IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HOMINY CREEK PRESERVATION ASSOCIATION, INC.,

Petitioner,
(Respondent Below),

v.

CASE NO. 11-0749
(No. 10-AA-102 in the Circuit Court of Kanawha County)

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,
(Petitioner Below).

PETITIONER'S OPENING BRIEF

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August 9, 2011

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ASSIGNMENTS OF ERROR

I. The circuit court erred in holding that the failure of the West Virginia Department of Environmental Protection ("DEP") to file a timely appeal of the West Virginia Surface Mine Board's final order awarding fees to Hominy Creek Preservation Association, Inc. ("HCPA") did not preclude review of the matters that the Board adjudicated in its final order.

II. Alternatively, the circuit court committed plain error in applying 38 C.S.R. § 2-20.12.a.1 to the facts of this case and reversing the Surface Mine Board's fee award on the ground that "[a]s a matter of law, Hominy Creek cannot recover fees from DEP without a finding that DEP was a violator and furthermore, that Hominy took part in determining such."

III. With respect to HCPA's entitlement to an award of fees and costs, the circuit court erred in failing to defer to the Surface Mine Board's finding that HCPA made a substantial contribution to a full and fair determination of the issues in the two administrative appeals underlying the Board's fee award and instead reversing the award based on the circuit court's own factual assertions, which the administrative record does not support.

IV. The circuit court erred in overlooking DEP's effective ratification of the settlement agreement between HCPA and Green Valley.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background.

In the first instance, this appeal concerns (1) the period of time for filing of actions for judicial review of agency decisions and (2) the absence of any provision tolling the running of that time with respect to a motion for reconsideration of a final order of the Surface Mine Board. The State Administrative Procedures Act provides that "[p]roceedings for review shall be instituted by

filing a petition . . . within thirty days after the date upon which [the petitioner] received notice of the final order or decision of the agency." W.Va. Code § 29A-5-4(b). The State Administrative Procedures Act does not authorize administrative agencies to reconsider or clarify final orders once issued, nor does it toll the time for filing a petition for judicial review if a party elects to file a motion for reconsideration or clarification anyway.

The statutes that specifically govern judicial review of orders of environmental review boards provide that "[a]ll of the provisions of section four, article five, chapter twenty-nine-a of this code apply to and govern the review with like effect as if the provisions of said section four were set forth in extenso in this section." W.Va. Code § 22B-1-9. Each order of a review board "shall be final unless vacated or modified upon judicial review thereof in accordance with the provisions of this chapter." W.Va. Code § 22B-1-7(j). The review board statutes do not authorize a board to reconsider or clarify final orders once issued, nor do they toll the time for filing a petition for judicial review if a party elects to file a motion for reconsideration or clarification anyway.

Collectively, the environmental review boards must "establish procedural rules in accordance with the provisions of chapter twenty-nine-a of this code for the regulation of the conduct of all proceedings before the boards." W.Va. Code § 22B-1-3(c). The Surface Mine Board has promulgated procedural rules that are codified at 49 C.S.R. 1. Those rules authorize the filing and disposition of motions "which tend to regulate the course of hearing, simplify the issues, and dispose of procedural requests or similar matters," 49 C.S.R. § 1-1-5.2, but they do not expressly authorize motions for clarification or reconsideration of final orders once entered. The rules of the Surface Mine Board also provide that "[t]he appellant may request a stay of the action appealed from by written motion contemporaneous with the filing of the notice of appeal," 49 C.S.R. § 1-1-5.5, but

they do not authorize the request or grant of a stay of the time for filing a petition for judicial review of a final order of the Surface Mine Board.

Alternatively, if this Court determines that DEP filed its petition for judicial review in a timely manner, this appeal turns on the statutes and regulations that govern fee-shifting in administrative review proceedings pursuant to the Surface Coal Mining and Reclamation Act, which is codified at W.Va. Code §§ 22-3-1 through 22-3-31A. The purposes of that Act include, among other things: (1) expanding the established and effective statewide program to protect the public and the environment from the adverse effects of surface mining operations and (2) assuring that adequate procedures are provided for public participation where appropriate. W.Va. Code § 22-3-1(b)(1) and (b)(6).

The Surface Coal Mining and Reclamation Act and its implementing regulations make up the approved state regulatory program for West Virginia pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 ("SMCRA"). Congress enacted SMCRA to, among other things: (1) "establish a **nationwide** program to protect society and the environment from the adverse effects of surface coal mining operations;" (2) "assist the States in developing and implementing a program to achieve the purposes of [SMCRA];" and (3) "assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary [of the Interior] or any State under [SMCRA]." 30 U.S.C. § 1202(a), (g), and (i) (emphasis supplied). Federal regulation requires that "States with an approved State program shall implement, administer, enforce and maintain it in accordance with the Act, this chapter and the provisions of the approved

State program." 30 C.F.R. § 733.11. A separate federal regulation authorizes amendment of approved state regulatory programs, but provides that:

> Whenever changes to laws or regulations that make up the approved State program are proposed by the State, the State shall immediately submit the proposed changes to the Director as an amendment. No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment.

30 C.F.R. § 732.17(g).

The Surface Coal Mining and Reclamation Act requires that "[n]o person may engage in surface mining operations unless he or she has first obtained a permit . . . . " W.Va. Code § 22-3-8. The statute and its implementing regulations establish detailed requirements for the content of permit applications and associated reclamation plans, for evaluation and approval of permit applications, and for revision and renewal of mining permits. W.Va. Code §§ 22-3-9, 22-3-10, 22-3-18, 22-3-19; 38 C.S.R. §§ 2-3 through 2.7, 2.9, 2.10, and 2.22.

The Surface Coal Mining and Reclamation Act allows any person having an interest which is or may be adversely affected to file written objections to any proposed initial or revised permit application for a surface mining operation and to request and participate in an informal conference on the proposal. W.Va. Code § 22-3-20(b). If DEP approves the application, those opposed may request a hearing before the Surface Mine Board pursuant to W.Va. Code § 22B-1-1 *et seq.*

The Legislature has empowered the Surface Mine Board "[t]o consider appeals, subpoena witnesses, administer oaths, make investigations and hold hearings relevant to matters properly pending" and "[t]o perform any and all acts within the appropriate jurisdiction of each board to secure for the benefit of the state participation in appropriate federally delegated programs." W.Va. Code § 22B-1-5(1) and (4). An "order made and entered by a board after an appeal hearing" is subject to judicial review pursuant to W.Va. Code §§ 22B-1-9 and 29A-5-4.

In 1985, in revising the West Virginia statutes governing regulation of surface coal mining operations, the Legislature enacted a fee-shifting provision which provided that:

> Whenever an order is issued under this section, or as a result of any administrative or judicial proceeding under this article, at the request of any person, a sum equal to the aggregate amount of all costs and expenses, including attorney fees, as determined by the board or the court to have been reasonably incurred by such person for or in connection with his participation in the proceedings, may be assessed against either party by the board or court.

W.Va. Code § 22-4-3(g) (1985). Appendix Record at 289.[1] In 1994, as part of a second revision of the surface mining statutes, the Legislature deleted the administrative and judicial appeal provisions that were part of the original program, including W.Va. Code § 22-4-3(g) (1985). *Id.* The deletion of those provisions was not shown or discussed in West Virginia's submission for OSM's approval. *Id.* The newly enacted statutes made no mention of reimbursement of costs and expenses, including attorney fees, incurred in administrative or judicial review proceedings. *Id.*

After analyzing these facts during the course of the Surface Mine Board's adjudication of HCPA's fee petitions at issue in this appeal, the federal Office of Surface Mining Reclamation and Enforcement ("OSM") concluded that:

> the statutory requirements at West Virginia Code 22-4-2 [1985] regarding appeals to the Surface Mine Board, and West Virginia Code 22-4-3 [1985] regarding appeals from the board, judicial review and temporary relief are still part of the State's approved program. In addition, West Virginia Code 22-4-3(g) [1985] and our approval of [38 C.S.R. 2-] subsection 20.12 make it clear that any person involved in any administrative or judicial proceeding is entitled to reimbursement of all costs and expenses, including attorneys' fees, incurred by his participation in the proceedings as determined by the board or court. Since the State's previously approved appeal provisions at West Virginia Code 22-4-2 and 22-4-3 [1985] remain part of the approved West Virginia program, they must be implemented by the State.

