Case No. 16-0221

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAILE BOULIS, HENRY THOMAS, TAMMY DYER, TOM ROMINE, LORETTA ROMINE , JAMES ROMINE, TIMOTHY HARTWELL, ANGIE HARTWELL, JAMES WALKER, FREDERICK FERRIS, II, ANGELA JACOBS-FERRIS, DAVID C. CORDELL, DANIELLE R. MANESS, UKIAH L. CORDELL, ANAHLI G. CORDELL, DOUGLAS WOOD, JAMES CRAIG WAGGY,

Appellants,

v.

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, KEYSTONE INDUSTRIES, LLC and REVELATION ENERGY, LLC,

Appellees.

APPELLANTS' BRIEF

On Appeal from the November 25, 2016
Order of Hon. Joanna Tabit
Dismissing Petition for Administrative Appeal

William V. DePaulo, Esq. #995
179 Summers Street, Suite 232
Charleston, WV 25301
Tel: 304-342-5588
Fax: 304-342-5505
william.depaulo@gmail.com

Counsel for Appellants

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III. ASSIGNMENTS OF ERROR

A. The Circuit Court's dismissal as moot of Appellants' Petition for Judicial Review of the final order of the DEP Surface Mining Board erroneously ignored the temporary character of the facts that barred mining of coal at that particular moment in time, but which in now way incapacitated Respondents' mining rights for the balance of the ten-year period recited in the permit.

1. Keystone and Revelation halted coal mining operations because of a downturn in the market price for coal and DEP staff orders which barred from resuming coal mining operations temporarily until they abated various permit violations.

2. Appellants can resume, without notice to Appellants, at any time after the temporary barriers, economic and administrative, in place on the date of the Circuit Court's decision, are abated.

B. W. Va. Code § 22-3-22(d)(2)'s explicitly barred DEP's issuance of permit S300609 on May 4, 2014, without SHPO "approv[ing] jointly" the surface mining permit on the date the permit was issued, i.e., May 4, 2104.

1. SHPO expressly objected to the viewshed impact of surface mining permit S300609 twice, in November 2013 and February 2014. DEP's May 5, 2014 issuance of S300609 – a mere four days after DEP's May 1, 2014 letter rejecting SHPO's viewshed objections -- did not nullify SHPO's prior objections merely because SHPO did not repeat its objections for yet a third time, i.e., by May 31, 2014 some 26 days ***after*** DEP's issuance of the May 4, 2014 permit.

2. DEP's citation of Keystone's demonstrably incompetent viewshed "expert" analysis as grounds for DEP's May 1, 2014 dismissal of SHPO's objections to S300609, was clearly erroneous, where Keystone's consultant assessed the viewshed impact on the Kanawha State Forest Historic District of the wrong mine (the adjacent Rush Creek mine, not the KD-2 mine permitted by S300609), and from the wrong direction (looking from the mine to the historic district vs. looking at the mine from the historic site).

C. DEP's *ex parte* revision of S300609 to substitute a revised surface water run off analysis – the adequacy of which was then in litigation before the Surface Mining Board – violated DEP regulations and appellants due process rights under the U. S. Constitution.

D. The Circuit Court's unilateral dismissal of Revelation Energy from the proceeding below denied Petitioner' right under the Rules of Civil Procedure and applicable Trial Court Rules to object.

IV. STATEMENT OF THE CASE

A. Procedural History

This appeal arises from the Circuit Court's January 29, 2016 order (**App. at 143**) dismissing a timely petition for judicial review of final February 2, 2015 order of the West Virginia Department of Environmental Protection (DEP) Surface Mining Board (SMB) upholding the DEP's issuance of surface mining permit S300609 to Keystone Industries, LLC on May 5, 2014 (**App. at 45**).

