

11-07200

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 REPLY BRIEF

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I. Introduction, Restatement of the Standards of Review and Request for Oral Argument.

Pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure and this Court's scheduling order, Hominy Creek Preservation Association, Inc., ("HCPA") replies as follows to the arguments set forth in the *Response Brief* of West Virginia Department of Environmental Protection ("WVDEP"). The standards for review of HCPA's assignments of error remain as described in HCPA's opening brief. HCPA requests oral argument for the reasons stated in its opening brief.

II. WVDEP's Petition for Appeal Was, In Fact, Untimely.

As HCPA established in its opening brief, judicial review of the Surface Mine Board's April 14, 2010, "Order Granting Award of Costs and Expenses, Including Reasonable Attorney and Expert Witness Fees," ("the fee order") was governed by W.Va. Code § 22B-1-9(a) ("Any person or a chief or the director, as the case may be, adversely affected by an order made and entered by a board after an appeal hearing, held in accordance with the provisions of this chapter, is entitled to judicial review thereof"). *Opening Brief* at 2, 4, and 17. Because the fee order was "made and entered by [the Surface Mine Board] after an appeal hearing," it triggered a thirty-day period for filing a petition for judicial review pursuant to W.Va. Code § 29A-5-4(b). *Id.*

Although W.Va. Code § 22B-1-9(a) modifies § 29A-5-4 by authorizing judicial review of any "order made and entered by a board after an appeal hearing" instead of restricting review to any "final order or decision," the environmental review boards statute expressly incorporates the remaining provisions of § 29A-5-4, including the requirement that a petition for appeal be filed no later than thirty days after a party receives notice of the order in question. When WVDEP failed to file its petition for appeal within thirty days after service of the fee order on April 16, 2010, the matters that the Surface Mine Board decided in the fee order became unreviewable thereafter.

Moten v. Stump, 220 W.Va. 652, 648 S.E.2d 639 (2007). Accordingly, the circuit court erred in refusing to dismiss WVDEP's petition as untimely.

The circuit court attempted to avoid this Court's holding in *Moten v. Stump* on the ground that (1) WVDEP had filed a formal "motion for clarification" of the Board's fee order and (2) the Board had then entered a summary order denying that motion. In its opening brief in this appeal, HCPA explained why the circuit court's reasoning is fatally flawed. *Opening Brief* at 18-20.

In response WVDEP abandons the circuit court's untenable rationale for conducting judicial review of the agency's untimely petition for appeal. Instead, WVDEP argues that the fee order did not trigger the thirty day period for filing a petition for appeal because the Board did not entitle the fee order a "final order" and did not include in the fee order words that expressly removed HCPA's petitions from the Board's docket. *Response Brief* at 7-8. WVDEP asserts that the matters decided in the fee order became subject to review only after the Board's entry of a June 7, 2010, order that summarily denied WVDEP's motion for clarification ("the summary denial order"). *Id.*

WVDEP's argument fails in the first instance because, without regard to whether the fee order was technically a "final order," it was most certainly "an order made and entered by a board after an appeal hearing" within the meaning of W.Va. Code § 22B-1-9(a). In that statute the Legislature expanded the class of orders that are subject to judicial review by authorizing review of **any** order that an environmental review board makes and enters "after an appeal hearing." *Id.* As noted above, the Legislature went on to incorporate the provisions of the State Administrative Procedures Act, but only "with the modifications or exceptions set forth in this chapter." *Id.*

Because the review board statutes do not specify when a petition for judicial review must be filed, the thirty day period specified in the State Administrative Procedures Act applies. *See*

W.Va. Code § 29A-5-4(b). Thus, the time for challenging the fee order – which shows on its face that it was made and entered after an appeal hearing, *see* Appendix Record 307 (“The history of these appeals and the attorney fee petition spans more than six years, hours of testimony and deliberation”),¹ – expired on May 17, 2010. WVDEP’s filing on July 7, 2010, was therefore 51 days beyond the time limit that the Legislature established.

Even if W.Va. Code § 22B-1-9(a) did not expand the class of orders subject to judicial review – which it most certainly does – the fee order would nonetheless be subject to judicial review pursuant to W.Va. Code § 29A-5-4 because the fee order was **also** a “final order or decision in a contested case” within the meaning of W.Va. Code § 29A-5-4(a). Although the State Administrative Procedure Act does not define “final order or decision,” the statute defines “order” to mean “the whole or any part of the final disposition (whether affirmative, negative, injunctive or declaratory in form) by any agency of any matter other than rulemaking.” W.Va. Code 29A-1-2(e). Moreover, the State Administrative Procedure Act specifies that a “[e]very final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.” W.Va. Code § 29A-5-3. If, but only if, one or more of the parties has previously proposed findings of fact and conclusions of law, “the final order or decision shall include a ruling on each proposed finding.” In the proceedings below, neither WVDEP nor HCPA proposed findings of fact or conclusions of law.

