

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET No. 11-0749

2/3/2011

**HOMINY CREEK PRESERVATION
ASSOCIATION, INC.**

Petitioner

Appeal from a final order
of the Circuit Court of Kanawha County
(10-AA-102)

V.)

**WEST VIRGINIA DEPARTMENT
OF ENVIRONMENTAL
PROTECTION,**

Respondent

**West Virginia Department of
Environmental Protection's
Response Brief**

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STATEMENT OF THE CASE

Petitioner's recitation of the history of this lengthy litigation is mostly accurate. However, several important omissions exist. Therefore, pursuant to Rule 10(d) of the Revised Rules of Appellate Procedure, Respondent deems it necessary to supplement the statement of the case as follows:

A. HCPA and Green Valley's Settlement Agreement and Consent Decree

Petitioner Hominy Creek Preservation Association, Inc. ("HCPA") entered into a Settlement Agreement and Consent Decree (collectively referred to as the "Agreements") with Green Valley Coal Company ("Green Valley") to conclude the federal litigation HCPA had filed against Green Valley. Administrative Record 25-41 (hereinafter "AR"). In the federal litigation, HCPA brought claims "pursuant to Section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, alleging that Green Valley has been and is discharging pollutants into waters of the United States." AR 25. However, the relief HCPA obtained pursuant to the Agreements deals exclusively with their claims in the two Surface Mine Board ("Board") appeals, 2003-46-SMB and 2005-12-SMB, at issue in the case *sub judice*. For example under remedial measures:

1. "To **address HCPA's claims in two of the administrative appeals**, namely Nos. 2004-15-SMB and 2005-12-SMB, and in the federal civil action, Green Valley agrees to perform the remedial work set forth in Paragraph 3 of the proposed *Consent Decree*...." AR 27 (bold emphasis added).¹
2. "To further and completely **address HCPA's claims in the remaining administrative appeal**, namely No. 2003-46-SMB..." *Id.* (emphasis added).

¹ 2004-15-SMB was closely related to 2005-12-SMB and was ultimately moved to be dismissed as moot as part of the Agreements. HCPA never requested fees regarding that action.

These are the only remedial measures contained within the Settlement Agreement. *Id.*

The Consent Decree contained additional detailed remedial actions in paragraph three as referenced in the Settlement Agreement above. *Id.*; AR 36-39. These remedial actions set forth in more detail the specific performances of Green Valley. One of the remedial actions required Green Valley to “submit an application to WVDEP to revise Surface Mine Permit No. 0-155-83.” AR 37 (Paragraph 3(b)). Three other remedial actions were to be made part of the submitted revision. AR 36-39 (Paragraph 3(a), (d) & (e)).² All of the remedial actions were to be taken under the auspices of West Virginia’s state regulatory program for the federal Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), not the Clean Water Act under which HCPA instituted the federal litigation. AR 36-39. In fact, three of the five remedial actions specifically state that any changes to these remedial actions will have to adhere to the requirements of SMCRA. *Id.* (Paragraph 3(a), (d) & (e)). The final remedial action simply releases all of the federal Clean Water Act claims. AR 39 (Paragraph 4).

No civil penalties were imposed under the Clean Water Act. AR 39. For HCPA’s efforts, HCPA obtained a fee award from Green Valley in the amount of \$165,000.00. *Id.*

B. The Administrative Appeals Underlying the Fee Award

1. Appeal No. 2003-46-SMB

HCPA did not succeed with the initial Final Order dated September 6, 2005 because West Virginia Department of Environmental Protection’s (“WVDEP”) decision to approve IBR No. 9 was **affirmed**. AR 20. Although the WVDEP was required to put

² A fourth remedial action called for one year of monitoring of water quality related to the work proposed in paragraph 3(a). AR 37 (Paragraph 3(c)).

