remedies as provided by the W.Va. Code §§ 22-21-5.<sup>3</sup> The statute at W.Va. Code § 22-21-1, *et seq.*, provides the exclusive means by which a person who intends to develop CBM may seek the authorization of the West Virginia Department of Environmental Protection, Division of Oil and Gas (hereinafter “Division”). This authorization is granted by the legal mechanism of a permit to

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<sup>1</sup> Additional defendants in the declaratory judgment action were heirs and successors of the original owners of the property allegedly involved in the suit. Counsel for the Dynatec Appellees and New Gauley Coal do not represent the additional original defendants to the action, and as such only the Dynatec Appellees and New Gauley Coal are parties to this appeal.

<sup>2</sup> W.Va. Code § 22-21-6(a); “It is unlawful for any person to commence, operate, deepen or stimulate any coalbed methane well, to conduct any horizontal drilling of a well commenced from the surface for the purpose of commercial production of coalbed methane . . . including in any case site preparation work which involves any disturbance of land, without first securing from the chief a permit pursuant to this article.”

<sup>3</sup> W.Va. Code § 22-21-5(a); The chairman shall call a meeting of the Board: (1) Upon receipt from the chief of a completed application for a permit to establish one or more coalbed methane gas drilling units pursuant to this article; (2) upon receipt from the chief of a request pursuant to section seven of this article or comments or objections pursuant to sections ten and eleven of this article . . .

drill a well into a coal seam for the purpose of recovering the CBM. There is no allegation in the complaint that the Dynatec Appellees failed to secure the necessary permit for the wells at issue in the case.

Notwithstanding the grounds presented by the CBM Appellees' motion to dismiss, the circuit court refused to dismiss the case. Instead, the lower court entered an Order on November 13, 2007, and to "avoid any statutory limitation problems, Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies is STAYED in favor of a ruling of the Division of Oil and Gas." (emphasis supplied). On the following page of the Order, the court expressly noted that the Appellant's, "objections and exceptions are saved."<sup>4</sup> (See Appendix A, pp. 5-6, attached.) Thus, far from dismissing all claims, the circuit court explicitly preserved them. The court, however, did support the legal conclusion presented by the CBM Appellees that certain factual findings were required to be made in the first instance by the Division. The Appellant was ordered to present its claims to that agency.

The Appellant instead decided to appeal the circuit court's Order. On February 4, 2008, the Appellant filed its appeal with this Court. In its docketing statement, it asserted that the Order appealed from was "a final decision on the merits as to all issues and parties." After a delay during which counsel for the CBM Appellees was allowed to file a memorandum of law opposing the notice of appeal, this Court entered its order of September 4, 2008 granting the appeal. In its Order, this Court required the Appellant to file its brief "within thirty days of receipt of this Order" and for the Appellees' to file their responsive brief within thirty days of receipt of the Appellant's brief. On October 10, the Appellant filed a letter with the clerk of the Court, by which Counsel for the CBM Appellees were also notified, stating that it did "not intend

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<sup>4</sup> Because the Appellant has not formally designated the record for its appeal as required by Rule 8 of the Rules of Appellate Procedure, the November 13, 2007 Order of the Circuit Court is attached as Appendix A.

to file any additional brief in this matter.” The CBM Appellees file this brief in response to the Court’s September 4, Order and pursuant to Rule of Appellate Procedure 10(b).

## II. COUNTER-STATEMENT OF FACTS

The Appellant’s statement of facts is deficient for two reasons. First, it omits facts that state precisely the conclusions made by the Division in issuing CBM permits to the Dynatec Appellees. The Division’s findings also refute the assertions made by the Appellant that the wells authorized by the Division affects the CBM it claims to own within its property. Second, Appellant’s statement of facts fail to state clearly what the lower court actually ruled in its order staying the proceeding. In combination, it is clear that there is no final order issued by the circuit court that can be appealed.