Construing these statutory provisions harmoniously, a “final order or decision” under the State Administrative Procedures Act is an agency’s (1) final disposition of any matter other than rulemaking, (2) which is rendered either in writing or stated on the record, (3) which is accompanied

¹ Throughout the remainder of this brief, the Appendix Record is cited as “AR ___”.

by findings of fact and conclusions of law, and (4) which includes a ruling on any proposed findings of fact or conclusions of law that the parties may have filed. This construction of the relevant statutes comports with the finality doctrine that this Court has articulated in determining which decisions of circuit courts are appealable:

A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

Syl. pt. 3, *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995).

The Surface Mine Board's fee order is a "final order or decision" because it (1) announced the Board's final disposition of all remaining matters before the Board in Appeal Nos. 2003-46-SMB and 2005-12-SMB, (2) was rendered in writing, (3) was accompanied by (indeed, actually contained) findings of fact and conclusions of law, (4) granted all the requested relief at issue, (5) left nothing further for the Board to adjudicate, (6) did not contemplate further proceedings, (7) terminated the proceedings on HCPA's fee petitions, and (8) left nothing to be done but to enforce by execution the award that the Board granted. The disposition of HCPA's fee petitions that the Board announced in the fee order was final as a matter of fact because the Board did not change that disposition at any time thereafter. Although the Board did not expressly entitle the fee order "final," the foregoing factors make it a "final order or decision" just as surely as if the Board had entitled it so.

Entry of the Board's summary denial order did not change, and thus did not undermine the finality of, the fee order. *See* AR 333-34. As just noted, the fee order – and that order alone – resolved all of the issues raised in HCPA's fee petitions. Contrary to WVDEP's arguments below, the fee order did, in fact, address and resolve all of WVDEP's arguments in opposition to the

requested fee award. *See* AR 398-402 (HCPA’s arguments below in opposition to WVDEP’s challenge to the adequacy of the fee order – an issue that the circuit court did not adjudicate). The summary denial order – **which itself is not entitled a final order** – did nothing more than serve notice on WVDEP that the Board had **previously** resolved all outstanding issues, had not contemplated any additional filings, and certainly would not allow anything further. *Id.* Thus, the summary denial order only emphasized the finality of the fee order; it certainly did not reopen the statutory period for filing an appeal of matters that the Board decided on April 14, 2010.

Because the fee order was both “made and entered by a board after an appeal hearing” and a “final order or decision” of the Surface Mine Board within the meaning of W.Va. Code § 29A-5-4(b), WVDEP’s petition for appeal to the circuit court was untimely. The Circuit Court erred in ruling otherwise.

III. WVDEP’s Challenge to Fee Order Rests on False Premises and Fails to Establish Error in the Surface Mine Board’s Findings of Fact or Conclusions of Law.

On the merits WVDEP argues that (1) the Surface Mine Board’s fee order would result in double-payment of litigation costs that HCPA previously obtained from Green Valley, (2) the law required HCPA to recover fees incurred in its state administrative appeals in the consent order entered in HCPA’s citizen suit under the Clean Water Act in federal court, (3) the decision in *Ohio River Environmental Coalition, Inc. v. Green Valley Coal Co.*, 511 F.3d 407, 416-17 (4th Cir. 2007) (“the *Green Valley* decision” or “*Green Valley*”) automatically “modified” 38 C.S.R. § 2-20.12 to authorize recovery of fee awards from permittee-intervenors in administrative appeals challenging WVDEP permitting decisions, (4) neither of the Surface Mine Board’s final orders constituted relief against WVDEP, and (5) WVDEP did not, in fact, ratify the final orders by allowing their entry without objection. For the reasons stated below, none of these arguments has merit.

A. Payment of the Fee Order Would Not Constitute Double Compensation.

Throughout its response brief, WVDEP continually asserts that the Surface Mine Board's fee order would result in double-payment of litigation costs that HCPA previously obtained from Green Valley. Nowhere, however, does WVDEP identify even one minute of attorney or expert witness time or one expense item that payment of the fee order would doubly compensate. As the Surface Mine Board was careful to ensure, there is none.

