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.

PETITIONERS' REPLY BRIEF IN SUPPORT OF APPEAL

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I. SUMMARY OF REPLY ARGUMENT

In its response brief, DEP incorrectly states that the current appeal alleges only that DEP's enforcement of the West Virginia Surface Coal Mining and Reclamation Act's permit-blocking provisions ("WVSCMRA"), and the Board's affirmation of the same, was arbitrary and capricious. *See* Respondent's Brief ("Resp. Br."), p. 6. While Petitioners certainly assert that DEP's application of West Virginia's permit-blocking rules was arbitrary and capricious in this instance, that is not the only grounds for appeal. Petitioners' opening brief cites numerous factual and legal errors in the decisions below. Petitioners assert that DEP and the Board's finding that Gilbert Nathan, as Plan Administrator of Pinn MC Wind Down Co., LLC ("Pinn MC"), is a "controller" of Pinnacle Mining Company, LLC ("Pinnacle Mining") is (a) affected by an error of law; (b) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and (c) arbitrary and capricious under W. Va. Code, 29A–5–4(g)(4)-(6). In its response brief, DEP elucidates significant legal misconceptions that clearly affected the final agency action that was the subject of the appeal below; given that the Board adopted DEP's legal reasoning, these legal errors also affected the Board's Final Order.

Perhaps most seriously, DEP's brief makes clear that the correct standard for "control," as set forth by OSM and adopted by the West Virginia Supreme Court of Appeals in *Kingwood Coal*, was ignored, in that neither DEP nor the Board examined whether the Mr. Nathan had the actual ability to exercise total control over the operation of the Pinnacle Mine Complex (as opposed to control in the form of implied authority to act on behalf of the nominal permit holder).

These legal errors led to a Decision and Order by DEP, and a Final Order by the Board, that are unreasonable and clearly wrong in view of reliable, probative, and substantial evidence in

a number of ways. First, when compared to the set of facts that the Supreme Court previously deemed insufficient to confer control upon *Kingwood Coal*, it is clear that substantial evidence does not support a finding of control in the present case. Second, DEP and the Board drew an unreasonable and irrational inference of "control" from Petitioners' failed attempts to coerce compliance out of Bluestone through legal action before the Alabama Bankruptcy Court. Rather than viewing the Plan Administrator's failed efforts to compel compliance from Bluestone as evidence that he lacked the type of unilateral authority over the Pinnacle Mine Complex operations necessary to confer "control" within the meaning of WVSCMRA/SMCRA, DEP and the Board found the Plan Administrator's efforts to be evidence of authority to control Bluestone. For these reasons and those stated below, as more fully explained in Petitioners' opening brief, this Court must reverse the Board's Final Order.

II. ARGUMENT

A. DEP and the Board Failed to Apply the Correct Standard for "Control" Under WVSCMRA.

1. DEP Incorrectly Focuses on the Plan Administrator's Authority to Act on Behalf of the "Permit Holder-Operator" Rather Than on His Authority Over the Surface Mining Operation.

DEP incorrectly claims that the Plan Administrator's alleged authority to act on behalf of the "permittee holder operator" is sufficient to establish "control" over the Pinnacle Mine Complex operations within the meaning of WVSCMRA. Resp. Br., pp. 6-9. However, in setting forth the standard for determining "control," the West Virginia Surface Mining Rules focus on the ability to control *operations,* rather than *operators.* W.Va. Code R. §38-2-2.85.c defines "owns or controls" as having a 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." Emphasis added.

The rules make a predicate to a finding of "control," within the meaning of §38-2-2.85.c, the conduct of surface mining operations. Indeed, actually being the operator of a surface mining operation is only sufficient to establish a rebuttable presumption of control; the rules go on to state that "control" is not established where a person—even an operator—"does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface mining operation is conducted." W.Va. Code R. §38-2-2.85.d (emphasis added). Thus, the law is clear that a person can control an operator, or even *be* an operator, without having control over the manner in which mining operations are conducted. Accordingly, the appropriate inquiry is not whether Mr. Nathan had some control over any operator; rather, the question is whether he had control over an entity that was conducting surface mining operations.

