

35511

35510, 35508, 35509, 35511

Consolidated Cases No. ~~10046, 10057, 10058, 10059~~

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**BRIEF OF APPELLANT
SIERRA CLUB, INC.**

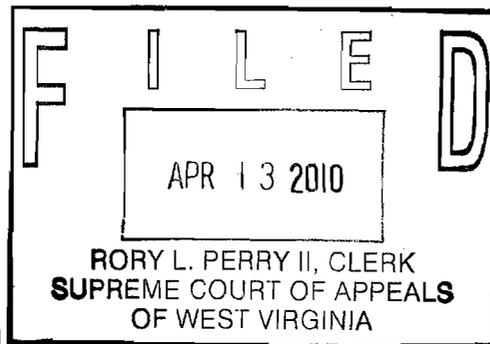
From the June 17, 2009 Decision and Order
Granting Petition for Judicial Review
Under W. V. Code § 22-6-40

CABOT OIL & GAS, INC., PETITIONER, AND LAWSON HEIRS, INC., INTERVENOR,

V.

**DEPARTMENT OF ENVIRONMENTAL PROTECTION, RESPONDENT, AND
SIERRA CLUB, INC., WEST VIRGINIA HIGHLANDS CONSERVANCY,
FRIENDS OF BLACKWATER AND CORDIE HUDKINS, INTERVENORS**

CA No. 08-C- 14
Hon. Roger L. Perry
Chief Judge, Seventh Judicial Circuit



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April 12, 2010

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

A. Overriding Reason for Granting this Petition for Appeal

Unless reversed by this Court, the June 16, 2009 decision of the Logan County Circuit Court will strip away long-standing, totally unambiguous legislative policies specifically designed to protect from mineral exploitation the 43 parks that constitute West Virginia's state park system. Absent judicial respect for legislative policy, and the executive department's diligent effort to enforce that policy, the 183,000 acres of state park lands will be exposed to the most aggressive natural gas exploration techniques now known, including very recently employed -- but not fully understood or adequately regulated -- drilling practices, such as hydraulic fracturing, which have been used to access the deepest geologic formations in the so-called "Marcellus Shale." These practices have caused widespread environmental devastation in New York, Pennsylvania -- and in this state -- where those practices have been employed, and enforcement actions, both from both governmental and private sources, are now beginning in multiple jurisdictions.

This is, by any standard, a totally inappropriate time to substitute *ad hoc* judicial views on natural gas drilling for explicit, decades-long, legislative bans -- particularly judicial views based on the superficial legal analysis underlying the Logan Circuit Court's June 17, 2009 decision. To be sure, the Circuit Court's opinion in this case stands a controlling precedent of this court literally on its head. In *Mountaineer Disposal Service, Inc. v. N. H. Dyer, State Director of Health*, 156 W. Va. 766; 197 S.E.2d 111 (1973), this Court held that the absence of a statutory provision authorizing the health department to deny a permit on the basis of an applicant's prior regulatory history invalidated the agency's denial of a permit on that basis. In its June 17, 2009 order, the Circuit Court held that the presence of a statutory provision authorizing denial of a drilling permit on the basis of an applicant's prior regulatory history, invalidated a denial of a drilling permit on any grounds *other than* the applicant's regulatory history.

This preposterous distortion of *Mountaineer* – and nothing else – is offered as the ground for disregarding: (1) a legislative policy dating back to the 1960's, made more stringent by the legislature in 1995, unambiguously prohibiting gas drilling in state parks, (2) an explicit statutory mandate that the Secretary of DEP enforce the legislature's environmental policy, and (3) an express statutory extension of the DEP Secretary's mandatory environmental duty to the DEP's Director of the the Office of Oil and Gas which, following express legislative mandates, denied the permit of Cabot Oil and Gas, Inc. to drill five gas well in Chief Logan state park.

B. Petition for Judicial Review under W. Va. Code § 22-6-40

On January 11, 2009, Cabot Oil & Gas Corporation filed a Petition for Judicial Review under W. Va. Code § 22-6-40 from the Department of Environmental Protection (DEP) 's December 16, 2008 denial of an application to drill five gas wells in Chief Logan State Park. Lawson Heirs, Inc., the owner of the mineral rights underlying the park (and lessor of those rights to Cabot Oil & Gas Corporation) had not participated in the DEP permit proceeding, but was permitted to intervene in the Circuit Court proceeding and supplemented the record with materials not presented to the DEP.

C. Circuit Court Finding DEP Lacked Authority To Deny Drilling Permits in State Parks

On June 17, 2009, the Circuit Court for Logan County, West Virginia entered an order granting the Cabot Oil & Gas Corporation Petition for Judicial Review and reversing the DEP's denial of the Cabot Oil & Gas Corporation drilling permit application. On September 17, 2009, the Sierra Club, Inc. filed a Motion to Intervene under Rule 24, W. Va. R. Civ. P., in which it requested the Circuit Court to vacate and reverse the June 17, 2009 order. Also moving to intervene under Rule 24 were the West Virginia Highlands Conservatory, Friends of Blackwater, and Cordie Hudkins, former Chief of the West Virginia State Park System. At an October 9, 2009 hearing on the motions to intervene, the Division of Natural Resources moved to intervene.

On October 16, 2009, the Circuit Court entered an order granting all motions to intervene, and reaffirmed its June 17, 2009 ruling. The October 16, 2009 order admitted into the record of the proceeding all exhibits, affidavits and other materials presented by the Intervenors in opposition to the Petition for Judicial Review, and extended until December 16, 2009 the time for filing a Petition for Appeal to the Supreme Court of Appeals.

II. STATEMENT OF FACTS

A. History of Drilling in State Parks

In his affidavit admitted into evidence by the Logan County Circuit Court, and not contradicted by Cabot Oil & Gas Corporation or Lawson Heirs, Inc., Cordie O. Hudkins, Chief of the West Virginia State Park System for a decade from 1990 to 2000, stated that “during the past fifty years the West Virginia State Park System has never permitted or agreed to the drilling of gas and oil wells to extract privately or publicly-owned mineral on State-owned land that is part of a West Virginia State Park.” Addendum to Petition for Appeal at 45 (emphasis added). Although a number of oil and gas wells currently operate in state parks, and are cited in the June 17, 2009 proposed order submitted to the Circuit Court by Lawson Heirs, Inc., and signed without change by the Circuit Court, none of those wells was permitted after the 1995 legislative adoption of W. Va. Code § 20-5-2 (b)(8).

B. Cabot Oil & Gas Corporation Has Demonstrated Technical Competence In Horizontal Drilling

1. The “Marcellus Shale” and Cabot Oil & Gas

On July 23, 2009, Cabot Oil & Gas announced the results of four successful horizontal completions in three different reservoirs in a geological formation referred to as the “Marcellus Shale,” a very highly publicized gas exploration prospect that has set off a classic land rush in the states of

Pennsylvania, New York, Ohio, and in West Virginia – the only state that falls entirely within the bounds of the Marcellus Shale.

According to the Dan O. Dinges, Chairman, Cabot Oil & Gas' President and Chief Executive Officer, Cabot's horizontal completion in the Marcellus, the Teel 8H, had an initial production (24-hour into sales) rate of 10.3 Mmcf per day with a maximum spot rate during that period of 12.0 Mmcf per day. "We believe the stimulation contacted most of the lower and upper shales, plus the Purcell limestone," said Dinges, adding "We consider this completion a critical event in the development of our Marcellus acreage." "Today in Pennsylvania, we are producing 39 Mmcf per day from seven horizontal and 20 vertical wells," stated Dinges. "One year ago we announced our first Marcellus production from a vertical well. Since that time we have cumulatively produced over 5.8 Bcf." Cabot's 2009 drilling program was on schedule to spud 18 additional horizontal wells by year-end.

2. The "Marcellus Shale" and Horizontal Drilling

Horizontal drilling is a phenomenon important to exploitation of the gas producing potential of the Marcellus Shale. Most historic wells in the Marcellus produced gas at a very slow rate because of the low permeability. However, some of the most successful historic wells in the Marcellus share a common characteristic: they intersect numerous fractures. These fractures allow the gas to flow through the rock unit and into the well bore. The fractures intersecting the well also intersect other fractures and those fractures intersect still more fractures. Thus, an extensive fracture network allows one well to drain gas from a very large volume of shale. A single well can recover gas from many acres of surrounding land. The fractures (also known as "joints") in the Marcellus Shale are vertical. So, a vertical borehole would be expected to intersect very few of them. However, a horizontal well, drilled perpendicular to the most common fracture orientation should intersect a maximum number of fractures.

High yield wells in the Marcellus Shale have been built using the horizontal drilling technique, which involves steering a downhole drill bit in a direction other than vertical. An initially vertical drillhole is slowly turned 90 degrees to penetrate long horizontal distances, sometimes over a mile, through the Marcellus Shale bedrock. Hydraulic fractures are then created into the rock at intervals from

the horizontal section of the borehole, allowing a substantial number of high-permeability pathways to contact a large volume of rock.

3. The "Marcellus Shale" and Hydrofracing

A second method used to increase the productivity of a Marcellus Shale well is to increase the number of fractures in a well using a technique known as "hydraulic fracturing" or "hydrofracing." This method uses high-pressure water or a gel to induce fractures in the rock surrounding the well bore. Hydrofracing is done by sealing off a portion of the well and injecting water or gel under very high pressure into the isolated portion of the hole. The high pressure fractures the rock and pushes the fractures open. To prevent the fractures from closing when the pressure is reduced several tons of sand or other "proppant" is pumped down the well and into the pressurized portion of the hole. When the fracturing occurs millions of sand grains are forced into the fractures. If enough sand grains are trapped in the fracture it will be propped partially open when the pressure is reduced. This provides an improved permeability for the flow of gas to the well.