There is no dispute that New Gauley Coal Corporation owns all of the Pittsburgh or River Vein of coal at issue in the case. Nor is there any dispute that New Gauley Coal leased this seam of coal to the Dynatec Appellees for the development of CBM. Its CBM lease includes the Pittsburgh seam beneath the tracts on which the Dynatec Appellees permitted CBM wells, and also beneath the surface tracts that the Appellant claims through its chain of title. These are the only facts that the parties do not dispute.

In dispute is the relation of the Appellant’s surface tracts to the Dynatec Appellees’ CBM wells. The Dynatec Appellees have secured more than one CBM permit from the Division, but the Appellant has never identified which Dynatec well allegedly is draining the CBM Appellant claims to own beneath the Appellant’s surface tracts. This fact is critical. In permitting each of its wells, the Dynatec Appellees have located those wells on the surface of its property leased from New Gauley Coal. It has drilled its horizontal wells exclusively from these surface locations into the Pittsburgh seam leased from New Gauley Coal. In securing each of these permits, the Dynatec Appellees provided notice as required by the statute to the owners of the

surface where the well was located, or that would be disturbed by reason of roads constructed to site the well. W.Va. Code § 22-21-9(a)(1) and (2). Coal owners and oil and gas owners likewise were notified. W.Va. Code § 22-21-9(a)(3) and (4). Publication of the application was made as required by the statute. W.Va. Code § 22-21-9(c). No allegation has been made that the Dynatec Appellees failed to make any notice required by the statute. Appellant filed no objections or comments to any of the permits.

Perhaps most significant for the purpose of this case, the Dynatec Appellees represented to the Division in its applications that it was recovering gas exclusively from the Pittsburgh seam of coal beneath the property it had leased. In issuing these permits, the agency accepted these representations as true and relied upon them. Stated differently and assuming *arguendo* the validity of Appellant's assertions, if the Dynatec Appellees are recovering gas from the Pittsburgh seam of coal beneath Appellant's surface, it is doing so contrary to the information that Dynatec provided in its applications.

The alleged trespass into Appellant's CBM, however, is not the only claim that is at odds with the CBM permits that the Dynatec Appellees have secured. The Appellant also alleges that the Dynatec Appellees are recovering CBM from coal seams *other* than the Pittsburgh seam, and that the Appellant owns these seams as well as the CBM within them beneath its surface. Again, assuming *arguendo* the validity of Appellant's assertions, the Dynatec Appellees have drilled their CBM wells through at least one coal seam that meets the definition of a "workable coal seam" within the meaning of the West Virginia CBM statute.<sup>5</sup> A solid casing was placed in that

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<sup>5</sup> W.Va. Code § 22-21-2(r) any seam of less thickness which is being commercially mined or can be shown to be capable of being commercially mined.

part of the well bore as required by the statute and regulations.<sup>6</sup> This was set forth in the drilling plans submitted to the Division and was also the basis on which the Division issued permits to the Dynatec Appellees.

Moreover, Appellant had the right to submit comments and objections to the permit applications but failed to do so. As the owner of oil and gas interests in the property allegedly affected by the Dynatec Appellees' wells, the Appellant was entitled to file comments "to the location or construction of the applicant's proposed" well.<sup>7</sup> As the alleged owner of the non-Pittsburgh coal seam, the Appellant had an additional basis for objecting generally to the Dynatec Appellees' wells, thereby placing the Division on notice of Appellant's Claims.<sup>8</sup> Thereafter, had the Division rejected any comments or objections filed, then the statute mandates that the Coalbed Methane Review Board must meet to consider Appellant's objections "upon receipt from the chief of . . . comments or objections pursuant to sections ten and eleven of this article." W.Va. Code § 22-21-5(a)(2).

One other avenue existed that might have afforded the Appellant relief. The statute allows pooling of multiple interests in CBM for the purpose of creating a drilling unit. The opportunity to petition the Coalbed Methane Review Board to establish a unit is a provision of the statute. Any person who merely *claims* an interest in CBM may petition to establish such a

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<sup>6</sup> C.S.R. § 35-3-2.7; "Casing" shall have the meaning set forth in W.Va. Code § 22-6-1. "Casing" means a string or strings of pipe commonly placed in wells drilled for natural gas or petroleum or both.