on evidence to explain its decision, the outcome did not modify or amend IBR No. 9 as no changes were made. *Id.* HCPA then moved to reconsider the Board's order on October 4, 2005 based upon federal litigation over WVDEP's rulemaking. AR 53. The following ensued over several years: 1) the Board vacated the Final Order; 2) WVDEP moved for reconsideration of the vacating order; 3) the Board ordered that additional hearings should be held in the matter; 4) HCPA obtained a stay of the additional hearings in Kanawha County Circuit Court; and finally 5) after the Agreements between HCPA and Green Valley were entered in federal court, the Board issued its Amended Final Order on June 9, 2010. AR 53-55; AR 42-43. HCPA's basis for its fee award is the Amended Final Order that specifically reinstates the initial Final Order affirming WVDEP's decision and amending IBR No. 9 by approving "the additional remedial measures **set forth in Paragraph 3 of the April 28, 2009, Settlement Agreement between HCPA and Green Valley.**" AR 43 (emphasis added). The Amended Final Order also makes the Settlement Agreement a part of the order. *Id.*

2. Appeal No. 2005-12-SMB

WVDEP's decision approving Revision No. 5 was vacated and remanded pursuant to the Board's June 9, 2010 Final Order. However, the Board's ruling was premised on the Board finding that "the remedial measures **specified in the settlement agreement between HCPA and Green Valley** constitute an adequate, fair and equitable resolution of the claims that HCPA has advanced in this appeal, will avoid protracted litigation, and are [in] the public interest." AR45-46 (emphasis added).

C. The Fee Award and Final Order

The Board entered the fee Award on April 16, 2010. AR 307-326. The Order was not titled a "Final Order." AR 307. Nor did it contain any language indicating it was final. AR 307-326. After WVDEP filed its motion for clarification, the Board entered an order denying WVDEP's request on June 7, 2010. AR 333-334. This order clearly indicated it was final: "[T]he Board...considers the arguments in these appeals **final and closed.**" AR 334 (emphasis added).

SUMMARY OF ARGUMENT

HCPA sought and received an award for over \$300,000.00 in attorney fees and costs for two Board appeals, 2003-46-SMB and 2005-12-SMB. Over Respondent WVDEP's objections to the legality and reasonableness of HCPA's request, the Board granted the fee award with scant attention to those objections. After seeking a supplemental order of the Board's fee award and being summarily denied, WVDEP sought judicial review. After reviewing the record, the Circuit Court adequately addressed WVDEP's objections and ultimately overturned the fee award on the basic premise that: **HCPA resolved these matters in a proceeding in U.S. District Court without WVDEP's participation in which HCPA received \$165,000.00 in attorney fees from Green Valley.**

As to the timeliness of WVDEP's appeal to Circuit Court, HCPA's reliance on the April 16, 2010 fee award as a final order is misplaced. The order was not titled as a final order and did not contain any language indicating it as such. The lack of finality in the April 16, 2010 order is further highlighted by the June 10, 2010 order which clearly

indicates it was final. It is this Final Order that WVDEP filed its appeal within thirty days of entry. The Circuit Court was correct to deny HCPA's motion to dismiss.

The Board and HCPA play down the importance of the Agreements reached by HCPA and Green Valley. However, an extensive review of the Agreements sheds light on one simple truth: HCPA was given a fee award for relief it obtained in the Agreements, in which **ALL** of the relief pertained to HCPA's SMCRA claims before the Board and not the Clean Water Act claims in the federal case. If all of the relief pertained to claims before the Board, then how can HCPA claim that the fee award was for litigation costs in the federal case? It cannot, at least not in good faith. Unfortunately, the Board went along with HCPA's ruse and awarded HCPA another \$300,000.00+ for the same relief. This is the clearly wrong and arbitrary and capricious act that the Circuit Court appropriately reversed. The inequity of having WVDEP pay for something HCPA has already received payment for serves as a recurrent theme for all of the Circuit Court's findings.

For instance, the Circuit Court's reliance upon W.Va. Code R. § 38-2-20.12.a.1 is consistent with its ruling and the applicable law. It is consistent because the ultimate resolution came about through the Agreements between HCPA and Green Valley, not through any action directed to the WVDEP. The fundamental principles of the Circuit Court's reliance upon W.Va. Code R. § 38-2-20.12.a.1 are that HCPA litigated against Green Valley, HCPA secured the Agreements with Green Valley and HCPA was paid by Green Valley for its work in securing that relief but WVDEP still pays even though it is not involved in the process.

Additionally, the Circuit Court's findings, when viewed in light of HCPA's Agreements with Green Valley, are, for the most part, accurately reflected within the record. To the extent they are not, it would not rise to reversible error. Furthermore, the Board's failure to recognize the factual importance of the Agreements between HCPA and Green Valley was clearly wrong in view of the reliable, probative and substantial evidence on the whole record. Since the Board was clearly wrong, and provided no rational for recognizing the Agreements, the Circuit Court did not err when it set forth its findings.

