

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-72

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MISSION COAL WIND DOWN CO., LLC,
and PLAN ADMINISTRATOR,
GILBERT NATHAN,
Appellants Below, Petitioners,

v.

DIRECTOR, OFFICE OF MINING AND
RECLAMATION, DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Appellee Below, Respondent.

PETITIONERS' BRIEF IN SUPPORT OF APPEAL

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Mission Coal Wind Down Co., LLC
and Plan Administrator, Gilbert Nathan**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
I. ASSIGNMENTS OF ERROR.....	1
1. THE BOARD ERRED IN FINDING THAT MR. NATHAN HAS A RELATIONSHIP GIVING HIM ACTUAL AUTHORITY TO CONTROL THE MANNER IN WHICH BLUESTONE OPERATES THE PINNACLE MINE COMPLEX.....	1
2. THE BOARD ERRED IN FINDING THAT MR. NATHAN IS A CONTROLLER OF THE PERMITTEE, PINNACLE MINING COMPANY LLC	1
3. THE BOARD ERRED IN AFFIRMING DEP’S ARBITRARY AND CAPRICIOUS APPLICATION OF WVSCMRA’S PERMIT BLOCKING PROVISIONS BECAUSE DEP’S CAPRICIOUS ENFORCEMENT HAS UNDERMINED THE POLICY BEHIND WVSCMRA’S PERMIT BLOCKING PROVISIONS AND THE APPLICANT VIOLATOR SYSTEM.....	1
II. STATEMENT OF THE CASE	1
A. Summary of Case.....	1
B. Factual Background	4
1. The Mission Coal Bankruptcy and Appointment of the Plan Administrator	4
2. Bluestone’s Post-Bankruptcy Operation of the Pinnacle Mine Complex	7
C. Proceedings Below	8
III. SUMMARY OF ARGUMENT	9
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	10
V. ARGUMENT.....	11
A. Legal Framework	11
1. WVSCMRA’s Permit Blocking Scheme.....	11
2. The Purpose of Permit Blocking and the AVS is to Encourage Compliance with Mining Laws and to Prohibit Scofflaws from Obtaining New Permits	13
3. Harm to Petitioner Resulting from DEP and the Board’s Erroneous Finding of Control	14
B. Standard of Review	15
C. Discussion	15
1. The SMB Erred in Affirming DEP’s Finding that Gilbert Nathan Had Relationship that Gave Him Authority to Control the Manner in which Mining was Conducted at the Pinnacle Mine Complex	15

a. Mr. Nathan’s Ability to Sue Bluestone in Bankruptcy Court Does Not Amount to Actual Authority to Control the Manner in Which Bluestone Conducts Mining Operations.....	17
b. Mr. Nathan Does Not Control the Permittee, Pinnacle Mining Company, LLC.....	20
c. The Board Erred in Concluding That Mr. Nathan Had Exclusive Authority to Complete the Transfer of the Pinnacle Permits to Bluestone.....	22
d. Mr. Nathan’s provision of DEP’s Correspondence to Bluestone Does Not Establish Actual Control	23
2. DEP’s Exercise of its Permit Blocking Authority in This Instance Was Arbitrary and Capricious	24
3. DEP’s Application of WVSCMRA’s Permit Blocking Provisions in This Instance Actually Undermines the Policy Goal of WVSCMRA’s Permit Blocking Provisions and the AVS	27
VI. CONCLUSION	29

TABLE OF AUTHORITIES

Cases

<i>Canestraro v. Faerber</i> , 179 W.Va. 793, 374 S.E.2d 319 (1988).....	13
<i>In re Briscoe Enters. Ltd.</i> , II, 138 B.R. 795 (N.D. Tex. 1992)	20
<i>In re Elec. Maint. & Constr., Inc.</i> , 2016 Bankr. LEXIS 2054 (Bankr. M.D. Fla., May 19, 2016).....	21
<i>United States v. Lincoln Sav. Bank (In re Commercial Millwright Serv. Corp.)</i> , 245 B.R. 603 (N.D. Iowa 2000)	21
<i>United States v. Redmond</i> , 36 B.R. 932 (D. Kan. 1984).....	21
<i>West Virginia Div. of Env'tl. Protec. v. Kingwood Coal Co.</i> , 200 W.Va. 734, 490 S.E.2d 823 (1997)	17, 18, 19

Statutes

30 U.S.C. §1260.....	11, 12
30 U.S.C. §1257(b)	11
30 U.S.C. §§1201-1328	13
W.Va. Code § 22-3-18(c).....	12
W.Va. Code § 29A-5-4(g)	15

Rules/Regulations

W.Va. Code R. §38-2-3.1.....	12
W.Va. Code R. §38-2-3.32.	16, 21
W.Va. Code R. §38-2-3.25.....	22
W.Va. Code R. §38-2-2.85.	12, 21

Other Authorities

The Applicant Violator System in Transition, 21 N. Ky. L. Rev. 555 (1994)	12
<i>Surface Coal Mining and Reclamation Permit Approval; Ownership and Control</i> , 56 Fed. Reg. 45780 (Sept. 6, 1991)	13
<i>Ownership and Control; Permit and Application Information; Transfer, Assignment, or Sale of Permit Rights</i> , 72 Fed. Reg. 68000 (Dec. 3, 2007)	17
<i>Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control</i> , 53 Fed. Reg. 38868 (Oct. 3, 1988)	11, 13, 16, 27

I. ASSIGNMENTS OF ERROR

1. THE BOARD ERRED IN FINDING THAT MR. NATHAN HAS A RELATIONSHIP GIVING HIM ACTUAL AUTHORITY TO CONTROL THE MANNER IN WHICH BLUESTONE OPERATES THE PINNACLE MINE COMPLEX.¹
2. THE BOARD ERRED IN FINDING THAT MR. NATHAN IS A CONTROLLER OF THE PERMITTEE, PINNACLE MINING COMPANY, LLC.²
3. THE BOARD ERRED IN AFFIRMING DEP'S ARBITRARY AND CAPRICIOUS APPLICATION OF WVSCMRA'S PERMIT BLOCKING PROVISIONS BECAUSE DEP'S CAPRICIOUS ENFORCEMENT HAS UNDERMINED THE POLICY BEHIND WVSCMRA'S PERMIT BLOCKING PROVISIONS AND THE APPLICANT VIOLATOR SYSTEM.³

II. STATEMENT OF THE CASE

A. Summary of Case

This appeal seeks to correct an extreme example of arbitrary and capricious enforcement by the West Virginia Department of Environmental Protection ("DEP") in administering the West Virginia Surface Coal Mining and Reclamation Act's ("WVSCMRA") ownership and control rules and permit blocking framework.⁴ As will be explained in more detail below, WVSCMRA's regulatory framework includes a concept commonly referred to as "permit blocking," which is

¹ Preserved in the record below through Petitioners' Notice of Appeal to the Board. *See* D.R. 0019 (Question of Fact and Law, No. 2).

² Preserved in the record below through Petitioners' opening statement to the Board. *See, e.g.*, D.R. 1418; Tr., p. 17.

³ Preserved in the record below through opening and closing statements, Petitioners' Notice of Appeal to the Board (D.R. 0010) and more specifically, through testimony by AVS expert, Barry Doss. *See, e.g.*, D.R. 1681-84; Tr, pp. 280-83 (B. Doss).