The production of commercial quantities of gas from this shale requires very large volumes of water to drill and hydraulically fracture the rock. This water must be recovered from the well and disposed of before the gas can flow. After drilling, the shale formation is then stimulated by hydraulic fracturing, which may require up to 3 million gallons of water per treatment. For gas to flow out of the shale, nearly all of the water injected into the well during the hydrofrac treatment must be recovered and disposed of. In addition to the problem of dealing with large bulk volumes of liquid waste, contaminants in the water may complicate wastewater treatment. Whereas the percentage of chemical additives in a typical hydrofrac fluid is commonly less than 0.5 percent by volume, the quantity of fluid used in these hydrofracs is so large that the additives in a three million gallon hydrofrac job, for example, would result in about 15,000 gallons of chemicals in the waste.

Hydrofrac fluids are often treated with proprietary chemicals to increase the viscosity to a gel-like consistency that enables the transport of a proppant, usually sand, into the fracture to keep it open after the pressure is released. The viscosity of these fluids then breaks down quickly after completion of the

hydrofrac, so they can be easily removed from the ground. The chemical formulations required to achieve this are closely guarded, and finding out exactly what is in these fluids presents a challenge.

The range of potential problems for local wastewater treatment facilities caused by proprietary chemical additives in hydrofrac fluid is, at this moment, unclear. Along with the introduced chemicals, hydrofrac water is in close contact with the rock during the course of the stimulation treatment, and when recovered may contain a variety of formation materials, including brines, heavy metals, radionuclides, and organics that can make wastewater treatment difficult and expensive. The formation brines often contain relatively high concentrations of sodium, chloride, bromide, and other inorganic constituents, such as arsenic, barium, other heavy metals, and radionuclides that significantly exceed drinking water standards.

The current disposal practice for Marcellus Shale liquids requires processing them through wastewater treatment plants, but the effectiveness of standard wastewater treatments on these fluids is not well understood. In particular, salts and other dissolved solids in brines are not usually removed successfully by wastewater treatment and reports of high salinity in some Appalachian rivers have been linked to the disposal of Marcellus Shale brines. Another disposal option involves re-injecting the hydrofrac fluids back into the ground at a shallower depth. Concerns in Appalachian States about the possible contamination of drinking water supply aquifers has limited the practice of re-injecting Marcellus fluids, however.

With good reason. Contamination of West Virginia waters by waste water is not a frivolous concern. A lengthy article published in the New York Times on September 12, 2009,¹ documented significant water pollution problems nationwide, resulting from numerous sources, but focused on the small town of Prenter, West Virginia, 17 miles from Charleston, and their experience with metal and other toxins polluting their water supply, most likely as a result of discharges by coal companies. Medical professionals in the area say residents show unusually high rates of health problems. A survey of more

¹ http://www.nytimes.com/2009/09/13/us/13water.html?_r=1&hp=&pagew

than 100 residents indicated that as many as 30 percent of people in this area have had their gallbladders removed, and as many as half the residents have significant tooth enamel damage, chronic stomach problems and other illnesses. Although the foregoing pollution and medical problems are directly associated with pollution of water tables by discharges from coal operations, not natural gas wells, the experience to date in the Marcellus Shale indicates that the chemical problems are the same for natural gas drilling.

An article in *The State Journal* of August 14, 2009² reported that the Clarksburg Sanitary Board had stopped accepting Marcellus Shale gas well drilling brine until they are provided extensive testing of the wastewater. According to *The State Journal's* article, the suspension was in response to a July 23 letter from the West Virginia Department of Environmental Protection transmitting a long list of pollutants of concern in oil and gas-related wastewaters.

"The wastewaters from these types of operations contain high levels of chloride, dissolved solid, sulfate and other pollutants," the letter reads. "(Publicly owned treatment works) provide little to no treatment of these pollutants and could potentially lead to water quality issues in the receiving stream."

September 24, 2009 Sierra Club, Inc. Response to Petition for Judicial Review at p 12.

The State Journal article stated that the DEP letter listed more than 40 pollutants of concern, including several forms of radiation, and quoted Clarksburg's plant Superintendent Bill Goodwin as follows:

"Those are parameters that they suspect or anticipate are in Marcellus water, and they want to make sure the levels that are in there are at concentrations that we can deal with -- or show that they're at levels we can't deal with."

Id.

The Clarksburg wastewater treatment plant had been accepting about 37,000 gallons per day of gas well drilling brine from Energy Contractors in a trial that began last fall, according to Goodwin, but

² The State Journal, New York Times and other publications referenced in this Petition were all admitted into evidence below by the Circuit Court's October 16, 2009 decision at p. 3.

after receiving the DEP letter, the sanitary board elected to stop taking the brine until Energy Contractors has the water tested, which Goodwin said, would cost about \$1,000 for a laboratory analysis for all of the pollutants of concern.

The experience in Clarksburg, West Virginia indicates clearly that the metals and other toxins are present in Marcellus Shale wastewater, and the experience in Prenter, West Virginia demonstrates that contaminated water is a serious problem that threatens the life and health of the citizens of this state. That is why the legislature has delegated very substantial authority to protect the state's citizens and land to the Department of Environmental Protection, protection which extends to the State Parks with particular clarity and urgency.

C. The 1960 Land Sale and Mineral Rights Reservation

In 1960, Lawson Heirs, Inc., a Virginia corporation, deeded approximately 3,200 acres of land formerly used for coal mining purposes to the Logan Civic Association, a private, non-profit association, for \$90,000,³ with a reservation of subsurface mineral rights. In December 1960, the Logan Civic Association transferred title to the State of West Virginia Conservation Division, and in 1969 the property was incorporated into what is now known as Chief Logan Park, a park in the State Park System managed by the Division of Natural Resources.

D. The 1995 Legislative Ban on All Mineral Exploitation in State Parks

In 1995, the West Virginia legislature enacted W. Va. Code § 20-5-2 (b)(8), granting broad rulemaking authority to the Director of the Division of Natural Resources, but narrowing that authority in specific areas, including mineral exploitation of state parks. Specifically, the 1995 legislative enactment provided that:

³ According to the Bureau of Labor Statistics, CPI calculator, the \$90,000 sales price -- which Lawson Heirs, Inc. preposterously characterized below as a "gift" to the state -- is the equivalent of \$649,667.56 in 2009 dollars, a sum not ordinarily associated with gift giving. See <http://data.bls.gov/cgi-bin/cpicalc.pl>

[T]he director may not permit public hunting, except as otherwise provided in this section, the exploitation of minerals or the harvesting of timber for commercial purposes in any state park.

W. Va. Code § 20-5-2 (b)(8)(emphasis added).

The 1995 legislative ban was merely a restatement, albeit a more strictly worded version of, long standing state policy. In 1976, the West Virginia Attorney General issued an opinion to Ira S. Latimer, Director of DNR, noted that Section 3, Article 4, Chapter 20 of the West Virginia Code, 1931, “requires that the Director of Natural Resources shall: ‘insofar as is practical, maintain in their natural condition lands that are acquired for and designated as state parks, and shall not permit public hunting, the exploitation of the minerals or the harvesting of timber thereon for commercial purposes.’” See 56 W. Va. Op. Atty Gen 318 (1976)(Addendum at p. 37).

Again, in a July 1980, the West Virginia Attorney General, in an opinion to the Oil and Gas Commission, reiterated his opinion that drilling for minerals in state parks was prohibited by then current law. Attorney General Chauncey Browning, Jr. quoted the provisions of W. Va. Code 20-1-7 which, in subsection (14), empowered the DNR Director to:

(14) Sell or lease, with the approval in writing of the governor, coal, oil, gas, ...that may be found in the lands under the jurisdiction and control of the director, *except those lands that are designated as state parks.*

59 W. Va. Op. Atty. Gen. 3 (1980)(italics in original)(Addendum at p. 39).

Importantly for the “takings” issue in the present litigation, the Attorney General’s 1980 opinion recognized that nothing in the prohibition against drilling within the state parks prohibited drilling outside of those parks, employing so-called “slant” drilling, as a means of accessing minerals underlying the state park:

It is our opinion that a directionally drilled well that would be drilled diagonally from outside a State par and would seek completion beneath a State park could be approved by the Commission and could include oil and gas owned by the State for royalty participation, provided there are sufficient safeguards in such permit that protect the State park surface from any disturbance.

Id.

E. Lawson Heirs, Inc. Explicitly Acknowledged The Ban On Drilling in State Parks in 1998

In 1998, at a time when natural gas prices were, by today's standards, at the relatively modest level of barely \$2.00 per mcf,⁴ Lawson Heirs, Inc., in the course of deeding additional lands to Chief Logan Park, unambiguously conceded that the minerals underlying such lands could never be accessed by drilling in the park, regardless of any reservation of mineral rights in the deed of conveyance. Thus, the September 30, 1998 deed (Addendum at p. 50) of 352 acres to the Public Land Corporation of DNR, for inclusion in Chief Logan Park, recites unhesitatingly that:

Lawson hereby acknowledges that the 352-acre Part A of the lands that is to be deed to DNR and that is then to be made a functioning part of Chief Logan Park may not be disturbed for any new extraction of minerals, drilling for, production of, or piping out of the oil and/or gas that may be located below said surface lands of Part A deeded to DNR, all as per WV Code Chapter 20-5-2(g).