Ignoring this fact completely, WVDEP persists in its double-payment argument. Instead of demonstrating a true threat of double payment for the same time or expenses, the agency argues that HCPA may not obtain payment for any of the services it received or expenses it incurred in **either** of the administrative appeals below because the **proposed** environmental relief formulated in the consent order that resolved HCPA's Clean Water Act citizen suit against Green Valley actually came about as a result of the Surface Mine Board's final order in Appeal No. 2005-12-SMB ("the Revision No. 5 appeal").² Based on the false premise that HCPA obtained the relief in question solely in the Revision No. 5 appeal pursuant to the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201-1328 ("SMCRA"), rather than under **both** the Clean Water Act and SMCRA as the result of HCPA's combined work in **both** its federal citizen suit **and** the Revision No. 5 appeal, WVDEP in effect asks this Court (1) to rule that the federal district court erred in approving HCPA's

² Principle examples of this argument appear at AR 8-9 ("all of the relief pertained to HCPA's SMCRA claims before the Board and not the Clean Water Act claims in the federal case"), 12 ("HCPA's federal litigation began with claims under the Clean Water Act and ended with relief under SMCRA . . . [t]his relief was obtained through the appeals to the Board"), 13 ("All of the remedial actions were to be taken under the auspices of West Virginia's state regulatory program for the federal SMCRA, not the Clean Water Act under which HCPA instituted the federal litigation"), 14 ("The only relief comes under SMCRA and not the Clean Water Act").

fee award from Green Valley under the Clean Water Act (because, in WVDEP's view, HCPA obtained no relief in that proceeding) and (2) to uphold the circuit court's reversal of the fee order as a means of correcting the federal court's supposed error.³

WVDEP contention is wrong both as a matter of law and a matter of fact. The Clean Water Act and SMCRA simultaneously regulate the discharge of pollutants from surface coal mining operations into waters of the United States. 33 U.S.C. § 1311(a) (making pollutant discharges unlawful except in compliance with the Clean Water Act); 30 C.F.R. §§ 816.42 and 817.42 (“Discharges of water from areas disturbed by surface [or underground] mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR part 434”). In enacting SMCRA, Congress knew that it was establishing an overlapping, dual regulatory scheme. *See* H.R. Rep. No. 218, 95th Cong. 1st Sess. 142 (1977) (discussing the regulatory overlap and provisions in SMCRA to accommodate it). To ensure maximum coordination and minimize the risk of duplication or conflict, Congress expressly directed that nothing in SMCRA be construed “as superseding, amending, modifying, or repealing” the Clean Water Act or its implementing regulations. *Id.*; 30 U.S.C. § 1292(a)(3).

For this reason, any relief obtained with respect to the discharge of pollutants from a coal mine to “waters of the United States” is, as a matter of law, obtained pursuant to **both** the Clean

³ WVDEP makes this bizarre demand even though neither the Surface Mine Board **nor** the circuit court below made any factual finding that might support it. Neither the Surface Mine Board nor the circuit court found that HCPA obtained all its relief before the Board. Moreover, the circuit court did not reverse the fee order in a effort to correct a perceived error by the federal court in approving HCPA's recovery of fees where none were due. The circuit court reversed the Board's fee order solely because, in the court's view, WVDEP did not violate the SMCRA program, a factor the court erroneously deemed essential to fee recovery. AR 432.

Water Act and SMCRA. It is certainly true that the SMCRA regulatory authority must evaluate and ultimately approve any enhancement of water management facilities or any expansion of hydrologic monitoring that the Clean Water Act may require at a coal mine. Nonetheless, attributing such measures only to SMCRA belies the dual regulatory scheme that Congress created. Argument of the sort that WVDEP makes in this appeal ignores the critical role that the Clean Water Act plays in setting the standards that (1) trigger the need to undertake remedial measures in the first place and (2) govern the results that coal operators and SMCRA regulatory authorities must achieve.

This case provides an excellent illustration. The deepening and enlargement of Green Valley's facility for capturing and diverting subsurface flow through the company's refuse pile was made necessary by Clean Water Act requirement to prevent pollutants from discharging, untreated, from the refuse pile – which is a Clean Water Act “point source” – into Hominy Creek., a water of the United States. Subsurface discharges from the refuse pile violated the Clean Water Act's effluent limitations because the company's discharge permit did not authorize them. The discharges also violated the Clean Water Act by repeatedly causing or contributing to excursions from water quality standards meant to protect Hominy Creek's status as a native, reproducing trout stream.