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[1] Throughout the remainder of this brief, the Appendix Record is cited as "AR ___".

AR 290. According to OSM, DEP has agreed to implement these provisions so that any pending or future proceedings involving costs and expenses, including attorneys' fees, on administrative or judicial review comply with W.Va. Code 22-4-3(g)(1985) and 38 C.S.R. § 2-20.12. *Id.*

For their part, the provisions of 38 C.S.R. § 2-20.12 authorize fee awards in five distinct circumstances. Fees may be awarded to:

* [a]ny participating party against the violator upon a finding that there is a violation of the Act, the regulations or the permit has occurred, and there is a determination that the party made a significant contribution to the full and fair determination of the issues, 38 C.S.R. § 2-20.12.a.1;

* any participating party other than the violator or his representative from the Department of Environmental Protection upon a determination that the party made a significant contribution to a full and fair determination of the issues, 38 C.S.R. § 2-20.12.a.2;

* a violator from the Department of Environmental Protection when the violator demonstrates that the Department of Environmental Protection issues cessation order, a show cause order or notice of violation in bad faith and for the purpose of harassing or embarrassing the violator, provided that no award shall be made under this subsection if the Department of Environmental Protection prevails upon the issue of a violation, 38 C.S.R. § 2-20.12.a.3;

* a violator from any participating party other than the Department of Environmental Protection where such participating parties initiated or participated in the magistrate proceeding in bad faith and for the purpose of harassing or embarrassing the violator, 38 C.S.R. § 2-20.12.a.4; and

* the Department of Environmental Protection from any participating party where the Department of Environmental Protection demonstrates that any such party participating in such proceeding in bad faith and for the purpose of harassing or embarrassing the Department of Environmental Protection, 38 C.S.R. § 2-20.12.a.5.

An award may also include attorneys' fees and expert witness fees expended in obtaining an award of costs, expenses and attorneys' fees. *Id.*

II. Statement of Facts and Proceedings Below.

The Surface Mine Board entered the combined fee award at issue in this appeal for work performed and expenses incurred in two separate administrative appeals in which HCPA challenged two separate decisions by DEP to approve significant revisions to each of two permits under which Green Valley Coal Company ("Green Valley") operates a coal preparation plant and associated refuse disposal facilities adjacent to Hominy Creek of the Gauley River in Nicholas County. In each appeal HCPA established error in the challenged agency decision and obtained on-the-ground relief that altered the legal relationship between HCPA, DEP, and Green Valley.

A. The Administrative Appeals Underlying the Fee Award.

On the merits of Appeal No. 2003-46-SMB, HCPA persuaded the Board that the statement of probable hydrologic consequences that Green Valley submitted to DEP in support of Incidental Boundary Revision No. 9 ("IBR 9") to Permit O-10-83 was insufficient. AR 16-18, 19-20, 308. In its initial final order in that appeal, the Board went on to find that evidence presented at hearing cured the deficiencies. AR 18, 308. The Board affirmed DEP's approval of IBR No. 9 on the basis of the curative additional evidence presented during the review hearing. AR 20. After amending and then vacating its initial final order, the Board ultimately reinstated that order and supplemented it with additional on-the-ground relief in an amended final order that actually ended consideration of the merits of HCPA's administrative appeal. AR 42-43.

On the merits of Appeal No. 2005-12-SMB, the Board vacated DEP's decision to approve "Revision No. 5" to Green Valley's Permit No. O-155-83. The Board remanded the matter to the agency for consideration of a new version of the permit revision. AR 45-46.

In each instance the Board acted favorably on a joint motion and proposed order that HCPA and Green Valley filed pursuant to comprehensive settlement that those two parties forged for the purpose of resolving a series of disputes concerning Green Valley's compliance with state and federal environmental statutes at the preparation plant and waste disposal facilities adjacent to Hominy Creek. AR 21-23 (HCPA/Green Valley joint motion), 25-33 (HCPA/Green Valley settlement agreement).[2] With respect to HCPA's two appeals then pending before the Surface Mine Board, the settlement agreement required only that the parties file and diligently prosecute the joint motions and proposed orders previously mentioned. AR 28-29. With respect to fees and costs, the settlement agreement noted the parties' agreement on an award for work performed and expenses incurred in the federal court action between the parties pursuant to the Clean Water Act. AR 31.[3] The settlement agreement went on to state the parties' determination that applicable law did not authorize an award from Green Valley to HCPA for work performed or expenses incurred in the pending administrative appeals. *Id.* The settlement recited Green Valley's agreement not to oppose any request for fees by HCPA from any other party. AR 32.

DEP did not oppose the joint motions that HCPA and Green Valley filed. Nor did the agency appeal the Surface Mine Board's final order in either appeal.

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[2] The details of the long course of litigation concerning Green Valley's operations adjacent to Hominy Creek are set forth in HCPA's fee petitions, AR 50-51, 194-195, and in HCPA's response brief in the court below, AR 370-71.

[3] The Consent Order in the Clean Water Act litigation required Green Valley to pay HCPA the sum of $165,000.00 "for litigation costs incurred in this action." AR 39.

B. HCPA's Fee Petitions.

Following entry of the Board's final orders, HCPA filed separate, timely fee petitions in each appeal. AR 48-191, 192-266, 307. After amending the petitions to correct oversights and mathematical errors, HCPA sought in Appeal No. 2003-46-SMB attorney fees totaling $54,525.00, expert witness fees in the amount of $17,112.50, $3,918.26 in out-of-pocket expenses, and $22,458.25 in prejudgment interest, for a total award of $98,014.01. AR 305. In Appeal No. 2005-12-SMB, HCPA ultimately requested an award of $106,293.75 in attorney fees, $39,413.00 in expert witness fees, $3,918.26 in out-of-pocket expenses, and $42,346.38 in prejudgment interest, which total $191,971.39. *Id.* For work performed in prosecuting both fee petitions, HCPA sought an additional award of $11,625.00 in attorney fees and $1,074.43 in out-of-pocket expenses, which total $12,699.43. *Id.*

DEP filed a single response to both petitions and then withdrew its principal arguments against the requested awards. AR 191-92. The agency did not file declarations or affidavits of fact, nor did it present any additional evidence to counter the factual assertions on which HCPA based the two fee petitions at issue. After HCPA filed a reply memorandum in support of its petition, the Board heard oral argument. Following oral argument, HCPA filed a supplemental fee petition and amendments to the pending petitions. AR 293-306. At no point in the proceedings on HCPA's fee petitions did DEP file proposed findings of fact or conclusions of law.

C. The Fee Award.

The Board granted HCPA's amended fee petitions in full. AR 307-27. At the outset, the Board noted that "[t]he history of these appeals and the attorney fee petition spans more than six years, hours of testimony and deliberation [which] culminated in a settlement and a final order

entered by the Board on June 9, 2009 that resolved all pending matters that were the subjects of these appeals." AR 307. The Board also made clear that "[a]lthough the June 9, 2009, final order states that DEP opposed the joint motion (because DEP did not authorize HCPA and Green Valley to file the motion as 'unopposed'), DEP did not in fact file any pleading in opposition to the joint motion." AR 309.