Addendum at 50 (Exhibit CH-4, ¶ 7 to Sept 16, 2009 Affid of Cordie O. Hudkins.)

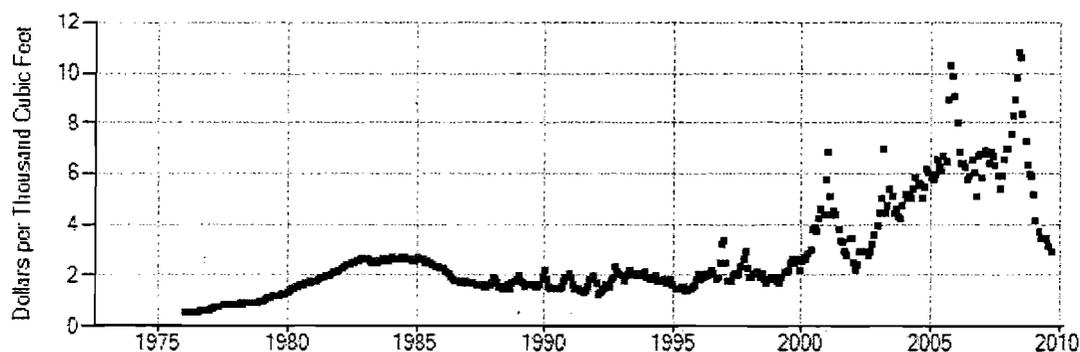
F. Lawson Heirs, Inc.'s 2003 Mineral Lease with Cabot Oil & Gas Corp.

In July 2003, nearly forty-three years after it had deeded away the acreage later incorporated into the state park system, and at a time when natural gas prices had risen to \$4 per mcf – a 100% increase from the \$2 per mcf price at the time of the 1998 admission discussed above – Lawson Heirs, Inc. leased the mineral rights underlying Chief Logan Park to Cabot Oil & Gas Corporation, a national oil and gas drilling company based in Houston, Texas.

The historic rise in natural gas prices is conveyed dramatically by the following graph:

⁴ Under W. Va. Rule of Evidence 201(b), this Court may take judicial notice of commodity prices which appear in the Addendum to this Petition.

Monthly U.S. Natural Gas Wellhead Price



Source: U.S. Energy Information Administration.

See: <http://tonto.eia.doe.gov/dnav/ng/hist/n9190us3m.htm>

The foregoing graph omits the detail of individual price movements. At the time Cabot Oil & Gas Corporation elected to apply for a drilling permit in November 2007, natural gas prices had passed \$10 per mcf, before declining and then rising again to nearly \$11 per mcf, prices 2 ½ times the \$4 per mcf price prevailing at the time Cabot Oil & Gas Corporation signed the 2003 lease with Lawson Heirs, Inc.

See: <http://tonto.eia.doe.gov/dnav/ng/hist/n9190us3m.htm>

G. DEP's Denial of Cabot Oil & Gas Corporation's 2007 Drilling Permit

Thus, in November 2007, Cabot Oil & Gas Corporation filed an application to drill five gas wells in Chief Logan State Park with the Office of Oil and Gas within the West Virginia Department of Environmental Protection. On December 16, 2008, the DEP denied the Cabot Oil & Gas Corporation application for a permit, citing W. Va. Code § 20-5-2 (b)(8), a section of the West Virginia Code that, in providing rulemaking authority to the Department of Natural Resources (DNR), codified the legislature's environmental policy that DNR "may not permit ... the exploitation of minerals ... in any state park."

III. ASSIGNMENTS OF ERROR

A. The Circuit Court erroneously held that the *presence* in the DEP enabling statute of authority to deny a permit on the basis of a drilling applicant's history of violations of prior drilling permits, foreclosed denial of a permit on any grounds *other than* the prior drilling history criteria recited in W. Va. Code § 22-6-6 (h)(Addendum at p. 35), even though:

(a) W.V. Code § 20-5-2 (b)(8)(Addendum at p. 31), providing rulemaking authority to the Department of Natural Resources (DNR), codified the legislature's environmental policy that DNR "may not permit ... the exploitation of minerals ...in any state park,"

(b) W. V. Code § 22-1-6 (c) (1)(Addendum at p. 32), commanded the DEP Secretary to carry out DEP's "functions in a manner which supplements and complements the environmental policies, programs and procedures of ... other instrumentalities of this State,"

(c) W.V. Code § 22-6-2 (c)(11)(Addendum at p. 34), explicitly confers on the OOG director "the power and duty to...perform all other duties which are expressly imposed upon the [DEP]secretary by the provisions of this chapter [22]," and

(d) W.V. Code § 22-6-6(h) was adopted in 1994 with full knowledge of, and as a means of satisfying this Court's ruling in, *Mountaineer Disposal Service, Inc. v. N. H. Dyer, State Director of Health*, 156 W. Va. 766; 197 S.E.2d 111, (1973), in which the health department's denial of a disposal permit was struck down because of the *absence* from the agency's enabling statute of explicit authority to deny permits based upon past misconduct.

B. The Circuit Court erroneously held that the DEP's denial of Cabot Oil & Gas Corporation's permit to drill for gas within Chief Logan state park, constituted an unconstitutional "taking" of property (i.e, the mineral interests underlying a state park) without just compensation, even though:

(a) neither Petitioner Cabot Oil & Gas Corporation, the drilling permit applicant, nor Intervenor Lawson Heirs, Inc., the owner of the reserved mineral rights, requested the Circuit Court to commence an inverse eminent domain proceeding;

(b) the West Virginia Attorney General has authorized the use of diagonal drilling (variously called "slant" or "horizontal" drilling) from outside a state park as a means of extracting mineral resources underlying a state park, and

(c) Cabot Oil & Gas Corporation has demonstrated recent, local competence in "horizontal" drilling that would provide it (and Lawson Heirs, Inc.) access to the minerals underlying the state park, from a drilling position totally outside the state park, thereby avoiding the prohibitions of the W. Va. Code, and simultaneously by-pass any taking that would trigger the compensation requirements of the Due Process Clauses of the U.S. and West Virginia Constitutions.

IV. POINTS AND AUTHORITIES

Cases

Appalachian Power Co. v. State Tax Dept of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995)16
Davis Memorial Hosp. v. West Virginia State Tax Com'r, 222 W.Va. 677 (W.Va. 2008).....18
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Francis O. Day Co., Inc., v. W.Va. Recl Bd Of Rev, 188 W. Va. 418; 424 S.E.2d 763 (1992).....25
Hartley Hill Hunt Club v. County Comm of Ritchie County, 220 W. Va. 382, 647 S.E.2d 818 (2007).....16
Mountaineer Disposal Service, Inc. v. State Dir of Health, 156 W. Va. 766; 197 S.E.2d 111 (1973)....3,26
Muscatell v. Cline, 196 W. Va. 488, 474 S.E.2d 518 (1996)16
Smith v. State Workmen's Compensation Commissioner, 159 W.Va. 108, 219 S.E.2d 361 (1975).....23
State Ex Rel. Hoover v. Berger, 483 S.E.2d 12 (1996).....25
W.Va Health Care Cost Rev Auth v. Boone Memorial Hospital, 196 W.Va. 326, 472 S.E.2d 411 (1996) 18
Zimmerer v. Romanos, Case No. 34269. (April 30, 2009).....18

Authorities

Rule 24, W. Va. R. Civ. P2
Rule 4, W. Va. R. Evid.....4
56 W. Va. Op. Atty Gen 318 (1976)3
59 W. Va. Op. Atty. Gen. 3 (1980)4, 29
W. Va. Code § 20-5-2 (b)(8)3, 6, 12, 19 20
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W. Va. Code § 22-6-6 (h)..... 12, 19
W. Va. Code § 22-6-401

V. ARGUMENT

A. Standard for Judicial Review

To the extent that the questions presented for review are questions of law, they are reviewed by this Court under a *de novo* standard. Syllabus Point 1, *Muscatell v. Cline*, 196 W. Va. 488, 474 S.E.2d 518 (1996). An administrative agency's findings of fact are accorded deference unless the reviewing court believes them to be clearly wrong. Syllabus Point 1, *Appalachian Power Co. v. State Tax Dept of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

B. Applicable Rules of Statutory Construction

This Court has consistently upheld administrative agency actions taken within the authority of their enabling statutes. The Court has construed agency authority purporting to exercise the police power broadly, requiring in an economic context only that "the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all person within the class are treated equally." *Hartley Hill Hunt Club v. County Comm of Ritchie County*, 220 W. Va. 382, 647 S.E.2d 818 (2007).

Within the last year this Court has reaffirmed the core rule of statutory construction:

This Court's long-standing rules of interpretation begin with the question of whether the statute being interpreted is clear and without ambiguity. Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation. Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

L.H. Jones Equipment Co. v. Swenson Spreader LLC, 224 W.Va. 570 (W.Va. 2009), 34745.

And in interpreting statutes this Court has scrupulously attempted to honor the intent of the co-equal, elected branch of our government to set policy. Thus, the Court has, as recently as June of this year, held that:

Our law is clear that:

This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this court to enforce legislation unless it runs afoul of the State or Federal Constitutions.