Finally, HCPA asserts that WVDEP's failure to object to the entry of the orders granting the relief set forth in HCPA and Green Valley's Agreements essentially ratified that relief and WVDEP cannot now argue that HCPA is not entitled to its fees. This argument would place WVDEP in a catch-twenty-two because WVDEP must now decide whether to accept additional environmental protections and end litigation or continue litigating its position to avoid the payment of substantial fees. HCPA is essentially asking this Court to punish WVDEP for choosing the former. This would not promote the resolution of cases by agreement. Therefore, the Circuit Court did not err in failing to address this issue.

For the above-stated reasons, WVDEP respectfully requests this Court to affirm the Circuit Court's decision reversing the Board's fee award to HCPA.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As to HCPA's contention that WVDEP's appeal was untimely, WVDEP asserts *Moten v. Stump*, 220 W.Va. 652, 648 S.E.2d 639 (2007), is distinguishable. As such, Rule 19(a)(1) of the Revised Rules of Appellate Procedure for oral argument regarding

“cases involving assignments of error in the application of settled law” would likely govern. Therefore, WVDEP requests Rule 19 oral argument regarding this issue.

With regards to the remaining issues, they concern the application of settled law and a result against the weight of the evidence. See Rule 19(a)(1) & (3) of the Revised Rules of Appellate Procedure. Therefore, WVDEP requests Rule 19 oral argument regarding the remaining issues.

ARGUMENT

A. Standards of Review

“In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*.” Syl. pt. 1, *Clower v. W. Virginia Dept. of Motor Vehicles*, 223 W.Va. 535, 678 S.E.2d 41, (2009) (citation omitted). “Evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong.” Syl. pt. 2, *Id.* (citation omitted). “When the court, on a thorough examination of the whole case, finds that substantial justice has been done, the judgment will not be reversed for any error committed by the circuit court, unless such error, if it had not been committed, would have tended in some measure to produce a different result.” Syl. pt. 2, *State ex rel. McGraw v. Nat'l Fuels Corp.*, 215 W. Va. 532, 600 S.E.2d 244 (2004) (citation omitted).

B. WVDEP's Appeal Was Timely

HCPA's reliance on the April 16, 2010 fee award as a final order is misplaced. The Order was not titled a “Final Order.” AR 307. Nor did it contain any language

indicating it was final. AR 307-326. The lack of finality in the April 16, 2010 order is highlighted by the June 10, 2010 order which clearly indicates it was final: “[T]he Board...considers the arguments in these appeals **final and closed.**” AR 334 (emphasis added). It is this Final Order that WVDEP indisputably filed its appeal within thirty days of entry.

Moten v. Stump, 220 W.Va. 652, 648 S.E.2d 639 (2007), is distinguishable and thus not dispositive as HCPA argues. The orders at issue in *Moten* contained specific language indicating their finality. For example, the December 15, 2004 order “stated ‘this matter is DISMISSED from the docket of this Court.’” *Id.* at 656. The October 12, 2005 order “stated specifically that ‘the Court dismisses this matter and strikes it from the docket, and ORDERS that the previous Dismissal Order entered on December 15, 2004, is effective and that this matter is now completed.’” *Id.* at 657. Since the April 16, 2010 order contained no similar language, it cannot be deemed final. Only when the June 9, 2010 order stated that “the arguments in these appeals [are] final and closed” does the Board enter a final order. Since WVDEP appealed within thirty days of the entry of the June 9, 2010 final order, WVDEP’s appeal was timely. The Circuit Court was correct to deny HCPA’s motion to dismiss.

C. **The Circuit Court Did Not Err Applying W.Va. Code R. § 38-2-20.12.a.1 Because it is Consistent with Applicable Law**

The Circuit Court was confronted the inequity of having WVDEP pay for something HCPA has already received payment for. A thorough review of HCPA and Green Valley’s federal litigation Agreements sheds light on one simple truth: HCPA was given a fee award for relief it obtained in the Agreements, in which all of the relief pertained to HCPA’s SMCRA claims before the Board and not the Clean Water Act

claims in the federal case. Therefore, the relief obtained by HCPA before the Board was really the relief obtained in litigation against Green Valley not WVDEP and Green Valley paid HCPA's fees. As such, the Circuit Court's reliance upon W.Va. Code R. § 38-2-20.12.a.1 is consistent with the applicable law.