The Board then explained that "Appellants' success in challenging DEP's approval of IBR 9, combined with its success in obtaining an order requiring the placement of piezometers to measure fill saturation, and an order vacating and remanding Revision No. 5 and obtaining agreement on enhanced environmental protection measures for Permit 0-155-83 merit a 'fully compensatory fee.'" AR 318. The Board further found that "HCPA's successes are not diminished because they stem from a comprehensive settlement of this and other litigation with Green Valley." *Id.* The Board explained that "[t]he relief that HCPA obtained came not through the Settlement Agreement itself but through the Board's June 9, 2009, final order, which altered the legal relationship of all the parties by reinstating the Board's initial final order and providing additional on-the-ground environmental relief." *Id.*

Turning to the entitlement standard for obtaining a fee award, the Board held that "Appellants meet that standard because (1) Appellants initiated this administrative review proceeding; (2) Appellants participated in this proceeding as the sole prosecuting parties, and (3) Appellants made a substantial contribution to a full and fair determination of the issues by identifying the defects in Green Valley's PHC and prompting Green Valley and DEP to submit additional evidence which the Board found sufficient to cure those defects, obtaining the Board's order requiring Green Valley to amend IBR 9 to add two piezometers to monitor fill saturation, and

demanding the enhancement of Revision No. 5 to require capture and treatment of all flow and to expand Green Valley's hydrologic monitoring plan." AR 325. In addition, the Board held that "HCPA significantly contributed to the changes made to the permits and absent the involvement of HCPA there would not have been a revision or modification to the permit." *Id.*

With respect to DEP's objections to specific segments of time that HCPA claimed for its counsel, the Board cited HCPA's brief as justification for the time spent in all phases of the litigation. AR 318. After extensively reviewing the factors bearing on computation of a reasonable fee, the Board concluded that the attorney fees, expert witness fees, out-of-pocket expenses, and prejudgment interest that HCPA requested were reasonable. AR 323-24. Accordingly, the Board granted HCPA's request in full.

D. <u>DEP's Motion for Clarification</u>.

The Surface Mine Board served its decision on counsel of record for DEP on April 16, 2010, by hand-delivery. AR 327. On or about May 4, 2010, DEP filed with the Board a "Motion for Clarification." AR 328-32. The motion did not identify any authority by which a party may seek – or the Surface Mine Board may grant – "clarification" of a final order after its entry. On June 7, 2010, the Board summarily denied DEP's motion, finding that "a supplemental order is not necessary." AR 333-34. The Board's order denying the "Motion for Clarification" did not address any substantive issue raised in DEP's motion or in the Board's final order on fees. *Id.*

E. <u>Proceedings In the Circuit Court</u>.

On July 7, 2010, a total of 82 days after service of the Board's fee award on its counsel of record, DEP filed a petition for appeal in the Circuit Court of Kanawha County. AR 336-58. DEP sought reversal of the fee award on the grounds that (1) HCPA had not, as a matter of law, prevailed

in either of the underlying administrative appeals, (2) the Surface Mine Board arbitrarily and capriciously included in the fee award compensation for time that HCPA's counsel spent in informal administrative proceedings on each underlying permit revision prior to DEP's decision approving it, (3) the Board incorrectly computed the prejudgment interest component of HCPA's fee award, and (4) the Board unlawfully failed to address each of DEP's arguments in opposition to the fee petitions. AR 345.

HCPA promptly moved to dismiss the petition for appeal as untimely. AR 359-64. HCPA then filed its response brief, AR 365-402, and DEP filed its reply, AR 403-18.

The circuit court then referred the matter to a special commissioner. The special commissioner did not hold a hearing or communicate of record with either party.

The special commissioner eventually filed a report that (1) recommended denying HCPA's motion to dismiss on the ground that the Surface Mine Board's June 9, 2010, order denying DEP's motion for "clarification" supposedly "became the contemplated 'Final Order' triggering the 30-day requirement to appeal the SMB Final Order," AR 422, (2) asserted, without specific citation to the record, the existence of certain mathematical errors in the Surface Mine Board's calculations and recommended that "[t]he SMB order of April 14, 2010, should be modified to correctly order the summary of fee and expense claims requested by HCPA," AR 424, and (3) recommended that the circuit court reverse the fee award on the ground that neither of the Board's final orders in the underlying administrative appeals were decisions on the merits that provided relief to HCPA against DEP, AR 424-26. The special commissioner did not serve a copy of his report on either party, and the circuit court did not provide notice of the report or an opportunity to object.

F. The Circuit Court's Final Order on Judicial Review.

On April 8, 2011, the circuit court issued its "Final Order" in DEP's action for judicial review. AR 427-37. The circuit court first denied HCPA's motion to dismiss DEP's appeal as untimely. Following the special commissioner's recommendation to the letter, the circuit court held that because DEP's filing of a "Motion for Clarification" required an additional order from the Surface Mine Board, that additional order "became the 'Final Order' triggering the 30-day requirement to appeal the SMB Final Order," and making DEP's petition for appeal timely. AR 428-29.

Like the special commissioner, the circuit court asserted the existence of mathematical errors in the Surface Mine Board's fee award to HCPA. AR 430. However, without modifying the award to conform to HCPA's summary of its fee and expense requests, AR 305, the circuit court asserted that "Hominy Creek did not prevail in either Appeal No. 2003-46-SMB or 2005-12-SMB and thus, should not be awarded any attorney fees and expenses." AR 430. Without first establishing that the Surface Mine Board's contrary findings are clearly wrong, the circuit court asserted that HCPA had obtained all its relief directly and solely from Green Valley and therefore could not properly claim a fee award from DEP. Along the way, the circuit court insisted that HCPA had received a fee award from Green Valley which encompassed the work performed in the administrative appeals underlying this case. AR 430, 431. The circuit court's ruling, however, concerned a section of the fee-shifting regulation that neither HCPA nor the Surface Mine Board had invoked and upon which DEP had not relied. The circuit court reversed the Surface Mine Board's fee award on the ground that, pursuant to 38 C.S.R. § 2-20.12.a.1 and as a matter of law:

> Hominy Creek cannot recover fees from WVDEP without a finding that WVDEP was a violator and furthermore, that Hominy took part in determining such. Hominy

> Creek did not prevail in proving that nor on the merits of this case and thus, the WVDEP is not required to pay their attorney fees and expenses.

AR 432. This appeal followed.

SUMMARY OF THE ARGUMENTS

The circuit court erred in refusing to dismiss DEP's petition for appeal as untimely. DEP filed the petition 82 days after receiving service of the Board's April 14, 2010, fee award. The applicable provisions of the State Administrative Procedures Act require that such a petition be filed within 30 days after service of the administrative order. Although the Surface Mine Board subsequently entered an order summarily denying DEP's post-award motion for "clarification," this Court's precedent holds that such an order does not provide jurisdiction to review matters adjudicated in a prior, unappealed order. The circuit court's contrary conclusion is thus flatly inconsistent with established law.

The circuit court further erred in applying 38 C.S.R. § 2-20.12.a.1 to the facts of this case reversing the Surface Mine Board's fee award on the ground that HCPA failed to show that DEP was a "violator" from whom that section authorizes fee awards. This Court's precedent clearly designates 38 C.S.R. § 2-20.12.a.2 as the proper fee-shifting provision in cases such as this one, as even DEP acknowledged early on. The latter subsection authorizes entry of fee awards from DEP without regard to whether the agency is a "violator." Accordingly, the principal (and perhaps only) basis for the circuit court's reversal of the fee award here at issue rests on a clear mistake of law.

The circuit court also erred in failing to acknowledge, analyze, and defer to the Surface Mine Board's findings of fact pertinent to HCPA's eligibility and entitlement to a fee award in this case. This Court's precedent requires circuit courts, when conducting judicial review of administrative orders, to respect agency factual findings unless they are clearly wrong. Here, the circuit court did

not acknowledge the Surface Mine Board's findings, much less explain why it deemed them unsupported by substantial evidence or otherwise clearly wrong. Instead, the circuit court substituted a litany of factual assertions, apparently drawn from DEP's briefs, which lack support in the administrative record and, in several cases, are demonstrably false. This Court's precedents repeatedly admonish circuit courts not to substitute their judgments for those set forth in agency orders unless the orders are first shown to be clearly wrong. The circuit court's decision is thus inconsistent with this Court's teaching on the appropriate scope of judicial review.

Finally, the circuit court reached its conclusion that HCPA did not prevail in the administrative appeals underlying the Board's fee award only by ignoring DEP's effective ratification of the settlement agreement by which HCPA and Green Valley Coal Company proposed remedial measures that ultimately ended the long-running environmental dispute at the root of this appeal. Because DEP did not oppose joint motions to reinstate a prior order adverse to the agency and to vacate agency approval of a previous permit revision, and because DEP elected not to appeal orders granting that relief, the agency forfeited objection to the Surface Mine Board's entry of a fee award based on that important relief.