When the Revision No. 5 appeal stalled before the Surface Mine Board even as pollutants continued to pour into Hominy Creek, it became necessary in HCPA's view to commence and prosecute a citizen suit to establish that the Clean Water Act required improvement of Green Valley's existing water management system. Once HCPA accomplished that result in federal court, it was equally necessary to persuade the Surface Mine Board to resolve the Revision No. 5 appeal by ordering WVDEP (as the SMCRA regulatory authority) to abandon its reliance on Green Valley's existing water management system and instead to evaluate and approve the specific

engineering plans and operations requirements that Green Valley had agreed to propose for the expanded facility. Thus, obtaining the required expansion of Green Valley's water management system required HCPA to obtain relief under **both** the Clean Water Act **and** SMCRA by prosecuting **both** the federal citizen suit against Green Valley **and** the Revision No. 5 appeal before the Surface Mine Board.

In this light WVDEP's claim that "HCPA cannot point to any relief within the Agreements associated with the Clean Water Act," *Response Brief* at 13, is false both as a matter of fact and as a matter of law. Although obtaining complete relief required HCPA to obtain the Surface Mine Board's final order vacating WVDEP's approval of Revision No. 5 and ordering WVDEP to consider Green Valley's enhanced remedial and monitoring proposal, each item of relief that HCPA obtained from the Surface Mine Board stemmed from specific requirements of the Clean Water Act that HCPA established by obtaining the consent order in its federal citizen suit.

WVDEP errs in arguing that compensation for the time and expenses HCPA incurred in its federal Clean Water Act citizen suit, based on the partial success achieved in that proceeding, compensated HCPA for any of the additional time and expenses incurred to obtain the further relief that it had to – and did – obtain from the Surface Mine Board.⁴ The fee payment that HCPA obtained from Green Valley was for a discrete, well-defined block of professional work and related

⁴ Throughout its *Response Brief* WVDEP errs in contending that fee awards are meant to compensate for relief obtained rather than discrete professional service hours or expense items incurred in obtaining relief. Where, as here, a litigant must prosecute two separate actions to obtain complete relief for legal wrongs that violate more than one statute, compensating the time and expenses separately incurred in each proceeding does not constitute double payment for the same thing. So long as the hours and expenses compensated in each proceeding are distinct, as they are here, and so long as all hours and expenses are reasonably incurred, claims of double payment are entirely unfounded.

out-of-pocket expenses incurred to establish (1) Green Valley's obligation to undertake additional remedial measures, (2) the general nature of those measures, and (3) the additional hydrologic monitoring that would be necessary to determine whether the enhanced remedial measures actually terminated Green Valley's repeated violations of the Clean Water Act. *See, e.g.*, AR 162-79. In contrast, the Board's fee order is meant to compensate HCPA's counsel and expert for a completely separate block of professional work and related out-of-pocket expenses, *see, e.g.*, AR 233-54, which HCPA incurred to compel WVDEP, as the SMCRA regulatory authority, to abandon the inadequate existing water management plan that the agency had erroneously approved, and ultimately to incorporate the required Clean Water Act remedial measures into Green Valley's mining permit. Relief from the Board was necessary to make the Clean Water Act remedial measures enforceable under SMCRA as well as the Clean Water Act and thus to ensure proper coordination of the two regulatory programs. The fact that WVDEP acquiesced in this result only strengthens HCPA's eligibility for, and entitlement to, a fee award for obtaining full relief.

HCPA's prosecution of both its Clean Water Act citizen suit and its Revision No. 5 appeal was necessary to obtain complete relief in protecting Hominy Creek. In the circumstances before the Court in this appeal, WVDEP's charge that payment of the two separate fees would amount to double recovery is patently false.

B. HCPA Had No Obligation to Recover Fees in Its Federal Citizen Suit For Work Performed in Administrative Appeals Before the Surface Mine Board.

Apart from its bogus double payment argument, WVDEP charges that "[e]ven without seeking a fee award against Green Valley in the Board appeals, HCPA could have sought compensation for the appeals in the federal litigation" *Response Brief* at 14 (citing the *Green Valley* decision and *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546

(1986)). However, WVDEP does not explain how HCPA could have made a colorable claim in its Clean Water Act citizen suit to recover the fees or expenses incurred in HCPA's "IBR 9 appeal" before the Surface Mine Board. The IBR 9 appeal involved a separate facility, a separate surface mining permit, and a separate set of point sources than did the federal citizen suit and the Revision No. 5 appeal. Although prosecution of the IBR 9 appeal was necessary to protect Hominy Creek downstream from Green Valley's coal preparation plant and the refuse pile on which the plant sits, HCPA's work in the IBR 9 appeal had no nexus with enforcement of the Clean Water Act remedies that HCPA obtained in its federal citizen suit. Those remedies took place entirely upstream of any effect that IBR 9 may have on Hominy Creek.