<sup>7</sup> W.Va. Code § 22-21-10; "All persons described in subsection (a), section nine of this article may file comments with the chief as to the location or construction of the applicant's proposed well within fifteen days after the application is filed with the chief."

<sup>8</sup> W.Va. Code § 22-21-11; "The owner or operator of any coal seam whose interests may be adversely affected by a coalbed methane well may, within fifteen days from the receipt of notice required by section nine of this article, file objections in writing to such proposed drilling with the chief, setting out the grounds on which such objections are based."

unit. An applicant is not restricted to a person who is a CBM well permittee.<sup>9</sup> “Upon receipt from the chief of a completed application for a permit to establish one or more coalbed methane gas drilling units pursuant to this article,” the Coalbed Methane Review Board must meet to review such an application. W.Va. Code § 22-21-5(a)(2). The Appellant made no such application.

The circuit court, confronted both with the complaint as well as the absence of any disputed facts between the parties, expressly “acknowledge[d] that the Defendants may not be the owners of the coalbed methane in the Pittsburgh seam.” Nevertheless, the underlying question of ownership to which the Appellant so ardently seeks adjudication, could not be answered by the circuit court on the allegations in the complaint juxtaposed with the facts established by the decisions made by the Division. Instead, whether the Dynatec Appellees, “had the right to drill and extract methane from the aforementioned coalbed is one for the Division of Oil and Gas rather than this Court.” (Opinion, p. 3. App. A).

Finally, the Appellant persistently, repeatedly and incorrectly identifies the circuit court’s decision as a dismissal. The circuit court’s Order expressly *stays* any decision on the CBM Appellee’s claim of exhaustion, as well as the Appellant’s related claims of trespass and conversion. It just as clearly *defers* any decision on the underlying claim of CBM ownership. Nothing in the opinion can be understood to make any findings on those claims in favor of any party or to dismiss any such claims. Accordingly, Appellant’s use of the term “dismissal” is totally at odds with the legal effect of what the circuit court ordered.

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<sup>9</sup> W.Va. Code § 22-21-15(a); “[A]n operator, owner or other party claiming an ownership interest in the coalbed methane may file an application with the chief to pool (i) separately owned interests in a single tract, (ii) separately owned tracts, (iii) separately owned interests in any tract, and (iv) any combination of (i), (ii) and (iii) to form a drilling unit for the production of coalbed methane from one or more coalbed methane wells.”

### III. ARGUMENT

#### A. No Justiciable Controversy Exists For This Court To Adjudicate

The Appellant is clear in expressing its claim that except for the Pittsburgh seam of coal it is the “rightful owner of all minerals” including the CBM “underlying the realty in question.” (App. Br. at 10). The Appellant next asserts that it is entitled to this decision in its favor of this claim in a suit brought as a declaratory judgment. What the Appellant cannot articulate, is how the circuit court could reach this question based on the pleadings and facts before it.

Although the Appellant denies that W.Va. Code § 22-21-1, *et seq.*, imposes any obligation to make any of the findings that the circuit court required before addressing the merits of the claims, the Appellant does acknowledge that the statute is designed to “facilitate the safe removal of coalbed methane gas from our seams” (Appl. Br. at 11). There is no disagreement that the Dynatec Appellees actually obtained permits for this purpose. There is disagreement whether the gas being extracted by the means of those wells includes the gas beneath Appellant’s surface. The Division has concluded that the wells do not recover any gas except the CBM leased by New Gauley Coal to the Dynatec Appellees based upon the representations made in the permit applications.