⁴ For simplicity, the regulatory framework, whereby DEP requires submission by permit applicants of information concerning their owners and controllers and then enters that information in the centralized Applicant Violator System in order to determine permit eligibility and permit blocking, will be referred to as "permit blocking".

designed to preclude current permittees who have failed their legal obligations from receiving additional permits. Once a person or entity is permit blocked, they become virtually unemployable in the coal industry because the permit block can spread to any entity that employs them in a controlling capacity.

The current permit holder (Pinnacle Mining Company, LLC) of the eight surface mining permits associated Pinnacle Mine Complex in Wyoming County, West Virginia went bankrupt and no longer exists as a going business concern. All assets associated with the Pinnacle Mine Complex were sold to Contura Energy, Inc. (“Contura”) or Bluestone Resources, Inc. and/or Bluestone Oil Corp. (hereinafter referred to collectively as “Bluestone”). Pursuant to the Bluestone Asset Purchase Agreement (“APA”), Bluestone was required to obtain surface mining permits for the portions of the Pinnacle Mine Complex that Contura did not take.

Petitioner Gilbert Nathan was appointed as the Plan Administrator over the post-bankruptcy, reorganized debtors, including the entity corresponding to the now-defunct permit holder. Mr. Nathan’s appointment was envisioned as lasting only a few short months until Bluestone secured transfer or replacement of all eight surface mining permits associated with the Pinnacle Mine Complex. However, Bluestone has now been operating the Pinnacle Mine Complex for four years, but has never secured the transfer of a single permit. Even worse, Bluestone has racked up over thirty unabated violations of the surface mining permits pursuant to which it operates, as well as approximately \$276,000 in unpaid fines and mining fees.

In deciding who should be deemed a “controller” of the Pinnacle Mine Complex for purposes of being linked to the violations and unpaid penalties within the centralized Applicant Violator System, DEP chose to ignore both the people who drove Pinnacle Mining Company, LLC into bankruptcy and—more egregiously—the operator (Bluestone) who has been profiting from

the operation of the complex for the past four years, accumulating fines and violations along the way.

Instead, DEP chose to exclusively target Gilbert Nathan, the Plan Administrator for the reorganized version of Pinnacle Mining Company, LLC—Pinn MC Wind Down Co., LLC (“Pinn MC”). Mr. Nathan was singled out for enforcement in spite of the fact that his scope of authority in this matter was limited to performing administrative tasks for post-bankruptcy shells of formerly existing companies until such time as they could be liquidated.

Never before has DEP listed a bankruptcy trustee or plan administrator for a liquidating trust as the “controller” of a coal mining operation. DEP’s stated reason for taking the novel approach of permit blocking Mr. Nathan as the Plan Administrator was that “every single corporate coal company” has a human being designated as responsible for compliance within the Applicant Violator System (“AVS”). In other words, DEP wants to have a live person, or “warm body,” it can threaten enforcement action against in order to coerce compliance from permit-holding entities.

The main problem with this justification is that the record established that DEP frequently allows permit-holding entities to operate without any such person at all being designated as the “responsible human.” The agency’s decision to list Mr. Nathan as a controller, while letting Bluestone and its officers off the hook, indicates only sporadic application of its newly-fabricated “warm body” standard. This is the definition of arbitrary and capricious agency action. The Board’s final order affirming this brand of selective enforcement was clearly unreasonable.

Furthermore, the record below established that Mr. Nathan does not have any actual authority to control the manner in which Bluestone runs the Pinnacle Mine Complex, which means he cannot be a “controller” under WVSCMRA. The entities Mr. Nathan administers were not left

with any of the personal or real property necessary to operate the Pinnacle Mine Complex—those assets all went to Bluestone. Mr. Nathan never had the authority to direct the timing or method of mining, nor could he determine to whom Bluestone sold its coal or for what price. Mr. Nathan repeatedly pleaded with Bluestone to bring the Pinnacle Mine Complex surface mining permits into compliance with WSMCRA, to no avail. Mr. Nathan has even done as DEP suggested: he filed a motion to hold Bluestone in contempt of its obligations under the various contracts its signed before the Alabama Bankruptcy Court, but not even the threat of Bankruptcy Court enforcement can spur Bluestone to action. Instead, DEP and the Board used Mr. Nathan’s failed efforts to compel compliance from Bluestone to further cement the finding that Mr. Nathan was actually capable of controlling the recalcitrant mine operator.

Mr. Nathan simply does meet the legal definition of a “controller”; he does not have a relationship that gives him the actual authority to direct the manner in which the Pinnacle Mine Complex is operated. Accordingly, DEP’s finding that he is a “controller” of the Pinnacle Mine Complex surface mining permits is not supported by substantial evidence or in accordance with applicable law, and, by extension, neither was the Board’s final order affirming DEP’s finding of “control.”

B. Factual Background

1. The Mission Coal Bankruptcy and Appointment of the Plan Administrator.

In October of 2018, Mission Coal Company, LLC (“Mission Coal”) and its subsidiaries, including Pinnacle Mining Company, LLC (“Pinnacle”), filed a voluntary petition in the United State Bankruptcy Court for the Northern District of Alabama seeking relief under the provisions of Chapter 11 of the United States Bankruptcy Code. D.R. 1446; Hearing Transcript (“Tr.”), p. 45 (Testimony of Gilbert Nathan). During the Mission Coal bankruptcy, Bluestone made a successful

bid to acquire all assets related to Mission Coal’s Pinnacle Mine Complex, other than specific assets to be acquired by Contura. D.R. 1451-54; Tr., pp. 50-53 (Gil Nathan). An Asset Purchase Agreement (“APA”) cementing the terms of the sale to Bluestone was executed on Mission Coal’s behalf by a chief restructuring officer—not the current Plan Administrator—on April 4, 2019. *See* D.R. 0578; Certified Record (“CR”), p. 35; *see also* D.R. 1450; Tr., p. 49 (Gil Nathan). Pursuant to the APA, Bluestone acquired all liabilities and obligations associated with the Pinnacle Mine Complex surface mining permits and all other associated permits.⁵ D.R. 0600; CR, p. 57 (APA, §2.33).

Bluestone also agreed to transfer into its name or obtain replacement permits for all the surface mining permits and associated permits related to the Pinnacle Mine Complex, which were and still are permitted to Pinnacle Mining Company, LLC. D.R. 0589-90; CR, pp. 46-47 (APA, §7.7(b)(iii); *see also* APA, §7.7(b)(iii)(2) (“[f]rom and after the Closing, Buyer shall use commercially reasonable efforts to pursue the transfer of the West Virginia Mining Permits (including Replacement Permits) to Buyer as promptly as possible”).