W.Va. Code R. § 38-2-20.12.a.1 provides:

Any 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;

HCPA asserts that this provision is inapplicable because the only provision applicable to fee awards in proceedings challenging WVDEP's permit decisions is W.Va. Code R. § 38-2-20.12.a.2, which provides fee awards against WVDEP and not Green Valley. See *Louden v. West Virginia Division of Environmental Protection*, 209 W.Va. 689, 551 S.E.2d 25 (2001). However, what HCPA fails to disclose to the Court is that *Louden's* ruling regarding fee awards in proceedings challenging WVDEP's permit decisions was modified by the U.S. Court of Appeals for the Fourth Circuit in *Ohio River Valley Environmental Coalition v. Green Valley Coal Company*, to also allow fee awards against intervenors – Green Valley in the appeals below. 511 F.3d 407, 417 (2007) (“In this case Green Valley's submission of allegedly illegal mining permit applications provides the necessary connection between the substantive provisions of SMCRA and fee liability.”). In effect, an intervenor, when defending allegedly illegal mining permits and practices, becomes a violator of SMCRA because the intervenor “violated its duties under SMCRA by submitting permit applications that did not comply with the Act's requirements.” *Id.* at 416. “[T]he purpose of SMCRA's fee-shifting provision – to ensure compliance with SMCRA's provisions... [by] the coal operators regulated by the

program – would be undercut by a rule that protects operators from fee liability when they intervene to defend allegedly illegal mining permits and practices.” *Id.*

Since SMCRA and its regulations contemplate fee awards against intervenors in permit challenges, West Virginia’s rules must be read in a consistent manner. See *Louden*, 209 W.Va. at 692, 551 S.E.2d at 28 (“a state regulation enacted pursuant to WVSCMRA ‘must be read in a manner consistent with federal regulations’ promulgated under [SMCRA]” (citation omitted)). To the extent *Louden* is contrary, it does not apply. The only applicable fee-shifting provision in West Virginia’s rules that can be read in a manner consistent with *ORVEC*’s ruling is W.Va. Code R. § 38-2-20.12.a.1. This is because, aside from the fee-shifting provision HCPA asserts against WVDEP, W.Va. Code R. § 38-2-20.12.a.1 provides the only other means by which an organization such as HCPA can obtain a fee award.³

Back to the Agreements, HCPA goes through painful detail to try to absolve Green Valley of its responsibility to pay HCPA for its fees. AR 31-32. The Agreements state that SMCRA does not “authorize the entry of fee awards against a permit applicant who is not a ‘violator’ of the state regulatory program” and that simply submitting an application for regulatory approval and defending the agency action granting the application does not make Green Valley a violator under the governing regulation. AR 31. Not only is HCPA and Green Valley’s statement a misrepresentation of the law, it is a deliberate misrepresentation so that HCPA can return to the honey pot and seek

³ HCPA is a “participating party” under the fee-shifting provisions in W.Va. Code R. § 38-2-20.12.a. Only W.Va. Code R. § 38-2-20.12.a.1 (against a violator) and 38-2-20.12.a.2 (against the WVDEP) allow the recovery of fees by a “participating party.”

additional fees from WVDEP.⁴ AR 32 (“Green Valley agrees not to oppose any request for fees by HCPA from parties other than Green Valley in those proceedings.”).

The ultimate resolution came about through the Agreements between HCPA and Green Valley, not through any action directed to the WVDEP. The fundamental principles of the Circuit Court’s reliance upon W.Va. Code R. § 38-2-20.12.a.1 are that HCPA litigated against Green Valley, HCPA secured the Agreements with Green Valley and HCPA was paid by Green Valley for its work in securing that relief. Green Valley was the “violator” and thus liable for HCPA’s fees, not WVDEP. As such, the Circuit Court appropriately reversed the Board’s clearly wrong and arbitrary and capricious act in granting a fee award to HCPA and prevents the inequity of having WVDEP pay for something HCPA has already received payment for.