The Appellant disagrees. The disagreement does not arise from any factual allegation about the proximity of the Dynatec CBM wells to the Pittsburgh seam of coal beneath Appellant’s property because no location is established by allegations in the complaint or by affidavit. The Appellant then identifies an alternative theory and alleges that even if the Dynatec Appellees are not capturing gas from the Pittsburgh coal seam—which the Appellant acknowledges it does not own—they must be capturing gas from another coal seam that New Gauley Coal did not lease. The Appellant fares no better under this theory. The facts are otherwise because the Dynatec Appellees are required to place a casing through any “workable

coal seam” and therefore, cannot be capturing CBM from the source. Again, this was a fact that the Division relied upon to approve the permit.

Apart from the Appellant’s presumably sincere belief that its land is being affected, there is no fact that supports these assertions. The Appellant never specifies which Appellees’ wells are capturing the methane it claims to own. Furthermore, the Appellant never specified what interest it allegedly owns are being affected by the permitting of CBM wells. Merely filing a declaratory judgment action does create the facts necessary for a court to resolve the legal question presented. “The “justiciable controversy” requirement in West Virginia is usually found in cases arising under the declaratory judgment act . . . but the actual dispute or controversy rule applies to all West Virginia judicial proceedings.” *State ex rel. West Virginia Deputy Sheriff's Ass'n, Inc. v. Sims*, 204 W.Va. 442; 513 S.E.2d 669 (1998), quoting *Harshbarger v. Gainer*, 184 W.Va. 656; 403 S.E.2d 399 (1991).

In staying the proceeding the circuit court did nothing to decide or impair the Appellant’s attempt to adjudicate its claim to CBM ownership. It did require the Appellant, however, to present facts to determine if there was an actual claim to adjudicate as “courts will not in such a proceeding adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies.” *Farley v. Graney*, 146 W.Va. 22, 29-30; 119 S.E.2d 833, 838 (1960). Had Appellant sought a determination of the claim it raised in its complaint before the Coalbed Methane Review Board, the Board could clearly decide the issue of whether the Dynatec Appellees’ wells were draining CBM from a property not included within its permits. Whatever conclusion the Board might make on such a claim, the decision of this issue is clearly a predicate to the ultimate ownership issue that Appellant seeks.

Given the findings already made by the Division in acting upon the permit applications submitted by the Dynatec Appellees and issuing the permits that granted those Appellees the legal right to drill wells, the circuit court stayed any decision of the Appellant's claims. Even assuming that facts could be presented in evidence by Appellant that could support a final decision, the court correctly declined to do so. As this Court has recognized in a slightly different context, "we have declined to extend relief through the extraordinary remedy of prohibition when the request therefor has the guise of a collateral attack on the lower tribunal's order." *State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W.Va. 525, 533; 514 S.E.2d 176, 184 (1999). Indeed, the circuit court correctly concluded that it could not entertain the complaint in the absence of the Division reviewing its own conclusions previously reached about the lands in question. To do otherwise would not only potentially put the circuit court in conflict with the Division, it would clearly disrupt the entire administrative scheme established by the statute.

Regardless of Appellant's desire for a judicial decision of who owns CBM, "[c]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken." *Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W.Va. 183, 185-86; 27 S.E.2d 486, 487-88 (1943). Based on the facts as they now exist, no such justiciable controversy exists.

**B. The Order Staying The Civil Action Is Not Final For The Purpose Of Review**

It is a long-recognized, fundamental premise of appellate practice before this Court that a petition for appeal can only be taken from a final order. *See, e.g., Taylor v. Miller*, 162 W.Va. 265, 269 (1978); 249 S.E.2d 191. ("To be appealable, therefore, an order must be a final order or an interlocutory order approximating a final order in its nature and effect.") (internal quotations

and citations omitted). An order is final “if the order resolves the litigation as to a claim or a party.” *Durm v. Heck’s, Inc.*, 184 W.Va. 562, 566; 401 S.E.2d 908 (1991).