On April 15, 2019, the Bankruptcy Court entered the *Order Confirming the Fourth Amended Joint Chapter 11 Plan of Mission Coal Company, LLC and Certain of its Debtor Affiliates* (“Confirmation Order”), which contemplated the sale of the Pinnacle Mine Complex to Bluestone as a cornerstone of Mission Coal’s wind-down effort. D.R. 0839; CR, p. 296 (Confirmation Order). The Fourth Amended Plan, which was approved via the Confirmation Order, stated that, after the effective date of the reorganization, the Debtors “for all purposes shall

⁵ The Article 3/surface mining permits associated with the Pinnacle Mine Complex include the following: O-0138-83 Pinnacle Plant; U-0707-00 Slope / Dump; O-4022-92 Impoundment; O-4008-92 Shafts / Borehole; O-4010-97 Gob Gas Well Sites; E-002500 GR1, GR2, NR pumps; U-0204-83 50 Mine & warehouse; U-0220-83 Maitland Ponds. The other associated permits are listed in Schedule 2.1(g) to the APA. *See* D.R. 1894-95.

be deemed to have withdrawn their business operations from any state in which the Debtors were previously conducting...their business operations....” D.R. 0930; CR, p. 387 (Fourth Amended Plan, Art. VII, §B); *see also* D.R. 1461; Tr., p. 60 (Gil Nathan).

The next flurry of activity in the Mission Coal bankruptcy occurred on April 30, 2019, with numerous documents being executed on Mission Coal’s behalf by its chief restructuring officer. Mission Coal and Bluestone entered into a *Contract Operator Agreement*, in which Bluestone agreed to become the operator on certain active Pinnacle Mine Complex permits. D.R. 0565; Tr., p. 22. Mission Coal and Bluestone executed the *General Assignment and Bill of Sale*, effectuating the closing of the sale contemplated by the APA. D.R. 0558; Tr., p. 15.

On April 30, 2019, contemporaneously with the execution of the *Contract Operator Agreement*, and *General Assignment and Bill of Sale*, the Bankruptcy Court approved appointment of Petitioner Gilbert Nathan as the Plan Administrator for Mission Coal Wind Down Co., LLC (“MC Wind Down”). *See* D.R. 0785; CR, p. 242, *Sixth Amended Plan Supplement*. MC Wind Down and its affiliates, including Pinn MC Wind Down Coal, LLC (“Pinn MC”), are distinct companies from their pre-bankruptcy corresponding entities. D.R. 1468-70; Tr, pp. 67-69 (Gil Nathan).

Pursuant to the terms of the *Plan Administrator Agreement*, Exhibit I to the *Sixth Amended Plan Supplement*, the Plan Administrator’s “Scope of Services” “is to provide post-Plan Effective Date Administration, wind down, dissolution, and liquidating services that are necessary, required, desirable, or advisable to effectuate the Wind Down and to make certain distributions under the Plan.” D.R. 0793; CR, pp. 250; D.R. 1457-60; Tr., pp. 56-59 (Gil Nathan). Nothing in the Plan Administrator’s scope of services authorizes him to operate coal mines or direct the manner in which the reorganized debtors’ former mines are operated. Moreover, once the reorganized

entities emerged from Bankruptcy, they had no employees and were, thus, not staffed to operate a coal mine. D.R. 1447; Tr., p. 46 (Gil Nathan). Accordingly, Mr. Nathan would have been incapable of operating coal mines, even if he were authorized to do so.

2. Bluestone's Post-Bankruptcy Operation of the Pinnacle Mine Complex.

After the Bluestone APA closed, Bluestone applied for transfer of the majority of the Pinnacle permits. On June 12, 2019, DEP granted Bluestone Advance Approval, in acknowledgement of the applications for permit transfer. D.R. 0960; CR, p. 417. Pursuant to the Advance Approval, Bluestone was allowed to act as the operator of the Pinnacle Mine Complex surface mine permits. D.R. 1677; Tr., p. 276 (B. Doss). Bluestone's Advance Approval to operate the Pinnacle Mine Complex was only valid for 60 days, yet DEP has allowed Bluestone to continue surface mining activities at the Pinnacle Mine Complex for three and a half years (as of the date of the hearing), with no evidence in the record that the Advance Approval has ever been formally extended by the agency. D.R. 1595; Tr., p. 194 (Gil Nathan).

Since the closing of the sale to Bluestone over four years ago, Bluestone has not secured the transfer of a single surface mining permit or obtained any replacement permits. D.R. 1449; Tr., p. 48 (Gil Nathan). Moreover, there have been 34 unabated violations and failure to abate cessation order, as well as unpaid civil penalties and unpaid Abandoned Mine Land ("AML") fees associated with the eight surface mining permits covering the Pinnacle Mine Complex. *See* D.R. 0997-1398; CR, pp. 454-855 (DEP notices of violations issued during Bluestone's operation of the Pinnacle Mine Complex). *See also* D.R. 1684; Tr., pp. 283 (B. Doss testimony that Bluestone accumulated more than \$276,000 in unpaid fines and AML fees).

There is no dispute that the operations at the Pinnacle Mine Complex have been overseen exclusively by Bluestone since April 30, 2019. Yet, on August 1, 2022, WVDEP issued a *Decision and Order* in which it named Gilbert Nathan as a controller of Pinnacle Mining Company LLC,

with a begin date of April 30, 2019, based solely on his status as Plan Administrator of Mission Coal Wind Down Co., LLC. *See* D.R.0012-0016 (WVDEP *Decision and Order*). As a result of WVDEP's *Decision and Order*, Mr. Nathan was immediately linked to the violations Bluestone has committed at the Pinnacle Mine Complex within the AVS, which led to him and an unrelated coal company being permit-blocked (due to Mr. Nathan's position on the board of directors for the company). D.R. 1464; Tr., p. 63 (Gil Nathan).

C. Proceedings Below

Mr. Nathan and Mission Coal Wind Down Co., LLC filed a timely appeal of WVDEP's *Decision and Order* to the West Virginia Surface Mining Board on August 31, 2022. D.R. 0004. The Board held an evidentiary hearing on October 19, 2022, during which it heard sworn testimony from Mr. Nathan (fact witness for Appellants), Mike Isabell (mining expert witness for Appellants), Barry Doss (expert witness for Appellants in mining, permitting, and the Applicant Violator System), and Susan Wheeler (fact witness for Appellee). D.R. 1401 (beginning of hearing transcript before the Board).

DEP's AVS Coordinator, Susan Wheeler, testified that this was the first time DEP had ever entered a plan administrator into the AVS. D.R. 1746; Tr., p. 345. Ms. Wheeler admitted neither Bluestone nor any of its officers or directors had ever been associated with the Pinnacle Mine Complex permits. D.R. 1752-54; Tr., pp. 351-53. It was also established that there have been multiple time periods, including a four-year period, where no person was linked to the Pinnacle Mine Complex within the AVS. D.R. 1675-76; Tr., pp. 274-75 (B. Doss testifying that Appellant Exh. 5 showed 4-year time period where no person was linked to Pinnacle). Ms. Wheeler admitted that DEP was unaware as to how often is actually adhered to the standard articulated at the hearing, which allegedly compels it to ensure that a live person is associated with every surface mining

permit in the AVS. D.R. 1755; Tr., p. 354 (Susan Wheeler testifying that she did not have an estimate of how many entities have no person associated with violations committed by the entity within AVS).