Accordingly, HCPA urges this Court to reverse the circuit court's final order, reinstate the Surface Mine Board's fee award, and order the circuit court to dismiss DEP's petition for appeal as untimely. Alternatively, HCPA urges the Court to vacate the circuit court's final order, reinstate the fee award, hold that HCPA is eligible for and entitled to recover costs and expenses, and remand this case for adjudication of DEP's objections to the amount of the Board's award.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

With respect to the circuit court's error in failing to dismiss DEP's appeal as untimely, HCPA regards the dispositive issue to have been authoritatively decided in *Moten v. Stump*, 220 W.Va. 652, 648 S.E.2d 639 (2007). Accordingly, Rule 18(a) of the Revised Rules of Appellate Procedure suggests that oral argument on that issue is unnecessary. HCPA is nonetheless prepared to present oral argument on the issue if this Court determines that oral argument would assist its disposition of this appeal.

With respect to HCPA's remaining assignments of error, HCPA regards none of the criteria listed in Rule 18(a) to apply. HCPA requests a Rule 20 oral argument because the circuit court's decision that HCPA is not eligible for or entitled to the fee award that the Surface Mine Board granted deviates so far from established standards for fee-shifting in proceedings under approved state programs pursuant to SMCRA as to trigger federal action to withdraw approval of West Virginia's program should the circuit court's decision stand. *See* AR 288-90. For this reason, the issues are of fundamental public importance within the meaning of Rule 20.

ARGUMENT

Standards of Review

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). "On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code § 29A-5-4[] and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. pt.1,

Cain v. West Virginia Division of Motor Vehicles, 225 W.Va. 467, 694 S.E.2d 309 (2010). "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. pt. 2, *Stewart v. West Virginia Board of Examiners for Registered Professional Nurses*, 197 W.Va. 386, 475 S.E.2d 478 (1996). This Court has held that a circuit court should not reverse the findings of an administrative review tribunal "simply because it is convinced that it would have decided the case differently . . . ." *CDS, Inc. v. Camper*, 190 W.Va. 390, 393 n.1, 395, 438 S.E.2d 570, 573 n.1, 575 (1993).

I.

The Circuit Court Erred In Holding that DEP's Appeal From an Order Summarily Denying a "Motion for Clarification" of the Surface Mine Board's Fee Award Allowed the Circuit Court to Review Matters Resolved in the Fee Award Itself, Which DEP Failed to Appeal Within the Statutory Time Limit.

Simply put, DEP's failure to file its petition for appeal of the Surface Mine Board's final order awarding fees within 30 days after service of the fee order on agency counsel rendered the matters resolved in that order no longer appealable, pursuant to W.Va. Code § 29A-5-4(b) and the principles of law announced in this Court's decision in *Moten v. Stump*, 220 W.Va. 652, 648 S.E.2d 639 (2007).[4] As noted earlier in this brief, the judicial review section of the statute governing environmental review boards incorporates the judicial review provisions of the State Administrative Procedures Act. W.Va. Code § 22B-1-9(a). The latter statute requires the filing of a petition for appeal "within thirty days after the date upon which such party received notice of the final order or decision of the agency." W.Va. Code § 29A-5-4(b). The record establishes that DEP did not file

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[4] HCPA brought this issue to the attention of the circuit court in both a motion to dismiss DEP's petition for appeal, AR 359-64, and in its response brief below, AR 366-69.

its petition for appeal until 82 days had elapsed from April 16, 2011, when the Clerk of the Surface Mine Board served DEP's counsel of record by hand delivery. AR 327, 336.

Instead of filing a timely petition for appeal with the circuit court, DEP filed with the Surface Mine Board a motion for "clarification" of the fee award order. Neither the State Administrative Procedures Act, the statutes governing environmental review boards, nor the rules that govern proceedings before the Surface Mine Board authorize motions for "clarification" or reconsideration of final orders once issued. Regardless of whether the Board may lawfully entertain and act upon such a motion, DEP has cited no provision of law that tolls the running of the appeal period specified by W.Va. Code § 29A-5-4(b) in response to the filing of such a motion, and HCPA has found none. In this instance, the Surface Mine Board entered an order summarily denying DEP's motion. AR 333-34.

Nonetheless, the circuit court held that because DEP's motion "required another 'Final Order' from the SMB," that subsequent order "became the 'Final Order' triggering the 30-day requirement to appeal the SMB Final Order." AR 429. Counting from the date of the order denying the motion for "clarification," the circuit court deemed DEP's petition for appeal timely.

The circuit court's ruling is fatally inconsistent with this Court's decision in *Moten v. Stump*. In that case Moten, the party aggrieved by agency action, failed in the first instance to appeal a circuit court's order affirming the revocation of his driving privileges. *Moten v. Stump*, 220 W.Va. at 656, 648 S.E.2d at 643. Instead, he moved the circuit court for relief from judgment pursuant to W.Va. R. Civ. P. 60. *Id.* Noting that a Rule 60 motion does not toll the appeal period for the order at issue, this Court held that "as a result of Mr. Moten's failure to appeal the December 15 order, the

substantive matters decided by that order cannot be addressed by this Court in this appeal."*Id.* at 220 W.Va. 656, 648 S.E.2d 643-44.

When the circuit court denied the Rule 60 motion, Moten did not appeal that order either. *Id.* at 220 W.Va. 657, 648 S.E.2d 644. Instead, he wrote a letter to the circuit court requesting "clarification" of the order denying relief pursuant to Rule 60. *Id.* Observing that the rules of civil procedure do not recognize a "letter of clarification" as tolling the appeal period of a circuit court's final order, this Court held that "as a result of Mr. Moten's failure to appeal the October 12 order, we cannot address the propriety of the denial of the Rule 60(b) motion." *Id.*

Like the Surface Mine Board in this case, the circuit court in *Moten* responded to the request for "clarification" by issuing a separate order denying relief. *Id.* Moten then filed a petition for appeal to this Court, which dismissed the appeal *sua sponte* because:

> Both of the grounds for remand were resolved in prior final orders that were simply not appealed. Insofar as we are constrained from addressing matters arising from the two previous orders because they were not appealed, the March 3 order does not present a timely appealable issue.

Id., citing *Mary R. v. Billy D.*, 219 W.Va. 520, 523, 637 S.E.2d 618, 621 (2006) (refusing to address issues that were decided in two previous final orders that had not been appealed); *Dababnah v. Dababnah,* 207 W.Va. 585, 592, 534 S.E.2d 781, 788 (2000) ("The [appellant] may not now raise this issue before this Court, as the time for an appeal of this particular decision has expired.").

The circuit court had no principled reason to entertain DEP's untimely appeal. The time limit for filing a petition for appeal from a final order of an administrative agency is entitled to the same respect and diligent enforcement as the time limit for filing an appeal of a circuit court's final order, because both time limits are prescribed by statute in the interest of orderly and efficient administration of justice. Unless a separate provision of law expressly tolls or restarts the running

of an appeal period, *see, e.g.*, Rule 72 of the West Virginia Rules of Civil Procedure, failure to comply with a time limit for filing an appeal renders the order at issue no longer appealable. As the *Moten* decision teaches, an order issued in response to a request for "clarification" of a dispositive order in a proceeding provides no basis to reopen matters rendered unappealable by a party's failure to appeal the dispositive order within the statutory time limit.

The circuit court refused to follow *Moten* because DEP filed a formal motion for "clarification" in this case rather than the sort of informal communication that Moten employed. AR 429. The holding in *Moten*, however, has nothing to do with the manner in which an aggrieved party requests "clarification" of an order while it is appealable. Nothing in the *Moten* decision indicates that this Court would have reached a different result if Moten had filed a formal motion rather than written a letter. Indeed, this Court pointed out that treating the letter in *Moten* as a motion under W.Va. R. Civ. P. 59(e) would not have altered the outcome because the letter, like DEP's motion in this case, was filed after expiration of the ten-day deadline applicable to a Rule 59(e) motion. *Moten v. Stump*, 220 W.Va. at 657 n.10, 648 S.E.2d at 644 n.10.

The principle announced in *Moten* is that failure to appeal an order within the statutorily prescribed time for doing so renders the order subsequently unappealable, and the substance of that order is not made reviewable by the filing of an appeal from a subsequent order refusing to disturb the settled disposition of the case. By overlooking or ignoring the vital principle this Court established in *Moten*, the circuit court erred as a matter of law in ruling on the substance of DEP's petition for appeal and reversing the Surface Mine Board's fee award to HCPA.

