

BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

DD OIL COMPANY,
A WEST VIRGINIA CORPORATION,

APPELLANT,

VS.

APPEAL NUMBER: 22-01-EQB

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

APPELLEE.

Original

EVIDENTIARY HEARING

JULY 14, 2022
9:00 A.M.

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
601 57TH STREET, SE
CHARLESTON, WEST VIRGINIA 25304

Denys Snodgrass, Certified Court Reporter

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T A B L E O F C O N T E N T S

WITNESS

PAGE

(NONE OFFERED)

EXHIBITS

IDENTIFIED

PAGE

(NONE OFFERED)

REPORTER'S CERTIFICATE: 49, 50

1 CHAIRMAN SNYDER: Thank you, Mr. Umina.

2 MR. DRIVER: This is Scott Driver for
3 Appellee West Virginia Department of Environmental
4 Protection. Seated at counsel table with me is the
5 agency representative James Martin. And I believe dialed
6 in by Zoom is our expert witness Randy Albert, and then I
7 have some fact witnesses sitting in the gallery behind
8 me.

9 CHAIRMAN SNYDER: Thank you, Mr. Driver.
10 So let the record show we have the parties here. Let the
11 record show we also have a quorum of the Board.

12 The Board is independent of the agency that
13 issued the permit or order in question and will conduct
14 the hearing impartially and in a manner fair to all
15 parties involved.

16 The rules of the Board can be found at 46-
17 CSR-4. I know all the attorneys know it. They govern
18 the conduct of this hearing, as does West Virginia Code
19 29-1-5-1, et seq.

20 We are going to be recording this and the
21 court reporter is there keeping a proper record. Please
22 for all technical terms, you may need to spell them out.
23 We will only have one person speaking at a time and the
24 most important thing we'll probably do today is keep a

1 good record.

2 So for the court reporter, if at any point
3 in time you need someone to repeat something or people
4 are speaking over each other, you have any issues, please
5 don't be shy.

6 Now, continuing onward. Presentations, the
7 order we're going to have, the Appellant will start, and
8 then followed by the Appellee dealing with the matters
9 that are before us today.

10 And we do have some pending matters we need
11 to address. It's my understanding that these first two
12 pleadings, first WVDEP had a motion, Appellee's Vacation
13 of Subject Order and Annulment of Underlying Notices of
14 Violation and Motion to Dismiss that was filed on July
15 the 8th, and it was responded to by DD Oil Company in
16 response to WVDEP's Vacation of Subject Order and
17 Annulment of Underlying Notices of Violations and Motion
18 to Dismiss filed on the 12th.

19 And I think we'll have Mr. Driver get
20 started with this, and then we'll proceed to Mr. Leach.

21 MR. WEILER: Mr. Chairman, this is Mark
22 weiler. Scott, if you could, you know, do a procedural
23 history, which you probably are going to, but to let the
24 Board know how we got here before you go into the reasons

1 why we should leave.

2 CHAIRMAN SNYDER: And, Mr. Weiler, Thank
3 you. And, yeah, make sure if I start getting ahead, pull
4 the reigns, so we keep everything as orderly as we can.

5 MR. DRIVER: Okay. If I could have about
6 30 seconds.

7 CHAIRMAN SNYDER: Thirty whole seconds.

8 MR. WEILER: Thirty seconds.

9 MR. DRIVER: I don't even think it'll take
10 that long, luckily.

11 CHAIRMAN SNYDER: You can take a full --
12 you can take a full minute, Scott.

13 MR. DRIVER: Okay. I'm going to go ahead
14 and go into what we consider ancient history on it, and
15 then I'm going to go into what we consider the relevant
16 procedural history, which is what we cited in our motion.

17 On March 26th, 2020, DD Oil issued the well
18 work permits that are referenced. On or about September
19 25th, 2020, it's DEP's contention that DD Oil completed
20 its drilling of several wells.

21 On April 25th, 2021, it's DEP's contention
22 that DD Oil was required to complete its reclamation.
23 That's sort of the genesis of why we're here. DD Oil's
24 contention is that the clock didn't start ticking on the

1 reformation and DEP's contention is that it did.

2 What we consider the relevant procedural
3 history for purposes of this motion, on February 1st,
4 2022, Doug Nuland, who I've got here as an inspector
5 supervisor with DEP. He issued four notices of
6 violation, which I'll be referring to as NOVs to DD Oil
7 for violation of the West Virginia code.

8 Each NOV stated that a particular form was
9 required to be submitted within 90 days of the completion
10 of well work. The Appellant has the right to appeal that
11 or to apply for an annulment.

12 On February 18th, 2022, they did that,
13 citing West Virginia Code 22-6-4(d). There's no
14 allegation that it wasn't timely or procedurally done
15 correctly. The Appellant alleged that it hadn't
16 completed drilling and it was entitled to annulment of
17 those notices of violation.

18 On March 9th, 2022, pursuant to the West
19 Virginia Code and the Environmental Resources sections of
20 the West Virginia code and, specifically, the oil and gas
21 sections, DEP issued an order, which was order number
22 2022-6.

23 That order affirmed each of the NOVs and
24 denied the Appellant's application for the annulment. On

1 March 24th, the Appellant filed in a timely manner its
2 notice of appeal. And it alleged that it was aggrieved
3 by the notices of violation described in its accompanying
4 appeal, and it alleged that it was aggrieved by order
5 2022-6.

6 On July 8th, 2022, that's when we
7 represented to the Board and memorialized by a later
8 order that as originally requested by the Appellant, we
9 were annulling the NOVs at issue on procedural grounds
10 and we were entirely vacating order 2022-6. And the
11 order vacating that previous order is order 2022-9.

12 And as I'll be arguing, it is DEP's
13 contention that order 2022-6 is the specific agency
14 action that has been complained of. It has been vacated
15 and the original relief to which the Appellant is
16 entitled has been granted and we don't have anything left
17 that the Board has jurisdiction to consider. So that is
18 what we consider the relevant procedural history.

19 MR. WEILER: why did you vacate? why did
20 DEP vacate?

21 MR. DRIVER: The Appellant had raised the
22 issue that pursuant to West Virginia Code 22-6-4, they're
23 entitled to apply for the annulment of these notices of
24 violation.