The petition for judicial review below challenged the legality of the May 5, 2014 issuance of the permit by DEP without the joint approval -- mandated by W. V. Code § 22-3-22 (d)(2) -- of the State Historic Preservation Office (SHPO). SHPO had on two separate occasions (**App. at 79, 82**) explicitly stated its objections to, and declined to join in the issuance of, S300609. Additionally, the Petitioners contended below that the DEP's *ex parte* amendment of a surface water run off analysis -- then a central issue in an ongoing appeal before SMB -- denied Petitioners due process.

The Respondent below was the DEP; Keystone Industries, LLC, the permittee under S300609, and Revelation Energy, LLC, Keystone's operator on the KD-2 mine site, both intervened. On April 21, 2014, one day after a motion to withdraw and proposed order was filed with the Court, the Circuit Court granted Revelation Energy, LLC permission to withdraw from the appeal, without affording Petitioners an opportunity to be heard in opposition (**App. at 138**).

On January 29, 2016, the Circuit Court of Kanawha County issued an order (**App. at 143**) dismissing the administrative appeal as moot, ruling that, because Keystone voluntarily ceased mining because weak coal market conditions, and the DEP had issued cessation orders temporarily suspending Keystone's right to conduct coal mining under

permit S300609 until violations of duties specified in Notices of Violation, had been cured, and and cessation orders issued incident thereto, had been lifted.

B. Statement of Facts

The facts critical to resolution of the mootness and justiciability issues presented in this appeal are brief and straight forward. To date, Keystone and its operator, Revelation, have conducted virtually all surface mining at the KD-2 mine site on the north side of the surface mining mountain site. The south side of the mountain – visible frm Kanawha State Forsest and the viewshed which caused SHPO to withhold approval of S300609 – remains unaffected, i.e., the viewshed is intact, to date. See photograph of mining operations in relation to Kanawha State Forest. (**App. at 196**)

Keystone and Revelation can, under the explicit terms of the Circuit Court's order of dismissal (**App. at 145**), resume mining on the KD-2 mine site without notice to Appellants, immediately upon compliance with the minor violations cited in DEP notices of permit violations, and their own determination that the market price for coal has improved sufficiently to warrant the cost of mining.

The immediate resumption of coal mining at KD-2 will allow Appellants the opportunity to clear cut the south side of the KD-2 mining site, obliterate the currently unaffected viewshed, and make this case -- for the first time -- actually moot.

What is placed at risk by these facts?

The Kanawha State Forest is a 9,300 acre nature preserve located seven miles south of Charleston, West Virginia. (**App. 29)** Historically consistent and abundant rainfall, has placed the eastern United States among the finest temperate hardwood forests on Earth; the healthiest and most extensive portions of this forest are found in the

Appalachian Mountain chain. West Virginia's Kanawha State Forest lies in the heart of this mountain chain. The ecological uniqueness of Kanawha State Forest is underscored by the fact that timbering has been banned from the forest, which has begun the process of returning to an old-growth forest habitat, the least common but most biologically rich and diverse type of forest ecosystem.

Apart from its unique timber stand, Kanawha State Forest also has a large number of vernal pools which are an essential part of the reproduction cycle for a variety of aquatic life, including salamander and frog species. These pools, along with healthy headwater streams and a largely intact forest, mean that Kanawha State Forest supports thriving populations of amphibians and reptiles. Among local institutions, Marshall University has conducted numerous studies on amphibians and reptiles at Kanawha State Forest over the years. All schools in Kanawha County that participate in the "Trout in the Classroom" program use the forest, as well as students from Jackson and Putnam counties.

The Kanawha State Forest Foundation and other organizations sponsor guided nature walks for the public throughout the year at the Forest. The Kanawha Valley Master Naturalist chapter conducts most of the fieldwork portions of its classes at Kanawha State Forest. The Forest is regularly utilized for bird counts, as well as butterfly surveys, dragonfly surveys, and other forms of research. The Kanawha State Forest includes cove forest sites which provide nesting habitat for 19 species of wood warblers, a feature that draws birders from as far away as Canada.