D. The Circuit Court Did Not Reject the Board’s Findings of Fact but Found the Board’s Fee Award Was Clearly Wrong in Light of the Substantial Evidence Regarding the Agreements and the Board’s Failure to Address the Agreements⁵

HCPA lists a litany of factual assertions made by the Circuit Court that HCPA alleges the record does not support. However, a review of the record clearly shows that the assertions of the Circuit Court are well founded in the record. It is the Board that was clearly wrong in addressing the Agreements and arbitrary and capricious in not

⁴ It is important to note that HCPA was a party to *ORVEC* and HCPA’s counsel in the appeals below were one in the same in *ORVEC*. Therefore, the statements within the Agreements cannot be attributed to mistake. The only other conclusion is that HCPA wanted more money for the same work.

⁵ WVDEP candidly agrees with HCPA that the Circuit Court’s statement regarding the impact of the 4th Circuit’s interpretation of two regulations on HCPA’s relief before the Board is not supported by the record. However, the statement is simply superfluous, could be removed from the Circuit Court’s order and if removed, would produce no different result to the Circuit Court’s decision. Since it would not produce a different result, this admitted error alone would not be sufficient to reverse the Circuit Court’s decision. Syl. pt. 2, *Nat’l Fuels Corp.*, 215 W. Va. 532, 533, 600 S.E.2d 244, 245 (2004).

recognizing the Agreements' significance in resolving the appeals. Most of the challenged factual assertions center upon the Agreements and it was proper for the Circuit Court to address the Agreements.

1. HCPA's Litigation Efforts Did Principally Involve Green Valley

HCPA admitted that its litigation efforts principally involved Green Valley. Aside from the two proceedings where HCPA challenged WVDEP's rulemaking, eight of the ten proceedings cited by HCPA were against Green Valley or WVDEP's decisions regarding Green Valley's submissions. AR 50-51. Call it what you will, but eight out of ten cases involving the same company, Green Valley, evidences a pattern to continually challenge Green Valley's operations, whether appealing WVDEP's decisions or directly attacking Green Valley. Furthermore, four of the proceedings were resolved through HCPA's Agreements with Green Valley in the federal litigation brought directly against Green Valley. AR 51. Given the above, the Circuit Court's statement is neither unsupported nor false.

2. HCPA's Fee Recovery From Green Valley Was For More Than HCPA's Clean Water Act Litigation

HCPA goes to great lengths to pull the wool over the Court's eyes and avert its gaze upon the glaring simplicity of the Agreements. HCPA's federal litigation began with claims under the Clean Water Act and ended with relief under SMCRA. AR 25-41. This relief was obtained through the appeals before the Board, which the Board had authority to grant given that the requested relief was the **same** relief being sought in the appeals at issue in the case *sub judice*. AR 27-29. HCPA obtained a fee award from Green Valley in the amount of \$165,000.00 for SMCRA relief not relief under the Clean

Water Act. AR 39. HCPA cannot point to any relief within the Agreements associated with the Clean Water Act.

The two remedial measures within the Settlement Agreement address SMCRA relief in the appeals before the Board:

1. "To **address HCPA's claims in two of the administrative appeals**, namely Nos. 2004-15-SMB and 2005-12-SMB, and in the federal civil action, Green Valley agrees to perform the remedial work set forth in Paragraph 3 of the proposed *Consent Decree*...." AR 27 (bold emphasis added).⁶
2. "To further and completely **address HCPA's claims in the remaining administrative appeal**, namely No. 2003-46-SMB...." *Id.* (emphasis added).

These are the only remedial measures contained within the Settlement Agreement. *Id.*

The Consent Decree contained additional detailed remedial actions in paragraph three as referenced in the Settlement Agreement above. *Id.*; AR 36-39. These remedial actions set forth in more detail the specific performances of Green Valley. 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. AR 36-39. In fact, three of the five remedial actions specifically state that any changes to these remedial actions will have to adhere to the requirements of SMCRA. *Id.* (Paragraph 3(a), (d) & (e)). The final remedial action simply releases all of the federal Clean Water Act claims with no relief afforded thereunder. AR 39 (Paragraph 4). Finally, no civil penalties were imposed under the Clean Water Act. AR 39.

⁶ 2004-15-SMB was closely related to 2005-12-SMB and was ultimately moved to be dismissed as moot as part of the Agreements. HCPA never requested fees regarding that action.