1 Their argument was that there is a clause
2 in there that says a special inspection must be performed
3 by the Department. When we're reviewing that, we have to
4 review and decide whether or not to annul those NOV's and
5 let them stand.

6 They argue that there is a clause in there
7 that said as part of the special inspection, we have to
8 do a side visit. And they said upon reviewing the record
9 and reviewing the pleadings, it became clear that we had
10 done a records review, we had done a special inspection
11 of the records, but a site visit did not take place.

12 Accordingly, we deemed that the original
13 annulment review was incomplete, and we vacated it
14 because in that particular case on that issue, the
15 Appellant was correct in that our administrative review
16 of it was incomplete.

17 Accordingly, we vacated it, as originally
18 requested and as they had argued in their pleadings. And
19 it's pursuant to Order 2022-9, it's fully vacated. It's
20 gone. It's of no force and effect, and the underlying
21 NOVs, four of them have been annulled.

22 MR. WEILER: Mr. Chairman, do you all have
23 any questions of Mr. Driver or you would like to hear
24 from DD Oil's counsel first?

1 MR. DRIVER: Mr. Weiler, if I could
2 interject --

3 MR. WEILER: Okay.

4 MR. DRIVER: -- other than the procedural
5 history, I do have some -- some further argument.

6 MR. WEILER: Okay. I'm sorry.

7 MR. DRIVER: No. That's Okay.

8 As you know, we have moved the Board to dismiss the
9 appeal on the basis of mootness, as order 2022-6 and the
10 underlying notice of violation have been vacated, as
11 originally requested.

12 As the Board knows, there is limited
13 subject matter of an appeal that the Board has
14 jurisdiction over. I have our paralegal Daniel who is
15 assisting me with the technical issues. And, Daniel, if
16 you could pull up and share on the screen, the documented
17 labeled "West Virginia Code 22B-1-7." And if you could
18 enlarge that a bit.

19 And if it is possible for the Board
20 members, if the Board members could take their smiling
21 faces off of screen for a minute, so we can read that
22 fully. And it's -- it's not a significant -- there we
23 go. I'm reading from what I've got on the screen with
24 some emphasis as 22B-1-7, which is the provision of the

1 code that governs appeals to boards. In relevant part,
2 I'm reading subsection "C," which states that "An appeal
3 filed with a board by a person subject to (in bold) an
4 **order, permit or official action** (end of emphasis) shall
5 be perfected by filing a notice of appeal with the board
6 within 30 days after the date upon which such **order,**
7 **permit or official action** (in bold) was received by such
8 person, as demonstrated by the date of receipt."

9 So that is the code section that lays out
10 exactly what the Appellant is entitled to, and it lays
11 out the subject matter jurisdiction of a board in black-
12 letter law. An interested or allegedly aggrieved party
13 can appeal an order, permit or official action within 30
14 days of receipt.

15 And, Daniel, if you can take that down and
16 put up what I most likely have labeled as "EQB Rules B
17 and C," and enlarge that for me. And, as you can see --
18 scroll back up just a little bit for the citation for the
19 court reporter -- as you can see in the board's
20 procedural rule, which is 46-CSR-4.2, subsection "C,"
21 under "when to file," it states, "An appeal filed by a
22 person authorized by statute to seek review of (in bold)
23 **an order, permit or official action** shall be perfected by
24 filing a notice of appeal within 30 days."

1 Then if we could scroll down a little bit
2 to subsection "C". The content of the appeal (in bold)
3 **"The notice of appeal shall set forth the action**
4 **complained of** (end of emphasis). And there's -- there's
5 some additional procedural language there that we don't
6 take any issue with.

7 But it's clear from both the code and the
8 code of state rules that the Board is entitled -- the
9 Board has subject-matter jurisdiction to review an
10 official action of the DEP. And beyond that, it does not
11 have jurisdiction. If there is no official action that
12 has been complained of, there is nothing left for the
13 Board to consider.

14 It can review an order, permit or official
15 action within 30 days of entry and receipt addressing a
16 specific action complained of.

17 Now, both the reading and the stylings of
18 Appellant's pleadings don't leave any doubt that they're
19 appealing the NOVs in Order 2022-6.

20 And, Daniel, if we could go to the notice
21 of appeal, and we're going to go to PDF page one of the
22 notice of appeal. And if we could just zoom out, so that
23 we can see the -- that introductory paragraph.

24 Okay. And as you can see under the notice

1 of appeal, which is just here, an initial filing document
2 that they accompanied with a memorandum, under "Action
3 Complained of," and, hopefully, everyone can read that,
4 "The Appellant represents that it is aggrieved by notices
5 of violation described in the appeal from order and
6 annulment review in order 2022-6."

7 Now, if you could go to PDF page 88. And
8 go up to the caption in the title, if you could. And as
9 you can see from the title of this pleading, it is an
10 appeal from order and annulment review. And it opens,
11 "For its appeal from order and annulment review dated
12 March 9th, 2022, hereinafter order 2022-6."

13 And you can go ahead and take that down,
14 Daniel. So, accordingly, it's clear both legally and
15 factually that the action being complained of is the
16 issuance of the NOVs in order 2022-6 that is, number one,
17 that's the official action that the Appellant was
18 entitled to seek review of. Number two, the stylings and
19 the content of its pleadings indicate that the action
20 complained of is order 2022-6 and the underlying NOVs.
21 Now, DEP has, as represented by this motion to dismiss
22 and now officially entered -- Daniel, if you could pull
23 up order 2022-9 -- and if you could zoom out just a
24 little bit. I'm sorry. Zoom in, Daniel. I'm not

1 technically adept today.

2 And the date that that was issued was July
3 13th, 2022. That is an official action of Cabinet
4 Secretary Ward and the DEP. It's listed as order number
5 2022-9. And you can stop there.

6 The introduction states that it's issued by
7 the DEP pursuant to the authority of the Environmental
8 Resource statute and Oil and Gas statute, and that it --
9 I'm sorry -- it supersedes order number 2022-6 issued on
10 March 9th, 2022, which is hereby vacated.

11 Now, if you could scroll down to the end of
12 the last page. I believe there may accidentally be a
13 blank page, so it will be page two. If you scroll down
14 to the order.