Moreover, while it is true that HCPA theoretically could have **sought** fees from Green Valley in federal court for work performed **in the Revision No. 5 appeal**, it is unlikely that HCPA could have actually obtained compensation for that work in federal court. First, HCPA's work in the Revision No. 5 appeal was incomplete and the final outcome uncertain when the federal court entered the consent decree in the Clean Water Act citizen suit. More fundamentally, WVDEP's suggestion runs counter to the settled legal principle that:

The inclusion of the time spent in administrative proceedings is inconsistent with the text of [30 U.S.C.] § 1270(d), the provision that allows for fee awards in citizen suits brought under SMCRA. Section 1270(d) provides that a court "in issuing any final order in any action brought" to compel compliance with SMCRA "may award costs of litigation (including attorney and expert witness fees) to any party" 30 U.S.C. § 1270(d) (emphasis added). The phrase "costs of litigation" refers to costs of litigating a citizen suit, and not to costs of pursuing separate administrative remedies.

Ohio River Environmental Coalition, Inc. v. Green Valley Coal Co., 511 F.3d 407, 418 (4th Cir. 2007) ("the *Green Valley* decision" or "*Green Valley*").

Like the fee-shifting provision at issue the *Green Valley* decision, the fee-shifting statute applicable to Clean Water Act citizen suits authorizes **only** the recovery of the “costs of litigation.” See 33 U.S.C. § 1365(d). Thus, it is highly doubtful that the Clean Water Act’s fee-shifting provision would in fact be construed to allow a prevailing party in a federal citizen suit to recover fees or expenses incurred in a related state administrative appeal under SMCRA, which contains a separate provision for fee-shifting in administrative appeals. See 30 U.S.C. § 1275(e).

However, even if the holding in *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air* were to trump the *Green Valley* decision in the circumstances here, the result would only provide a party like HCPA the **option** of attempting to recover administrative appeal costs in separate federal court proceedings. The *Delaware Valley* decision certainly did not **require** HCPA to do so on pain of forfeiting its right to recover costs from WVDEP under 38 C.S.R. § 2-20.12.a.2. WVDEP cites no authority whatsoever for such a draconian result, and HCPA has found none.

HCPA was clearly within its rights in pursuing cost recovery from WVDEP for its state administrative appeals based on the success it expected to (and did in fact) achieve before the Surface Mine Board. In light of its right to recover from WVDEP under 38 C.S.R. § 2-20.12.a.2, HCPA was no obliged to expend additional time and resources seeking an award for administrative time and expenses from Green Valley in federal court, well before work on the Revision No. 5 appeal was complete and HCPA’s success under the West Virginia SMCRA program became final.

In sum, based on the success that HCPA achieved before the Surface Mine Board, HCPA was entitled to pursue recovery of fees for work performed in the Revision No. 5 appeal from WVDEP alone. WVDEP’s suggestion that HCPA violated a supposed legal duty to pursue recovery of such fees in its federal court citizen suit is entirely unfounded.

C. **The *Green Valley* Decision Does Not Authorize Fee Awards Against Intervenors in Administrative Appeals Concerning Permitting Decisions, and Thus It Does Not Support the Circuit Court's Reliance on 38 C.S.R. § 2-20.12.a.1.**

As explained in HCPA's opening brief, the circuit court erred in ruling that "[a]s 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"). *See* AR 432. Instead of attempting to defend this untenable ruling, WVDEP argues instead that the *Green Valley* decision automatically "modified" this Court's decision in *Louden v. West Virginia Division of Environmental Protection*, 209 W.Va. 689, 551 S.E.2d 25 (2001) ("the *Louden* decision") in a manner that supports the circuit court's decision. *Response Brief* at 9-10. Specifically, WVDEP asserts that the *Green Valley* decision **allows** the Surface Mine Board to assess fee awards against intervening permit applicants in successful administrative appeals that challenge decisions to approve surface mine permits, based on a finding that the intervening permit applicant is a "violator" within the meaning of 38 C.S.R. § 2-20.12.a.1. *Id.* Then, without providing a logical explanation for the leap, WVDEP proceeds to argue that, because the Surface Mine Board supposedly had **the authority** to award fees against *Green Valley*, the Board's decision to award fees against WVDEP pursuant to 38 C.S.R. § 2-20.12.a.2 was unlawful. For a host of reasons, WVDEP is plainly wrong.