In this case, Appellant’s claim should be rejected outright because it is not taken from a final order, but a simple order staying or deferring the final adjudication of its claims. All of this is obvious on the face of the November 13, 2007 Order. The circuit court held that Appellant “did not exhaust the administrative remedies presented by the Coalbed Methane Act.” (App. A, Order at p.5). However, the circuit court declined to dismiss the action as requested by the Appellees. Instead, it stayed any further action until the Division made its findings and conclusions. (App. A, Order at p.5). It is clear that the Appellees had no basis for appealing the court’s decision not to dismiss. “[O]rdinarily the denial of a motion to dismiss is an interlocutory order and, therefore, is not immediately appealable. *Ewing v. Board of Educ. of County of Summers*, 202 W.Va. 228, 235; 503 S.E.2d 541, 548 (1998), *See also*, Syl. pt. 2, *State ex rel. Arrow Concrete Co. v. Hill*, 194 W.Va. 239; 460 S.E.2d 54 (1995). The Appellant offers no reason, however, why the remainder of the order was final and appealable to this Court

After the Division makes its findings and conclusions, the circuit court could dismiss the action, in which case there would be a final order from which an appeal could be taken. Conversely, the circuit court might find that there are further issues that require adjudication. In any event, there is no final order in place that “resolves the litigation as to a claim or a party.” *Durm*, 184 W.Va. at 566. The circuit court’s order was no more than a simple stay—which does not constitute a final, appealable order. Appellant’s claims should be denied on this basis of a lack of finality and returned to the circuit court pending action by the Division as originally ordered.

### C. The Appellant Failed To Exhaust Administrative Remedies

Appellant finds and present arguments that do not derive—even remotely—from any legal conclusions made by the circuit court.

The doctrine of exhaustion of administrative remedies has long been a part of West Virginia jurisprudence. The general rule regarding the doctrine was first stated in *Daurelle v. Traders Federal Savings & Loan Assoc.*, 143 W.Va. 674; 104 S.E.2d 320 (1958):

The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.

*Id.* at syl. pt. 1. The doctrine was further explained in *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W.Va. 245; 183 S.E.2d 692 (1971):

The doctrine simply provides that when the legislature provides for an administrative agency to regulate some particular field of endeavor, the courts are without jurisdiction to grant relief to any litigant complaining of any act done or omitted to have been done if such act or omitted act is within the rules and regulations of the administrative agency involved until such time as the complaining party has exhausted such remedies before the administrative body.

*Id.* at 249, 183; S.E.2d at 694-95 (citations omitted). In failing to challenge the Division's issuance of the CBM well permits before the Coalbed Methane Review Board, the Appellant "violated a basic tenet of administrative law." *State ex rel. Lovejoy v. Callaghan*, 213 W.Va. 1, 4; 576 S.E.2d 246, 249 (2002). Indeed, in that case brought to force the rescission of a permit to drill a well for conventional natural gas, the failure to exhaust the administrative remedy afforded by the statute was "fatal" to the petitioner's claim.

Although the circuit court could have dismissed the case, it deferred exercising jurisdiction in this case until the Coalbed Methane Review Board ("Review Board") made the factual findings entrusted to it by statute. Enacted in 1994, the Coalbed Methane Act ("Act")

is far from a general statute. Indeed, this Court has previously referred to it as “an elaborate statutory scheme.” *Energy Development Corp. v. Moss*, 214 W.Va. 577, 592; 591 S.E.2d 135, 150 (2003). The Act contains specific procedures that are to be following in everything from initial permitting to enforcement actions to plugging and reclamation. The Appellant’s claims and the remedies sought fall squarely within the administrative procedures set forth in the Act and Appellant’s failure to follow and exhaust such procedures is fatal to this action.

**1. The Appellant Failed to Seek a “Pooling Order” From the Coalbed Methane Review Board.**

The Appellant is claiming that the Dynatec Appellants, while drilling for coalbed methane in the Pittsburgh seam, have located their boreholes and casing in such close proximity to the Appellant’s lands that the Dynatec Appellants are improperly “taking and draining the coalbed methane from the Appellant’s coalbed methane formations.” (Compl. ¶ VII). As set forth below, the circuit court was not the proper place to make such a determination because the Act explicitly places the authority and duty for doing so with the Division and the Coalbed Methane Review Board.