15 MR. WEILER: Have you provided that order
16 to everybody?

17 MR. DRIVER: I have. I emailed it out
18 yesterday.

19 MR. WEILER: Did I get that? Probably.

20 MS. DERAIMO: I was going to say --

21 MR. DRIVER: You all have it, don't you?

22 MR. LEACH: Yeah.

23 MS. DERAIMO: I was going to say, I printed
24 it out with your stuff.

1 MR. WEILER: Probably.

2 MR. DRIVER: I cc'd you, Mr. Weiler --

3 MR. WEILER: That's All right.

4 MR. DRIVER: -- but I won't go through and
5 read the --

6 MR. WEILER: Well, that's fine. I was just
7 making sure that -- and the Board all has it, right?

8 MS. DERAIMO: Yeah. I sent it to them.

9 MR. WEILER: Okay. Good. I'm sorry. Go
10 ahead.

11 MR. DRIVER: Assuming everyone can read
12 that on the screen and has a copy, I'll kind of
13 abbreviate it. The substance of the order is that DEP
14 hereby orders that all four of those NOVs are hereby
15 annulled and that the application for annulment of the
16 NOVs is hereby granted, and that the original order 2022-
17 6 is hereby vacated.

18 Within the body of the order, it indicated
19 that the reason that happened is that as the Appellants
20 pointed out, a special inspection on the site itself was
21 not performed, DEP therefore deemed the annulment review
22 administratively complete and granted the annulment and
23 vacated the NOVs, as requested.

24 MR. WEILER: It would've been nice if that

1 was done back in like April.

2 MR. DRIVER: It would've been ideal;
3 however, this was -- in the preparation for coming
4 forward on this litigation, we reviewed it, we discussed
5 it internally, we considered the Appellant's arguments.
6 We did a legal review and concluded that they were
7 correct, it was administratively --

8 MR. WEILER: Did you all have discussions
9 with DD Oil's counsel throughout this, that this may be
10 coming?

11 MR. DRIVER: Not about this subject, no. I
12 can't represent to you, other than having a very brief
13 phone call, letting them know we intended to vacate it.
14 This wasn't like a negotiated settlement --

15 MR. WEILER: Okay.

16 MR. DRIVER: -- this is something that was
17 pursuant to an internal review.

18 MR. WEILER: Okay. Accordingly, there's
19 not an action left to be appealed. The complained of
20 action has been vacated and no longer exists. And as a
21 matter of practice, the Board can't take any action to
22 vacate, modify or affirm the official action, as it's
23 been -- as it's been vacated.

24 Real briefly going to talk about

1 declaratory judgement as a relief. I laid that out in
2 the motion. I'm prepared to argue it, if necessary. I
3 don't think we have to reach the issue of whether or not
4 the Board has the authority in general to issue
5 declaratory judgements. I think it's clear that it's not
6 legally authorized to issue injunctions, but I can argue
7 about the declaratory judgment, if necessary.

8 The determination is irrelevant because the
9 action upon which the Board could've granted declaratory
10 judgement has already been vacated and it's of no effect.
11 There's nothing to make a declaratory judgement about.
12 And in its response to its motion, the Appellant
13 correctly notes that the Board does have the power to
14 modify permits. That is absolutely correct.

15 However, as noted above, the permit itself
16 is not the action that's complained of. And even if it
17 were, an appeal to modify the terms and conditions of the
18 permit would've been 30 days after the permit's issuance.
19 That has long passed. That passed over two years ago.

20 So what it boils down to is this, if this
21 appeal is not declared moot, first of all, we'll be
22 having the hearing predicated on an action that DEP has
23 already agreed to vacate. It will be predicated on an
24 action that no longer for consideration purposes exists.

1 What that does is boil down to a trial of
2 all the collateral matters without -- without the
3 potential to potentially vacate it at the end.

4 Second, as a practical matter going
5 forward, not rendering this moot will -- would enable an
6 Appellant to appeal, literally, of any action taken by
7 the DEP. It could appeal an NOV, any other action that
8 it could piggyback these collateral attacks and requests
9 for declaratory judgment on permits that we issued years
10 ago, which is what's happening here. The permit was
11 issued years ago. There's been appeals of NOVs and an
12 order and they're piggybacking on collateral attacks on
13 the permit itself.

14 Finally, in addition to the declaratory
15 judgment, the Appellant asks that the DEP be enjoined for
16 what's been characterized as interference with their
17 contracts, their business.

18 As the Board knows, contracts and tort
19 matters are clearly outside of the Board's bailiwick.
20 Those belong in other venues. If the Appellant would
21 like to bring an action and exercise its legal right to
22 allege that, you know, there's been some tortious
23 interference or other, you know, interference with the
24 contracts, that's something they can do in another venue.

1 That is outside of what the Legislature has charged the
2 Board with doing.

3 In short, they're legally entitled to
4 review of a specific agency action. They complained of a
5 specific agency action. DEP granted their request to
6 vacate that action and there's nothing live left for the
7 Board to legally decide that it has any jurisdiction
8 over. And with that, I'll pass it over to the Board or
9 to counsel.

10 CHAIRMAN SNYDER: Any questions of Mr.
11 Driver from Board members?

12 MR. SOMERVILLE: None for me.

13 MR. CAPELLI: None here.

14 MS. WINTERS: None for me. Thank you.

15 CHAIRMAN SNYDER: None from me. So just --
16 what I hear you saying is any of the items that have been
17 brought forth by DD Oil have been removed at this point
18 in time?

19 MR. DRIVER: They have brought forth
20 multiple items other than being aggrieved by order 2022-
21 6. DEP's position is that they were entitled to review
22 of order 2022-6 and the underlying NOVs. That is the
23 action complained of in their notice of appeal. That was
24 the title of their accompanying memorandum. That's what

1 they're legally entitled to appeal. And the other
2 requests for relief are collateral matters over which
3 either the Board has no jurisdiction or are mooted by the
4 fact that the order no longer exists. But they
5 definitely have other things that are listed as requested
6 relief in the pleadings.

7 CHAIRMAN SNYDER: What you're saying is
8 what they have brought before the Board has been taken
9 care of at this point by the DEP?

10 MR. DRIVER: Yes. Mr. Chairman, we believe
11 what they were legally entitled to bring before the Board
12 has been addressed.