Boyd v. Merritt, 177 W.Va. 472, 474, 354 S.E.2d 106, 108 (1986). *See also, Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 692, 408 S.E.2d 634, 642 (1991) ("the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."); Syllabus Point 1, in part, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965) ("Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary.")

DEP and Goals Coal Company v. Coal River Mountain Watch, Case No. 34138 (June 9, 2009).

Moreover, this Court has deferred to agency interpretations of their authority:

4. "Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage." Syllabus Point 3, *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

5. "If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va.Code, 29A-4-2 (1982)." Syllabus Point 4, *Appalachian*

Power Co. v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995).

The West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital, 196 W.Va. 326, 472 S.E.2d 411 (1996).

This Court has recognized that the overriding judicial obligation is to discern legislative intent. Thus, in reconciling potentially conflicting statutes relating to the same subject matter, the touchstone is legislative intent:

When two statutes address the same subject matter, this Court attempts to construe the statutes *in pari materia* to give effect to the full intent and meaning of both legislative enactments. "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. pt. 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361. "[W]here two statutes are in apparent conflict, the Court must, if reasonably possible, construe such statutes so as to give effect to each." Syl. pt. 4, in part, *State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958). If, however, the two statutes cannot be reconciled, the language of the more specific promulgation prevails. "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984). *Accord Tillis v. Wright*, 217 W. Va. 722, 728, 619 S.E.2d 235, 241 (2005) ("[S]pecific statutory language generally takes precedence over more general statutory provisions."); *Bowers v. Wurzburg*, 205 W. Va. 450, 462, 519 S.E.2d 148, 160 (1999) ("Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails." (citations omitted)); *Daily Gazette Co., Inc. v. Caryl*, 181 W. Va. 42, 45, 380 S.E.2d 209, 212 (1989) ("The rules of statutory construction require that a specific statute will control over a general statute when an unreconcilable conflict arises between the terms of the statutes." (citations omitted)).

Zimmerer v. Romano Romano; And West Virginia Department Of Transportation, Division Of Highways, Case No. 34269. (April 30, 2009).

And in construing legislative pronouncements, this Court will as a matter of comity assume that the legislature knows the law. *Davis Memorial Hosp. v. West Virginia State Tax Com'r*, 222 W.Va. 677 (W.Va. 2008), 33862, Syl. Pt. 4. (" 'A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to

the subject-matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.' Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908)." Syllabus point 3, *Buda v. Town of Masontown*, 217 W.Va. 284, 617 S.E.2d 831 (2005)". See *State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979) (" It is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning."). "It is a familiar principle of statutory interpretation that the Legislature, in enacting new legislation, is presumed to know the existing law." *Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen*, 714 So. 2d 293, 297 (Ala. 1998); "The legislature is presumed to have enacted an article or statute in light of the preceding law involving the same subject matter and court decisions construing those articles or statutes, and where the new article or statute is worded differently from the preceding law, the legislature is presumed to have intended to change the law." Louisiana Code, RS 24:177. *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008)("[t]he legislature is presumed to know the law in the area in which it is legislating"); *State v. Torres*, 151 Wn. App. 378, 385, 212 P.3d 573 (2009).

No grand issue of constitutional limits, separation of powers or innovative statutory construction is required in this case. What is required is simply that one read the plain language of the applicable statutes and apply them in their most straight forward, every day, common meaning. As in *DEP and Goals Coal Company v. Coal River Mountain Watch*, the "sterile, narrow legal question[s] presented" do not engage broad policy questions – even though the outcome may (and in fact plainly does) affect matters of policy.

As it relates to DEP's statutory authority, the "sterile, narrow, legal question presented" is whether the DEP Secretary's authority to deny a drilling permit is confined to the sole criteria listed in W. Va. Code § 22-6-6 (h), as the Circuit Court held. Or alternatively, as Appellants urge, does the statutory delegation of authority recited at W. Va. Code § 22-6-2(c)(11) extend to the OOG Director the DEP Secretary's duty under W. Va. Code § 22-1-6 (c)(1) to enforce the laws consistent with the environmental

policies of the state, and thereby compel the OOG Director to enforce the legislative policy against drilling for gas in state parks, codified at W. Va. Code § 20-5-2 (b)(g).

Tellingly, despite the fact that § 22-6-2(c)(11) has now been briefed before the Circuit Court in the Sierra Club's motion to intervene, and before this Court in a Petition for Appeal, Cabot Oil & Gas, Inc. nor Lawson Heirs, Inc. have yet to even acknowledge, let alone discuss, the existence of this statute that explicitly addresses the authority of the DEP Secretary which is delegated to the Director of the DEP Office of Oil and Gas, and which, by its express terms, provides the delegation of authority which the Circuit Court ruled necessary to sustain the OOG Director's action.

The conclusion is unavoidable that both Cabot and Lawson Heirs have simply concluded, as a tactical matter, that if they ignore the clearly controlling statute, perhaps this Court will as well. After all, the Circuit Court ignored it. But Cabot Oil & Gas, Inc., and Lawson Heirs, Inc. cannot have it both ways, i.e., arguing that the DEP Secretary and OOG Director are confined to the explicit provisions of the statute; but simultaneously disregarding those portions of the same statute that are inconvenient to their desired result. Their intentional avoidance of the issue makes it incumbent on this Court to force them to confront the issue squarely with the simple query: "Why doesn't § 22-6-2-(c)(11) provide the OOG Director all authority he needs to deny the requested drilling permit?"

With regard to the purported "taking" issue, this Court need only answer two questions. First, regardless of what Lawson Heirs, Inc. may have granted or reserved in the various deeds of property to the state, could any of those deeds have foreclosed the state from exercising its power of eminent domain to take whatever Lawson Heirs, Inc. reserved? Simply stating the question dictates the obvious answer "no." Second, why would this Court affirm the Circuit Court's gratuitous declaration that DEP's denial of a permit to drill within a state park is an unconstitutional "taking" where: (a) the drilling company has demonstrated competence in horizontal drilling which would permit access to the mineral underlying the state park, from a drilling site located outside the state park, thereby avoiding any taking at all, and (b) where neither Lawson Heirs, Inc. nor Cabot Oil & Gas, Inc. has requested that the Circuit Court

commence an inverse eminent domain proceeding, as a means of granting the driller “just compensation” under the Due Process Clause and, thereby, avoiding any unconstitutional taking.

C. The West Virginia Legislature Has Repeatedly Banned All Drilling Within State Parks.

As noted above, the legislature in 1961 and 1995 enacted increasingly restrictive bans on drilling in state parks, and the Attorney General in 1976 and 1980, repeatedly interpreted the legislative bans barring drilling in state parks and expressly ruled that the use of diagonal drilling avoids any taking. To be sure, the Logan County Circuit Court’s June 17, 2009 ruling acknowledges that the legislature has, in WV Code § 20-5-2 (b)(8)), explicitly directed the DNR to adopt regulations that prohibit the exploitation of minerals in state parks, in language that does not admit of ambiguity:

(b) The Director of the Division of Natural Resources shall

(8) Propose rules for legislative approval in accordance with the provisions of article three [§§ 29A-3-1 et seq.], chapter twenty-nine-a of this code to control the uses of parks: Provided, That the director [of DNR] may not permit public hunting, except as otherwise provided in this section, the exploitation of minerals or the harvesting of timber for commercial purposes in any state park.

W. Va. Code § 20-5-2 (b)(8)(emphasis added).

However, focusing exclusively on the authority of the Department of Environmental Protection (DEP) statutory authority in § 22-6-6(h) – one subsection of one section of Article 6 of Chapter 22 of the West Virginia Code – the Court held that the legislative prohibition applicable to DNR rule making authority notwithstanding, DEP was powerless to deny a drilling permit to Cabot Oil & Gas, in the absence of a prior bad drilling record, the criteria listed in WV Code 22-6-6 (h) as mandatory grounds for denying a drilling permit.

In ¶7 of the June 17, 2009 order, the Circuit Court observes that “Where a statute is clear and unambiguous in expressing legislative intent, the statute is to be applied as written without resorting to rules of interpretation,” and in the very next ¶8 -- without citing any legislative sources or pointing to any

ambiguity in the statute that would warrant an inquiry into legislative intent -- simply speculates on the fly that:

By drafting specific legislation to preclude the Director of the DNR from permitting the exploitation of minerals for commercial purposes in any state park, the legislature *likely* intended to reserve unto itself the ability to decide when state owned minerals could be produced or sold. It was likely not the legislature's intent to bar any and all exploitation of minerals in state parks whether state-owned or privately-owned.

June 17, 2006 Order at p.7, ¶ 8 (emphasis added).

The June 17, 2009 ruling as to the “likely” legislative intent came against a background which includes the uncontested fact – according to the affidavit of former DNR chief Cordie Hutchins – that no permit to drill for oil or gas has been issued to permit drilling in any state park since the 1995 legislation mandating DNR’s prohibition by rule of drilling in state parks. And the history of legislative intent had been twice addressed by the Attorney General in the 1976 and 1980 opinions, both of which were published and presumed to be known by the legislature, when it reenacted the ban on state-park drilling in 1995. Both of those Attorney General Opinions dealt with the issue of access to privately-owned minerals, not state-owned minerals. There is, in short, no basis in the legislative, judicial or executive branches’ fifty year history of state-park drilling bans to support the Circuit Court’s out-of-the blue divination of the *“likely”* legislative intent. Does the Circuit Court cite any floor debate? Or possibly a legislative report? Or even contemporaneous newspaper accounts? No. The estimation of “likely” legislative intent is simply a judicial example of spontaneous combustion.