Section 22-21-15(a) of the Act provides that, in the absence of a voluntary agreement, a “party claiming an ownership interest in the coalbed methane may file an application with the chief<sup>10</sup> to pool . . . (ii) separately owned tracts . . . to form a drilling unit for the production of coalbed methane from one or more coalbed methane wells.” W.Va. Code § 22-21-15(a). Section 22-21-15(b) then goes on to set forth the specific information that must be included in the pooling application. The application must include, among other things, the name and address of the owners of the coalbed methane for each separate tract that is to be included in the pooled drilling unit. *Id.* § 22-21-15(b)(5). The application must further include a statement describing

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<sup>10</sup> The term “chief” as used in the Act means the Chief of the Office of Oil and Gas of the Division of Environmental Protection. W.Va. Code § 22-21-2(i).

the actions taken by the applicant to obtain the voluntary agreement of the owners of the coalbed methane in the separate tracts that are to be included in the pooled drilling unit. *Id.* § 22-21-15(b)(6).

Upon notice to all interested parties, the Coalbed Methane Review Board is then to hold a conference at which time the pooling applicant and owners of the separate tracts are given an opportunity to enter into voluntary agreements for the development of the pooled drilling unit. *Id.* § 22-21-17(a). If no agreement is reached, the Coalbed Methane Review Board then holds a public hearing on the application for the pooled drilling unit. At this hearing, the Coalbed Methane Review Board takes evidence concerning, among other things, “[t]he area which may be drained efficiently and economically by the proposed coalbed methane well or wells” and “[t]he nature and extent of ownership of each coalbed methane owner or claimant and whether conflicting claims exist.” *Id.* § 22-21-17(b)(1),(6).

After taking and considering the evidence, the Coalbed Methane Review Board, if satisfied that a pooled drilling unit should not be established, enters an order denying the application. *Id.* § 22-21-17(c). If satisfied that such a unit should be established, a pooling order establishing the unit is entered. *Id.* After issuance of the pooling order, the various coalbed methane owners subject to the pooling order have thirty days to make one of the of the following elections:

- (1) An election to sell or lease its interest to the operator on such terms as the parties may agree, or if unable to agree, upon such terms as are set forth by the Board in its order;
- (2) An election to become a working interest owner by participating in the risk and costs of the well; or
- (3) An election to participate in the operation of the well as a carried interest owner.

*Id.* § 22-21-17(e). If the owner fails to make an election within thirty days, such owner is deemed to have elected to sell or lease its interest pursuant to the terms set forth in the Coalbed Methane Review Board's Order. *Id.*

In this case, the Appellant is claiming that the Dynatec Appellees are improperly draining the coalbed methane from the Appellants' adjoining properties, without identifying which properties they might be. This is the Appellant's claim of conversion and trespass. The Legislature has explicitly placed authority and duty for making this determination with the Coalbed Methane Review Board. *Id.* § 22-21-17(b)(1),(6) (the review board is to determine "[t]he area which may be drained efficiently and economically by the proposed coalbed methane well or wells" and "[t]he nature and extent of ownership of each coalbed methane owner or claimant and whether conflicting claims exist").

Pursuant to the Act, the Appellant should have filed a pooling application with the Chief of the Oil and Gas Division. The Appellant failed to do so. (Affidavit of James Martin at ¶ 8, attached as Appendix B). Had the Appellant done so, the Review Board could have then made the trespass determination that the Appellant asked the circuit court to make. The Appellant has wholly failed to comply with, much less exhaust, any of the procedures set forth in the Act. This Court has previously held in a matter commenced before an administrative board that "[i]n the absence of such a properly entered final order," a circuit court "was without jurisdiction to consider an appeal" of the case. *Expedited Transp. Systems, Inc. v. Vieweg* 207 W.Va. 90, 100; 529 S.E.2d 110, 120 (2000).<sup>11</sup> The only distinction between the facts in *Expedited Transp. Systems, Inc.*, and the present case is that the plaintiff in the former case actually commenced the

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<sup>11</sup> In that same case this Court observed that "Due to the circuit court's lack of jurisdiction, this Court is similarly without jurisdiction to address the substantive issues raised in this appeal."

proceeding before the administrative body. The legal conclusions in the two matters, however, are identical. Jurisdiction over the subject matter was not properly in the circuit court.