13 CHAIRMAN SNYDER: Legally entitled is the
14 term I was looking for. Thank you.

15 MR. DRIVER: We believe the entire
16 substance of the notice of appeal have been addressed,
17 and I'm confident that counsel will disagree with me.

18 CHAIRMAN SNYDER: Thank you, Mr. Driver.
19 Mr. Leach?

20 MR. LEACH: Well, Mr. Chairman, we
21 respectfully disagree with a few of those positions. And
22 I'd like to highlight a few things.

23 First, we'll start with our notice of
24 appeal. And I don't have somebody to summon the

1 documents in front of you, as Mr. Driver did, but the
2 first --

3 MR. DRIVER: If I can interject, I can
4 have, if Mr. Leach would like me to, I can put them up,
5 but if you don't need me to, then that's --

6 MR. LEACH: If you don't mind putting up
7 the notice of appeal, first page.

8 MR. DRIVER: Okay. If you could --

9 CHAIRMAN SNYDER: That would be helpful to
10 the Board. Thank you.

11 MR. DRIVER: Daniel, if you could put up
12 Notice of Appeal, PDF page 1.

13 MR. LEACH: Thank you.

14 MR. DRIVER: Okay. And, Daniel, just
15 scroll it to wherever Mr. Leach wants.

16 MR. LEACH: If you could, scroll down to
17 where we can see the relief requested, which is one
18 through eight. Thank you.

19 So a few other things that I feel that were
20 omitted here in our discussion regarding our notice of
21 appeal. We've asked for several different types of
22 relief that we do believe that the Board has the
23 authority to make a ruling on today pursuant to its
24 authority under 22B-1-7(g)(1), which is also cited in our

1 response to their motion to dismiss.

2 To highlight a few things: Number two,
3 "Entry of an order declaring that WVDEP's request for
4 form WR35," which is a completion report, that that is
5 premature. That is an authority that the Board has under
6 22B-1-7. We cited those reasons in our response. And,
7 basically, that's a review of an official action and,
8 also, a request to affirm, which the Board specifically
9 has the ability to affirm permits. So this is something
10 that is clearly at this point in time not moot.

11 we'll go to number three, "The entry of an
12 order declaring that DD Oil's permit rights for the
13 subject wells were and are still valid." Again, this is
14 something that the Board under its authority 22B-1-
15 7(g)(1), that is something that the Board has the
16 authority to affirm that at all times, our permits were
17 valid.

18 MR. WEILER: Excuse me. Has there been any
19 time where the DEP said that the permits were not valid?

20 MR. LEACH: There are. In our notices of
21 violations -- well, let's start this way. The effect of
22 a notice of violation from the DEP immediately enjoins DD
23 Oil from any further permit work.

24 And the real substantive issue of this case is

1 that starting from back in July of last year, almost
2 exactly a year ago when the first finding of imminent
3 danger and cease operations order was issued, that's when
4 this case starts, and DD Oil's complaint is the effect of
5 issuing these orders, all of which have either been
6 overturned by a Circuit Court Judge or have been
7 retracted by the DEP itself, effectively has denied our
8 exercise of our valid permit rights.

9 So what we are asking the Board to do this
10 morning is to affirm that the actions taken by the DEP
11 were in error.

12 MR. WEILER: I think that's -- whether it was
13 in error or not, they retracted it.

14 MR. LEACH: And still deprived DD Oil of its
15 valid permit rights.

16 MR. WEILER: Okay.

17 MR. LEACH: And for those reasons, we are
18 asking the Board to modify its permit and to extend its
19 permit for the period of time in which it has lost, which
20 as of this month is approximately one year.

21 MR. WEILER: Okay. Well, can't the DEP just
22 extend the permit, considering what they did?

23 MR. DRIVER: First of all --

24 MR. WEILER: In a separate matter from this.

1 MR. DRIVER: -- we -- first of all, the DEP is
2 not conceding that the permits are still valid. That's
3 still at issue. That's still a legal issue. That's very
4 much live between the Appellant and DEP.

5 Number two, I don't know that the DEP has the
6 authority to unilaterally extend an oil and gas permit.

7 MR. WEILER: Yeah.

8 MR. DRIVER: And the third thing that I've got,
9 I'll give Mr. Leach a chance to present his argument, and
10 then I'll revisit it.

11 MR. WEILER: Yeah. Okay. I'm sorry, Mr. Leach
12 for interrupting, but I've got to show the law clerk here
13 some things. Go ahead.

14 MR. LEACH: So we'll continue on here. So I
15 believe I just addressed number three.

16 MR. WEILER: Yeah.

17 MR. LEACH: We'll move on to number four,
18 "Entry of an order declaring that WVDEP deprived DD Oil
19 of its right to contest the notice of violation."

20 There were several other procedural errors made
21 in this case that we have outlined in our response on
22 some other relevant procedural history that we feel,
23 again, was conveniently omitted. If the Board --

24 would he be able to, Mr. Driver, pull up our

1 response?

2 MR. DRIVER: Yes. Daniel, that should be
3 under, I believe, it would be DD Oil's response to
4 something along the lines of motion to dismiss.

5 MR. LEACH: If you could just scroll down to
6 relevant procedural history. We'll start with number
7 one. Thank you. So, again, back to the timeline here.
8 "Finding of imminent danger and cease operations order
9 entered on July 16th by Inspector James."

10 At this point in time is really when the
11 controversy regarding DD Oil's permits begin because at
12 this point in time, DD Oil is unable to proceed with any
13 of its permitted well work, which we, of course, claim
14 that that permit was valid.

15 The finding of imminent danger provided a
16 provision that you had to -- that you could apply for
17 hearing within 15 days, down to number three. Before any
18 action could be taken by DD Oil, they issued notices of
19 violation on July 20th, then again further prohibiting
20 our client from taking any further action under what we
21 believe was their valid permit.

22 In that notice of violation, they were allowed
23 to have seven days to either address or abate the alleged
24 violations. However, again, before DD Oil could comply

1 with any sort of response or make any attempt to abate,
2 if even necessary, the DEP then files a Motion for
3 Preliminary Injunction in the Circuit Court of Ritchie
4 County of which there was a corresponding order
5 temporarily granting the restraining order.