DEP does not dispute that, at all relevant times during the appointment of the Plan Administrator, Pinnacle Mining: (a) has lacked the equipment to conduct mining operations, (b) has lacked any and all real or personal property rights necessary to conduct mining operations, and (c) has lacked employees other than the Plan Administrator. There is no dispute in the record that Bluestone was approved by DEP to act as the operator at the Pinnacle Mine Complex. *See, e.g.,* D.R. 2152 (Final Order, ¶ 35, n. 10). Further, there is no dispute that Bluestone is the only operator who has actually conducted on-the-ground mining operations at the Pinnacle Mine Complex since Mr. Nathan's appointment as Plan Administrator.

Rather than focusing on Mr. Nathan's alleged control over a now-defunct entity with no physical assets or employees, DEP and the Board should have analyzed whether Mr. Nathan has the actual ability to control the mining operations being conducted by Bluestone at the Pinnacle

Mine Complex. Their failure to apply the correct legal standard for determining "control" amounts to reversible legal error.

2. Federal Guidance on the Level of Control Necessary to be Deemed a "Controller" of a Surface Mining Operation is Persuasive Authority That Must be Given Due Consideration.

There is a fundamental disconnect between the legal standard DEP articulates for determining "control" and that articulated in federal and state law, as expounded upon by OSM and adopted by the West Virginia Supreme Court. As Petitioners explained in their opening brief, OSM defines "authority" to control surface mining operations as the "actual ability" to exert "total control over a surface mining operation." *See* Petitioners' Brief ("Pet. Br."), pp. 16-17.

DEP does not attempt to refute Petitioner's recitation of OSM's statements regarding the type and scope of authority a person must have over a mining operation to be deemed a "controller" of the operation for permit-blocking purposes, nor does DEP attempt to distinguish the federal regulations OSM was expounding upon in its guidance from the legislative rules currently in effect in West Virginia. Instead, DEP simply waives off OSM's guidance on the meaning of "control," claiming it "has no relevance here." Resp. Br., p. 14, n. 63.

In interpreting West Virginia's surface mining laws, however, our Supreme Court has a long and consistent record of looking to federal guidance regarding the meaning and application of similar or identical provisions of the federal Surface Mining Control and Reclamation Act ("SMCRA"). In fact, in the only permit-blocking case cited by DEP or Petitioners, *Kingwood Coal*, the Supreme Court expressly stated that OSM's guidance should be given "due consideration" in applying West Virginia's permit-blocking rules:

> The United States Department of Interior, through the Office of Surface Mining and Reclamation and Enforcement (hereinafter

> "OSM"), administers the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.,* and promulgates regulations including 38 C.S.R. 2–2.84(b)(6) (1996)'s federal counterpart, 30 C.F.R. § 773.5(b)(6) (1996). In that the former is identical to and derived from the latter, we give due consideration to the latter's regulatory history as well as to relevant federal case law in resolving the (b)(6) issues before us. *See State ex rel. McMahon v. Hamilton,* 198 W.Va. 575, 583 n. 14, 482 S.E.2d 192, 200 n. 14 (1996).

W. Virginia Div. of Envtl. Protec. v. Kingwood Coal Co., 200 W.Va. 734, 738, 490 S.E.2d 823, 827 (1997) (emphasis added); *see also Curnutte v. Callaghan*, 188 W.Va. 494, 498-99, 425 S.E.2d 170, 174–75 (1992) (citing OSM statements in Federal Register in interpreting meaning of "valid existing rights" under WVSCMRA). Accordingly, this Court must decline DEP's invitation to simply ignore federal guidance.

Thus, when OSM says that the test for "control" under SMCRA is actual ability to control all aspects of a mining operation, DEP has two options: (1) it must explain why that is not also the test under WVSCMRA; or (2) it must point to evidence in the record establishing that Mr. Nathan had the actual ability to exercise total control over the operation by Bluestone of the Pinnacle Mine Complex. DEP has not attempted to do either. Instead, it summarily dismisses the persuasive authority relied upon by the West Virginia Supreme Court of Appeals in a seminal West Virginia permit-blocking case. Given DEP's failure to explain why the standard of "control" relied upon by it and the Board diverges from that articulated by OSM, the decisions below are clearly impacted by errors of law.