**2. The Appellant Failed to Administratively Enforce the Terms of the Dynatec Appellees' CBM Permit.**

Section 22-21-6(g) of the Act provides that if the Chief of the Division of Oil and Gas determines that a "substantial violation has occurred with respect to existing operation and that the operator has failed to abate or seek review of the violation . . . , [the chief] may suspend the permit on which said violation exists . . . ." W.Va. Code § 22-21-6(g). The Act further provides that the "chief shall make written findings of any such determination made . . . and may enforce the same in the circuit courts of this state . . . ." *Id.*

The Act does not stop there. The Act gives the chief or the Coalbed Methane Review Board authority to pursue injunctive relief in circuit court in order to abate any violation of the Act, rule or decision:

Whenever it appears to the chief or review board that any person has been or is violating or is about to violate any provision of this article, any rule promulgated by the chief or review board, any order or any final decision of the chief or review board, the chief or review board may apply, in the name of the state, to the circuit court of the county in which the violation occurred, is occurring or is about to occur, or to the judge thereof in vacation, for injunctive relief against the person and any other persons who have been, are or are about to be, involved in any practices, acts or omissions, in violation, enjoining the violation or violations.

*Id.* § 22-21-27(a). It is only after the chief or the Coalbed Methane Review Board, upon request, fails to apply for injunctive relief that a person aggrieved by a violation may seek injunctive relief in circuit court. *Id.* § 22-21-27(e).

In this case, the essence of one of the Appellant's claims is that the Dynatec Appellees violated the Act by not properly casing their wells so as to prevent the drainage of coalbed

methane from the Appellant's coal seam into their wells. *See* W.Va. Code § 22-21-14(a) (“[W]hen a well penetrates one or more workable coal beds, the well operator shall run and cement a string of casing in the hole through the workable coalbed or beds in such a manner a will exclude all oil, gas or gas pressure as may be found in such coalbed or beds.”). However, the Act clearly sets forth an administrative procedure that is to be followed in such a situation. The Appellant is first required to notify the Chief of the Oil and Gas Division of such alleged violation. The chief then investigates the allegations, determines whether a suspension is necessary, and if so, makes written findings of the same. The Appellant can then make a written request to the chief or Coalbed Methane Review Board to seek injunctive relief. The chief or the Coalbed Methane Review Board can then seek injunctive relief. If they do not, then the Appellant can seek injunctive relief in circuit court.

The Appellant has done none of the above. (App. B at ¶¶ 11-12). This is the enforcement mechanism the Legislature chose and the Appellant could not avoid it by attempting to seek relief directly from the circuit court. This appeal should be dismissed and the Appellant ordered to proceed administratively as the Legislature requires and the circuit court ordered.

**3. The Court Should Defer Exercising Jurisdiction Until the Coalbed Methane Review Board Enters Factual Findings Required by Statute.**

Although the circuit court lawfully could have dismissed the present case, it deferred further proceedings in the case until the Coalbed Methane Review Board made the factual findings required by the Act. Indeed, this result is favored under the doctrine of primary jurisdiction.

This Court has explained that “where an administrative agency and the courts have concurrent jurisdiction of an issue which requires the agency’s special expertise and which extends beyond the conventional experience of judges, the doctrine of primary jurisdiction

applies. In such a case, the court should refrain from exercising jurisdiction until after the agency has resolved the issue.” *State ex rel Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W.Va. 402, 411; 497 S.E.2d 755, 764 (1997). In applying the doctrine of primary jurisdiction, the court’s jurisdiction is only postponed, not voided. *Id.* “Moreover, because there is no fixed formula to determine whether the primary jurisdiction doctrine should be applied, each case must be examined individually to determine whether it would be aided by the doctrine’s application.” *Id.* (internal quotation and citations omitted.)