6 So from the time the finding -- I'm sorry,
7 what's the document called -- the finding of Imminent
8 Danger and Cease Operations Order was entered in July,
9 all the way through the end of July now, DD Oil has been
10 completely deprived of any response via several
11 additional official actions of the West Virginia Division
12 of Environmental Protection, of which now this Board has
13 authority to review.

14 And what we are arguing is that the way in
15 which they filed these deprived us of any ability to make
16 a response, and then when we actually did have an ability
17 to respond, that was before the Circuit Court in Ritchie
18 County, and Honorable Judge Sweeney denied their bid for
19 injunction and threw that out, and then remanded for
20 further proceedings, which is where we've gotten to
21 today.

22 MR. WEILER: Couldn't you have done a writ of
23 prohibition somewhere, I don't know whether it's Circuit
24 Court or Supreme Court to stop them for doing what

1 they're doing?

2 MR. LEACH: Well, specifically in the order
3 dissolving the DEP's request for preliminary injunction,
4 Sweeney remanded it back for further proceedings on the
5 permit because this is actually the correct venue to
6 address those issues. So other courts would not have
7 that authority until we have the hearing that we're here
8 trying to have today.

9 MR. WEILER: Okay. Yeah. But that was all
10 last summer and, you know, we're here on this order that
11 was issued in March. That's what we're dealing with,
12 March 2022, right?

13 MR. LEACH: Correct. So if I could continue on
14 through the rest of this.

15 MR. WEILER: Go ahead.

16 MR. LEACH: Because it all is inter -- you
17 know, interlocked here because, again, we start back in
18 July, there's a cease-and-desist order.

19 MR. WEILER: Yeah.

20 MR. LEACH: Then there's a notice of violation.
21 Then there's a preliminary injunction. All of those
22 three actions were taken, and DD Oil did not even have a
23 chance to respond.

24 Once we do finally get an order from the

1 Circuit Court judge saying you didn't even come close to
2 showing a finding of imminent danger. That's -- at
3 almost the conclusion, probably within a week of
4 receiving that order, then DD Oil gets another official
5 correspondence from DEP then stating that now WR35 is
6 due, which is a completion report.

7 So, again, DD Oil has been deprived of its
8 permit right. And that's why these all matter because it
9 was just action after action after action after action
10 where they are not permitted to proceed on these permits
11 until they address these actions.

12 So that's where we get to. And we can check
13 the certified record on this, but we have filed requests
14 for annulments, I believe, in February. That's close to
15 the time that my firm and my co-counsel got involved in
16 this case, and that's when the DEP then issued that order
17 denying our annulment based on the substance of those
18 arguments.

19 MR. WEILER: It just seems to me that even at
20 that point, it seems to me that some type of writ action
21 by DD Oil would've been what needed to be done because
22 the DEP was going -- acting crazy and not giving you the
23 opportunity to deal with these issues, that it would be a
24 writ because I'm always -- in other agencies, I'm on the

1 other end of that, having to respond to writs to show
2 that -- you know, but that just seems odd.

3 But I mean what's the bottom line here? I mean
4 did you lose money? Did DD Oil lose money? Are there
5 attorney fees involved? Have you considered an action
6 against -- in the Legislative Claims Commission to recoup
7 moneys, those kind of things?

8 Because I still don't see -- of course it's
9 just me, you know, what the appeal board, Quality Board
10 can do in this matter, but I'll let you go ahead further.

11 MR. LEACH: First and foremost on some other
12 type of writ or some other form of relief, any court that
13 we would go and file in, and this is the direction of
14 Judge Sweeney, was that we had to first exhaust all
15 administrative remedies, which was, first, requesting an
16 annulment from DEP. That was then denied, and then our
17 next step in exhausting all administrative remedies is
18 then to appeal to this Board of which, as we've discussed
19 today, and as Mr. Driver has also conceded to, that the
20 Board does have the authority to modify and review these
21 official actions and do what we are here for today, which
22 is a one-year extension of the permits.

23 Yes. They have been aggrieved by the DEP's
24 actions. Yes. They have suffered substantial losses.

1 Yes. We do intend to file further actions against the
2 DEP for those issues, however, first, we must exhaust all
3 of the administrative remedies because the issue of
4 whether the permit was valid or not is a critical piece
5 of those next steps.

6 MR. WEILER: Yeah. I mean --

7 MR. LEACH: So this is the appropriate venue.

8 MR. WEILER: Yeah. I mean I don't know if that
9 exhaust administrative remedies, I mean I use that
10 argument all the time, and sometimes it works and
11 sometimes it doesn't. I guess sometimes it depends on
12 the judge. And, you know, you would've probably had a
13 little bit more success in Kanawha County than you did
14 in -- what county were you all in in all this?

15 MR. LEACH: We were in Ritchie County where the
16 venue is proper.

17 MR. WEILER: Ritchie. But I mean if -- is
18 there a process where you request an extension of permit,
19 they deny, and then you can appeal that?

20 MR. LEACH: The Board has the authority -- we
21 noticed this in our appeal, and that is the relief that's
22 requested. And we would certainly appreciate if the
23 Board would order that because we do believe that that
24 rectifies the situation to the extent that this Board has

1 the authority to do so.

2 When I say certainly in equity when you look at
3 all the actions taken against the DEP, now some of which
4 were dismissed by a Circuit Court judge, some of which
5 have now been vacated by the Department's own actions,
6 that would be a very appropriate remedy in this case.

7 MR. WEILER: Okay. Do you want to go further?

8 MR. LEACH: Yeah.

9 MR. WEILER: Anything else?

10 MR. LEACH: I believe my co-counsel wants to
11 speak to a few things.

12 MR. WEILER: Go ahead.

13 MR. UMINA: Yeah. If I could. Just a couple
14 of things. you know, one of the reasons that that
15 previous -- the previous procedural history is relevant
16 in matters, you know, after they lost their injunction,
17 which again was filed prior to the expiration of the
18 abatement period, they went and filed an injunction after
19 losing in that hearing, the DEP then contacted the
20 producers who DD Oil had lined up and prevented them from
21 producing from these wells.