The Board entered a Final Order on January 23, 2023 affirming the finding by DEP that Gilbert Nathan is a “controller” of Pinnacle Mining Company, LLC and thereby personally subject to “permit blocking” for violations of environmental laws attributable to Pinnacle. *See* D.R. 2144-71. The Board’s conclusion that Mr. Nathan controls the Pinnacle Mine Complex rests primarily on four points, each of which will be addressed in the argument section below: (1) Mr. Nathan has control over the permit holder, Pinnacle Mining Company, LLC; (2) Mr. Nathan passed along WVDEP’s notices of violations (“NOVs”) to Bluestone and that, “[a]t least on occasion”, Bluestone complied with the remedial measures commanded by WVDEP’s NOVs; (3) Mr. Nathan filed a motion with the Alabama Bankruptcy Court to compel Bluestone to comply with its obligations under the APA and other bankruptcy documents; and (4) Mr. Nathan has exclusive authority to complete the permit transfers. *See* D.R. 2163-69; Final Order, pp. 20-26.

III. SUMMARY OF ARGUMENT

The Board committed legal error in inferring from various bankruptcy contracts and documents that Gilbert Nathan, in his capacity as Plan Administration for Mission Coal Wind Down Co., LLC and Pinn MC, had a relationship that gave him implied authority to determine the manner in which mining operations were conducted at the Pinnacle Mine Complex. The law requires a demonstration of a relationship that gives Mr. Nathan *actual* authority to control the manner in which Bluestone conducts mining. The record, however, is devoid of any evidence that Mr. Nathan had actual, unilateral authority to force Bluestone into compliance.

The Board further erred in affirming DEP's arbitrary and capricious application of WVSCMRA's permit blocking provisions. In the present case, the agency was challenged as to why it listed Mr. Nathan as a controller of Pinnacle Mining Company, LLC, rather than linking Bluestone's officers to violations Bluestone caused. DEP had no valid answer for its inconsistent application of WVSCMRA's ownership and control rules and corresponding permit blocking provisions.

DEP's arbitrary and capricious enforcement of WVSCMRA and the Board's endorsement of the same place Mr. Nathan in a very untenable position. DEP lays all the blame for Bluestone's operations at his feet. The only way he can get out from under the permit block is to either (1) remedy Bluestone's violations, which he does not have the resources to do; or (2) get the Pinnacle permits transferred to Bluestone, which DEP refuses to do. To the extent Mr. Nathan arguably ever had any leverage on Bluestone, it has long since dissipated as DEP allowed Bluestone to wring all economic benefit out of the Pinnacle permits for three and a half years before ever notifying Mr. Nathan that he would ultimately be held personally responsible for cleaning up Bluestone's mess.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners aver that oral argument under Rule 19 would be useful in articulating the issues for the Court's consideration because the matter involves assignments of error related to Respondent's novel application of settled law and further involves narrow issues of law. This appeal is not appropriate for a memorandum decision pursuant to W.Va. R. App. P. 21.

V. ARGUMENT

A. Legal Framework

1. WVSCMRA's Permit Blocking Scheme.

The Surface Mine Board's affirmation of WVDEP's decision to link Mr. Nathan to Pinnacle and, consequently, to Bluestone's violations at the Pinnacle Mine Complex has resulted in a "permit-block" to the Mr. Nathan as Plan Administrator, which has caused him personal and professional harm. The federal Surface Mining Control and Reclamation Act ("SMCRA"), enacted in 1977, includes a "permit blocking" provision designed to prevent operators that have unabated environmental violations from obtaining new surface mining permits until those violations are addressed to the satisfaction of the appropriate agency. 30 U.S.C. 1260(c). The pre-SMCRA mining industry included many small mine operators that would mine and then abandon sites without reclaiming in accordance with then-existing state laws. *See Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control*, 53 Fed. Reg. 38868 (Oct. 3, 1988). There was no mechanism preventing those operators from abandoning such operations, forming a new business entity and then obtaining new permits. The "permit block" provision and OSM's later-enacted regulations were designed as way of preventing those operators and entities that own or control those operators from obtaining new permits until their prior violations were abated. *Id.*

Accordingly, SMCRA and its implementing regulations require that permit applications contain information about the applicant's ownership structure, the holders of the interests in property to be mined, and other entities under common control. 30 U.S.C. §1257(b). Additionally, SMCRA requires that applicants include a schedule of all violations of SMCRA and the resolution of the violations and prohibits permit issuance where that the applicant or an entity owned or

controlled by the applicant has unabated violations. 30 U.S.C. §1260. In order to maintain a comprehensive schedule of violations across states, the federal Office of Surface Mining created the Applicant Violator System (“AVS”), which is a computerized database program created in 1987 to identify links between known violators and applicants, individuals, and corporations. Sam P. Burchett, *The Applicant Violator System in Transition*, 21 N. Ky. L. Rev. 555, n.5 (1994). OSM operates the database and makes it available to the public via the Internet. *See* Office of Surface Mining, Access, at <https://avss.osmre.gov/login.aspx> (last accessed September 12, 2022).

States are given the option of assuming primacy for the regulation of surface mining within their borders and can enact their own version of SMCRA, which must be approved by the federal Office of Surface Mining. *See* 30 U.S.C. 1260(a). West Virginia enacted the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”), which contains its own “permit-blocking” provisions within the statute (W.Va. Code § 22-3-18(c)) and also within the statute’s implementing legislative rules. *See* W.Va. Code. R. §38-2-3.32.c.

In West Virginia, every surface mining permit application must identify the applicant’s owners and controllers, as defined in §38-2-2.85 of the rules. *See* W.Va. Code R §38-2-3.1.c-d. West Virginia’s surface mining rules define “owns or controls” to mean being a permittee of a surface coal mining operation, owning in excess of 50% of an entity, or “having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface mining operations.” W.Va. Code R. §38-2-2.85.a-c. Being an operator of a surface mining operation is also a presumptive category of control. W.Va. Code R. §38-2-2.85.d.2.

State regulations enacted pursuant to WVSCMRA must be read in a manner that is consistent with federal regulations enacted by OSM pursuant to the federal Surface Mining Control

and Reclamation Act (“SMCRA”). *See* 30 U.S.C. §§1201-1328; *see also Canestraro v. Faerber*, 179 W.Va. 793, 374 S.E.2d 319 (1988). Accordingly, OSM’s guidance on ownership and control in the permit blocking context is entitled to significant weight in interpreting West Virginia’s ownership and control rules.

2. The Purpose of Permit Blocking and the AVS is to Encourage Compliance with Mining Laws and to Prohibit Scofflaws from Obtaining New Permits.

The AVS system was created for two main purposes: (1) to identify violators who might try to avoid abating their violations by continuing to mine in revised corporate form; and (2) to coerce remedial action by owners or controllers of violators with the threat of a permit block. 53 *Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control*, Fed. Reg. 38868, 38875 (Oct. 3, 1988); *see also* 56 Fed. Reg. 45780 (Sept. 6, 1991). As Barry Doss, AVS expert, testified, the AVS is “essentially a database as we know it today to enforce the provisions of SMCRA and to the programs that have primacy under SMCRA to make sure that bad actors, if you will, can’t start an operation in once place, not meet their reclamation obligations, and then go across the street and start up another company with another shingle hanging out and essentially start another coal company.” D.R. 1666; Tr., p. 265 (B. Doss). “And so the Applicant/Violator System is used to track these people and to make sure if you go start something, you know, you can’t do so unless you’ve fulfilled your other obligation. If you haven’t, then you can’t be a permittee. I think that’s the big picture. So it’s a database system to enforce the SMCRA rules.” D.R. 1666-67; Tr., pp. 265-66 (B. Doss). DEP acknowledged that OSM’s AVS is “clearly designed to deal with scuffball.⁶ And we’re not saying Mr. Nathan is a scuffball.” D.R. 1791; Tr., p. 390 (closing argument of DEP counsel, Kevin Barrett).

