

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

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**DD OIL COMPANY,
A WEST VIRGINIA CORPORATION,**

JULY 8, 2022

Appellant,

Environmental Quality Board

v.

**STATE OF WEST VIRGINIA, EX REL.,
HAROLD D. WARD, CABINET SECRETARY,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Appellee.

**WVDEP’S VACATION OF SUBJECT ORDER, ANNULMENT
OF UNDERLYING NOTICES OF VIOLATION, AND MOTION TO DISMISS**

The Appellee, Harold D. Ward, Cabinet Secretary, West Virginia Department of Environmental Protection (“WVDEP”), by counsel, hereby moves the Board for entry of an order dismissing the above-styled action with prejudice and striking it from the docket of the Board. WVDEP so moves because WVDEP is vacating the subject order and granting the Appellant’s request to annul the notices of violation at issue, rendering the matter moot and removing it from the Board’s jurisdiction. In support of its motion, WVDEP states as follows.

RELEVANT PROCEDURAL HISTORY

On February 1, 2022, Douglas Newlon, Inspector Supervisor for the WVDEP Office of Oil and Gas (“OOG”), issued Notices of Violation Nos. 11778, 11779, 11780, and 11781 (“NOVs”) to the Appellant for violations of W. Va. Code R. § 35-4-12.2a. Each NOV stated that “[a] WR-35 is required to be submitted within 90 days of completion of well work.”

On February 18, 2022, citing W. Va. Code § 22-6-4(d), the Appellant timely applied for annulment of the NOV's at issue, alleging that it had not completed drilling and/or hydraulic fracturing on the wells that were the subject of the NOV's.

On March 9, 2022, pursuant to W. Va. Code §§ 22-1-1 et seq., and 22-6-1 et seq., WVDEP issued Order No. 2022-6 ("Order"), affirming each of the NOV's at issue and denying the application for annulment thereof.

On March 24, 2022, the Appellant timely filed its Notice of Appeal ("Notice"), alleging that it is aggrieved by the NOV's described in its accompanying Appeal from Order and Annulment Review ("Memorandum").

On July 8, 2022, WVDEP represented to the Board by this motion and to be memorialized in forthcoming order, that it is annulling the NOV's at issue on procedural grounds¹. WVDEP so annuls the NOV's because the special inspection performed as part of the annulment review pursuant to W. Va. Code § 26-6-4(a) included a record review but not a site visit.²

MOOTNESS

W. Va. Code § 22B-1-7 governs the procedure for appeals to, and the jurisdiction of, the Board, and states that any person authorized by statute to seek review of an order, permit, or official action of WVDEP may appeal to the Board. Additionally, W. Va. Code R. § 35-4-12.2 generally, and specifically at 2.1, 2.2b, and 2.2d affirms that appeals to the Board are made from orders, permits, or official actions with written notifications.

¹ WVDEP does not hereby abandon its underlying position regarding the characterization of the Appellants' activities.

² For purposes of clarification of the record, WVDEP notes that ¶ 47 of the Memorandum inserts the word "only" into the language of the Order, and that the word "only" does not appear in the quoted language or the Order.

By filing this motion, and to be memorialized in forthcoming order, WVDEP represents that it is vacating the Order and annulling the underlying NOV's as requested by the Appellants. Accordingly, no order, permit, or official action remains to confer jurisdiction to the Board. The matter is accordingly moot, the proper relief having been granted.

Under West Virginia law, "to enable a court to hear and determine an action, suit or other proceeding, it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction." *State ex rel. Dale v. Stucky*, 232 W. Va. 299, 303, 752 S.E.2d 330, 334 (2013) (per curiam) (internal quotations omitted). Subject matter jurisdiction is conferred on the Board by W. Va. Code § 22B-1-7 and W. Va. Code R. § 35-4-12.2. When a court lacks jurisdiction, it "must take no further action in the case other than to dismiss it from the docket." *Hinkle v. Bauer Lumber & Home Bldg. Ctr. Inc.*, 158 W. Va. 492, 495, 211 S.E.2d 705, 707 (1975).