II.

The Circuit Court Erred Applying 38 W.Va.C.S.R. § 2-20.12.a.1 and Concluding That HCPA Cannot Recover Fees From DEP Without Finding That DEP Was a Violator and That HCPA Took Part in Determining Such.

Over a decade ago, this Court established that 38 C.S.R. § 2-20.12.a.2 is the only fee-shifting provision that applies to requests for fee awards in proceedings to review DEP's decisions to approve applications for new or significantly revised mining permits.[5] In *Louden v. West Virginia Division of Environmental Protection*, 209 W.Va. 689, 551 S.E.2d 25 (2001), this Court held that a permit applicant may not be made liable for any portion of a fee award in a permit review case. This Court explained that because such cases do not involve a violation of the Surface Coal Mining and Reclamation Act, "the applicable provision of the state regulations for award of attorney's fees in this case is 38 W.Va.C.S.R. 2 § 20.12.a.2." *Id.* at 209 W.Va. 693, 551 S.E.2d 29. The unmistakable implication of this holding is that 38 C.S.R. 2-20.12.a.1, which authorizes fee awards from "violators," does **not** apply to permit review proceedings such as this one.

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[5] As noted above in HCPA's statement of the statutory and regulatory background, the West Virginia regulation that authorizes fee-shifting in administrative and judicial review proceedings pursuant to the Surface Coal Mining and Reclamation Act establishes separate standards to govern requests for fee awards in five distinct circumstances. 38 C.S.R. § 2-20.12.a. First, if the underlying proceeding resulted in a finding that a party violated the Act, the regulations, or a permit, the regulation authorizes an award from the violator to any participating party who "made a significant contribution to the full and fair determination of the issues." 38 C.S.R. § 2-20.12.a.1. Second, regardless of whether the underlying proceeding resulted in a finding of a violation – that is to say, in any and every administrative proceeding pursuant to the Surface Coal Mining and Reclamation Act – the regulation authorizes an award of fees and expenses from DEP to any participating party other than a violator or a violator's representative, if the fee applicant "made a significant contribution to the full and fair determination of the issues." 38 C.S.R. § 2-20.12.a.2. Additionally, upon a showing of bad faith, the regulation authorizes fee awards from DEP to violators or from participating parties to violators or to DEP. 38 C.S.R. § 2-20.12.a.3-5.

In light of the plain language of the regulation and the decision in *Louden*, HCPA requested fee awards in the administrative appeals at issue pursuant to 38 C.S.R. § 2-20.12.a.2. AR 59, 203. Because that regulation does not require proof of a violation of the Surface Coal Mining and Reclamation Act, HCPA did not submit evidence that DEP was a "violator." Indeed, such evidence did not and does not exist.

Citing the decision in *Louden*, the Surface Mine Board invoked 38 C.S.R. § 2-20.12.a.2 as authority for the fee award at issue in this appeal. AR 316, 325. Consequently, the Board made no finding that DEP was a "violator" within the meaning of subsection a.1 of the regulation, nor did the Board have any basis or reason to do so. Subsection a.2, as noted earlier in this brief, authorizes fee awards from DEP without regard to whether the agency has violated the Surface Coal Mining and Reclamation Act. If more than this were needed, W.Va. Code § 22-4-3(g)(1985), which remains a part of West Virginia's approved state program for implementing SMCRA, also provides authority for awarding fees from DEP to participants in permitting matters without regard to whether DEP is a "violator" and without requiring proof of such. AR 289.

In its petition for appeal below, DEP did not rely upon 38 C.S.R. § 2-20.12.a.1 or argue that proof of "violator" status was necessary in this case. Nonetheless, the circuit court held *sua sponte* that subsection a.1 governs the award of fees in this case. AR 432.[6] The circuit court then proceeded to base its reversal of the Surface Mine Board's fee award on the notion that "Hominy Creek cannot recover fees from WVDEP without a finding that WVDEP was a violator and furthermore, that Hominy took part in determining such." *Id.*

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[6] Because the circuit court acted *sua sponte* in ruling that 38 C.S.R. § 2-20.12.a.1 applies to this case, HCPA had no opportunity to present counter-argument to the circuit court before entry of the final order here on appeal.

The circuit court's decision is flatly inconsistent with the plain language of the regulation and with this Court's decision in *Louden*. The regulation separately authorizes fee awards to participating parties from "a violator" on the one hand and from DEP on the other. To obtain a fee award from a "violator," there must indeed be "a finding that there is a violation of the Act, the regulations or the permit," and the applicant must further show that it "made a substantial contribution to a full and fair determination of the issues." 38 C.S.R. § 2-20.12.a.1. However, to award fees from DEP to a participating party who is not a violator or a violator's representative, the Surface Mine Board or a court conducting judicial review need only determine that the party requesting a fee award "made a substantial contribution to a full and fair determination of the issues." 38 C.S.R. § 2-20.12.a.2. Because the Legislature carefully established separate fee-shifting authorizations with respect to "violators" and DEP, and because a finding that a violation has occurred is necessary only to obtain fees from a "violator" but not from DEP, the circuit court misapplied the law by holding that subsection a.1 governs this case and by reversing the Surface Mine Board's fee award for lack of proof that DEP was a "violator."

III.

The Circuit Court Erred in Failing to Defer to the Surface Mine Board's Finding That HCPA Made a Substantial Contribution to a Full and Fair Determination of the Issues in the Two Administrative Appeals Underlying the Board's Fee Award and Instead Reversing the Award Based on the Circuit Court's Own Factual Assertions, Which the Administrative Record Does Not Support.

In support of its decision to award HCPA fees and costs in the administrative appeals underlying this case, the Surface Mine Board found, among other things, that:

A. "The history of these appeals and the attorney fee petition spans more than six years, hours of testimony and deliberation [which] culminated in a settlement and a

final order entered by the Board on June 9, 2009 that resolved all pending matters that were the subjects of these appeals," AR 307;

B. "In this case, the Board modified Revision 5 to Permit No. 0-155-83 [and] found that '[i]n its application [for IBR 9], Green Valley failed to provide an accurage (*sic*) and complete statement of probable hydrologic consequences,' and that 'DEP should not have accepted Green Valley's PHC as complete or adequate,'" AR 316;

C. "By identifying defects that rendered Green Valley's PHC inaccurate and incomplete and by prompting Green Valley and DEP to present the additional evidence which the Board deemed sufficient to cure those defects, HCPA made a substantial contribution to a full and fair determination of the issues which the Board's final order resolves;" AR 316;

D. "In addition to the relief that HCPA obtained through reinstatement of the Board's initial final order, HCPA's continued litigation of this appeal after September 6, 2005, resulted in the additional relief supplied by this Board's amendment of that order;" AR 316;

E. "The additional piezometers will monitor for unsafe saturation of the refuse fill and thuse [*sic*] protect the environment and downstream users of Hominy Creek from the threat of fill movement in future," AR 316;

F. "Appellants' success in challenging DEP's approval of IBR 9, combined with its success in obtaining an order requiring the placement of piezometers to measure fill saturation, and an order vacating and remanding Revision No. 5 and obtaining agreement on enhanced environmental protection measures for Permit 0-155-83 merit a 'fully compensatory fee,'" AR 318;

G. "The relief that HCPA obtained came not through the Settlement Agreement itself but through the Board's June 9, 2009, final order, which altered the legal relationship of all the parties by reinstating the Board's initial final order and providing additional on-the-ground environmental relief," AR 318; and

H. "Appellants meet that standard [the "substantial contribution" requirement of 38 W.Va.C.S.R. § 2-20.12.a.2] because (1) Appellants initiated this administrative review proceeding; (2) Appellants participated in this proceeding as the sole prosecuting parties, and (3) Appellants made a substantial contribution to a full and fair determination of the issues by identifying the defects in Green Valley's PHC and prompting Green Valley and DEP to submit additional evidence which the Board found sufficient to cure those defects, obtaining the Board's order requiring Green Valley to amend IBR 9 to add two piezometers to monitor fill saturation, and demanding the enhancement of Revision No. 5 to require capture and treatment of all flow and to expand Green Valley's hydrologic monitoring plan," AR 325.