⁶ The Undersigned believes this may be a transcription error and that DEP’s counsel used the term “scofflaw.”

3. Harm to Petitioner Resulting From DEP and the Board's Erroneous Finding of Control.

WVDEP and all states with OSM-approved surface mining programs provide information on ownership and control received through state permit applications to the AVS and are also required to review the AVS information on permit applicants. Thus, once WVDEP enters a “control” link to an individual with a permit-block, that individual may, themselves, then be “personally” permit blocked in all states. In turn, if that person is, for example, an officer or director, he or she may carry that block from the violating entity to a non-violating entity where he or she serves in a similar capacity. In that instance, the non-violating entity may avoid the block only if the violating entity cures the outstanding violations or it severs its relationship with the permit blocked individual—making such individuals virtually unemployable in the mining industry.

The Plan Administrator formerly sat on the board of directors for a different, unrelated coal company that was actively applying for surface mining permits in other states. After running the mandatory AVS cross-checks on the owners and controllers identified by that coal company during the application process, the regulatory authorities in those states noticed that the coal company was connected to Pinnacle's violations through its connection to Mr. Nathan. D.R. 1501-1503; Tr., pp. 100-102. Once the potential risk of a permit block was identified, Mr. Nathan felt compelled to resign his position on the board of directors for the good of the company so that it would not be permit-blocked as a result of WVDEP's decision to connect Mr. Nathan to Bluestone's violations in the AVS. *Id.* It is undisputed that substantial rights of Petitioner Gilbert Nathan have been prejudiced by DEP and the Board's finding that he had a relationship that gave him authority to control mining operations at the Pinnacle Mine Complex.

B. Standard Of Review

This appeal is governed by the State Administrative Procedures Act, which provides as follows:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code § 29A-5-4(g).

C. Discussion

1. The SMB Erred in Affirming DEP's Finding that Gilbert Nathan Had a Relationship that Gave Him Authority to Control the Manner in which Mining was Conducted at the Pinnacle Mine Complex.

The record before the Board clearly established that Mr. Nathan did not have actual authority over the manner in which Bluestone operated the Pinnacle Mine Complex; its finding to the contrary was not supported by substantial evidence on the whole record.

Mr. Nathan testified that he has no “operational control” over the operations at the Pinnacle Mine Complex: “I have no control over what Bluestone does, period.” D.R. 1478; Tr., p. 77. Moreover, the record is undisputed that neither Mission Coal Wind Down Co., LLC, nor Pinn MC or any of the other reorganized entities Mr. Nathan is charged with administering own the physical assets associated with the Pinnacle Mine Complex. Accordingly, Mr. Nathan cannot legally remove Bluestone from the property or otherwise divest it of property it now owns. Furthermore,

even if the Plan Administrator could get DEP to withdraw Bluestone's operator approval, the surface mining permits would simply fall into disrepair because Mr. Nathan could not grant a new operator the rights to mine the permits without owning the mineral rights or personal property associated with them. D.R. 1607; Tr., p. 206 (Gil Nathan).

The Board's Final Order is based upon the implied control it believes various contracts and agreements executed through the bankruptcy granted to Mr. Nathan. *See, e.g.*, D.R. 2165; Final Order, p. 22 (finding that Contract Operator Agreement gave Pinnacle right to cure violations). However, implied control is not enough. In crafting the federal regulations governing ownership and control, upon which West Virginia's surface mining rules are based, the federal Office of Surface Mining emphasized that the ability to *actually* control the manner in which mining occurs is the relevant question:

Actual Authority. As originally proposed, the rule would have defined "control" as "any relationship which gives one person express or implied authority to determine the manner in which that person or another person mines, handles, sells or disposes of coal * * *" (Emphasis added.) Some commenters stated that it was not clear what was meant by "express or implied authority." They suggested that control should turn on "actual" authority, as opposed to "express or implied" authority. OSMRE agrees, and has not included the phrase "expressed or implied" in the final definition. Paragraphs (a)(3) and (b) simply use the term "authority," which is intended to mean actual authority.

Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control, 53 Fed. Reg. 38868, 38870 (Oct. 3, 1988) (emphasis added). OSM further clarified that the concept of "control should be based on total control of a surface mining operation, and not on one aspect such as handling or selling coal." *Id.* Through numerous iterations of its ownership and control/permit blocking rules, OSM has reiterated that the salient issue is whether an entity has actual control over day-to-day operations:

We stress that though we are removing certain language from the previous definition, the new definition still allows a regulatory authority to reach any person or entity with the ability to determine how a surface coal mining operation is conducted. Further, the “ability to determine” standard will continue to encompass both indirect and direct control, as well as control in concert with others, where there is actual ability to control.

Ownership and Control; Permit and Application Information; Transfer, Assignment, or Sale of Permit Rights, 72 Fed. Reg. 68000, 68003 (Dec. 3, 2007) (emphasis added).

Thus, the inferences the Board drew from the APA, the Plan Administrator Agreement, the Contract Operator Agreement, etc., are an inadequate basis upon which to rest of finding of control. The record below did not establish Mr. Nathan’s actual authority to unilaterally exert total control—or any control for that matter—over Bluestone’s operation of the Pinnacle Mine Complex, nor does the record indicate that Pinn MC was left with the financial resources or property rights to actually exercise its right to correct violations. Accordingly, the Board’s Final Order affirming DEP’s finding of control was not in accordance with applicable law or supported by substantial evidence.

a. Mr. Nathan’s Ability to Sue Bluestone in Bankruptcy Court Does Not Amount to Actual Authority to Control the Manner in Which Bluestone Conducts Mining Operations.

One of the main points the Board and DEP pointed to as an indicative of control was the fact that Mr. Nathan filed a motion to compel Bluestone to comply with its contractual obligations with the Alabama Bankruptcy Court that confirmed Mission Coal’s plan of reorganization. D.R. 2167-69; Final Order, pp. 24-26. The West Virginia Supreme Court’s decision in *West Virginia Div. of Env’tl. Protec. v. Kingwood Coal Co.*, in which it found that DEP overstepped its permit blocking authority, is instructive on this point. *See West Virginia Div. of Env’tl. Protec. v. Kingwood Coal Co.*, 200 W.Va. 734, 490 S.E.2d 823 (1997).

The facts of the *Kingwood* case are worth summarizing in order to contrast that case with the current one. In *Kingwood*, Kingwood Coal Company (“Kingwood”) leased its coal reserves to T&T Fuels (“T&T”) to conduct underground mining. Kingwood also entered into a coal supply agreement with T&T under which Kingwood agreed to purchase all coal mined by T&T. WVDEP viewed this as indistinguishable from a standard contract mining arrangement which, under its rules, created a rebuttable presumption of control.