The *Green Valley* decision upheld a fee award pursuant to a federal fee-shifting statute, 30 U.S.C. § 1270(d), that includes none of limitations or eligibility or entitlement standards found either in either 38 C.S.R. § 2-20.12.a.1 or in 43 C.F.R. § 4.1294(a)(1), its federal counterpart. Thus, the *Green Valley* decision goes no further than to authorize fee awards against intervenors in federal citizen suits brought pursuant to 30 U.S.C. § 1270.

Importantly, the fee-shifting principles announced in *Green Valley* do not authorize **federal** courts or the Secretary of the Interior to interpret 43 C.F.R. § 4.1294(a)(1) to allow fee awards against intervenors in **administrative appeals from federal permitting decisions**. This is so because § 4.1294(a)(1) – unlike 38 C.S.R. § 2-20.12.a.1 – expressly applies only to administrative appeals concerning enforcement actions. On the federal level, a permittee who is a “violator” of the surface mine laws or regulations may be held liable for the litigation costs of another party **only** in proceedings to review federal enforcement actions, **not** in appeals like this one, which challenge permitting decisions. The only federal fee-shifting provisions that authorize fee-shifting in federal administrative appeals from permitting decisions are 43 C.F.R. § 4.1294 subsections (b) (from the federal regulatory authority to any party **other than a permittee**), (d) (to a permittee from a party who initiates or participates in an appeal in bad faith or to harass), and (e) (to the federal regulatory authority from a party who initiates or participates in an appeal in bad faith or to harass). Thus, the federal fee-shifting regulations expressly limit the fee liability of permittees in administrative review proceedings to only those proceedings to review enforcement actions that result in a finding that a violation of federal law has occurred or that an imminent hazard existed. 43 C.F.R. § 4.1294(a)(1).

Nothing in the *Green Valley* decision altered the regulations that limit fee-shifting against permittees in federal administrative appeals. Consequently, while the *Green Valley* decision unquestionably authorizes the entry of fee awards against permittees who intervene in federal citizen suits aimed at enjoining the approval of permits or permit revisions, that decision most certainly does **not** authorize fee awards against permittees who intervene in federal administrative appeals in support of decisions to approve and issue mining permits.

Because the *Green Valley* decision did not in fact change federal fee-shifting law to authorize entry of fee awards against permittees in federal administrative appeals concerning permitting decisions, the ruling did not automatically modify this Court's settled interpretation of 38 C.S.R. § 2-20.12, as announced in the *Louden* decision. The interpretation announced in *Louden* is perfectly consistent with the applicable federal regulations because it construes 38 C.S.R. § 2-20.12 in a manner that conforms the West Virginia rule to its federal counterpart and thus makes the West Virginia regulation "no less effective than the Secretary's regulations in meeting the requirements" of the federal Act. *See* 30 C.F.R. § 730.5(b).

Contrary to WVDEP's claim that the *Green Valley* decision automatically "modified" this Court's interpretation of 38 C.S.R. § 2-20.12.a.1, any change to the text or governing interpretation of that regulation which would enable the Surface Mine Board to grant fee awards against permittees in proceedings to review permit approval decisions could not lawfully take effect unless and until the change was submitted to, and approved by, the federal Office of Surface Mining Reclamation and Enforcement ("OSM"). 30 C.F.R. § 732.17(g). If WVDEP were truly persuaded that the *Green Valley* decision demanded a change in 38 C.S.R. § 2-20.12.a.1 to allow entry of fee awards against permittees who intervene in administrative appeals concerning permitting decisions, the agency would long ago have proposed such a change to the text of the regulation and attempted to obtain the necessary approval of the Legislature and OSM. Because WVDEP has not done so in the more than four years that have passed since the *Green Valley* decision, the agency may not credibly contend in this case that by some mysterious process, a federal court of appeals somehow

“modified” 38 C.S.R. § 2-20.12.a.1 by handing down a decision that did not cite that rule or address its content.⁵

Guided by the *Louden* decision, HCPA correctly sought fees from WVDEP for the work of its counsel and expert witness in the administrative appeals below. Consistent with *Louden*, the Surface Mine Board rejected WVDEP’s unfounded demand that it assess fees against Green Valley. Instead, the Board correctly awarded fees solely from WVDEP, based on a well-supported finding that HCPA satisfied the requirements of 38 C.S.R. § 2-20.12.a.2. Thus, the circuit court’s reliance on the requirements of 38 C.S.R. § 2-20.12.a.1 to reverse that award was patently erroneous.