3. DEP Misstates the Role of WVSCMRA's Rebuttable Presumption of Control.

In two separate portions of its response brief, DEP misinterprets the role of the rebuttal presumption in establishing control over a mining operation in a misguided attempt to defend the decision below. First, DEP mistakenly argues that *Kingwood Coal* is inapplicable because "[t]hat

case involved the presumption of control that arises from one's ownership of the coal and having the right to receive the coal after mining." Resp. Br., p. 15, n. 64. Later in its brief, DEP incorrectly asserts that Mr. Nathan's status as an officer of Pinnacle Mining Company, LLC provides an alternate basis to affirm the Board's decision: "[i]nasmuch as Mr. Nathan is the Debtor's sole officer, Section 2.85.d.1 provides an alternate basis on which to affirm the Director's and the Board's decisions." Resp. Br., p. 17. Even assuming Pinn MC and Pinnacle Mining Company, LLC are the same entity, indistinguishable for legal purposes, Mr. Nathan's alleged status as an officer of Pinnacle Mining Company, LLC does not meaningfully distinguish this case from *Kingwood Coal*, nor does it serve as an "alternate" basis for affirming DEP's and the Board's decisions.

In discussing the rebuttable presumptions applicable under the WVSCMRA's implementing surface mining rules, the Supreme Court repeatedly referenced OSM guidance on the application and import of the presumptions. *See, e.g., Kingwood Coal*, 200 W.Va. at 747-49, 490 S.E. 2d at 836-38. As OSM explained in that guidance:

> The presumptions in the definition do not determine who ultimately is responsible for the manner in which a surface coal mining operation is conducted. The presumptions determine who has the burden of proof, and have been established on the basis of those classes of persons who have apparent authority over the conduct of surface coal mining operations. The burden of proof properly should rest with those who have access to the information on which a control determination can be accurately made—the officers, directors, general partners, operators, those with the ability to commit the financial or real property or working resources of an entity, owners of a ten through fifty percent interest, and owners and lessors of coal. Neither OSMRE nor regulatory authorities have easy access to the information which is needed to make an accurate determination of control in such circumstances, whereas persons subject to the presumptions would have better access to the information needed to show control does not exist.

Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control, 53 Fed. Reg. 38868, 38871 (Oct. 3, 1988) (emphasis added).

It must be noted that DEP's counsel expressly stated at the hearing that DEP did not apply the rebuttable presumption in W.Va. Code R. 38-2-2.85 to Mr. Nathan. *See* D.R. 1438 (opening statement of DEP's counsel at evidentiary hearing). However, whether or not the rebuttable presumption was applied is of no import at this point. The rebuttable presumption simply functions to allow the regulatory authority to presume a person or entity's control over an operation based on certain relationships to a mining operation. The burden of producing evidence debunking the presumption of control then shifts to the person or entity that is the subject of the presumption. The purpose of the rebuttable presumption is simply to shift the burden of proof to the party that is likely to have information relevant to actual control readily available.

Thus, even if one the rebuttable presumptions were applied here, the ultimate inquiry remains whether the evidence establishes that Mr. Nathan has a relationship conferring actual ability to exert total control over the mining operations in question. As explained in Petitioner's opening brief, substantial evidence does not support a finding that Mr. Nathan had a relationship that allowed him to exert control over Bluestone's operation of the Pinnacle Mine Complex. The Court must reject DEP's invitation to use the rebuttable presumption either (a) to ignore *Kingwood Coal* or (b) as an alternate basis to support DEP and the Board's erroneous finding of "control."

B. DEP and the Board's Inference of Control From the Plan Administrator's Failed Attempts to Compel Compliance From Bluestone was Unreasonable and Irrational.

In its Final Order, the Board cited the fact that the Plan Administrator attempted to force Bluestone to remedy violations at the Pinnacle Mine Complex through legal action as evidence that "he has the power and authority to force Bluestone to comply with its obligations…." D.R.

2168. Likewise, DEP points to Mr. Nathan's failed efforts to compel compliance out of Bluestone as evidence of control over the manner in which Bluestone conducted mining operations. Resp. Br., p. 17. According to DEP, the fact that Mr. Nathan's "efforts have, so far, been unsuccessful does not alter the conclusion that he has the actual authority to direct and determine the manner of surface mining operations on the Pinnacle Permits." *Id*.