The Circuit Court’s June 17, 2009 order rejected the simplest, most straight forward reading of the plain, unambiguous language of the ban, the reading that the plenary grant of authority to DEP in WV Code § 22-1-6(c)(1) – *“(c) The secretary has responsibility for the conduct of the intergovernmental relations of the department, including assuring: (1) That the department carries out its functions in a manner which supplements and complements the environmental policies, programs and procedures of the federal government, other state governments and other instrumentalities of this State”* -- cited by the DEP for the proposition that DEP was not only authorized, but required, to carry-out its functions in a manner

which supplements and complements the legislative policy expressed in a limitation on DNR rulemaking authority at WV Code § 20-5-2 (b)(8)).

According to the June 17, 2009 ruling, at page 5, ¶¶ 12 -13: —

There is no statutory, regulatory or legal precedent which authorizes DEP to use the provisions of W.Va. Code § 20-5-2(b)(8) as a basis to deny well work permits. The authority vested in DEP's OOG is set forth in W. Va. Code § 22-6-1 et seq. Section 22-6-6 sets forth the reasons which DEP must deny a well permit application. The DEP did not deny the permits for any reasons set forth in Section 22-6-6, nor any of the statute applicable to OOG permitting authority.

Effectively, the Court ruled that there were no “dots” connecting the specific authority of the DEP Office of Oil and Gas, recited in Chapter 22, Article 6 of the West Virginia Code, with the limits on DNR rulemaking authority spelled out in Chapter 20, Article 5 of the West Virginia Code.

The reality is that there is such a statute, in the DEP enabling statute itself, a statute not made available to the Circuit Court by any party in advance of the June 17, 2009, and not addressed, even obliquely, by the Circuit Court in its summary reaffirmation of the June 17, 2009 order in the one sentence ruling granting Appellants' motions to intervene (“I am going to allow intervention by the movants and the DNR for appeal purposes. I am going to decline to set aside the order. I've considered the submissions and arguments made; and as I said, I'm not going to do that.”) October 9, 2009 Hearing Transcript at p. 49.

D. WV Code § 22-1-6 (c) Compels DEP's Secretary to Comply with State Environmental Policy

WV Code § 22-1-6 (c) mandates that in implementing state-wide environmental policy:

(c) The [DEP] secretary has responsibility for the conduct of the intergovernmental relations of the department, including assuring:

(1) That the [DEP] carries out its functions in a manner which supplements and complements the environmental policies, programs and procedures of the federal government, other state governments and other instrumentalities of this State to enforce environmental policies of other instrumentalities of the state.

W. Va. Code 22-1-6 (c)(emphasis added).

As noted, the Circuit Court acknowledged -- but simply rejected as an adequate intermediate “dot” -- the general authority of DEP recited in § 22-1-6(c)(1) to follow other state policies, because of the more specific authority for drilling permits that was recited in § 22-6-6 (h) which mentions a driller’s prior history in discussing grounds for denial of an application for a drilling permit.

Thus, in the critical Conclusion of Law on page 6, ¶ 4 of the June 17, 2009 order:

None of the statutory authority delegated to the DEP’s OOG, including W.Va. Code § 22-1-6(c)(1), authorizes the DEP’s OOG to —take note, adopt or infer the statutory limit on rulemaking granted to DNR to prohibit the exploitation of minerals for commercial purposes in state parks.

June 17, 2009 Order at p. 6, ¶ 4.

The DEP’s interpretation of W. Va. Code § 22-1-6 (c)(1) is entitled to no small deference under the so-called “Chevron” criteria. Any candid inquiry into “whether the Legislature has directly spoken to the precise question at issue” could only come to the conclusion “yes” and that the spoken legislative words banned drilling in state parks, all drilling.

Even if one by tortuous reading concocted an ambiguity between the clear statement of legislative policy in § 20-5-2 (b)(8), and the single mandatory permit denial criteria of § 22-6-6 (h), that is an ambiguity which can be resolved easily by readily available rules of construction, in lieu of judicial speculation as to what the legislature’s “likely” intent was.

As noted, the overriding duty of a Court in any interpretation of a legislative enactment is to “ascertain and give effect to the intent of the Legislature.” Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975). And, the Court’s task when confronted with statutes with an actual conflict, is to reconcile these two apparently conflicting statutes.

[W]here two statutes are in apparent conflict, the Court must, if reasonably possible, construe such statutes so as to give effect to each.

Syl. pt. 4, in part, *State ex rel. Graney v. Sims*, 144 W.Va. 72, 105 S.E.2d 886 (1958).

This is not a difficult task as the Legislature has plainly expressed its intent to ban drilling in state parks in § 20-5-2. The June 17, 2009 opinion obliterates that clear intent by allowing one relatively minor

statute, § 22-6-6 (h) to defeat the abundantly clear intent in § 20-5-2. Plainly, the purported conflict between the requirement that the DEP Secretary comply with the ban on state park drilling, may be reconciled with the requirement that the OOG director consider a driller's history in assessing an application for any drilling permit.

Specifically, § 22-6-6 (h) does not even purport, as Cabot and Lawson Heirs assert, to set out the general criteria for the grant or denial of a permit; it simply recites one *per se* circumstance in which an application must be denied, i.e., where “the director determines that the applicant has committed a substantial violation of a previously issued permit, including the erosion and sediment control plan, or a substantial violation of one or more of the rules promulgated hereunder, and has failed to abate or seek review of the violation within the time prescribed by the director...”

A contrary conclusion is not supported by *S.E.R. Hoover v. Berger*, 483 S.E.2d 12 (1996). In *Hoover*, the issue was succinctly stated by Justice Cleckley as follows: “Did the Board of Medicine have the authority to issue a subpoena to compel the production of a transcript taken and transcribed by a private court reporter?” 199 W. Va. at 17. Concluding that it did not, Justice Cleckley reasoned that “A subpoena duces tecum may not be used to direct a privately retained court reporter to prepare a document that is not in existence.” 199 W.Va. at 21. *Hoover* stands for nothing more than the proposition that an agency subpoena power does not include the authority to compel the creation of that which is being subpoenaed. Assuredly, *Hoover* in no way informs an analysis of the interplay between § 20-5-2 and § 22-6-6 (h) and § 22-1-6 (c)(1), all of which clearly constitute grants of authority, a far cry from the total lack of authority in *Hoover*.

Similarly, *Francis O. Day Co., Inc., v. The West Virginia Reclamation Board Of Review*, 188 W. Va. 418; 424 S.E.2d 763 (1992) rejected as *ultra vires* purported actions of the Reclamation Board taken without the statutory minimum number of members present to satisfy the quorum requirements of 22-4-1(c) and, thus, stands only for the proposition that administrative agencies “have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” This broad proposition does not advance Respondents' argument; the DEP relied on specific statutory

authority at § 22-1-6 (c)(1), and Appellant has pointed to other even more compelling statutory authority at § 22-6-2 (c)(11), discussed in detail below, as supportive of the DEP denial of the drilling permits at issue in this case.

As noted previously, *Mountaineer Disposal Service, Inc. v. N. H. Dyer, State Director of Health*, 156 W. Va. 766; 197 S.E.2d 111 (1973), far from supporting the Circuit Court's June 17, 2009 order, represents the exact opposite holding. In *Mountaineer*, this Court noting that agency authority depends on statutory grant, not common law, ruled that, under the controlling statutes, "the director [of the Health Department] has no right to prevent the commencement of business by an otherwise qualifying applicant based upon the past experience of the health department with an employee of the applicant"(emphasis added).

Explaining that the health director's authority was prospective only, the Court ruled that although the director "has the right to control, suspend or terminate noncomplying landfill operations conducted subsequent to the approval of the permit," he "has no right to prevent inception of business by an otherwise qualifying applicant based upon the past experience of the health department with an employee of the applicant."

No issue of retroactivity or prospectivity is presented in this case, as in *Mountaineer*. Here we are dealing with concrete statutory enactments, explicitly mandating actions in conformity therewith by the Secretary of DEP. DEP is not here invoking common law principles; it is citing statutory enactments which, to date, have been ignored by the Circuit Court, Cabot Oil & Gas, Inc. and Lawson Heirs, Inc. This is a far cry from the circumstances of *Hoover's* subpoena, *Francis O'Day's* quorum requirements, and *Mountaineer's* resort to retroactivity.

The statutory enactment of § 22-6-6 (h) is not, as portrayed by Appellees, an encyclopedic recitation of all matters that the DEP Secretary or the OOG Director may consider in granting or denying a permit. It is simply an example of one, *per se* grounds for denial. In this respect, *Mountaineer* is not only instructive; if read with even a minimum amount of attention, *Mountaineer* clearly dictates a result opposite that reached by the Circuit Court in the June 17, 2009 opinion. WV Code § 22-6-6 (h), enacted

in 1994, some 21 years after the decision in *Mountaineer*, explicitly authorizes the DEP to deny a permit in the circumstances where the Health Director was denied similar authority. Specifically, in *Mountaineer* the Health Department director denied a permit to dump waste to an applicant because one of the applicant's employees had a bad prior record relating to dumping. But because the statute did not authorize denial on that basis, this Court required issuance of the permit.