These findings are amply supported by, among other things, the two volumes of hearing transcripts in each of the underlying administrative appeals, in which HCPA presented more than 224 pages of detailed scientific testimony and examined expert witnesses presented by DEP and Green Valley throughout an additional 222 pages of hearing transcript. The Board's findings are further supported by the seven (7) post-hearing briefs that HCPA filed in the two appeals, which collectively total 122 pages. In light of this and other support in the administrative record, the Board's findings fully satisfy this Court's requirement that an order awarding costs and expenses under the Surface Coal Mining and Reclamation Act "must contain specific findings of fact related to the standards set forth in the Act or the governing regulations which provide sufficient detail to allow appellate review." Syl. pt. 3, *Louden v. West Virginia Division of Environmental Protection*, 209 W.Va. 689, 551 S.E.2d 25 (2001).[7]

At a minimum, the Surface Mine Board's account of the evidence is plausible in light of the record viewed in its entirety. That being so, the circuit court had no authority to reverse the Board's fee award based on the apparent conviction that had it been sitting as trier of fact, it would have weighed the evidence differently. *Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W.Va. 53, 56, 365 S.E.2d 251, 254 (1986), citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). After all, as this Court has repeatedly stated: "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Id.*; *CDS, Inc. v. Camper*, 190 W.Va. 390, 393 n.1, 438 S.E.2d 570, 573 n.1. Here, the fact finder is the Surface Mine Board, not the circuit court.

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[7] HCPA brought the issues discussed in this argument to the attention of the circuit court in its response brief below, AR 381-92.

For these reasons, the circuit court should have had no difficulty affirming the Board's determination that HCPA is eligible for and entitled to the fee award in question. Nonetheless, without acknowledging the Board's material findings of fact or identifying any basis for rejecting them, the circuit court concocted a litany of factual assertions that the administrative record simply does not support. Specifically, the circuit court asserted that:

* "Hominy Creek's [*i.e.*, HCPA's] efforts have involved principally litigation against Green Valley and not WVDEP," AR 430;

* "The terms of the settlement [reached in 2009 between HCPA and Green Valley] were that in exchange for $165,000.00 in fees awarded to Hominy Creek counsel, Hominy Creek would drop all pending litigation in all jurisdictions," *id*;

* "No convincing evidence has been submitted where Hominy Creek achieved any success on the merits of its appeal regarding WVDEP's permitting . . . no clear evidence supports any success against WVDEP on the merits," *id.*;

* "the only change in WVDEP's original permit decision on IBR-9 was the installation of the two piezometers in the refuse fill allowed to be constructed in Blue Branch," AR 431;

* "these modifications along with the reinstatement of the SMB Order of September 6, 2005, are the result of the 4th Circuit interpretation of two specific regulations [and t]hus the June 9, 2009 order in Appeal No. 2003-46-SMB does not constitute a decision on the merits," *id.*;

* "Hominy Creek's counsel received attorney fees of $165,000.00" for work in obtaining the June 9, 2009, order of the Surface Mine Board "that vacated WVDEP's approval of Revision No. 5 remanding the matter back to WVDEP for a new revision consistent with the settlement and agreement between Green Valley and Hominy Creek," *id.*; and

* The Surface Mine Board's order vacating WVDEP's approval of Revision No. 5 "derived from federal consent decree requiring a deepening of an existing hole for added protection of water quality," *id.*

The circuit court clearly misapplied this Court's precedents when it failed to analyze the Board's findings of fact and determine whether the administrative record as a whole contains

substantial evidence to support them. Syl. pt. 2, *Stewart v. West Virginia Board of Examiners for Registered Professional Nurses*, 197 W.Va. 386, 475 S.E.2d 478 ("The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis"); *CDS, Inc. v. Camper*, 190 W.Va. at 395, 438 S.E.2d at 575 (holding that a circuit court should not reverse the findings of an administrative review tribunal "simply because it is convinced that it would have decided the case differently"). Apparently, the circuit court simply decided to substitute the inferences it drew from a closeted examination of an unspecified portion of the record for the studied inferences that the Board made after presiding over the two administrative appeals at issue for six and four years, respectively. This Court's precedents simply do not countenance such roughshod treatment of administrative fact finding. *Lilly v. Stump*, 217 W.Va. 313, 317, 617 S.E.2d 860, 864 (2005) ("[t]he scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner") (quoting *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 304 , 465 S.E.2d 399, 406 (1995)).

All this said, it is important to note in an abundance of caution that the circuit court's error extended far beyond merely disregard of the Board's factual findings. As explained in the following paragraphs, none of circuit court's material assertions about the facts of this litigation withstands scrutiny.

A. <u>HCPA's Litigation Focused Principally On DEP Rather Than Green Valley.</u>

HCPA's efforts to improve water quality in Hominy Creek and assure proper enforcement of SMCRA and the Surface Coal Mining and Reclamation Act have most certainly **not** "involved litigation principally against Green Valley and not WVDEP." HCPA's fee petitions list ten (10)

administrative or judicial proceedings through which HCPA pursued its goals between 1997 and 2009. Of these ten proceedings, seven directly challenged agency action by DEP and involved Green Valley only as an intervenor. Two of these seven are the administrative appeals underlying the instant fee award. Of the remaining three proceedings, two were actions involving federal officials and the proper implementation of SMCRA. Only one proceeding involved Green Valley alone: HCPA's action to enforce applicable effluent limitations pursuant to the Clean Water Act. Thus, the circuit court's assertion that HCPA has litigated principally with Green Valley rather than DEP is not only unsupported by the record; it is demonstrably false.

B. HCPA's Fee Recovery From Green Valley Concerned Only the Parties' Clean Water Act Litigation.

The circuit court's assertions that (1) the terms of the 2009 settlement agreement between HCPA and Green Valley were that HCPA would drop all litigation against Green Valley in return for payment of $165,000.00 in fees to HCPA's counsel, AR 430, and (2) "Hominy Creek's counsel received attorney fees of $165,000.00" for work in obtaining the June 9, 2009, order of the Surface Mine Board "that vacated WVDEP's approval of Revision No. 5," AR 431, are each gross distortions of the record, if not demonstrably false. The settlement agreement, which appears at AR 25-33, recites a bargain by which HCPA agreed to resolve all outstanding litigation with Green Valley through a series of joint motions filed in several forums for the purpose of obtaining orders granting specific relief against both Green Valley and DEP. The settlement agreement also recites the agreement between HCPA and Green Valley for payment of litigation costs in Clean Water Act litigation between those two parties. However, it is grossly inaccurate to characterize that payment as the entire consideration for ending HCPA's litigation against Green Valley or to assert that any portion of the payment was for time spent on either of the underlying administrative appeals.

The settlement agreement identifies Green Valley's fee payment as solely for "costs and expenses that HCPA has incurred in prosecuting the federal civil action . . . ." AR 31. The agreement plainly envisions that HCPA would attempt to recover fees from DEP upon resolution of the administrative appeals that were then pending before the Surface Mine Board: indeed, the agreement includes Green Valley's express promise not to oppose any such request. AR 31-32.

Although DEP was not a party to the settlement agreement (because DEP refused to negotiate settlement of the pending appeals), DEP was on notice of its terms well before the Surface Mine Board entered its final orders and this present fee dispute arose. By including the settlement agreement and federal consent order as exhibits to the joint motions filed in the two appeals pending before the Board, AR 21-41, HCPA made clear that it (and not its counsel, as the circuit court asserted) had recovered $165,000.00 in litigation costs from Green Valley solely for work performed and expenses incurred in the federal civil action between those parties. Moreover, in an effort to dispel any concern regarding double recovery, HCPA made the time records upon which the federal court based its $165,000.00 award an exhibit to the fee petitions at issue here. AR 162-79. Despite the circuit court's unfounded assertion to the contrary, at no point has either DEP or the circuit court identified any double-charged time in the Surface Mine Board's fee award or in HCPA's amended fee petitions.

