INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Aug 26 2026
02:14PM EDT
Transaction ID 80465526

Tucker United,
Friends of Blackwater,
and
West Virginia Highlands Conservancy,
Appellants Below, Petitioners

v.) No. 25-ICA-391

Laura Crowder, in her official capacity
as Director, Division of Air Quality
Department of Environmental Protection,
Appellee Below, Respondent

DISMISSAL ORDER

On August 26, 2026, the Intermediate Court of Appeals of West Virginia made and entered the following order, in vacation:

On October 6, 2025, Petitioners, Tucker United, Friends of Blackwater and West Virginia Highlands Conservancy, by counsel, J. Brent Easton, Brent Easton, Attorney at Law, PLLC, presented a notice of appeal from an order of the West Virginia Air Quality Board ("WVAQB") (Case No. 25-01-AQB) entered on September 4, 2025.

However, on April 30, 2026, Chief Judge Daniel W. Greear filed a letter addressed to the Chief Justice of the Supreme Court of Appeals of West Virginia seeking his voluntary recusal from this matter. Likewise, on May 1, 2026, Judge Charles O. Lorensen filed his letter also seeking voluntary recusal from this matter. On June 11, 2026, the Supreme Court of Appeals of West Virginia issued administrative orders granting the voluntary recusals of Chief Judge Greear and Judge Lorensen and appointing Judge Shawn D. Nines and Judge Gregory L. Howard, Jr., to sit on this matter by temporary assignment.

On July 16, 2026, the Court, now having a quorum, issued an order requiring the parties to submit supplemental briefing on the issues of:

> (1) whether jurisdiction of this matter is appropriate in the Intermediate Court of Appeals in light of West Virginia Code § 22B-1-9, § 22B-2-3, and § 29A-5-4; and (2) whether this appeal is mooted by the appeal docketed as 26-ICA-92 given that this appeal concerns a draft of the final permit at issue in 26-ICA-92 and the same "trade secrets" or "confidential business information" appear to be at issue in both appeals.

On July 23, 2026, Petitioners submitted their supplemental briefing. On July 30, 2026, Respondent submitted her supplemental briefing. Upon consideration and review of the supplemental briefing, the applicable law, and the record, the Court determines that it lacks jurisdiction over this matter.

Pursuant to West Virginia Code § 22B-1-9(a), appeals from orders of the environmental boards of the State of West Virginia are governed by West Virginia Code § 29A-5-4, with the caveat that the exceptions set forth in West Virginia Code § 22B-2-3, § 22B-3-3, and § 22B-4-3 apply.

West Virginia Code § 29A-5-4(b) provides that "proceedings for judicial review of any final order or decision [of an administrative agency] issued after June 30, 2022, must be instituted by filing an appeal to the Intermediate Court of Appeals as provided in § 51-11-1 *et seq.* of this code[.]"[1] However, West Virginia Code § 22B-2-3 is an exception to West Virginia Code § 29A-5-4 and states, in pertinent part in subsection (b), that the petition for review "shall be filed in the circuit court of the county wherein the alleged statutory air pollution complained of originated or in Kanawha County upon agreement between the parties."[2]

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1 Likewise, West Virginia Code § 51-11-4(b)(4) states that the Intermediate Court of Appeals has jurisdiction over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to § 29A-5-4 or any other provision of this code[.]"

2 Since this matter concerns an order of the WVAQB that does not involve denying, approving, or modifying a permit, West Virginia Code § 22B-2-3 applies. Further, the parties expressly state that they do not consent to proceeding in the Circuit Court of Kanawha County.

While West Virginia Code § 29A-5-4(b) and § 51-11-4(b)(4) seem to indicate that the legislature intended for administrative appeals of orders entered post June 30, 2022, to be filed with this Court, the Court must construe these statutes along with § 22B-1-9 and § 22B-2-3 so as to give effect to each. *See* Syl. Pt. 4, *State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958). Therefore, while West Virginia Code § 29A-5-4 is applicable to this appeal by virtue of West Virginia Code § 22B-1-9, the exception to the provisions of § 29A-5-4 found in § 22B-2-3 are applicable and dictate that this Court lacks jurisdiction.

Further, the Supreme Court of Appeals of West Virginia has held that appellate courts do not settle moot questions; and whenever it appears by time or other cause the matter in controversy has been extinguished pending the appeal, the appeal will be dismissed. *See* Syl. Pt. 4, in part, *Whyel v. Jane Lew Coal & Coke Co.*, 67 W. Va. 651, 69 S.E. 192 (1910). "Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court." *W. Va. Secondary Sch. Activities Comm'n v. David D.*, 251 W. Va. 102, 107, 909 S.E.2d 137, 142 (2024). In this appeal, Petitioners seek relief in the form of vacation of the order on appeal regarding the draft permit and remand for further evidentiary proceedings. However, the evidentiary proceeding has already occurred and the final permit in the underlying matter has been issued and appealed to this Court on largely the same basis put forth by Petitioner herein. In short, even if we were to grant the relief Petitioners seek, it would essentially be an advisory opinion as there would be nothing left to do in regard to the draft permit.

In regard to Petitioners' argument that this Court should still decide this matter even if technically moot under the factors outlined in *DD Oil Co. v. State ex rel. Ward,* 249 W. Va. 483, 492, 896 S.E.2d 456, 465 (Ct. App. 2023), the Court determines that Petitioners have failed to demonstrate that this matter has sufficient collateral consequences, concerns an issue of sufficient public importance, or is capable of evading review. The final permit has been appealed and whether certain information was protected trade secrets or confidential business information, as well as the ultimate approval of the permit, has been preserved for review in Case No. 26-ICA-92. Petitioners do not explain how issues in the permitting process are not reviewable on appeal of the final permit. Furthermore, the Court is not aware of any reason

Petitioners cannot challenge the ruling of the WVAQB that it lacked jurisdiction to hear an appeal of a draft of the permit in the appeal of the final permit.

Accordingly, this matter is dismissed for lack of jurisdiction. Each party is to bear their own costs.

Chief Judge Daniel W. Greear, not participating. Judge Shawn D. Nines, sitting by temporary assignment.

Judge Charles O. Lorensen, not participating. Judge Gregory L. Howard, Jr., sitting by temporary assignment.

A True Copy

Attest: /s/ Ashley N. Deem
Chief Deputy Clerk of Court