Contrary to DEP's argument, the purpose of WVSCMRA's permit-blocking rules "is to hold persons '[r]esponsible for any outstanding violations of the Act [including the nonpayment of civil penalties and AML fees] which such a person could have prevented or corrected.'" *Arch Mineral Corp. v. Babbitt*, 894 F. Supp. 974, 986 (S.D.W. Va. 1995), *aff'd*, 104 F.3d 660 (4th Cir. 1997) *citing* 53 Fed. Reg. 38868, 38877 (Oct. 3, 1988) (Preamble to ownership and control rule)(emphasis added). Consistent with SMCRA's policy of incentivizing compliance from the persons with the power to correct or prevent violations is the stated policy goal of permit-blocking, evidence sufficient to rebut a presumption of control necessarily includes "proof that the applicant in fact attempted to exercise control using every means available to prevent or to abate violations and was unsuccessful…." *See "Control" of Surface Coal Mining Operations Under the Surface Mining Control and Reclamation Act Memorandum,* U.S. Department of the Interior, Office of the Solicitor, 1996 WL 34368396, *11 (I.B.L.A) *citing* 53 Fed. Reg. at 38871, 38874 (emphasis added).

The record establishes that the Plan Administrator did not simply rely on his perceived inability to control Bluestone to challenge DEP's finding of control. Rather, the Plan Administrator attempted to use all tools at his disposal to coax compliance from Bluestone, including the filing of a motion to enforce Bluestone's obligations under the various bankruptcy agreements with the Alabama Bankruptcy Court. *See* D.R. 1909 (9/27/22 Plan Administrator's

Motion for Enforcement of Confirmation Order and Related Agreements Against Bluestone Parties).

In spite of the Plan Administrator's expenditure of significant resources towards these efforts, Bluestone had racked up 34 unabated violations and failure to abate cessation orders by the time of the evidentiary hearing. *See* D.R. 0997-1398; CR, pp. 454-855 (DEP notices of violations issued during Bluestone's operation of the Pinnacle Mine Complex). Moreover, it has been nearly a year since the Plan Administrator sought the Alabama Bankruptcy Court's intervention in compelling compliance from Bluestone, but violations on the Pinnacle Permits still remain unaddressed, and Bluestone is no closer to getting the Pinnacle Permits transferred into its name than it was a year ago.

Rather than viewing the Plan Administrator's failed efforts as evidence that he lacks control over Bluestone, the Board and DEP irrationally interpret the fact that he tried at all as evidence of control. Once again, *Kingwood Coal* counsels against the inference drawn by DEP and the Board. In *Kingwood Coal*, the Court acknowledged that Kingwood Coal Company had the ability to attempt to force the mine operator to comply with its wishes by seeking to enforce contract rights in arbitration or litigation. *Kingwood Coal*, 200 W.Va. at 742, 490 S.E. 2d at 831. However, the fact that the agreements were executed at arms-length, were designed to protect the interests of both parties, and did not provide for the unilateral exertion of control without resort to litigation, all weighed against a finding of control. *Id.* at 752, 841.

The Court in *Kingwood Coal* does not state whether Kingwood Coal Company even attempted to force compliance via litigation, as the Plan Administrator has unsuccessfully attempted here. Given that the stated policy goal of WVSCMRA's permit-blocking regime is to encourage prevention and/or correction of violations by entities with the ability to do so, it makes

little sense to disincentivize attempts compel correction of violations by creating the fear that merely attempting to force compliance will be seen as exerting "control."

C. DEP's Finding and Application of "Control" in This Instance Was Arbitrary and Capricious and Affected by Errors of Law.

Petitioners explained in their opening brief that DEP and the Board failed to articulate a rational basis for loading Gil Nathan, rather than Bluestone's officers and directors, into the AVS as controllers of Pinnacle Mining Company, LLC. Pet. Br., pp. 24-27. Afterall, Bluestone is the designated operator of the Pinnacle Permits, and DEP's AVS Coordinator conceded that an operator of a permit is one of the presumptive categories of controllers delineated in the West Virginia surface mining rules. D.R. 1752-53 (testimony of Susan Wheeler). Furthermore, OSM "agrees that entities physically engaged in surface coal mining operations will almost universally control such operations…." 53 Fed. Reg. at 38873 (emphasis added). Yet, DEP inexplicably chose to link Mr. Nathan in the AVS to the violations caused on the Pinnacle Permits by Bluestone, instead of Bluestone's officers and directors.