In 1994, a blowout occurred, and millions of gallons of acid mine drainage entered the Cheat River. In 1995, T&T filed for bankruptcy. Later that year, WVDEP issued a final agency decision concluding that, due to Kingwood’s authority to determine the manner in which T&T Fuels conducted its underground mining operations, Kingwood would be permit blocked. DEP’s finding of control was based upon communications from Kingwood to T&T during mining regarding which sections should be mined to obtain the best coal. Kingwood appealed DEP’s decision to the Surface Mine Board, which reversed DEP’s finding of control. The Board held that, although Kingwood owned the coal being mined by T&T and had certain contractual rights pursuant to its lease with T&T, “Kingwood had no unilateral right sufficient to force T&T to accede to Kingwood’s wishes.” *Id.* at 742, 831. In affirming the Board’s opinion, the Supreme Court listed factors relevant to the question of control:

Important factors to be considered in determining the actual relationship of the parties include whether the mining company is free to sell the coal it extracts to whenever it wishes and the degree of involvement of the coal owner or lessor in the mining operation. Information which can be used to rebut a presumption of control can include, but is not limited to, data on who provides engineering services, who determines the placement and method of driving entries or making cuts, and to whom the coal may be sold and at what price.

Id. at 747, 836. Ultimately, even though Kingwood had certain rights pursuant to its contract with T&T, the Board and Supreme Court noted that those contracts were arms-length agreements that

required Kingwood to first go through arbitration to enforce its rights. *Id.* at 752, 841. Accordingly, Kingwood could not be deemed a controller of T&T.

DEP's assertion of control in the present case is far more tenuous than the prior DEP decision that was vacated in *Kingwood*. Here, Pinn MC does not own any of the mineral Bluestone has mined and sold; it does not own any of the real property upon which Bluestone operates or any of the machinery and equipment associated with the Pinnacle Mine Complex. Unlike Kingwood, Mr. Nathan never had any say in the timing or location of Bluestone's mining activities. Mr. Nathan never provided engineering services or determined such things as the placement of driving entries and cuts, nor did he have the authority to direct to whom Bluestone sold its coal. D.R. 1643; Tr., p. 242 (Mike Isabell testifying that he had no responsibility for overseeing on-the-ground operations or directing anyone at Bluestone to do anything).

Perhaps the most relevant point from *Kingwood* is the Supreme Court's holding that an arms-length contract that did not provide for unilateral remedies was insufficient to confer control over a party. Thus, although DEP and the Board rest their finding of control heavily on Mr. Nathan's ability to file suit against Bluestone in Alabama to enforce Pinn MC's contractual rights, the Supreme Court of Appeals has already concluded that Kingwood's ability to compel action from T&T only through arbitration was insufficient to give it actual authority to control the manner in which operations were conducted. Similarly, Mr. Nathan lacks any unilateral ability to leverage compliance out of Bluestone. The fact that Mr. Nathan has petitioned various courts and agencies to intercede on his behalf establishes the opposite of control: Mr. Nathan needs the involvement of someone, like a court or a regulatory authority, with actual ability to coerce compliance from Bluestone.

b. Mr. Nathan Does Not Control the Permittee, Pinnacle Mining Company, LLC.

The distinction between Pinn MC and Pinnacle Mining Company, LLC was a contested issue at the hearing below because permittees are considered “controllers” of the operations for which they hold permits for permit blocking purposes. Although the Board erred in conflating Pinnacle Mining Company, LLC with Pinn MC, its holding on this point should have no bearing on the erroneous finding that Mr. Nathan is a controller of the Pinnacle Mine Complex.

First, Mr. Nathan does not, in fact, control the permittee of the Pinnacle permits. Pinnacle Mining Company, LLC, the entity that no longer exists, remains to this day the named permittee on the surface mining permits associated with the Pinnacle Mining Complex. *See* D.R.0988; CR, p. 445 (Permit Face for Permit No. 0013883 showing Pinnacle Mining Company, LLC as the permit-holder). Mr. Nathan was appointed to wind down the operations of the reorganized debtors, which are listed in Appellee Exhibit 2. *See* D.R. 1899. Mission Coal Wind Down Co., LLC is akin to a liquidating trust. Neither it nor its affiliates hold any surface mining permits, any real property rights necessary to mine coal, or significant personal property, such as machinery or equipment. Just as Mission Coal Company, LLC was reorganized into Mission Coal Wind Down Co., LLC, all of Mission Coal’s subsidiaries emerged as distinct entities as well. Pinnacle Mining Company, LLC was reorganized into Pinn MC Wind Down Co., LLC. *Id.* at D.R. 1899.

Under the United States Bankruptcy Code, a debtor emerges from a Chapter 11 case as a reorganized entity that is entirely new; it is separate and distinct from the pre-confirmation entity. *See In re Briscoe Enters. Ltd.*, II, 138 B.R. 795, 809 (N.D. Tex. 1992), *rev’d on other grounds*, 994 F.2d 1160 (5th Cir. 1993) (“[U]pon plan confirmation, a debtor is no longer a debtor in possession and the bankruptcy estate ceases to exist. In other words, the reorganized debtor is a new entity not subject to the jurisdiction of the bankruptcy court, except as provided in the plan”);

In re Elec. Maint. & Constr., Inc., 2016 Bankr. LEXIS 2054, *10 (Bankr. M.D. Fla., May 19, 2016) (“It is important to recognize that upon confirmation of a Chapter 11, the debtor and the bankruptcy estate cease to exist. In their place stands the reorganized debtor, a new entity no longer subject to the jurisdiction of the bankruptcy court except as provided in the plan”); *United States v. Redmond*, 36 B.R. 932 (D. Kan. 1984) (“It is clear that upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the reorganized debtor, a new entity, and administration of the estate ceases”); *United States v. Lincoln Sav. Bank (In re Commercial Millwright Serv. Corp.)*, 245 B.R. 603 (N.D. Iowa 2000) (“The reorganized debtor operates as a new entity, free of its preconfirmation obligations except as provided in the plan”).

Mr. Nathan’s authority as Plan Administrator, however, was limited to winding down the affairs of the *reorganized* entities, which are separate from the pre-bankruptcy companies, including Pinnacle Mining Company, LLC. D.R. 1447, 1470; Tr., pp. 46, 69 (Gil Nathan). Mr. Nathan was never given authority over Pinnacle Mining Company, LLC while it existed, and his primary responsibility to Pinn MC Wind Down Co., LLC was to complete administrative affairs on its behalf until the Pinnacle Mine Complex permits were transferred into Bluestone’s name, at which point the reorganized wind-down entities would be liquidated. Thus, DEP and the Board erred in holding that Pinnacle Mining Company, LLC continued to exist after confirmation of the debtors’ plan of reorganization. *See* D.R. 2163; Final Order, p. 20.