Although HCPA points to self-serving statements within the Agreements that the payment of \$165,000.00 was for the federal litigation only, the proof is in the pudding. The only relief comes under SMCRA and not the Clean Water Act. Instead of obtaining a full fee award from the appropriate party, Green Valley, HCPA intentionally misrepresented the law so they could raid the State coffers. See *ORVEC*, 511 F.3d at 416-417 (Green Valley would be a violator and subject to fee liability). Even without seeking a fee award against Green Valley in the Board appeals, HCPA could have sought compensation for the appeals in the federal litigation because, as HCPA points out throughout its brief, the Board orders were necessary to grant the relief in the Consent Decree. See *Id.* at 418 (in discussing *Pennsylvania v. Delaware Valley Citizen's Council*, 478 U.S. 546, the *Delaware Valley* court allowed fee recovery for time spent in administrative proceedings, but only when it was necessary to enforce the remedy ordered by the District Court).

HCPA received \$165,000.00 for its efforts in obtaining relief under SMCRA. Since it had already been paid for that relief by Green Valley, it was inappropriate for it to seek additional compensation from the WVDEP, no matter how clever HCPA thought it was in drafting the Agreements. Given the above, the Circuit Court's statement is neither unsupported nor false.

3. HCPA Did Not Achieve Success on the Merits Against WVDEP

In Appeal No. 2003-46-SMB, WVDEP's decision to issue IBR No. 9 was affirmed by the Board.⁷ AR 20. HCPA and Green Valley sought to reinstate the affirmation order with an amendment brought directly from the Agreements between HCPA and Green Valley. AR 42-43. The amendment to IBR No. 9 required the installation of two piezometers, which measure fill saturation to determine a fill's stability. AR 27. Fill stability is an engineering issue, which HCPA dropped during the evidentiary hearing. AR 5-6 (TR Page 14, Lines 1-17 and TR Page 239, Line 16 – Page 240, Line 5.). Only when HCPA had obtained a concession from Green Valley in their Agreements, were the piezometers amended into IBR No. 9. With regards to Green Valley, HCPA was successful. HCPA was not successful against WVDEP because the order did not advance the goal to make sure WVDEP fulfilled its statutory duties. See *West Virginia Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 247 (2009) ("An administrative remand...that advances an important statutory goal is sufficient success on the merits to establish eligibility for an award of fees under *Ruckelshaus* and *Hanson*, even when that goal is simply to make sure that an agency fulfills its statutory duties.") The order simply implemented the Agreements between HCPA and Green Valley regardless of whether WVDEP fulfilled its duties. HCPA therefore failed to meet the fee award eligibility requirement. *Id.* at 245 ("The fee petitioner must thus satisfy two requirements under the regulation: first, what is called the 'eligibility requirement' (achieving at least

⁷ WVDEP is aware of HCPA's insistence that by forcing WVDEP to explain their decision at an evidentiary hearing, that this explanation constituted success on the merits beyond the placement of two piezometers. However, it is the result that matters and the result would have been the same with or without HCPA's appeal because either way, WVDEP's decision is affirmed.

some degree of success on the merits); and, second, what is called the “entitlement requirement” (making a substantial contribution to the determination of the issues).”).

Furthermore, WVDEP did not take any corrective action. Green Valley took action to amend IBR No. 9 to include two piezometers not WVDEP. To award fees, HCPA must show that the appeal had some bearing on the actions ultimately taken by WVDEP. See *Kentucky Resources Council, Inc. v. Babbitt*, 997 F.Supp. 814, 820 (1998) (“[T]here must be a causal nexus between the plaintiffs’ actions in prosecuting the appeal to the Board and the corrective actions taken by [WVDEP].”); accord *Louden*, 209 W.Va. at 694, 551 S.E.2d at 30 (“For a party to have been successful so as to entitle him/her to an award of attorney’s fees, there must be some causal connection between the lawsuit and a change in the defendant’s conduct.” (citations omitted)); accord *Norton*, 343 F.3d at 247 (“[T]he key to a finding of substantial contribution is ‘the existence of a causal nexus between petitioners’ actions in prosecuting the Board appeal and the relief obtained.’” (citations omitted)). The appeal had no bearing on WVDEP’s actions. As such, HCPA also fails to meet the entitlement requirement.