The only defense DEP offers in its response brief for the decision to forego any enforcement action against Bluestone rests upon a completely fabricated limitation on its enforcement authority:

> The Petitioners suggest that the Department should take enforcement actions against its own contract operator rather than itself as the permit holder-operator. The Department, however, does not have direct regulatory authority over a contract operator. Sections 17(c) and (g) authorize enforcement only against the permit-holder operator.

Resp. Br., p. 16, n. 68. WVSCMRA, however, makes no such distinction between a "permit holder-operator" and any other type of operator for purposes of enforcement.

The term "operator" is defined broadly to include "any person who is granted or who should obtain a permit to engage in any activity covered by the Act or this rule, or anyone who engages in surface mining and/or surface mining and reclamation operations." W.Va. Code R. § 38-2-2.80 (emphasis added). The law is clear that anyone engaging in surface mining operations is an "operator." No one disputes that Bluestone has engaged in surface mining activities at the Pinnacle Mine Complex or that Bluestone was approved by DEP as the operator on the Pinnacle Permits. *See* D.R. 2152 (Final Order, ¶ 35, n. 10). There can be no doubt that Bluestone is an operator of the Pinnacle Permits within the meaning of WVSCMRA.

The next question is whether WVSCMRA makes a distinction between "permit holder-operators" and other operators. But the term "permit holder-operator" does not even appear in WVSCMRA. Furthermore, not only do W.Va. Code §§ 22-3-17(c) & (g) make no distinction between "permit holder-operators" and other types of operators, WVSCMRA does not even expressly limit enforcement of its provisions to "operators." Instead, W.Va. Code §22-3-17(c) authorizes assessment of civil penalties against "[a]ny person engaged in surface-mining operations who violates any permit condition or who violates any other provision of this article or rules promulgated pursuant thereto…." (emphasis added). Likewise, W.Va. Code §22-3-17(g) provides that "[a]ny person who willfully and knowingly violations a condition of a permit…is guilty of a misdemeanor…." There is nothing in the provisions cited by DEP that prohibit the agency from loading Bluestone's officers and directors into ERIS and the AVS as controllers of Pinnacle Mining, nor is there anything that precludes enforcement against Bluestone.

The clear import of DEP's articulated defense against Petitioners' allegation that its exercise of enforcement authority in this instance was arbitrary and capricious is that the agency action at issue rests on a clear misreading of WVSCMRA. Having offered no valid defense of its

arbitrary enforcement against Mr. Nathan, to the exclusion of those actually responsible for causing the violations at issue, this Court must reverse the decisions below.

D. Pinn MC is a Separate Entity from Pinnacle Mining Company, LLC.

In its response, DEP criticizes the notion that a reorganized debtor emerging from bankruptcy is considered a new entity; DEP complains that this is a "legal fiction." Resp. Br., p. 18. But the fact that Pinn MC may appear to be the same as Pinnacle Mining Company, LLC should not be taken to mean that the legal distinction between the two entities is not real. After all, all corporations operate under the "legal fiction" that they constitute an entity separate and apart from the persons who own them. *See, e.g.,* Syl. Pt. 2, *Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 352 S.E.2d 93 (1986). Complaining that a reorganized debtor is a legal fiction is no different than complaining that any corporation is a legally distinct entity from its owners and affiliates.

In fact, the very language DEP quotes from the *Mesabi* decision reinforces the distinctness of Pinn MC from Pinnacle Mining Company, LLC:

> The "separateness" of each of these three (fictional) "entities" is a central feature of federal bankruptcy law.

Mesabit Metallics Co. LLC v. B. Riley FBR, Inc. (*In re Essar Steel Minnesota, LLC*, 16-11626 (CTG), 2023 WL 4163458, at *1 (Bankr. D. Del. June 23, 2023) (emphasis added).