HCPA's recovery of $165,000.00 in attorney fees, expert witness fees, and out-of-pocket expenses in its separate Clean Water Act litigation provides no basis for denying or reducing HCPA's recovery of the entirely separate attorney fees, expert witness fees, and out-of-pocket expenses incurred in the two administrative appeals at issue here. As the settlement agreement itself makes clear, each element of HCPA's litigation had a discrete and independent effect in persuading

Green Valley to settle. AR 32. Accordingly, each separate case provided an important element of relief necessary to adequate enforcement of the applicable statutes and regulations. Thus, it was simply incorrect for the circuit court to overlook or ignore the role that HCPA's two administrative appeals played in advancing the public interest through the overall settlement that HCPA and Green Valley negotiated and that DEP ultimately, if tacitly, endorsed.

C. HCPA Achieved Outstanding Success On the Merits Against DEP.

The circuit court's unexplained assertion that HCPA failed to achieve any success on the merits against WVDEP's permitting decisions fails to confront, much less explain away, the evidence that the Surface Mine Board relied upon in making its completely contrary determination. Moreover, the circuit court's allegation betrays a profound misunderstanding of the Surface Mine Board's final orders in each administrative appeal.

As noted earlier in this brief, the Surface Mine Board identified HCPA's successes as (1) successfully demonstrating that DEP erred in approving IBR 9, (2) prompting DEP and Green Valley to submit additional evidence during the administrative hearing which cured the defects in IBR 9 and enabled the Board, on *de novo* review, to approved the measure as amended, (3) obtaining an order requiring the placement of two additional piezometers to measure saturation in Green Valley's coal refuse fill, and (4) obtaining the Board's order vacating and remanding Revision No. 5 so that Green Valley could propose, and DEP might approve, a host of enhanced environmental protection measures for Permit 0-155-83. AR 318. Each of these items of relief, without more, establishes that DEP approved one or the other of Green Valley's permit applications despite material defects that the Surface Mine Board ultimately found necessary to correct.

Thus, HCPA prevailed on the merits of DEP's permitting decisions by demonstrating defects in the permit applications or the need for additional remedial measures beyond those that DEP initially prescribed. It is difficult to imagine in what more material way HCPA might have prevailed in these appeals. Indeed, the Surface Mine Board concluded that these successes were sufficiently significant to merit HCPA's recovery of a "fully compensatory fee." AR 318.[8]

In claiming that no evidence exists to show that HCPA prevailed against DEP on the merits of its permitting decisions, the circuit court did not explain why the Surface Mine Board's final order in the IBR No. 9 appeal – which identified serious defects in IBR 9 and described the vital role that HCPA played in prompting correction of those defects during the hearing – is not perfect evidence that HCPA prevailed against DEP's permitting decision. Similarly, the circuit court did not explain why the Board's modification of IBR 9 to include two additional piezometers for measuring fill stability is not clear evidence that HCPA prevailed against DEP, which approved IBR 9 without requiring those necessary measures. Finally, the circuit court failed to justify its refusal to regard the Board's order completely vacating DEP's approval of Revision No. 5 as evidence that HCPA prevailed against the agency. After all, there is nothing more that the one may accomplish

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[8] It seems likely that the circuit court may have adopted the notion that a citizen group like HCPA prevails on the merits of a permit challenge only when it obtains an order instructing DEP to deny the permit application altogether. The purpose of the Surface Coal Mining and Reclamation Act, however, is not to ban coal mining in most instances but instead to ensure that mining occurs in strict compliance with a host of detailed pre-planning requirements and exacting performance and reclamation standards. When a citizen group that proves that DEP has been insufficiently vigilant in performing its regulatory functions – and thus convinces the Surface Mine Board to vacate or amend DEP's challenged permitting decisions, as HCPA did in the administrative appeals at issue here – the group most certainly prevails against DEP in a way that is crucial to the overall success of the regulatory program.

in a permitting case than obtaining an order vacating DEP's approval of the permit at issue. Unless the circuit court simply did not comprehend this, it placed the bar for success impossibly high.

D. HCPA Obtained More Relief Than the Placement of Two Piezometers.

For the reasons just mentioned, the circuit court's assertion that "the only change in WVDEP's original permit decision on IBR-9 was the installation of the two piezometers in the refuse fill allowed to be constructed in Blue Branch," AR 431, is both incorrect and misguided. The assertion is incorrect because, as the Surface Mine Board's reinstated decision on IBR 9 clearly states, "[t]he PHC [statement of probable hydrologic consequences] submitted by Green Valley was insufficient" and "[t]he DEP should not have accepted Green Valley's PHC as complete or adequate." AR 19-20. As the Board made clear in its fee award, HCPA played an important role in prompting correction of these defects during the *de novo* hearing and thus obviating the need for vacatur and remand.

The key point here is that the Board was able to remedy the defective permit application as a result of HCPA's efforts, thus making HCPA a prevailing party for fee-shifting purposes. *West Virginia Highlands Conservancy, Inc. v. Kempthorne*, 569 F.3d 147, 152 (4th Cir. 2009) ("We interpret 'prevailing in part'—or achieving some degree of success on the merits—in light of the goals of SMCRA's citizen suit provision, 'a key purpose of which' is to ensure that OSM fulfills its statutory duties in a responsible manner"); *West Virginia Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 247 (4th Cir. 2003) (holding that a fee applicant in a SMCRA administrative appeal demonstrates "success on the merits" by obtaining a remand order that "advances an important statutory goal . . . even when that goal is simply to make sure that an agency fulfills its statutory duties").

Thus, as the principles announced in *Norton* and *Kempthorne* make clear, even if HCPA had obtained no more than the addition of two piezometers to measure fill stability, that limited but necessary relief would constitute sufficient success to make HCPA a partially prevailing party and thus establish the group's eligibility for a fee award. *West Virginia Highlands Conservancy v. Kempthorne*, 569 F.3d at 154 ("a remand that requires an agency to perform a regulatory duty represents the achievement of some success on the merits"). The fact that in this case the Board used its *de novo* review authority to modify the permit at issue rather than remanding the matter with directions that DEP require revision of Green Valley's PHC or the addition of two piezometers does not diminish the success that HCPA obtained by adding the necessary additional remedial measures.

E. <u>The Fourth Circuit's Decision Played No Role in Shaping the Relief Obtained</u>.

The circuit court's assertion that the Surface Mine Board's modification of IBR 9, along with reinstatement of the Board's Order of September 6, 2005, "are the result of the 4th Circuit interpretation of two specific regulations" also lacks support in the record and is, in fact, false. *See* AR 431. Accordingly, the circuit court's related conclusion that "the June 9, 2009 order in Appeal No. 2003-46-SMB does not constitute a decision on the merits," AR 431, has no basis in fact.

The only "4th Circuit interpretation of two specific regulations" that played any role in the procedural history of this case is the decision in *Ohio River Valley Environmental Coalition, Inc. v. Kempthorne*, 473 F.3d 94 (4th Cir. 2006). AR 310-12. That decision affirms the setting aside of a decision of the Secretary of the Interior to approve two amendments to the West Virginia state regulatory program concerning proper definition of the SMCRA term "material damage to the hydrologic balance." Although it is true that the Surface Mine Board at first granted HCPA additional relief based on that decision, the Board almost immediately vacated the orders in

question. AR 311-12. Importantly, neither the decision in *Ohio River* nor application of the term "material damage to the hydrologic balance" played any role whatsoever in the subsequent reinstatement of the initial disposition of the IBR 9 appeal or modification of the underlying mining permit to add two additional piezometers.

The Board's amended final order does not mention the *Ohio River* decision or "material damage to the hydrologic balance." *See* AR 42-43. More importantly, reinstatement of the Board's initial final order on IBR 9 could not possibly have turned on the Fourth Circuit's decision in *Ohio River* because the initial final order pre-dates that decision and thus could not have stemmed from it. The Board's addition of the two piezometers was expressly meant to bolster monitoring of the stability of Green Valley's refuse fill. The piezometers thus play the same role regardless of which definition of "material damage to the hydrologic balance" applies to the refuse fill at any given time. Simply put, the *Ohio River* decision could not have been the source of the Board's final orders because it played no role in shaping the remedial measures that the Board's orders provided.