The Kanawha Trail Club has a lodge at Kanawha State Forest. They sponsor hikes every weekend of the year, and many of their hikes take place on the trails of Kanawha State Forest. The Forest's group camp area, just up the hollow from the swimming pool,

is regularly utilized by scout troops and other youth organizations. The campground area that has hook-ups for trailers attracts both local and out-of-state campers. Many organizations sponsor distance runs on the paved road or the trails of Kanawha State Forest. Kanawha State Forest's extensive network of single-track trails and ridgetop fire roads make it a magnet for mountain bikers. The annual Black Bear mountain bike race is renowned for its challenging course.

Kanawha State Forest is handicapped accessible and is frequented by thousands of visitors yearly for camping, hiking, mountain biking, cross country skiing, swimming, horseback riding, hunting and fishing; the forest has one of the few shooting ranges -- free and open to the public -- anywhere in the Kanawha County area. In the years 2011 through 2014, total visitors to Kanawha State Forest have steadily increased from approximately 225,000 per year to approximately 270,000 per year.

Like many state parks, Kanawha State Forest was constructed largely by the labor and skill set of an American work force known and respected as the Civilian Conservation Corps. "Camp Kanawha" was located in Shrewsbury Hollow at the present site of the swimming pool at Kanawha State Forest. The forest shelters, that were built to last by the CCC, are popular for family reunions, weddings, church picnics, and other social events. Administration of much of the 9,300 acre of Kanawha State Forest is committed to the West Virginia Department of Natural Resources, but nearly 1,500 acres -- including the historic structures constructed by the CCC -- are subject to the jurisdiction of the Archives and History Commission and its State Historic Preservation Office (SHPO). The National Park Service (NPS) of the United States Department of Interior lists the 1,500 acre "Kanawha State Forest Historic District" on the National Registry of Historic Sites (**App. 30**).

On May 5, 2014, DEP issued Permit No. S300609 (**App. 45)** to Keystone Industries, LLC. By the terms of permit S300609, Keystone was authorized to commence surface coal mining operations on a 413.8 acre parcel of real estate in Kanawha County, West Virginia referred to as the KD-2 mining site. The KD-2 mining site is located to the west of existing Revelation Energy, LLC surface mines, Rush Creek Surface Mine No. 1, S300499, and Rush Creek Surface Mine No. 2, S300404. The permit area for KD Surface Mine No. 2 is contiguous to both permits but on the opposite facing side of the mountain from the other mines. Unlike the other mines which drain towards the Kanawha River, the KD-2 mine site drains directly into the residential community of Loudendale, West Virginia which was subjected to devastating flash floods in 2003.

The Keystone surface coal mining site, commonly referred to as "KD-2," is located directly above the community of Loudendale, WV, in close proximity to the South Hills, Mt. Alpha and Louden Heights residential neighborhoods of Charleston, W. Va., and immediately adjacent to the Kanawha State Forest; the shooting range of the Kanawha State Forest is directly across the street from the permitted MTR mining site. Work on specific areas of the mine site commenced on May 6, 2014, one day after DEP's issuance of permit no. S300609 on May 5, 2014, and is scheduled to occur in eleven separate phases, each confined to a part of the entire site, over a ten-year period. The permit itself was good through May 5, 2019 and, like the permits on KD-1, Rush Creek 1 and 2, all issued to the Appellees in this proceeding, were subject to minimal requirements for renewal.

V. SUMMARY OF ARGUMENT

1. Appellants' objections to SMB's final order upholding the DEP's issueance of surface mining permit S300609, were not rendered moot, and the issue of permit S300609's illegality remained justiciable, despite the economic downturn in the coal market which caused Respondents to voluntarily halt current operations, and DEP notices of permit violations which temporarily interrupted Appellants' ongoing permitted operations.