Second, and more importantly, the Board seems to have conflated Mr. Nathan’s alleged control over Pinnacle Mining Company, LLC with actual authority to control the manner in which mining operations are conducted. But while the West Virginia Surface Mining rules designate surface mine permittees as *per se* controllers, there is no such designation for the controllers of *per se* controllers. *See* W.Va. Code R. §38-2-2.85.a-c. Rather, DEP still had the burden of establishing

that Mr. Nathan had a relationship that gave him actual authority to control the manner in which operations were conducted with the Pinnacle Mine Complex. Thus, while the State Surface Mining Rules authorize DEP to proceed under the legal fiction that a defunct entity such as Pinnacle Mining Company, LLC, as the permittee, has authority to control operation of the Pinnacle Mine Complex— notwithstanding its total lack of assets or actual ability to otherwise exercise control—the agency is not allowed to apply this same fiction to Mr. Nathan. Thus, the Board’s reliance on Mr. Nathan’s perceived proximity to the permittee of the Pinnacle permits is both legally and factually infirm.

c. The Board Erred in Concluding That Mr. Nathan Had Exclusive Authority to Complete the Transfer of the Pinnacle Permits to Bluestone.

The Board’s finding that Mr. Nathan “has the exclusive authority to complete the transfer of the Pinnacle Permits to Bluestone” is clearly wrong from a factual and legal perspective. *See* D.R. 2164-65; Final Order, pp. 21-22. Contrary to the Board’s conclusion of law, West Virginia’s Surface Mining Rules vest DEP with exclusive authority to approve permit transfer applications. *See* W.Va. Code R. §38-2-3.25.

As explained above, applicants for permit transfers must provide DEP with ownership and control information in order to allow the agency to decide whether to approve or deny the permit application. The Board’s Final Order found that Mr. Nathan admitted he had exclusive authority to act on behalf of the permittee to complete the transfer of the Pinnacle Mine Complex permits, but Mr. Nathan clearly testified that he has no such authority:

Q. Do you have any control over whether or not those permit transfers actually get approved?

A. Absolutely not. The state does. And they transferred permits to different Bluestone entities in the past at different points in time. But it's my understanding that OSM has Bluestone as an operator that is in the violator system, and they can't transfer the permit from

Kentucky and Tennessee. And that's according to Jay Justice. He told me that himself.

D.R. 1467; Tr., p. 66 (Gil Nathan).

It must also be noted that Bluestone is not just permit-blocked as a result of its violations on the Pinnacle permits; it is blocked as a result of violations at multiple operations spanning several states. *See* D.R. 1681; Tr., p. 280 (B. Doss testifying that Bluestone is permit blocked in most states they do business in). As explained above, the AVS allows DEP to permit block an entity for violations that occur in other states. So, in order for Mr. Nathan to have any ability to get the Pinnacle permits transferred to Bluestone, he would not only need actual authority to compel compliance at the Pinnacle Mine Complex, he would also need the authority to direct the manner in which Bluestone operates every single operation where it currently has an unabated violation in order to get Bluestone unblocked and eligible to receive transfer of the Pinnacle surface mine permits. The record is devoid of any evidence of such control.

d. Mr. Nathan's provision of DEP's Correspondence to Bluestone Does Not Establish Actual Control.

At the hearing, DEP made much of the fact that Mr. Nathan or his consultant provided DEP's notices to Bluestone, and the Board agreed that this was somehow indicative of control because "[a]t least on occasion, Bluestone complied with its obligations and remediated certain violations and issues on the Pinnacle Permits." *See* D.R. 2167-68; Final Order, ¶¶ 106-07. The Board's finding, that "[t]he Plan Administrator's actions in seeking to secure Bluestone's compliance with its obligations under the *Bluestone Sale Agreement* and the *Contract Operator Agreement* demonstrates that he has relationships that give him the authority to cause Bluestone to complete the transfer or replacement of the permits and remedy violations," is unreasonable and is not supported by substantial evidence.

Contrary to the Board's conclusion, the fact that Bluestone only occasionally heeded Mr. Nathan's repeated pleas to comply with WVDEP's orders and that Bluestone's refusal to comply ultimately forced Mr. Nathan to seek bankruptcy court intervention in the matter suggests that Mr. Nathan did not, in fact, have the type of relationship with Bluestone that would give him actual authority to determine how it operated the Pinnacle Mine Complex.

Mr. Nathan's provision of paperwork from the regulatory authority charged with enforcing environmental laws at the complex Bluestone is operating actually suggests that Mr. Nathan hoped the specter of enforcement against it by the State might motivate Bluestone to comply with its permit obligations. Furthermore, DEP actually provided its notices directly to Bluestone as well. D.R. 1654-56; Tr., p. 253-55 (Mike Isabell). As AVS and Permitting expert, Barry Doss, explained, DEP has the right to issue violations directly to the operator—in this case, Bluestone—on any surface mining permits. DEP's practice of providing notices directly to Bluestone undercuts its argument that Mr. Nathan's provision of this paperwork to Bluestone demonstrates authority to compel compliance at the Pinnacle Mine Complex.

Ultimately, it stands to reason that, if Mr. Nathan had the type of relationship that gave him such leverage over Bluestone, Bluestone would have actually complied with Mr. Nathan's repeated request to clean up its violations and secure transfer of the permits. The Board erred in equating Mr. Nathan's failed efforts to complete the wind down and dissolution of the reorganized debtor, which efforts were impeded by Bluestone's refusal to adhere to its contractual obligations under the APA, as *actual* authority to control the manner in which Bluestone operated.

2. DEP's Exercise of its Permit Blocking Authority in This Instance Was Arbitrary and Capricious.

DEP's application of the permit block to Mr. Nathan under these circumstances is extraordinarily inequitable and unjust. To briefly recap, Mr. Nathan was appointed as the Plan

Administrator over entities without the assets or manpower necessary to operate the Pinnacle Mine Complex in order to perform administrative duties for them for a few short months until the sale of assets closed and all permits were disposed of. Mr. Nathan did not steer these companies into bankruptcy, and he has had no hand in accumulating violations at the Pinnacle Mine Complex since bankruptcy. Yet, it is Mr. Nathan that has been permit blocked as a result of violations at the Pinnacle Mine Complex, not Bluestone or the people who ran Mission Coal and Pinnacle Coal into bankruptcy in the first place.

In addressing the harsh and unfair result worked by its decision to list Mr. Nathan as a controller of Pinnacle Mining Company, LLC, DEP claimed its hands were tied by some vague mandate that a live person be linked to every permit-holding entity within the AVS. *See* D.R. 1423-26; Tr., pp. 22-25.⁷

But DEP's claimed mandate to link Mr. Nathan to the Pinnacle violations is nothing more than an *ad hoc* rationalization for an unreasonably unfair outcome. The record established that there have been multiple time periods, including a four-year period, where no person at all was linked to the Pinnacle Mine Complex within the AVS. D.R. 1675-76; Tr., pp. 274-75 (B. Doss testifying that Appellant Exh. 5 showed 4-year time period where no person was linked to Pinnacle). DEP's AVS Coordinator, Susan Wheeler also admitted that DEP was unaware as to how often is actually adhered to the standard articulated at the hearing, which allegedly compels it to ensure that a live person is associated with every surface mining permit in the AVS. D.R. 1755; Tr., p. 354 (Susan Wheeler testifying that she did not have an estimate of how many entities

⁷ Opening Statement of DEP Counsel, Kevin Barrett: "DEP and the director said, no, a corporate permit holder has to have some human being in control of the permit holder—has to." "He asked this board to exempt Pinnacle Mining and Mr. Nathan from obligations that every single corporate coal company has in connection with the operations in West Virginia. He wants to be the only person who is in control of a permit who is exempt from the ownership and control and permit plan. Having a permit holder without a person designated to act on its behalf just cannot stand."

have no person associated with violations committed by the entity within AVS); *see also* D.R. 1752; Tr., p. 351 (Susan Wheeler testifying that there were no officers associated with Pinnacle Mining Company, LLC in the AVS when Mr. Nathan was placed in AVS). Additionally, in spite of DEP's claim that a responsible officer has been linked in the AVS to a permit-holder in every single one of these bankruptcy cases, Ms. Wheeler testified that this was actually the first time DEP has ever linked an officer appointed by a bankruptcy court to the bankrupt permit-holder within AVS. D.R. 1746; Tr., p. 345.