In Appeal No. 2005-12-SMB, the final order was directly related to the Agreements between HCPA and Green Valley. AR 45-46 (Revision No. 5 was remanded to “amend Revision No. 5 in accordance with the requirements of a settlement agreement between HCPA and Green Valley....”). Again, HCPA could be deemed to have been successful against Green Valley, because Green Valley took the action to submit an amended application for Revision No. 5. However, even in the Board’s order remanding Revision No. 5, WVDEP is not directed to take any additional

actions beyond review of Green Valley's voluntary amended Revision No. 5; the same action WVDEP took in the first instance. Therefore, it cannot be said that the remand advanced an important statutory goal; it simply advanced HCPA and Green Valley's Agreements. And it cannot be said that the appeal's outcome had any bearing on WVDEP's actions, because WVDEP will simply take the same action it took before, reviewing the revision. HCPA fails to meet the eligibility and entitlement requirements for Appeal No. 2005-12-SMB as well.

Since HCPA does not meet the fee award eligibility requirements of obtaining success on the merits nor can it show it meets the entitlement requirements of making a significant contribution to a full and fair determination of the issues, the Circuit Court was appropriate in reversing the Board's clearly wrong and arbitrary and capricious fee award to the contrary.

4. The Relief Granted by the Board Was Derived from the Agreements

WVDEP agrees that the specific relief negotiated for in the Agreements requires the Board to enter orders to that effect. The Agreements were designed that way so that HCPA could seek an additional fee award for relief Green Valley had agreed to and paid HCPA's fees for. As the old adage goes, you can put lipstick on a pig but it is still a pig. HCPA uses semantics to try to get around the fact that all the relief obtained before the Board, upon which its fee award is based, was SMCRA relief accepted by Green Valley in the Agreements. It is nothing more and nothing less. The Circuit Court was correct in seeing what the Agreements were and rightly reversed the Board's clearly wrong and arbitrary and capricious fee award to the contrary.⁸

⁸ WVDEP's arguments regarding the relationship between the Agreements and the ultimate relief granted by the Board are discussed in more detail *supra*.

E. WVDEP Did Not Ratify the Agreements

WVDEP was given a choice to: 1) accept additional environmental protections; or 2) litigate its position to avoid substantial payments in fees. First, WVDEP is not in the habit of objecting to additional environmental protections should a permittee wish to institute those protections at its expense, nor should it be. This quandary would also fail to promote the resolution of cases by agreement because the WVDEP may determine the fiscal implication of a fee award may outweigh any additional environmental protections beyond what is required by law.

Second, silence does not imply ratification. Silence allows WVDEP to maintain its position that its actions were proper while still allowing additional environmental protections to be implemented. Furthermore, it is dubious of HCPA to stretch WVDEP's position from remaining silent on additional environmental protections agreed upon by two independent parties to agreeing to a \$300,000.00+ fee award to a party that has already been paid. Although WVDEP never contested the relief agreed upon by HCPA and Green Valley in their agreements, WVDEP has hotly contested the fee award as evidenced by the appeal now before this Court. Additionally, the relief granted by the Board pursuant to the Agreements never required WVDEP to change its position or take action. As such, HCPA's reliance on *Louden* is misplaced.

Finally, WVDEP never contemplated nor could have anticipated at the time of entry of those orders that HCPA would have the audacity to request attorney fees for relief in which it had already been paid \$165,000.00. Therefore, the Circuit Court did not err in failing to address this issue.

CONCLUSION

For the reasons stated above, WVDEP respectfully requests this Court to affirm the decision of the Circuit Court.

Respectfully submitted,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

By counsel,

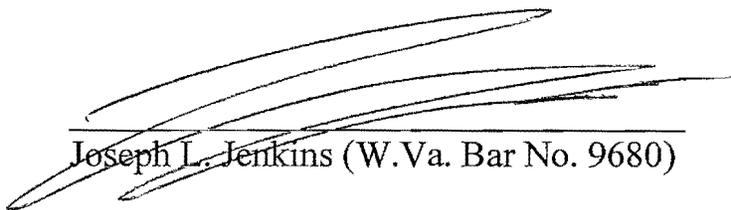


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CERTIFICATE OF SERVICE

I, Joseph L. Jenkins, counsel for the West Virginia Department of Environmental Protection, do hereby certify that I served a copy of the foregoing **“West Virginia Department of Environmental Protection’s Response Brief”** on the **23rd day of September, 2011**, via U.S. Mail to the following:

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