E. DEP's Actions in This Case Do Not Further the Stated Goals of WVSCMRA's Permit Blocking System.

In the final section of its brief, DEP attempts to rebut Petitioners' argument that aiming their enforcement tools at Mr. Nathan, who has no ability to influence the manner in which Bluestone conducts operations at the Pinnacle Mine Complex, undercuts the purpose of permit-blocking, which is to compel prevention or correction of violations by those in a position to do so. DEP bizarrely claims that loading Mr. Nathan into AVS as a "controller" of Pinnacle Mining

Company, LLC "worked, worked well, and worked as the statute intended…." Resp. Br., p. 22. According to DEP, "'loading' Mr. Nathan into Pinnacle Mining's ownership and control database, which automatically associated Pinnacle Mining's violations with him, induced Mr. Nathan to finally assert Pinnacle Mining's contractual rights vis-à-vis its contractor after three and a half years of passing and passive attempts to get its contractor to act." *Id.* DEP completely ignores the fact that Mr. Nathan's efforts have had no effect whatsoever on either the state of compliance at the Pinnacle Mine Complex or upon the status of the permit transfers. DEP fails to explain how its decision to proceed with enforcement against Mr. Nathan, while the agency allows Bluestone to mine consequence-free for over four years, racking up violations and hundreds of thousands of dollars in fines and penalties along the way, furthers the policy goals of WVSCMRA.

DEP also incorrectly asserts that it has the option of holding Mr. Nathan personally liable for the "same civil penalties, fines and imprisonment that may be imposed upon a corporate permit holder-operator." Resp. Br., pp. 21-22. Although there was some debate about this issue at the evidentiary hearing, the question of Mr. Nathan's personal liability was not addressed in either DEP's Decision and Order or the Board's Final Order; accordingly, it was not raised as an issue in this appeal. Given DEP's insistence on raising the issue in its response brief, however, Petitioners must point out that the Bankruptcy Plan, which DEP cites repeatedly throughout its brief as a basis for imputing control over Bluestone to the Plan Administrator, expressly exculpates Mr. Nathan from such liability. Article VII, titled "The Plan Administrator," subpart C, titled "Exculpation; Indemnification; Insurance; Liability Limitation," from the Bankruptcy Plan includes the following language:

> For the avoidance of doubt, notwithstanding anything to the contrary contained herein, the Plan Administrator in its capacity as such, shall have no liability whatsoever to any party for the liabilities and/or

> obligations, however created, whether direct or indirect, in tort, contract, or otherwise, of the Debtors.

See D.R. 0930. Thus, DEP's articulated need to impose personal liability on corporate officers of the permittee as a policy justification for its actions are misplaced in this case, given the clear exculpations afforded the Plan Administrator in the very same documents DEP relies upon for its finding of "control".

Finally, DEP's concern that its inability to impose all of the same punishments upon bankruptcy court-appointed trustees and administrators will somehow "open a gaping hole in the enforcement of the State's surface mining law" is completely unfounded. *See* Resp. Br., pp. 22-23. The purpose of WVSCMRA's permit blocking framework is to incentivize compliance by those in a position to prevent or correct violations. By the time an operator is so capital-deficient that it must liquidate, its permits and operations will inevitably already be in wide-spread noncompliance with the state's environmental laws. It is the individuals who ran these companies into the ground that DEP can and should hold responsible. As has been made abundantly clear in this case, holding the bankruptcy professionals who are hired to oversee the orderly liquidation of the shell-versions of these coal companies, which are left with little-to-no resources with which to operate, is not only unfair, but completely ineffective at bringing those operations into compliance.

Moreover, such practice by DEP can only discourage qualified individuals from agreeing to accept positions as trustees or administrators of bankrupt coal companies. *See* D.R. 1694 (testimony of B. Doss that DEP's position that any plan administrator or trustee could be permit-blocked and held personally liable for violations would negatively impact willingness of individuals to serve in such capacity). DEP's actions in this case clearly undercut the policy goals of the statute the agency is attempting to enforce.

IV. CONCLUSION

For all the reasons stated above, as more fully explained in Petitioners' opening brief, Petitioners request that this honorable Court reverse the decisions below in 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.

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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 August 1, 2023, I have served the foregoing ***Petitioners' Reply Brief In Support of Appeal*** on the following counsel of record via the Court's E-Filing system.

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