22 So despite losing, the DEP went out of their
23 way, contacted the producers. well, now we're into
24 August, September. So then the producers leave. They go

1 to other jobs, so then we have all winter long that the
2 new producers can't get out there, can't do anything.

3 So in fact when we were looking at what
4 remedies we have, some of them that you mentioned, then
5 they show up right as spring is starting after they had
6 run the producers out of there the previous fall, after
7 losing, mind you, and then they issue these additional
8 violations.

9 So now we're postured here. And we think in
10 equity, the due process rights of DD Oil and even as we
11 sit here now, this hearing was even continued for months
12 to which our permits, as it relates to these wells
13 expired during that time.

14 So here's where we're postured now. DD Oil --
15 if the Board doesn't extend these permits, DD Oil is
16 going to have to repay the permit fees, go back to all of
17 the landowners, get new bonds and go through all of these
18 processes that are much more than just the cost.

19 And when we're looking at what occurred here,
20 the DEP at every single turn has lost or withdrawn their
21 actions. So we do not believe in equity and in fairness
22 that DD Oil should eat the cost in the value of those
23 permits for the entire period of time that the DEP has,
24 frankly, been interfering with their permits.

1 Now, counsel just stated the DEP can't
2 unilaterally change it, but we know who can. This Board
3 can. It is explicitly clear that the Board has the
4 authority to modify permits.

5 So what we are asking, very simply, at this
6 juncture, and the only reason that any of us have to even
7 talk today is because this is the main thing that we are
8 looking for.

9 MR. WEILER: I don't think -- I think the
10 Board, and I would like to hear from the Board, but as
11 long as -- you know, I've been here a couple years, two
12 or three years, and usually the Board are hearing appeals
13 -- with regards to permits, whether it was denied, a
14 registration to the general permit was denied, or the
15 parameters of the requirements of a permit. We can
16 modify those, whether or not the testing, you know, that
17 kind of thing.

18 I don't think we've ever had this situation. I
19 mean if any of the Board's members have any historical
20 knowledge that this is something that the Board could
21 even do.

22 CHAIRMAN SNYDER: I don't believe I recall
23 anything of this nature being brought before the Board.
24 Mr. Driver from the DEP, I don't think -- I know you -- I

1 don't believe you've ever brought anything of this nature
2 before us before.

3 MR. DRIVER: I can't make any kind of, you
4 know, proffer that I would swear on, but I have -- I've -
5 - in my experience and in my colleague's experience,
6 we've never had the Board address these matters. I mean
7 that's obviously not dispositive. That's just anecdotal,
8 but I've never seen it.

9 CHAIRMAN SNYDER: And just a general comment
10 listening to Mr. Umina, going back and starting from
11 scratch with the permit, it's involved.

12 MR. WEILER: Yeah. I mean I look at it and I
13 say what options do you all have? I don't know if you've
14 sent a pre-suit notice to the DEP yet. I don't know if -
15 - or are you considering a case to the Legislative Claims
16 Commission because, you know, it's a fairness issue to
17 get relief or reimbursement for costs. I don't know if
18 there's a tortious interference case, if they're
19 interfering with you and your producers.

20 But I just -- you know, that's why it's tough
21 for me to see that we can modify a permit that's not the
22 subject of an appeal technically or, you know,
23 specifically not subject to the appeal. So why don't you
24 respond to that, and then we'll have Mr. Driver.

1 MR. LEACH: Yeah. The notices of violation
2 that we're appealing, those put the permit on ice.

3 MR. WEILER: Yeah.

4 MR. LEACH: So at whatever point that the Board
5 would like to look back and say that this interference
6 and now they have abandoned those claims has deprived our
7 client of their valid rights to its permit and deprived
8 us of due process, that's what we're asking the Board now
9 to make a rule on is to modify that permit, which they
10 very clearly have the authority to do, just a plain-
11 language, black-letter law reading of 22B-1-7(g)(1), they
12 expressly have the authority to modify a permit.

13 MR. WEILER: Yeah.

14 MR. LEACH: I think very logically. The
15 extension of a permit through the period of time of which
16 we have lost due to notices of violations being issued
17 that, again, by their own admission, they have withdrawn,
18 that is a very appropriate remedy in this case, and I
19 think that that's -- that's the least that -- you know,
20 that's exactly what we're asking the Board to do here
21 today is to extend those permits.

22 MR. WEILER: Yeah. I mean I appreciate your
23 arguments. I think I went to a legal seminar once where
24 the guy said, "After you look at your motion, get rid of

1 all the adverbs because nothing is ever clear.” We may
2 have authority, I don't know, but it's not clear that we
3 have authority.

4 But nonetheless, Mr. Driver, why don't you have
5 the last word, and then the Board -- if anybody on the
6 Board has any individual questions, we'll go with that.

7 MR. DRIVER: Yeah. Would the Board -- I'm
8 sorry. Would the Board like to hear anything else from
9 Mr. Leach? I'm not sure if he was done.

10 MR. WEILER: Okay.

11 CHAIRMAN SNYDER: I think if other Board
12 members have questions for Mr. Leach or Mr. Umina, I
13 think I understood their positions clearly. Is that --
14 what is the DEP's response to that because it does appear
15 that -- I think was it Mr. Leach who said put everything
16 on ice. That is kind of what happened.

17 MR. DRIVER: Dr. Snyder, I'm not going to get
18 into the weeds on that characterization unless you really
19 want me to.

20 MR. WEILER: We want you to. How about that?

21 MR. DRIVER: An NOV does not, per se, stop an
22 operator from operating. We have operators out there who
23 get NOV's once a week and they're able to keep going.
24 All it does is put the operator on notice that they are

1 violating, that they need to correct it and that future
2 enforcement might be -- an enforcement action might be
3 taken if they don't.

4 One thing I do want to make clear to the Board
5 is the hearing in Ritchie County Circuit Court in front
6 of Judge Sweeney was intended to find whether there was
7 imminent danger sufficient to support DEP's application
8 for injunctive relief.

9 Judge Sweeney found that there was not an
10 adequate showing of imminent danger, however, in last or
11 second-to-last paragraph of his order, he explicitly
12 declined to address it, to address the matter on its
13 merits and suggested that it needed to go back downstairs
14 for administrative consideration.