In deciding an appeal, the Board is given authority to "make and enter a written order affirming, modifying or vacating the order, permit, or official action of [WVDEP], or shall make and enter such order as the chief or secretary should have entered[.]" W. Va. Code § 22B-1-7 in relevant part. Because WVDEP has vacated the Order and annulled the NOV's, there is no order or official action in controversy, and none over which the Board has jurisdiction.

When a controversy no longer exists, the general rule is that the appeal is moot and must be dismissed. Syl. Pts. 2 & 3, *Butler v. Price*, 212 W. Va. 450, 574 S.E.2d 782 (2002) (per curiam). No controversy exists for the Board to adjudicate, as the Board has jurisdiction only to hear appeals from orders, permits, or official actions. WVDEP agrees to the only relief that the Board is authorized to grant. Accordingly, the appeal is moot and must be dismissed.

**LACK OF AUTHORITY TO
GRANT DECLARATORY AND INJUNCTIVE RELIEF**

In addition to its prayer to stay and vacate the Order and NOV's, the Appellant moves the Board to enter an order granting declaratory relief as to matters outside the proper subject matter of the appeal. The Appellant specifically seeks a declaratory judgment as to "the validity of the WVDEP's threats to sanction its service companies" and an injunction "enjoining WVDEP from further interference with DD Oil's valid permit rights and contracts with its service companies until completion of the permitted well work for the Subject Wells." In doing so, the Appellant cites W. Va. Code § 29A-4-1, which grants agencies the authority to issue "declaratory ruling[s] with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it." The Appellant does not cite authority for the grant of injunctive relief.

The Board is not an "agency" as defined by statute. W. Va. Code § 29A-1-2 specifically provides that a state board that is part of the judicial branch does not fall under the definition of "agency." The Board is a statutorily created body and its enabling statute, W. Va. Code § 22B-1-1, provides that appeals shall be conducted in a quasi-judicial manner. It is the clear intent of the Legislature that the Board serve as an adjudicatory body analogous to constitutionally created judicial bodies.

Furthermore, it is dispositive that, in W. Va. Code § 22B-1-7, the Legislature has expressly delegated specific authority to the Board to "make and enter a written order affirming, modifying or vacating the order, permit, or official action of [WVDEP], or shall make and enter such order as the chief or secretary should have entered[.]" The Board is a purely statutory body and the Legislature has seen fit to narrow its authority by statutory provision. As pertains to the subject matter of this appeal, the Board may affirm the Order, modify it, vacate it, or enter it in

such form as the Board deems proper. The Board may not issue declaratory judgments or injunctions and has historically declined to do so.

Finally, the Board lacks jurisdiction to decide matters of contractual and tortious interference. Such actions are properly brought before other tribunals.


CONCLUSION AND PRAYER FOR RELIEF

As a threshold matter, the appeal is moot. A party may appeal an order, permit, or official action. There is no order, permit, or official action. The order no longer exists. Accordingly, by express provision of the Code and the Board's procedural rules, there remains no subject matter over which the Board has jurisdiction.

Additionally, the Appellants seek relief that the Board has no authority or jurisdiction to grant. The Board does not have authority to issue declaratory judgments or injunctions and is an improper venue for matters of contract and tort.

Accordingly, WVDEP moves the Board for entry of an order dismissing the above-styled action with prejudice and striking it from the docket of the Board, and for such other relief as is deemed just and appropriate.

Respectfully Submitted,
HAROLD D. WARD
By Counsel



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Appellee.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the attached WVDEP's Vacation of Subject Order, Annulment of Underlying Notices of Violations, and Motion to Dismiss was served on the following persons by electronic mail on July 8, 2022, with hard copies served by United States Postal Service mail, first class, on the same date.

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