D. Each Final Order of the Surface Mine Board Provided Relief Against WVDEP.

HCPA explained in its *Opening Brief* that the Surface Mine Board’s final order in Appeal No. 2003-46-SMB (“the IBR 9 appeal”) constituted relief against WVDEP because the final order (1) identified serious error in the agency’s decision to approve IBR 9 without sufficient hydrologic information and analyses, (2) utilized the Board’s *de novo* review authority to effectively amend the permit in question to include additional information and analyses supplied at the hearing to build a competent record on which the permit could be lawfully approved, and (3) amended the permit further to add environmental protection features that WVDEP itself had refused to require. In response WVDEP claims that neither the errors that HCPA demonstrated in the agency’s initial

⁵ Even if the *Green Valley* decision had automatically changed 38 C.S.R. § 2-20.12 – which it did not – the change would only have **allowed** HCPA to seek, and the Surface Mine Board to grant, a fee award against Green Valley in this case. In no way may the *Green Valley* decision be reasonably interpreted to **require** entry of a fee award against permittees who intervene in administrative appeals that modify or vacate permitting decisions. Nor would expansion of the West Virginia rule to **allow** fee awards against permittees justify reversal of the Surface Mine Board’s fee award against WVDEP where, as here, the requirements of 38 C.S.R. § 2-20.12.a.2 are met. Consequently, the *Green Valley* decision provides no basis on which the circuit court might have lawfully reversed the fee award at issue in this appeal.

approval of IBR 9 nor the additional information, analyses, or protective features that the Board added to the permit as a result of HCPA's efforts advanced the goals of West Virginia's coal regulatory program by ensuring that WVDEP fulfilled its statutory duties responsibly. *Response Brief* at 15. WVDEP further discounts these successes in claiming that it did not take corrective action with respect to IBR 9. Neither claim has merit.

Simply put, the Board exercised its *de novo* review authority in the IBR 9 appeal to take corrective action **on WVDEP's behalf** after the Board identified serious failures on the agency's part in fulfilling its statutory duties. The Legislature's provision for *de novo* review authority by the Board effectively allows the Board to "step into the shoes" of WVDEP and modify unlawfully approved mining permits to make them lawful. When the Board exercises that authority, the modifications it makes to a mining permit constitute relief against WVDEP just as surely as if the Board had elected to vacate the decision at issue and remand the matter to WVDEP with direction to take the necessary corrective action itself. Thus, the Board's amendments to IBR 9 ensured that WVDEP fulfilled its statutory duties by correcting the agency's errors directly, thus producing a lawful permit that has guided WVDEP's regulatory efforts to date and will continue to so in future.

WVDEP errs in interpreting the decision in *Kentucky Resources Council, Inc. v. Babbitt*, 997 F.Supp. 814, 817 (E.D. Ky. 1998), to establish an across-the-board requirement that fee applicants prove that every administrative appeal caused a voluntary change in a regulatory authority's conduct. That is certainly the rule in appeals that become moot because of action that a regulatory authority takes **before** the appeal is decided. However, where an administrative appeal results in a final order that vacates or modifies an agency decision, it is beyond question that the administrative appeal led directly to the final order and the relief that it provides. Unlike the fee

claim at issue in *Kentucky Resources*, the fee order here does not rest on the so-called “catalyst theory,” and thus standards for an award pursuant to the “catalyst theory” do not apply.

Turning to the Revision No. 5 appeal, WVDEP fails even to acknowledge the Board’s decision to vacate the agency’s unlawful approval of Revision No. 5 in form that Green Valley initially proposed. Certainly, WVDEP makes no attempt to explain how wiping its decision off the books entirely was not a clear victory for HCPA and a devastating loss for the agency. Instead, while ignoring the prime indicator of HCPA’s success, WVDEP attempts to avoid fee liability by, in effect, disclaiming its role and responsibilities as regulatory authority. According to WVDEP, it was directed only to “review” Green Valley’s replacement proposal. In fact, however, the Board ordered the agency to “receive and consider” that filing after endorsing the remedial measures Green Valley proposed. AR 46. Importantly, the Board left it to WVDEP to fulfill its statutory duty to grant or deny Green Valley’s revised application. *See* W.Va. Code § 22-3-18(a) (“Upon the receipt of a complete surface-mining application or significant revision or renewal thereof, including public notification and an opportunity for a public hearing, the director shall grant, require revision of, or deny the application for a permit within sixty days and notify the applicant in writing of the decision”). Given the complexity of Revision No. 5, it was certainly prudent for the Board to rely on WVDEP’s resources and expertise in evaluating and approving or denying the proposal.