Furthermore, AVS Expert Barry Doss explained that no such requirement exists or has been historically applied by DEP:

Q. So it's been represented that the sort of position of the regulator is that they have to have somebody in the hot seat so to speak. They have to have a name. They have to have a person who is a responsible officer in the AVS for a company. But if I look at this report, it suggests that no one was required to update this for roughly four years in terms of putting an officer -- or an actual person in there?

A. That's correct. And first of all, I'm unaware of any regulation SMCRA -- West Virginia SMCRA or any West Virginia code that requires an individual or a warm body, person to be listed as a controller. An LLC can be an entity. A trust can be an entity. It's the same issue with this entity. You don't have to have a warm body. I strongly disagree with that.

Q. If there was the rule -- if that were some sort of informal rule, then it does not appear to have been followed here with regards to Pinnacle?

A. Based on this current printout, that appears to be the case.

D.R. 1675-76; Tr., pp. 274-75 (B. Doss).

Ultimately, DEP provided no explanation as to why it applied its "live person" standard to Pinnacle Mining Company, LLC, but not to Bluestone. Barry Doss explained that Bluestone is the operator of the Pinnacle Mine Complex permits. D.R. 1677; Tr., p. 276. As such, it is a

“controller” within the meaning of WVSCMRA. D.R. 1677-78; Tr., pp. 276-77. In spite of the fact that Bluestone is an operator—a category of “control” under the surface mining rules—Bluestone is inexplicably not linked to Pinnacle Mining Company, LLC within the AVS. D.R. 1678; Tr., p. 277 (B. Doss); *see also* D.R. 1752; Tr., p. 351 (Susan Wheeler testifying that neither Bluestone nor any of its officers is associated with Pinnacle Mining Company, LLC in AVS). DEP’s inconsistent application of a newly-created and inconsistently-applied “warm body” rule is the definition of arbitrary and capricious enforcement.

3. DEP’s Application of WVSCMRA’s Permit Blocking Provisions in This Instance Actually Undermines the Policy Goal of WVSCMRA’s Permit Blocking Provisions and the AVS.

In the present case, DEP’s fixation on permit blocking a bankruptcy plan administrator to the exclusion of anyone else has actually undermined the purpose of the AVS system. The purposes of the AVS are to (1) to identify violators who might try to avoid abating their violations by continuing to mine in revised corporate form; and (2) to coerce remedial action by owners or controllers of violators with the threat of a permit block. 53 Fed. Reg. at 38875. DEP conceded that the AVS is clearly designed to deal with scofflaws and that Mr. Nathan is not a scofflaw. D.R. 1791; Tr., p. 390 (closing argument of DEP counsel, Kevin Barrett). Rather, he is a finance professional who has been brought in to help administer a situation that went bad long before he was appointed as Plan Administrator. D.R. 1465; Tr., p. 64 (Gil Nathan).

On the other hand, Bluestone has been operating the Pinnacle Mine Complex over the intervening years with near impunity as a result of DEP’s Advance Approval coupled with its refusal to enforce the terms of the Pinnacle permits against it. This, despite the fact that it is permit blocked. AVS expert, Barry Doss, explained how allowing Bluestone to enjoy the economic

benefit of operating the Pinnacle Mine Complex without the threat of State enforcement action completely undercuts the purpose of the AVS:

Q. We mentioned before that – and I think you’ve mentioned that Bluestone was granted a temporary approval, and that was to last 60 days?

A. Yes. I understand that.

Q. And the permits haven’t been transferred to Bluestone because of Bluestone’s own permit block?

A. That’s correct. They’re permit blocked in most states they do business in.

Q. So Bluestone has been permit blocked, and they can’t receive the transfer of these permits and take them off the estate’s hands? But they are allowed to mine the coal for three-and-a-half years despite the fact that they’re permit blocked. Is that what’s happened?

A. That’s exactly what’s happened, sir.

Q. If Bluestone is authorized to go ahead and mine the coal and make money off of selling the coal and rack up these violations in spite of being permit blocked – if they don’t have to assume the permits with all the liabilities that come with that, I guess what is the incentive for Bluestone to take the transfer of these permits?

A. Well, if that relationship is allowed to continue, I would see no incentive to do it. I mean, they’re obligated to do it, but I don’t see an incentive. If you’re allowed to mine without holding a mining permit, and if you’ve been given advance approval and you have operator status – and yet as an operator, DEP has the right to write violations to the operator, not just the permittee. So DEP has a right to issue the violations to Bluestone as the operator to Bluestone as the advance approval, but you’re not getting those violations. You can commit them, and you’re not getting the paper. But it sounds like they would want to continue that relationship as long as they can.

Q. Again, if they’re permit blocked but allowed to go ahead and profit from mining the coal on these permits that they can’t take the transfer of – is that effectuating the purposes of the ownership and control, rules and the permit blocking scheme?

A. No. Absolutely not. I think you’re allowing exactly what we said AVS was set up to do. And that was to prevent bad actors from being able to hold permits, be an operator or mine coal.

D.R. 1681-84; Tr, pp. 280-83 (B. Doss). The Board’s approval of an outcome so at odds with the purpose of WVSCMRA’s permit blocking framework cannot be in accordance with applicable law.

V. CONCLUSION

For all the reasons stated above, Petitioners request that this honorable Court reverse the decision of the West Virginia Surface Mine Board and remand this matter with instructions for the Board to vacate the WVDEP’s *Decision and Order* and further order WVDEP to update its ownership and control records to delist Petitioners as “controllers” of Pinnacle Mining Company, LLC, and also to update the centralized Applicant Violator System maintained by OSM to reflect the same.

Respectfully submitted,

**MISSION COAL WIND DOWN CO., LLC
and PLAN ADMINISTRATOR, GILBERT NATHAN**

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-72

MISSION COAL WIND DOWN CO., LLC,
and PLAN ADMINISTRATOR,
GILBERT NATHAN,
Appellants Below, Petitioners,

v.

DIRECTOR, OFFICE OF MINING AND
RECLAMATION, DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Appellee Below, Respondent.

CERTIFICATE OF SERVICE

I, Christopher M. Hunter, counsel for Petitioners Mission Coal Wind Down Co., LLC and Plan Administrator, Gilbert Nathan, certify that on May 24, 2023, I have served the foregoing *Petitioners' Brief In Support of Appeal* on the following counsel of record via the Court's E-Filing system.

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