In the present case it is undisputed that the Division is accorded specific responsibilities. These include the duty to issue well permits that comply with the requirements of the statute. As part of the permit, the Division is charged with determining the lands that will be drained by the proposed well. If lands drained by a well include property not under lease by the permittee, the Coalbed Methane Review Board may require the property to be pooled. Likewise, if a proposed well permit is objected to by another person, the Coalbed Methane Review Board may deny the permit if appealed, or condition it.

In the present case it is clear that certain predicate findings—what well permitted by the Dynatec Appellees allegedly was affecting lands owned by the Appellant, the drainage pattern of the well, whether lands owned by Appellant are affected by the well’s drainage, and if so, which lands—must be made by the Division pursuant to the doctrine of primary jurisdiction. Those conclusions are then reviewable by the Coalbed Methane Review Board. The statutory scheme established by W.Va. Code § 22-21-1, *et seq.*, is clear, and the Appellant made no pretense of following it. As exhaustion of the administrative remedies is required by the statute, this Appellant’s claim must be denied and this case must be dismissed.

#### IV. CONCLUSION

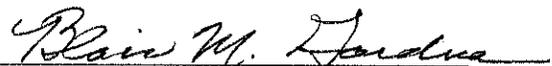
The ultimate legal question—the ownership of coalbed methane—that the Appellant seeks to adjudicate cannot be decided in the absence of administrative decisions by the Division and the Coalbed Methane Review Board as required by the statute. Based on that statute, the Appellant has presented no justiciable controversy for this Court or the circuit court to entertain. No final order was entered by the circuit court that could form the basis of an appeal to this Court. Moreover, even if this Court were inclined to determine the issue of CBM ownership neither the circuit court, nor this Court has afforded the parties the opportunity to brief and argue this question.

Finally, certain factual questions are committed by W.Va. Code § 22-21-1, *et seq.*, to the initial decision of the Division and the Coalbed Methane Review Board. Those questions were not presented to the administrative agency as required, and in the absence of exhausting its remedies before the Coalbed Methane Review Board, the Appellant's appeal to this Court must be dismissed. The case should be remanded to the circuit court for further proceedings consistent with its order of November 13, 2007.

Respectfully submitted,

DYNATEC CORPORATION, USA  
DYNATEC ENERGY  
DYNATEC DRILLING, INC.  
NEW GAULEY COAL CORPORATION

By Counsel



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*Counsel for Appellees*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**CBC HOLDINGS, LLC, a West Virginia  
Limited Liability Company, in its own  
Behalf on in behalf of the other owners of  
undivided interests in the minerals  
underlying the realty in question,**

**Appellant,**

**Supreme Court No. 34267**

v.

**DYNATEC CORPORATION, USA, a  
foreign Corporation not licensed to do  
business in West Virginia, DYNATEC  
ENERGY, INC., a foreign Corporation  
licensed to do business in West Virginia,  
DYNATEC DRILLING, INC., a foreign  
corporation Licensed to do business in West  
Virginia, NEW GAULEY COAL CORPORATION,  
a West Virginia corporation,**

**Appellees.**

**CERTIFICATE OF SERVICE**

I, Blair M. Gardner, counsel for Dynatec Corporation USA; Dynatec Energy, Inc.;  
Dynatec Drilling, Inc.; and New Gauley Coal Corporation do hereby certify that on this the 10th  
day of November, 2008, I served *Dynatec Corporation, USA; Dynatec Energy, Inc.; Dynatec  
Drilling, Inc.; and New Gauley Coal Corporation's Brief* upon counsel of record U.S. regular  
mail, postage prepaid to:

Larry L. Skeen  
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Counsel for Plaintiff CBC Holdings, LLC

  
BLAIR M. GARDNER