Proper deference for a co-equal branch of government, requires that this Court accept that the 1994 legislative authors of § 22-6-6 (h), were cognizant of this Court's ruling in *Mountaineer*; and plainly the legislature intended, by inclusion of the explicit authority for DEP to consider a drilling applicant's prior history, to avoid the limitations that applied to the Health Department director in *Mountaineer*.

However, it would be nonsensical, in light of the judicial history of *Mountaineer*, to hold that because the legislature *expanded* the authority of the DEP Secretary and the OOG Director to include consideration of past misconduct, that now that is the *only* criteria that the DEP may consider in denying a drilling permit. That result would require this Court to engage in an extraordinary act of cognitive dissonance: holding in *Mountaineer* that the absence of the authority to look backwards invalidated the denial of a permit, but in this case the presence of authority to look backwards made consideration of any other criteria impermissible. This Court is not in the habit of aggressively seeking out and adopting the most demonstrably frivolous position from all of those available to it, but the proposition advanced by Appellees, and adopted by the Circuit Court, surely is that proposition.

As noted, like § 22-6-6 (h), the legislative policy of § 20-5-2 simply adds one more per se instance relating to state parks, where the legislature has again confined the delegation of authority to the administrator by forbidding issuance of a permit for drilling in any state park. This addition does not create any conflict with § 22-6-6 (h), let alone an irreconcilable conflict. And even if a conflict were to exist, § 22-6-6 is, if anything, the more "general," and § 20-5-2 the more "specific," such as to require deference to the latter. The restrictions of § 22-6-6 apply to all drilling operations throughout the state's 15,500,000 acres, regardless of location. By contrast, § 20-5-2 applies only in the very small subset of the total consisting of lands of the state parks which, at 183,000 acres, constitute less than 1.2% of the

total acreage in the state. And for purposes of analysis of the Circuit Court's opinion, it is irrelevant that the mineral rights underlying Chief Logan at issue in the present case either do, or do not, fall within the geological formation commonly referred to as the Marcellus Shale; the Circuit Court's opinion clearly reaches all geological formations in all 55 counties of this state, and no party may plausibly contend to the contrary.

The history of § 20-5-2, including fifty years of consistent administrative and executive department interpretation and enforcement, all effectively ratified by the legislature's near verbatim 1995 reenactment of the drilling ban, totally contradict the Circuit Court's speculative interpretation of what the legislature "likely" intended. Incredibly, Lawson Heirs, Inc. cites the 1961 legislative predecessor to statute as authority for the proposition that the legislature did not intend to ban drilling in 1995, despite the fact that the latter statute is unquestionably more emphatic in its ban by eliminating the qualifying language which restricted the ban only to those circumstances where it was practical. The 1995 legislation has no such limitation, and the 1961 statute, already a clear manifestation of legislative intent, was after all repealed the 1995 act.

E. WV Code § 22-6-2(c)(11) Explicitly Extended The DEP Secretary's Mandate to the OOG Director

The exclusive focus of the Circuit Court opinion on the minutia of § 22-6-6 (h) fails even as an exercise in myopia. Specifically, one need not resort to rules of construction to resolve the imagined tension between § 20-5-2 and § 22-6-6 (h), because the legislature has already addressed the issue, explicitly. The Circuit Court opinion ignores the language – in the same Chapter and Article and specifically applicable to the Director of OOG – expressly requiring the OOG Director to follow the DEP Secretary's other legal obligations recited in § 22-1-6.

At the time the Circuit Court issued its June 17, 2009 order, it did not have before it (because no party cited it) the language which clearly supplies the intermediate bridge for OOG to invoke other instrumentalities authority, i.e., the "dot" that specifically directs the OOG – and not merely the DEP in

general – to follow the policies recited elsewhere in implementing its narrow authority over the regulation of oil and gas. Specifically, no party had presented to the Circuit Court, and the Court did not include in the June 17, 2009 order in this case, any reference to WV Code 22-6-2 (c)(11) -- directly relating to OOG's authority over oil and gas drilling – and which explicitly provides that:

"The secretary shall have full charge of the oil and gas matters *set out in this article*In addition to all other powers and duties conferred upon him or her, the secretary shall have the power and duty to:

(11) Perform all other duties which are expressly imposed upon the secretary by *the provisions of this chapter*.

WV Code 22-6-2 (c)(11)(emphasis added).

This language provides the missing link in DEP authority, in the absence of which, the Circuit Court concluded that OOG's authority was narrower than the plenary authority of DEP in general. First, the reference in § 22-6-2 (c) to the five italicized words "*set out in this article*" clearly refers to Article 6, entitled "Office of Oil and Gas; Oil and Gas Wells; Administration; Enforcement." The balance of the main clause of § 22-6-2 (c) provides for an addition to the authority recited elsewhere in Article 6 (specifically, in addition to the language on which the Circuit Court relied in Article 6-6 (h)).

Second, the reference in the last five italicized words of § 22-6-2 (c)(11) to "*the provisions of this chapter*" can only mean Chapter 22 (i.e., the Chapter establishing the DEP) recites the added authority of the Office of Oil and Gas to include all of the general DEP authority, thereby vesting OOG with authority over an area of activities vastly broader than the inherently narrower area of management of oil and gas activities.

Although § 22-6-2(c)(11), which appends a mandatory duty to the broad grant of authority in § 22-6-2(c) itself, is nonetheless a straight forward example of the "sterile, narrow, legal" questions presented for decision by this Court. More to the point, no plausible legal construction provides a credible path around the ineluctable dictates of § 22-6-2(c)(11). The very plain language of that section not only authorizes, it compels the Office of Oil and Gas – OOG itself and not merely DEP in general – to comply with the mandate of WV Code 22-1-6 (c) to implement state-wide environmental policy.

The language § 22-6-2 (c)(11) contradicts the Circuit Court's wooden holding limiting DEP's plenary authority over oil and gas to the very few items recited in Article 6 of Chapter 22, i.e., WV Code 22-6-6 (h). The legislative statement of limits on DNR rulemaking authority is, no matter what else one may say, unmistakably an "environmental policy" of an "instrumentality" of the state, i.e., the legislature. Therefore, DEP and its component OOG not only have explicit legislative *authority* to enforce the legislative policy banning drilling permits in parks, DEP and OOG both have a mandatory, statutorily imposed, *obligation* to deny all requests for such permits.

It is unfortunate but ultimately irrelevant that these matters were not clearly laid out for the Circuit Court in advance of the issuance of the June 17, 2009 order; they were laid out plainly in the Sierra Club's Rule 24 submissions and disregarded without any discernible or reviewable analysis by the Circuit Court. But the import of the language is clear; the missing "*dot*" bridging the authority of the Office of Oil and Gas to the broad mandates applicable to DEP generally, and thereby to the legislative policy expressed in a delegation of rulemaking authority to the DNR, has been found. No serious reason may be proffered for failing to "*connect those dots*" now. And the response to date of Cabot Oil & Gas, Inc. and Lawson Heirs, Inc. has been simply to lie low in the bull rushes and hope this Court is as lacking in diligence as the Circuit Court.

Additionally, it is totally irrelevant that the rule making authority of the DNR pertaining to exploitation of minerals in state parks was not explicitly exercised. That exercise is not necessary to make the statement of legislative policy a policy of an instrumentality of the state for purposes of § 22-6-2(c)(11).

F. Denial of a Permit to Drill Inside Chief Logan Park Will Not Result in Any "Taking" Because Cabot Oil & Gas, Inc. Can Access Minerals Underlying Chief Logan Park By Horizontal Drilling From Outside the Park

The Circuit Court's fact finding that denial of the permit to drill within the park would "clearly would prohibit the development of the oil and gas estate" – and thereby constitute a compensable "taking"

-- has no evidentiary basis whatsoever. Uncontradicted evidence, from the highest officials of Cabot Oil & Gas, Inc. plainly, establishes that Cabot Oil & Gas Corporation has substantial skills in horizontal drilling technology, and consequently a readily available means of avoiding any "taking." while simultaneously upholding the long standing state park drilling ban, explicitly recognized in the W. Va. Atty. Gen. Op. issued in 1980, and presented to the Circuit Court without contradiction by any party.

G. Nothing in the Lawson Heirs' 1961 Transaction Could Have Foreclosed The State's Exercise of the Power of Eminent Domain, Either By the Legislature in 1995 or the DEP in 2008, to Take Whatever Was "Reserved".

In its superficial gloss over the topic of "takings," the Circuit Court held that the "DEP permit denial would constitute an inverse condemnation or regulatory taking since it clearly would prohibit the development of the oil and gas estate and would take away substantial private property rights which were previously recognized by the State when it obtained title to the property which became Chief Logan State Park." Even if accepted as an accurate factual description of the historical transaction in 1961, this statement is not dispositive of the legal issue before this Court in 2010.

The question before the Court today is whether the legislature in 1995, or the DEP Secretary in 2008, could exercise the power of the state to condemn property to take whatever property was reserved by Lawson Heirs, Inc. in 1961. Plainly, the state retained that authority, and does retain it to this day. The details as to strata and scope and manner of exploitation contained in the 1961 transaction are totally irrelevant to the question of the state's authority today, which survives *in toto*, to take whatever the Lawson Heirs had not previously conveyed.