By law, the Board’s remand of Revision No. 5 with instructions to “receive and consider” Green Valley’s amended proposal obligated WVDEP, within a defined time period, to decide whether to grant the proposal, to deny it, or to require Green Valley to revise it. Contrary to WVDEP’s current argument, the actions that the Board’s remand required were not the same acts that the agency previously carried out. After all, Revision No. 5 had changed dramatically in the

interim, and vacatur of WVDEP's initial decision precluded repetition of the agency's earlier errors. Obtaining an order that vacates a challenged permitting decision and remands for consideration of an amended proposal plainly constitutes sufficient success against a SMCRA regulatory authority to support a fee order. *West Virginia Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239 (4th Cir. 2003).

Both of the Surface Mine Board's June 9, 2009, final orders constituted success on the merits against WVDEP because they altered HCPA's legal relationship with the agency in ways that advanced HCPA's interests in preserving Hominy Creek. The circuit court erred in ruling to the contrary.

E. WVDEP Effectively Ratified the Settlement Agreements Between HCPA and Green Valley.

WVDEP denies that its failure to object to or appeal the Board's final orders on IBR 9 and Revision No. 5 effectively ratified the settlement agreement between HCPA and Green Valley. The agency is wrong for the reasons HCPA stated in its opening brief. In addition, HCPA notes that WVDEP filed a petition for appeal of the Surface Mine Board's initial final order on IBR 9, even though that order granted no more relief than it did when the Board reinstated it two years later. AR 339 n.2 (WVDEP's acknowledgment of its appeal of the initial final order concerning IBR 9). On that occasion WVDEP attached to its petition for appeal HCPA's initial fee petition for work performed in challenging approval of IBR 9, demonstrating that one of WVDEP's purposes in seeking judicial review was avoidance of the same success claim that HCPA made before the Board in this case. WVDEP's course of action on the initial final order concerning IBR 9 belies the agency's current claims that (1) the relief granted with respect to IBR 9 was too innocuous to merit

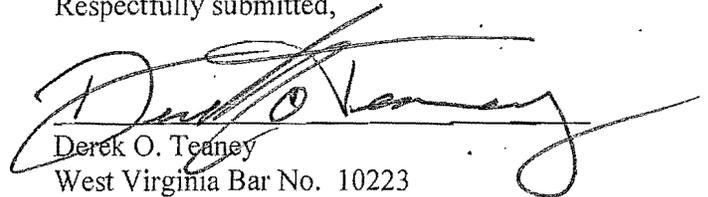
an appeal and (2) WVDEP had no reason to anticipate that HCPA would file a fee petition based on that relief.

Conclusion

At stake in this appeal is payment of fair compensation to HCPA's counsel and expert for their successful work in challenging and prompting the material revision of two surface mining permits that WVDEP unlawfully approved and then acquiesced in correcting. HCPA's claim is grounded on public policy that Congress and the West Virginia Legislature announced in SMCRA and 38 C.S.R. § 2-20.12.a.2: parties who protect their property or the environment by successfully prosecuting challenging WVDEP decisions are entitled to recover litigation costs from WVDEP not to penalize the agency but as a means of encouraging public participation in the administration and enforcement of SMCRA and the West Virginia Surface Coal Mining and Reclamation Act. The circuit court unjustifiably broke that promise by vacating the Surface Mine Board's fee award.

HCPA urges the Court to correct that error. For the reasons stated in this reply and in HCPA's *Opening Brief*, HCPA again requests that this Court reverse the circuit court's final order, reinstate the fee order, and, to the extent the Court deems necessary, remand this case to the circuit court for adjudication of WVDEP's objections to the amount of the Surface Mine Board's fee 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)

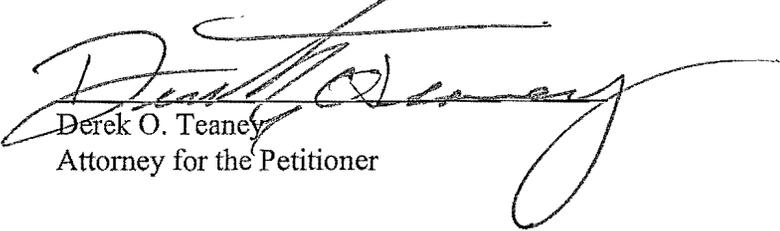
WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,
(Petitioner Below).

CERTIFICATE OF SERVICE

I, Derek O. Teaney, Counsel for Petitioner Hominy Creek Preservation Association, Inc., do hereby certify that on the 17th day of October, 2011, I caused a true and exact copy of the attached **Petitioner's Reply Brief** for this appeal to be served by hand-delivery to:

Joseph L. Jenkins, Senior Counsel
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