As noted above, Keystone and its operator, Revelation, have conducted virtually all surface mining at the KD-2 mine site on the north side of the surface mining mountain site. The south side of the mountain – visible frm Kanawha State Forsest and the viewshed which caused SHPO to withhold approval of S300609 – remains unaffected, i.e., the viewshed is intact, to date. See map depicting mining operations to date and the current failure, albeit fortuitous, to impact viewshed from Kanawha State Forest at **App. 196**.

Keystone and Revelation can, under the explicit terms of the Circuit Court's order of dismissal, resume mining on the KD-2 mine site immediately and without notice to Appellants (**App. at 225**), upon compliance with the minor violations cited in DEP notices of permit violations, and their own determination that the market price for coal has improved sufficiently to warrant the cost of mining.

The immediate resumption of coal mining at KD-2 will allow Appellants the opportunity to clear cut the south side of the KD-2 mining site, obliterate the currently unaffected viewshed (**App. 196)**, and make this case -- for the first time -- actually moot.

The DEP argued below, and the Circuit Court agreed, that dimissal was required by this Court's October 14, 2015, order in Case No. 14-1337. That case involving an appeal by these Appellants, and involving the same Respondents, from the Hon. James Stuckey's denial of a writ of prohibition, at a time when the administrative proceedings

before the SMB were still proceeding and at a time when mining operations were underway and, critically, at a time when Appellants' request for an administrative stay of operations under S300609 had been denied.

Thereafter, when DEP issued notices of violation that temporarily barred ongoing mining operations at KD-2, this Court's order dismissed the appeal in Case No. 14-1337 as moot, "in light of the June 15, 2015 notice, published by the Department of Environmental Protection, that a cessation order had been entered for the surface mine that is the subject of this appeal." (**App. at 143**).

SMB issued a final order in Appellants' administrative appeal on February 2, 2015, the final order sought to be reviewed in the present Petition for Judicial Review. Contemporaneous with its March 2015, Petition for Judicial Review, Appellants requested that the Circuit Court expedite consideration of the Petition for Judicial Review precisely because no stay was then in place that barred mining on the south side of the KD-2 mine site. (**App. at 123**); the Circuit Court declined, without issuance of any formal order, to go forward because of the pendency of this Court review in Case No. 14-1337.

Upon issuance of this Court's October 15, 2015 decision in Case No. 14-1337, Appellants requested that the Circuit Court enter a scheduling order. (**App. at 141**). DEP's response, incorporating a request to dismiss the current proceeding as moot, explicitly relied on this Court's October 15, 2015 in Case No. 14-1337 for the proposition that the Petition for Judicial Review was moot and non-justiciable (**App. at 144**), a position adopted in the Circuit Court's order dated January 29, 2016 (**App. at 224**).

Case No. 14-1337 involved a petition for a writ of prohibition, i.e., a request for interim judicial relief to block the clear cutting of the south side of KD-2 at a time when no order barred that injury to Kanawha State Forest's viewshed, and no administrative

relief was available. Appellants suggested in pleadings filed in 14-1337 with this Court, and this Court clearly agreed, that in light of the D enforcement actions, and the issuance of a final decision by the SMB, the request for interim judicial relief represented by the petition for writ of prohibition was moot. Those factors do not support the dismissal of the Petition for Judicial Review in the present proceeding.

To the contrary, the SMB's decision was ripe for review when issued in Februrary 2015 and this Court's dismissal of the request for interim relief (already in place as a result of actions in May 2015 by DEP in issuing a cessation order) makes resolution of the legality of S300609, issued without SHPO concurrence, ripe for decision. Far from being moot, the failure of the Circuit Court to address the issue now, while interim administrative relief is in hand, places at risk the precise matter sought to be preserved by these proceedings, the viewshed from Kanawha State Forest, which Appellees may destroy without notice to Appellants under the express terms of the Circuit Court order under review here.

2. DEP's May 5, 2014 issuance of S300609 required SHPO's "joint approval" and SHPO consistently and timely withheld that approval.