Moreover, the mere fact of a "taking" does not create an unconstitutional event warranting reversal of the taking; it simple triggers the requirement of "just compensation." The Circuit Court's June 17, 2009 opinion would rewrite the taking language of the due process clause from its present "...nor shall private property be taken for public use, without just compensation" to the more abbreviated form of "nor shall private property be taken." There may well be broad public support for such an idea among the

uninformed; however, the truncated version of the takings doctrine has never made its way into “taking” clauses of either the federal or state constitutions, and the Circuit Court of Logan County is not presently authorized to bring about that change unilaterally.

The obvious remedy -- if any is needed -- for a purported “taking” is, as the Lawson Heirs, Inc.’s brief below readily acknowledges, an inverse eminent domain proceeding. The failure of Cabot Oil & Gas Corporation or Lawson Heirs, Inc. to invoke that remedy is no ground for reversal of DEP’s decision, expressly mandated by the legislature in a lawful exercise of the police power, to deny Cabot Oil & Gas’ request for a drilling permit in a state park. Nothing in the tedious and totally irrelevant history of the Lawson Heirs, Inc.’s real estate transactions -- to which the state was not once a party -- presents any equitable issues, and the effort to construct a “contract interference” theory ignores the fact that even contract rights may be subject to a taking. As the Attorney General noted in 1980, “the State parks are public lands and can be regulated by the State Legislature through the State’s police power for the benefit of the citizens and the ‘rights’ of any mineral owner will be subordinate to the State’s valid exercise of its ‘police power.’” 59 W.Va. Op. Atty. Gen 3 (1980).

VI. RELIEF REQUESTED

This Court should enter an order vacating and reversing the Circuit Court’s June 17, 2009 order, and reinstating the DEP denial of the application for a drilling permit to Cabot Oil & Gas Corporation.

Respectfully submitted,

SIERRA CLUB, INC.

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ADDENDUM

§ 20-5-2. Powers of the director with respect to the Section of Parks and Recreation.

(a) The Director of the Division of Natural Resources is responsible for the execution and administration of the provisions in this article as an integral part of the parks and recreation program of the State and shall organize and staff the Section of Parks and Recreation for the orderly, efficient and economical accomplishment of these ends. The authority granted in the year one thousand nine hundred ninety-four to the Director of the Division of Natural Resources to employ up to six additional unclassified personnel to carry out the parks' functions of the Division of Natural Resources is continued.

(b) The Director of the Division of Natural Resources shall:

(1) Establish, manage and maintain the State's parks and recreation system for the benefit of the people of this State and do all things necessary and incidental to the development and administration of the State's parks and recreation system;

(2) Acquire property for the State in the name of the Division of Natural Resources by purchase, lease or agreement; retain, employ and contract with legal advisors and consultants; or accept or reject for the State, in the name of the division, gifts, donations, contributions, bequests or devises of money, security or property, both real and personal, and any interest in the property, including lands and waters, for state park or recreational areas for the purpose of providing public recreation: Provided, That the provisions of section twenty [§ 20-1-20], article one of this chapter are specifically made applicable to any acquisitions of land: Provided, however, That any sale, exchange or transfer of property for the purposes of completing land acquisitions or providing improved recreational opportunities to the citizens of the State is subject to the procedures of article one-a [§§ 20-1A-1 et seq., see editor's notes] of this chapter: Provided further, That no sale of any park or recreational area property, including lands and waters, used for purposes of providing public recreation on the effective date of this article and no privatization of any park may occur without statutory authority;

(3) Approve and direct the use of all revenue derived from the operation of the state parks and public recreation system for the operation, maintenance and improvement of the system, individual projects of the system or for the retirement of park development revenue bonds: Provided, That all revenues derived from the operation of the state parks and public recreation system shall be invested by the Treasurer and all proceeds from investment earnings shall accrue for the exclusive use for the operation, maintenance, and improvement of the system, individual projects of the system or for the retirement of park development revenue bonds;

(4) Effectively promote and market the State's parks, state forests, state recreation areas and wildlife recreational resources by approving the use of no less than twenty percent of the:

(A) Funds appropriated for purposes of advertising and marketing expenses related to the promotion and development of tourism, pursuant to subsection (j), section eighteen [§ 29-22-18], article twenty-two, chapter twenty-nine of this code; and

(B) Funds authorized for expenditure from the Tourism Promotion Fund for purposes of direct advertising, pursuant to section twelve [§ 5B-2-12], article two, chapter five-b of this code and section ten [§ 29-22A-10], article twenty-two-a, chapter twenty-nine of this code;

(5) Issue park development revenue bonds as provided in this article;

(6) Provide for the construction and operation of cabins, lodges, resorts, restaurants and other developed recreational service facilities, subject to the provisions of section fifteen [§ 20-5-15] of this article and section twenty [§ 20-1-20], article one of this chapter;

(7) The director may sell timber that has been severed in a state park incidental to the construction of park facilities or related infrastructure where the construction is authorized by the Legislature in accordance with section twenty [§ 20-1-20], article one of this chapter, and the sale of the timber is otherwise in the best interest of park development, without regard to proceeds derived from the sale of timber. The gross proceeds derived from the sale of timber shall be deposited into the operating budget of the park from which the timber was harvested;

(8) Propose rules for legislative approval in accordance with the provisions of article three [§§ 29A-3-1 et seq.], chapter twenty-nine-a of this code to control the uses of parks: Provided, That the director may not permit public hunting, except as otherwise provided in this section, the exploitation of minerals or the harvesting of timber for commercial purposes in any state park;

(9) Exempt designated state parks from the requirement that all payments must be deposited in a bank within twenty-four hours for amounts less than five hundred dollars notwithstanding any other provision of this code to the contrary: Provided, That such designated parks shall make a deposit in any amount no less than every seven working days;

(10) Waive the use fee normally charged to an individual or group for one day's use of a picnic shelter or one week's use of a cabin in a state recreation area when the individual or group donates the materials and labor for the construction of the picnic shelter or cabin: Provided, That the individual or group was authorized by the director to construct the picnic shelter or cabin and that it was constructed in accordance with the authorization granted and the standards and requirements of the division pertaining to the construction. The individual or group to whom the waiver is granted may use the picnic shelter for one reserved day or the cabin for one reserved week during each calendar year until the amount of the donation equals the amount of the loss of revenue from the waiver or until the individual dies or the group ceases to exist, whichever first occurs. The waiver is not transferable. The director shall permit free use of picnic shelters or cabins to individuals or groups who have contributed materials and labor for construction of picnic shelters or cabins prior to the effective date of this section. The director shall propose a legislative rule for promulgation in accordance with the provisions of article three [§§ 29A-3-1 et seq.], chapter twenty-nine-a of this code governing the free use of picnic shelters or cabins provided in this section, the eligibility for free use, the determination of the value of the donations of labor and materials, the appropriate definitions of a group and the maximum time limit for the use;

(11) Provide within the parks a market for West Virginia arts, crafts and products, which shall permit gift shops within the parks to offer for sale items purchased on the open market from local artists, artisans, craftsmen and suppliers and local or regional crafts cooperatives;

(12) Provide that reservations for reservable campsites may be made, upon two days' advance notice, for any date for which space is available within a state park or recreational area managed by the Parks and Recreation Section;

(13) Provide that reservations for all state parks and recreational areas managed by the Parks and Recreation Section of the division may be made by use of a valid credit card;

(14) Develop a plan to establish a centralized computer reservation system for all state parks and recreational areas managed by the Parks and Recreation Section and to implement the plan as funds become available; and

(15) Notwithstanding the provisions of section fifty-eight [§ 20-2-58], article two of this chapter, the Natural Resources Commission is authorized to promulgate rules in accordance with the provisions of article three [§§ 29A-3-1 et seq.], chapter twenty-nine-a of this code to permit and regulate the hunting of white-tail deer in any state park as deemed appropriate by the director to protect the ecological integrity of the area.

§ 22-1-6. Secretary of the Department of Environmental Protection.

(a) The secretary is the chief executive officer of the department. Subject to section seven [§ 22-1-7] of this article and other provisions of law, the secretary shall organize the department into such offices, sections, agencies and other units of activity as may be found by the secretary to be desirable for the orderly, efficient and economical administration of the department and for the accomplishment of its objects and purposes. The secretary may appoint a deputy secretary, chief of staff, assistants, hearing officers, clerks, stenographers and other officers, technical personnel and employees needed for the operation of the department and may prescribe their powers and duties and fix their compensation within amounts appropriated.

(b) The secretary has the power to and may designate supervisory officers or other officers or employees of the department to substitute for him or her on any board or commission established under this code or to sit in his or her place in any hearings, appeals, meetings or other activities with such substitute having the same powers, duties, authority and responsibility as the secretary. The secretary has the power to delegate, as he or she considers appropriate, to supervisory officers or other officers or employees of the department his or her powers, duties, authority and responsibility relating to issuing permits, hiring and training inspectors and other employees of the department, conducting hearings and appeals and such other duties and functions set forth in this chapter or elsewhere in this code.

(c) The secretary has responsibility for the conduct of the intergovernmental relations of the department, including assuring:

(1) That the department carries out its functions in a manner which supplements and complements the environmental policies, programs and procedures of the federal government, other state governments and other instrumentalities of this State; and

(2) That appropriate officers and employees of the department consult with individuals responsible for making policy relating to environmental issues in the federal government, other state governments and other instrumentalities of this State concerning differences over environmental policies, programs and procedures and concerning the impact of statutory law and rules upon the environment of this State.

§ 22-6-2. Secretary -- Powers and duties generally; department records open to public; inspectors.