15 So I just wanted to make it clear that the
16 hearing in front of Judge Sweeney was not on the merits,
17 the factual merits of the case. It was simply his
18 determination that DEP didn't make a finding of imminent
19 danger. And he explicitly declined to usurp
20 administrative authority.

21 MR. WEILER: I mean when the inspector issues -
22 - correct me if I'm wrong -- a finding of imminent danger
23 and cease operations, I mean that would scare the hell
24 out of me if I was DD Oil.

1 MR. DRIVER: Well, cease and desist -- and
2 Martin, correct me if I'm wrong, I'm referring to Mr.
3 Martin -- cease and desist order is gone, correct?

4 MR. MARTIN: Yeah.

5 MR. DRIVER: The cease-and-desist order is not
6 at issue here. The cease-and-desist order has been
7 vacated.

8 MR. WEILER: I know, but back then if they had
9 -- as a -- even as a precautionary measure stopped their
10 operations, what you all were doing preventing them from
11 the permit, what they would operate on the permit, I mean
12 I think that's real. Now, I don't know what we can do
13 about it here now, but I think that's real.

14 You know, unless I'm just -- I mean because
15 that's -- what is that in "A Few Good Men," grave danger,
16 grave danger, is there any other kind, you know, imminent
17 danger, you know. I mean that's some harsh words. I
18 mean I know that's wording from a -- you know, a reg or
19 statute, but I don't -- but I understand, so --

20 MR. LEACH: If I could address some language
21 from these notices of violations.

22 MR. WEILER: Right.

23 MR. LEACH: I mean they essentially say that
24 that doesn't mean you have to stop work. "Failure to

1 abate a violation by the date will result in bond
2 forfeiture and may result in assessment of civil
3 penalties or filing of misdemeanor charges and/or further
4 action for injunctive relief.”

5 So to claim that the issuance of a notice of
6 violation doesn't mean you have to stop today, maybe they
7 have better relations with other producers or whatever it
8 may be, that they have an understanding that will work
9 towards a resolution, which is my understanding happens
10 with many other producers. My producer was not afforded
11 that opportunity, so he is faced with comply with this
12 notice of violation, of which he claimed I have not
13 violated. How can you abate something that you haven't
14 violated?

15 MR. WEILER: Yeah.

16 MR. LEACH: And then not only are you facing
17 that, but you're also facing civil penalties, your bond
18 forfeiture. The bond you put up, you lose that, in
19 addition to potentially criminal misdemeanor charges for
20 violating that order. How can you continue on in the
21 face of a notice of violation that has such language?

22 MR. WEILER: Yeah. Professor Cady -- whoever
23 went to WVU -- used to say “Every dog gets one free bite.
24 It's the second bite that, I mean, you know, can cost you

1 out of pocket.” So I mean I understand if you get notice
2 that there’s imminent danger and you continue on
3 operating and something happens, you know, that could be
4 problematic for DD Oil. So I don't know, that’s my law
5 school lecture for the day.

6 MR. DRIVER: And Mr. Weiler, can I?

7 MR. WEILER: Yeah.

8 MR. DRIVER: I would point out that the NOV
9 refers to these potential consequences predicated on a
10 failure to abate.

11 MR. WEILER: Yeah.

12 MR. DRIVER: But I mean the bottom line, as has
13 been pointed out repeatedly is that the complained of
14 action is an order and the underlying NOVs.

15 The Appellant correctly states that the Board
16 has the power to modify permits, however, it does not
17 have the power to modify a permit in this particular
18 instance.

19 If an application by an Appellant to modify a
20 permit is going to be made, it needs to be made within 30
21 days from the permit being issued. 22B-1-7 only confers
22 the Board the power to review these things to modify, to
23 vacate or affirm, if the appeal is filed within 30 days
24 of the official action. They can’t come in two years

1 later and ask for modification of term permits.

2 The Board does have the power to modify
3 permits. They don't have the power here. 22B-1-7 does
4 not confer that power. They would've had to appeal the
5 permit. That should've happened two years ago. The
6 Board can't enter injunctive relief because there is no
7 provision in the statute for it.

8 Simply put, I mean the Board does not --
9 everyone on the Board knows permit appeals happen within
10 30 days of the permit being issued. You can't come back
11 two years later and ask for modification of a permit.

12 Now, the procedural history on this, the appeal
13 is from the order and NOV. The procedural history prior
14 to these actions is not implicated. It's not at issue
15 here. And those are properly issues for another venue.
16 Again, allowing these collateral issues to be piggybacked
17 onto an NOV appeal or an NOV order appeal would allow any
18 litigant to appeal an agency action, and then start
19 seeking permit modifications.

20 And in the case of Judge Sweeney's remand, I
21 don't know that a remand from Circuit Court for failure
22 to exhaust administrative remedies forecloses either an
23 extraordinary writ or filing in another administrative
24 venue, like the Court of Claims. It just makes it

1 premature for consideration by the Circuit Court.

2 MR. WEILER: Yeah.

3 MR. DRIVER: I can't make -- can't make a
4 nuance legal argument right there, but I don't know that
5 it forecloses extraordinary writs.

6 MR. WEILER: I mean I know that DEP put you,
7 Scott, in a difficult position because all the sudden out
8 of nowhere the day before the hearing, they wipe their
9 hands of everything like nothing ever happened.

10 you know, if you go back before -- if they're
11 wiping out the notice of violations, then if you go back
12 to the time when those were issued, and then work your
13 way forward, look at all the stuff that happened to DD
14 Oil and what they had to go through at the time. That's
15 what's concerning.

16 I went to the University of Tennessee, and they
17 used to have a saying, "The big orange screw" is when the
18 school screwed you, whether it would be registering for
19 classes or whatever, but that was -- you know, it was in
20 the '80s, and that's what they called it, the big orange
21 screw". This looks like the DEP screw.

22 So I mean -- and I feel -- you know,
23 personally, I feel an issue with what DD Oil went
24 through. Legally, I don't know what we can do about it,

1 but if anybody wants to have any more -- and I think the
2 Board, if they have any questions. If not, we're going
3 to do a deliberation.