DEP issued surface mining permit S300609 unilaterally on May 5, 2014, in violation of the unambiguous mandate of "joint approval" by SHPO expressly required by W. Va. Code § 22-3-22(d)(2)**.** The "Surface Coal Mining and Reclamation Act," at W. Va. Code § 22.3.2 in subsection (d)(2) provides that, after the 1977 effective date:

> *"no surface mining operations, except those which existed on that date, shall be permitted:*
>
> ***
>
> *(2) which will adversely affect any publicly owned …places included in the national register of historic sites……unless approved jointly by the [DEP] director and the … state … agency with jurisdiction over the …historic site….*

No one here contends that SHPO in fact jointly approved S300609. DEP's the argument for a "constructive" approval is based entirely on the proposition that SHPO was required to repeat by May 31, 2014 – *26 days after DEP's May 5 issuance of permit S300609* -- for a third time, in addition to its November 2013 (**App. 90, 165**) and February 2014 (**App. 90, 166**) objections to S300609 The May 31, 2014 deadline was, under Appellees' frivolous argument, not due on the May 5, 2014 date of DEP's issuance of the permit – as explicitly requeired by law – but unless reiterated for a third time within 30 days of DEP's May 1, 2014 letter unilaterally (and erroneously) rejecting SHPO's objections, a date 26 days after the May 5, 2014 issuance of surface mining permit S300609, and 25 days after Keystone commenced work on May 6, 2014.

SHPO had in November 2013 (**App. 165**), and again in February 2014 (**App. 166**), objected to issuance of S300609 on the basis of the viewshed impact of the proposed surface mine on the Kanawha State Forest Historic District, listed on the National Register since 1993. Both of those objections were withing the thirty days provided by law. The event purportedly triggering yet another assertion of adverse impact by SHPO, was a May 1, 2014 letter (**App. 90**) from DEP simply rejecting SHPO's analysis, based upon a Keystone consultant's demonstrably incompetent analysis that there was no impact on the KSF Historic District.

In short, Appellees contend that DEP was entitled to issue S300609 on May 5, 2014, a bare 4 days after its own May 1, 2104 letter, and at a time when, even under SMB's studied legal analysis, there were still 26 days left to run before SHPO's thirty-day response time expired. This position is frivolous, and the Circuit Court's holding to the contrary is erroneous as a matter of law.

Moreover, DEP's May 1, 2014 conclusion that SHPO approval was not required -- because the proposed mining activity had no impact on the Kanawha State Forest Historic District -- was clearly erroneous. The finding of "no-impact" was based entirely on the spectacularly ill-informed conclusions of Keystone's purported "expert" who assessed the impact on the Kanawha State Forest Historic District of the older, an already approved and mined, Rush Creek coal mine, ***not the impact of S300609's KD-2 mine site.*** In short, the expert had the wrong mine in his sights.

Finally, and removing any doubt as the expert's incompetence, the viewshed impact was conducted backwards, i.e., from the mine site looking towards the Kanawha State Forest Historic District, not as required looking from the historic site towards the mine site (and preferably the right mine site). To the extent that the Circuit Court relied upon the May 1, 2014 letter and its assertion of the "expert" opinion of Keystone's hired-gun, the Circuit Court decision was clearly erroneous.

3. DEP's *ex parte* amendment of Keystone's SWROA (surface water run off analysis), a "before and after" study, critical to insuring that the mining project did not increase the likelihood of flooding – at a time when the adequacy of that SWORA was the principal issue on appeal by these Appellants before the Surface Mining Board – violated DEP regulations and denied these Appellants due process.

At the June 26, 2014 hearing before the SMB, Thomas Wood of DEP acknowledged, as Appellants had alleged in their notice of appeal to the Surface Mining Board (SMB), that it was error for Keystone to use a 2006 soil survey. Use of the proper soil survey is critical to enforcing the requirement that surface mines not increase the likelihood of flooding; Appellants included residents of Loudendale which suffered catrasrophic flooding in 2003.