(a) The secretary shall have as his or her duty the supervision of the execution and enforcement of matters related to oil and gas set out in this article and in articles eight [§§ 22-8-1 et seq.] and nine [§§ 22-9-1 et seq.] of this chapter.

(b) The secretary is authorized to propose rules for legislative approval in accordance with the provisions of article three [§§ 29A-3-1 et seq.], chapter twenty-nine-a of this code necessary to effectuate the above stated purposes.

(c) The secretary shall have full charge of the oil and gas matters set out in this article and in articles eight [§§ 22-8-1 et seq.] and nine [§§ 22-9-1 et seq.] of this chapter. In addition to all other powers and duties conferred upon him or her, the secretary shall have the power and duty to:

(1) Supervise and direct the activities of the Office of Oil and Gas and see that the purposes set forth in subsections (a) and (b) of this section are carried out;

(2) Employ a supervising oil and gas inspector and oil and gas inspectors;

(3) Supervise and direct such oil and gas inspectors and supervising inspector in the performance of their duties;

(4) Suspend for good cause any oil and gas inspector or supervising inspector without compensation for a period not exceeding thirty days in any calendar year;

(5) Prepare report forms to be used by oil and gas inspectors or the supervising inspector in making their findings, orders and notices, upon inspections made in accordance with this article and articles seven [§§ 22-7-1 et seq.], eight [§§ 22-8-1 et seq.], nine [§§ 22-9-1 et seq.] and ten [§§ 22-10-1 et seq.] of this chapter;

(6) Employ a hearing officer and such clerks, stenographers and other employees, as may be necessary to carry out his or her duties and the purposes of the Office of Oil and Gas and fix their compensation;

(7) Hear and determine applications made by owners, well operators and coal operators for the annulment or revision of orders made by oil and gas inspectors or the supervising inspector, and to make inspections, in accordance with the provisions of this article and articles eight [§§ 22-8-1 et seq.] and nine [§§ 22-9-1 et seq.] of this chapter;

(8) Cause a properly indexed permanent and public record to be kept of all inspections made by the secretary or by oil and gas inspectors or the supervising inspector;

(9) Conduct such research and studies as the secretary shall deem necessary to aid in protecting the health and safety of persons employed within or at potential or existing oil or gas production fields within this State, to improve drilling and production methods and to provide for the more efficient protection and preservation of oil and gas-bearing rock strata and property used in connection therewith;

(10) Collect a permit fee of four hundred dollars for each permit application filed other than an application for a deep well or a coalbed methane well; and collect a permit fee of six hundred fifty dollars for each permit application filed for a deep well: Provided, That no permit application fee shall be required when an application is submitted solely for the plugging or replugging of a well, or to modify an existing application for which the operator previously has submitted a permit fee under this section. All application fees required hereunder shall be in lieu of and not in addition to any fees imposed under article eleven [§§ 22-11-1 et seq.] of this chapter relating to discharges of stormwater but shall be in addition to any other fees required by the provisions of this article: Provided, That upon a final determination by the United States Environmental Protection Agency regarding the scope of the exemption under section 402(l)(2) of the federal Clean Water Act (33 U.S.C. 1342(l)(2)), which determination requires a "national

pollutant discharge elimination system" permit for stormwater discharges from the oil and gas operations described therein, any permit fees for storm water permits required under article eleven of this chapter for such operations shall not exceed one hundred dollars.

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(11) Perform all other duties which are expressly imposed upon the secretary by the provisions of this chapter;

(12) Perform all duties as the permit issuing authority for the State in all matters pertaining to the exploration, development, production, storage and recovery of this State's oil and gas;

§ 22-6-6. Permit required for well work; permit fee; application; soil erosion control plan.

(a) It is unlawful for any person to commence any well work, including site preparation work which involves any disturbance of land, without first securing from the director a well work permit. An application may propose and a permit may approve two or more activities defined as well work.

(b) The application for a well work permit shall be accompanied by applicable bond as prescribed by section twelve, fourteen or twenty-three [§ 22-6-12, § 22-6-14 or § 22-6-23] of this article, and the applicable plat required by section twelve or fourteen of this article.

(c) Every permit application filed under this section shall be verified and shall contain the following:

(1) The names and addresses of (i) the well operator, (ii) the agent required to be designated under subsection (e) of this section, and (iii) every person whom the applicant must notify under any section of this article together with a certification and evidence that a copy of the application and all other required documentation has been delivered to all such persons;

(2) The name and address of every coal operator operating coal seams under the tract of land on which the well is or may be located, and the coal seam owner of record and lessee of record required to be given notice by section twelve, if any, if said owner or lessee is not yet operating said coal seams;

(3) The number of the well or such other identification as the director may require;

(4) The type of well;

(5) The well work for which a permit is requested;

(6) The approximate depth to which the well is to be drilled or deepened, or the actual depth if the well has been drilled;

(7) Any permit application fee required by law;

(8) If the proposed well work will require casing or tubing to be set, the entire casing program for the well, including the size of each string of pipe, the starting point and depth to which each string is to be set, and the extent to which each such string is to be cemented;

(9) If the proposed well work is to convert an oil well or a combination well or to drill a new well for the purpose of introducing pressure for the recovery of oil as provided in section twenty-five [§ 22-6-25] of this article, specifications in accordance with the data requirements of section fourteen [§ 22-6-14] of this article;

(10) If the proposed well work is to plug or replug the well, (i) specifications in accordance with the data requirements of section twenty-three [§ 22-6-23] of this article, (ii) a copy of all logs in the operator's possession as the director may require, and (iii) a work order showing in detail the proposed manner of plugging or unplugging the well, in order that a representative of the director and any interested persons may be present when the work is done. In the event of an application to drill, redrill or deepen a well, if the well work is unsuccessful so that the well must be plugged

and abandoned, and if the well is one on which the well work has been continuously progressing pursuant to a permit, the operator may proceed to plug the well as soon as the operator has obtained the verbal permission of the director or the director's designated representative to plug and abandon the well, except that the operator shall make reasonable effort to notify as soon as practicable the surface owner and the coal owner, if any, of the land at the well location, and shall also timely file the plugging affidavit required by section twenty-three of this article;

(11) If the proposed well work is to stimulate an oil or gas well, specifications in accordance with the data requirements of section thirteen [§ 22-6-13] of this article;

(12) The erosion and sediment control plan required under subsection (d) of this section for applications for permits to drill; and

(13) Any other relevant information which the director may require by rule.

(d) An erosion and sediment control plan shall accompany each application for a well work permit except for a well work permit to plug or replug any well. Such plan shall contain methods of stabilization and drainage, including a map of the project area indicating the amount of acreage disturbed. The erosion and sediment control plan shall meet the minimum requirements of the West Virginia Erosion and Sediment Control Manual as adopted and from time to time amended by the division, in consultation with the several soil conservation districts pursuant to the control program established in this State through section 208 of the federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1288). The erosion and sediment control plan shall become part of the terms and conditions of a well work permit, except for a well work permit to plug or replug any well, which is issued and the provisions of the plan shall be carried out where applicable in the operation. The erosion and sediment control plan shall set out the proposed method of reclamation which shall comply with the requirements of section thirty [§ 22-6-30] of this article.

(e) The well operator named in such application shall designate the name and address of an agent for such operator who shall be the attorney-in-fact for the operator and who shall be a resident of the State of West Virginia upon whom notices, orders or other communications issued pursuant to this article or article eleven [§§ 22-11-1 et seq.], chapter twenty-two, may be served, and upon whom process may be served. Every well operator required to designate an agent under this section shall within five days after the termination of such designation notify the director of such termination and designate a new agent.

(f) The well owner or operator shall install the permit number as issued by the director in a legible and permanent manner to the well upon completion of any permitted work. The dimensions, specifications and manner of installation shall be in accordance with the rules of the director.

(g) The director may waive the requirements of this section and sections nine, ten and eleven [§§ 22-6-9, 22-6-10 and 22-6-11] of this article in any emergency situation, if the director deems such action necessary. In such case the director may issue an emergency permit which would be effective for not more than thirty days, but which would be subject to reissuance by the director.

(h) The director shall deny the issuance of a permit if the director determines that the applicant has committed a substantial violation of a previously issued permit, including the erosion and sediment control plan, or a substantial violation of one or more of the rules promulgated hereunder, and has failed to abate or seek review of the violation within the time prescribed by the director pursuant to the provisions of sections three and four [§§ 22-6-3 and 22-6-4] of this article and the rules promulgated hereunder, which time may not be unreasonable: Provided, That in the event that the director does find that a substantial violation has occurred and that the operator has failed to abate or seek review of the violation in the time prescribed, the director may suspend the permit on which said violation exists, after which suspension the operator shall forthwith cease all well work being conducted under the permit:

Provided, however, That the director may reinstate the permit without further notice, at which time the well work may be continued. The director shall make written findings of any such determination and may enforce the same in the circuit courts of this state and the operator may appeal such suspension pursuant to the provisions of section forty [§ 22-6-40] of this article. The director shall make a written finding of any such determination.

(i) Any person who violates any provision of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five thousand dollars, or be imprisoned in the county jail not more than twelve months, or both fined and imprisoned.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Brief on behalf of the Sierra Club, Inc. was served by US mail, postage pre-paid, this 11th day of April, 2010, on the following:

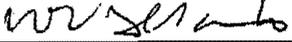
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