F. The Board's Order on Revision No. 5 and the Federal Consent Decree Were Independently Necessary Actions in Restoring and Protecting Hominy Creek

The circuit court's assertion that the Surface Mine Board's order vacating DEP's approval of Revision No. 5 "derived from federal consent decree requiring a deepening of an existing hole for added protection of water quality," AR 431, distorts the true relationship between the two orders by implying that the federal consent decree required the Board to provide the relief that HCPA and Green Valley requested in their joint motions. In fact, the consent order did not require the Surface Mine Board to take any action whatsoever. *See* AR 35-41. Although the consent order required

Green Valley to submit an application to DEP for revision of Permit O-155-83 in accordance with agreed specifications, it did **not** require DEP to approve that application.

Thus, while the two orders are obviously interconnected and endorsed the same remedial measures, it is inaccurate to assert that either one "derived" from the other. In fact, HCPA and Green Valley proposed each order in hopes that the federal court on the one hand and the Surface Mine Board on the other would separately approve the same remedial measures and thus end the parties' long running dispute. Happily enough, that is what actually occurred. But nothing in the settlement agreement between HCPA and Green Valley or in the federal consent decree required the Board to grant the relief requested in the joint motions. Moreover, nothing required DEP to endorse or acquiesce in the requested remedial measures.

After entry of the federal consent decree, the Board retained authority to refuse to grant the joint motions or otherwise implement the settlement agreement. Similarly, DEP was free to oppose the joint motions, to appeal their entry, or simply to refuse to approve Green Valley's permit revision application once the company submitted it. Thus, to actually put their disputes to rest, HCPA and Green Valley had to not only obtain the federal court's entry of the consent order but then also (1) persuade the Surface Mine Board to enter the requested final orders in the two pending administrative appeals and (2) persuade DEP to approve Green Valley's amended version of Revision No. 5. Entry of the federal consent order mandated none of the necessary actions by the Surface Mine Board or DEP, nor could it have lawfully done so. HCPA and Green Valley consummated their settlement only by successfully persuading the Board and DEP to take actions that either agency was free to refuse to take.

The Surface Mine Board's fee award appropriately recognizes HCPA's success this regard. In explaining its holding that HCPA merited a "fully compensatory fee," the Board held that:

> The relief that HCPA obtained came not through the Settlement Agreement itself but through the Board's June 9, 2009, final order, which altered the legal relationship of all the parties by reinstating the Board's initial final order and providing additional on-the-ground environmental relief.

AR 318. For reasons stated earlier in this brief, the circuit court was obliged to acknowledge this finding and review the settlement agreement and other aspects of the record thoroughly to determine whether they support the Board's finding. Instead, the Board committed clear error by making a contrary finding that is clearly wrong in light of the actual provisions of the federal consent order and the settlement agreement between HCPA and Green Valley.

In sum, the circuit court erred both in ignoring and failing to analyze the Surface Mine Board's findings of fact and in substituting its own misguided and largely inaccurate assessment of the administrative record. These errors throughly undermine the circuit court's reversal of the instant fee award.

IV.

The Circuit Court Erred in Overlooking DEP's Effective Ratification of the Settlement Agreement Between HCPA and Green Valley.

The circuit court erred for another reason in holding that HCPA did not prevail on the merits of its challenges to DEP's permitting decisions. The circuit court overlooked DEP's effective ratification of the settlement agreement between HCPA and Green Valley as the result of (1) DEP's failure to object to the joint motions that HCPA and Green Valley filed before the Surface Mine Board and (2) the agency's failure to appeal the Surface Mine Board's orders granting those motions. As explained in the preceding section of this brief, DEP had the option of opposing

reinstatement of the Board's initial decision on IBR 9 or vacatur of the agency's approval of Revision No. 5. The agency did not oppose. DEP also had the option of seeking judicial review of the Board's orders once the Board entered them. DEP elected not to do so.

DEP's inaction with respect to HCPA's motions for relief and the Surface Mine Board's orders granting those motions effectively ratified or consented to the relief that HCPA obtained as the result of its motions. It would be entirely unreasonable to allow DEP to avoid an award of costs and expenses pursuant to 38 W.Va.C.S.R. § 2-20.12.a.2 merely by declining to respond to motions for relief before the Surface Mine Board or electing not to appeal adverse orders of the Surface Mine Board that either vacate agency decisions or modify them in ways that benefit a party that has challenged permit approval. To do so would effectively allow DEP to avoid fee awards simply by remaining silent, no matter how meritorious a challenge to its actions may be.

Here, DEP raised no objection to the proposed remedial measures set forth in the joint motions, and then the agency elected not to appeal the resulting final orders. Having acquiesced in the relief that the Board entered against it, DEP forfeited any ground on which it might reasonably argue that HCPA "lost" its administrative appeals.

Independently of other factors, DEP's effective ratification of the settlement agreement between HCPA and Green Valley made HCPA a "prevailing party" for fee-shifting purposes. In *Louden* this Court held that:

> Courts should promote, not impede, the resolution of cases by agreement. Accordingly, we hold that an otherwise appropriate award of costs and expenses, including attorneys' fees, may be made in actions brought pursuant to the West Virginia Surface Coal Mining Reclamation Act, W. Va. Code §§ 22-3-1 to -32 (1994 & Supp. 2000), upon an agreed order of dismissal of an appeal from the Surface Mine Board that has been approved and entered by the circuit court.

209 W.Va. at 693-94, 551 S.E.2d at 29-30. In so holding, this Court expressly approved an earlier federal court decision which held that (1) "the final order of the [Interior Board of Land Appeals] dismissing the plaintiffs' appeal does constitute a 'final order' **even though it does not address the merits of the appeal**" and (2) that such an order properly supported an award of fees to litigants who obtained relief as the result of unilateral action by the Government while their appeal was pending. *Kentucky Resources Council, Inc. v. Babbitt*, 997 F.Supp. 814, 818 (E.D. Ky. 1998) (emphasis supplied). Because mere unilateral action by the Government may constitute a sufficient basis for awarding fees, a settlement agreement prescribing remedial measures which the Government (here, DEP) ratifies and implements without objection or appeal most certainly provides an even stronger basis for a fee award.[9]

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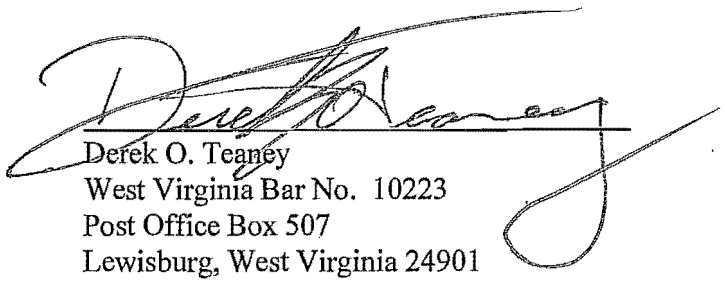
[9] HCPA brought this issue to the attention of the circuit court in its response brief below, AR 388-89.

CONCLUSION

For the reasons stated in HCPA's first argument above, HCPA requests that this Court reverse the circuit court's final order, reinstate the Board's fee award, and remand this case with instructions to dismiss DEP's petition for appeal as untimely. Alternatively, for the reasons stated in the other arguments above, HCPA requests that this Court vacate the circuit court's final order, reinstate the Board's fee award, hold that HCPA is both eligible for and entitled to a fee award in connection with the two administrative appeals in question, and remand this case to the circuit court with instructions to adjudicate in the first instance DEP's challenges to the amount of the award.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HOMINY CREEK PRESERVATION ASSOCIATION, INC.,

Petitioner,
(Respondent Below),

v.

CASE NO. 11-0749
(No. 10-AA-102 in the Circuit Court of Kanawha County)

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,
(Petitioner Below).

CERTIFICATE OF SERVICE

I, Derek O. Teaney, Counsel for Petitioner Hominy Creek Preservation Association, Inc., do hereby certify that on the 9th day of August, 2011, I caused a true and exact copy of both the attached **Petitioner's Opening Brief** and the separate **Appendix Record** for this appeal to be served by hand-delivery to:

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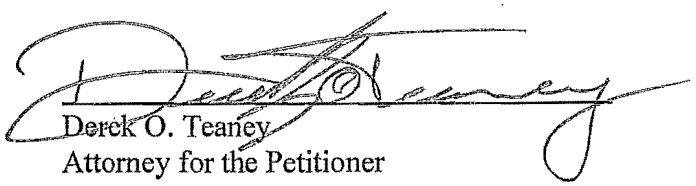

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