4 MR. LEACH: I have one additional comment.

5 MR. WEILER: Yeah.

6 MR. LEACH: I think that if you take Mr.
7 Driver's analysis here, the interpretation of the
8 statutes that we have that control these permits, this
9 would just lead to a completely absurd result, as we're
10 seeing here; for example, how do you abate a permit when
11 you dispute the violation? How do you modify a permit
12 when you have notices of violation on it? Those are not
13 a logical result.

14 what is a logical result of the notice of
15 violation in what are threatened with bond forfeiture,
16 civil penalties and misdemeanor charges is that you
17 cannot operate under your permit. And that's why the
18 request that we're making today is extension of the
19 permit for one year from the time in July of last year
20 when the first cease order was entered -- or that was
21 filed until today.

22 MR. UMINA: If I could have two sentences if
23 everyone doesn't mind.

24 MR. WEILER: Yeah.

1 MR. UMINA: I think like many cases in west
2 Virginia, you know, even when we look at the Supreme
3 Court, this is kind of a case of first impressions before
4 this Board in terms of what is its ability to modify
5 permits?

6 Again, it would be an absurd result to think
7 you must -- and the only time the Board can modify a
8 permit is at the time it's issued or denied. And the DEP
9 can do whatever it wants during your permit period, but
10 if you are aggrieved and it interferes with you utilizing
11 your permit, that the Board then cannot modify it. That
12 is a completely absurd interpretation.

13 Plain language reading of that statute clearly
14 gives this Board the ability to modify, and equity
15 demands it.

16 MR. WEILER: Yeah. I don't think you're going
17 to see the Board making cases of first impression. We
18 leave that to Circuit Courts and Supreme Courts and the
19 Legislators to change regs or statutes, but it's an
20 interesting thought.

21 Does the Board have any questions? And I
22 apologize if I have spoke so much today. I just -- you
23 know --

24 CHAIRMAN SNYDER: Any questions from the Board

1 members, Chuck?

2 MR. SOMERVILLE: No, I don't think so at this
3 time. I think maybe a chance to speak off -- out of the
4 --

5 MR. WEILER: Deliberate.

6 CHAIRMAN SNYDER: Yeah. Steve?

7 MR. CAPELLI: I agree. I think it's time we
8 went into deliberation.

9 MS. WINTERS: I'm the same.

10 CHAIRMAN SNYDER: Yeah. I'll discuss this
11 during deliberation. But yeah, I think, Mark, some of
12 your comments well summed up some of my thoughts, so --
13 okay. Let us then go off the record and we will discuss
14 this and get back to you as soon as we possibly can.
15 This may take a while.

16 (DELIBERATION OFF THE RECORD
17 OUTSIDE THE PRESENCE OF PARTIES.)

18 (OFF THE RECORD.)

19 (ON THE RECORD.)

20 CHAIRMAN SNYDER: And thank you, everyone.
21 After a great deal of discussion, we're going to dismiss
22 this -- well, the issue before the Board and allow this
23 to continue, properly, to another venue.

24 It does seem that by dropping the NOV's, it

1 would almost seem appropriate to restart the clock for DD
2 Oil, but we do not have the authority to cause that to
3 occur, but that was -- in our discussions, it seemed to
4 be a poor way to deal. This is where the Board is on
5 this particular item. Mark, do you want to add to that?

6 MR. WEILER: Well, just being specific, I mean
7 the Board has unanimously voted to dismiss this appeal,
8 the issue being moot. The Board does not have the
9 authority to modify the permit under the circumstances
10 presented.

11 But I note, all the Board felt that the DEP
12 should work with DD Oil to extend permits and stuff and
13 try to make up for the havoc that's been caused in this
14 matter, some not -- some due to no fault of DD Oil, but
15 it seems like you'd want to work something out.

16 well, we just don't feel -- the Board doesn't
17 feel it has the authority to grant the relief that you're
18 requesting, and that the fact that all NOV's have been
19 withdrawn, you know, that's what we're here for in the
20 first place, understanding all the circumstances and
21 procedural history in this matter.

22 so we're requesting that Mr. Driver draft an
23 appropriate order granting and have it reviewed by Morgan
24 and Ryan before presenting to the Board for entering.

1 MR. DRIVER: I will do that.

2 MR. WEILER: Okay. And I don't think there's
3 anything further unless anybody has any last comments.

4 MR. LEACH: No, we don't. Thank you, Mr.
5 Chairman.

6 MR. WEILER: Okay.

7 CHAIRMAN SNYDER: Well, thank you. It would be
8 -- I would think of it as a fair and appropriate thing if
9 there could be dialogue between DEP and DD Oil to see if
10 there could be some sort of fair resolution, considering
11 that there were probably issues on both sides, but it
12 would be nice to see something appropriate worked out.
13 And any Board members have anything else to add?

14 MR. CAPELLI: Nothing here.

15 MR. SOMERVILLE: Not from me. Thanks.

16 CHAIRMAN SNYDER: Okay. And I thank all the
17 parties. You presented in a very clear and succinct
18 fashion. I think we have a pretty good idea of what
19 occurred. With no further comments, we'll go off the
20 record.

21 (WHEREUPON, THE HEARING WAS CONCLUDED.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

I, Denys Snodgrass, Notary Public in and for the State of West Virginia, duly commissioned and qualified, do hereby certify that the foregoing deposition was duly taken by and before me, under the West Virginia Rules of Civil Procedure, at the time and place and for the purpose specified in the caption thereof; the said witness having been duly sworn by me to testify the whole truth and nothing but the truth concerning the matter in controversy.

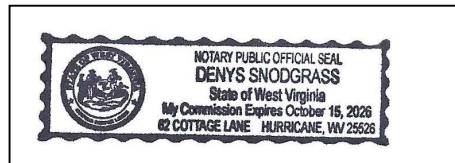
I certify that the attached transcript meets the requirements set forth within Article 27, Chapter 47 of the West Virginia Code.

I do certify that the said deposition was correctly taken by me by means of the Stenomask; that the same was transcribed by me, and that the said transcript is a true record of the testimony given by said witness.

I further certify that I am not connected by blood or marriage with any of the parties to this action, am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, or financially interested in the action, or interested, directly or indirectly, in the

matter in controversy.

Given under my hand this 18th day of July 2022.



A handwritten signature in blue ink that reads "Denys Snodgrass".

Denys Snodgrass, CCR, Notary Public

My commission expires October 15, 2026.