DEP's Wood testified on June 26, 2014 that no decision had been made regarding

compelling Keystone to file a revised SWROA to incorporate the 2012 soil survey which Petitioners had brought to DEP's attention in their Notice of Appeal. Clearly, DEP did later require Keystone to file a revised SWROA, because Wood announced that at a July 2014 hearing that the revision had already been approved. No notice of the revised SWROA proceeding was ever given to Appellant's, nor were they afforded an opportunity to be heard on the issue.

Appellants were actively litigating the adequacy of the SWROA before the SMB; and only learned about the ***ex parte*** amendment after all proceedings relating to it were concluded, and the revised SWROA – not once submitted to cross examination by the Petitioners who found the mistake in using the obsolete 2006 soil survey – was already approved. This procedure violated DEP regulations relating to revision of permits and denied Appellants basic due process.

4. The Circuit Court's unilateral dismissal of Revelation Energy from the proceeding below denied Petitioner' right under the Rules of Civil Procedure and applicable Trial Court Rules to object.

The Circuit Court's April 21, 2014 dismissal of Revelation Energy, one day after the filing of Revelation's April 20, 2014 motion to withdraw, denied Appellants the opportunity to be heard on the motion which was never set for a hearing, and in violation of Trial Court Rule 24 affording Appellants five days in which to comment on an order to which they had not agreed.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellants respectfully request oral argument on this Petition pursuant to Rule 20 because the case involves issues of importance relating to compelling government

agencies to comply with applicable law. Additionally, the case presents important questions involving the authority of the State Historic Preservation Office to review and, either approve or disapprove, surface mining permits based upon enforcement of national standards pertaining to historic preservation.

VII. ARGUMENT

A, The January 29, 2016 decision's incorrect dismissal of a timely appeal of a final order as moot or non-justiciable will effectively deprive petitioners of their right of appeal by placing at risk the still present viewshed overlooking Kanawha State Forest.

In *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the United States Supreme Court dealt pragmatically with the assertion that the case before it was moot and that no justiciable case or controversy, capable of judicial resolution existed, merely because the pregnancy had terminated before the case itself. There the Supreme Court held that:

> The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. United States v. Munsingwear, Inc., 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950); Golden v. Zwickler, supra; SEC v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972).
>
> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). See Moore v. Ogilvie, 394 U.S. 814, 816, 89 S.Ct. 1493 1494, 23 L.Ed.2d 1 (1969); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 178-179, 89 S.Ct.

> 347, 350, 351, 21 L.Ed.2d 325 (1968); United States v. W. T. Grant Co., 345 U.S. 629, 632-633, 73 S.Ct. 894, 897-898, 97 L.Ed. 1303 (1953).
>
> We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

410 U.S. at 125 (emphasis added).

In Camreta v. Greene, 563 U.S. __, 131 S.Ct. 2020, 179 L.Ed.2d 1118 (2011), the U. S. Supreme Court recently reaffirmed the principles stated in Roe, in the context of an appeal by a prevailing party, not the loser in the proceeding below:

> An appeal brought by a prevailing party may satisfy Article III's case-or-controversy requirement. To comply with that requirement, litigants must demonstrate a "personal stake" in the suit. Summers v. Earth Island Institute, 555 U. S. 488,_. The petitioner has such a stake when he has "suffered an 'injury in fact' " that is caused by "the conduct complained of and that "will be 'redressed by a favorable decision.' " Lujan v. Defenders of Wildlife, 504 U. S. 555, 560-561. And the opposing party also must have an ongoing interest in the dispute, so that the case features " 'that concrete adverseness which sharpens the presentation of issues.' " Los Angeles v. Lyons, 461 U. S. 95, 101. The parties must have the necessary stake not only at the outset of litigation, but throughout its course. Arizonans for Official English v. Arizona, 520 U. S. 43, 67. So long as the litigants possess the requisite personal stake, an appeal presents a case or controversy, no matter that the appealing party was the prevailing party below. See Deposit Guaranty Nat. Bank v. Roper, 445 U. S. 326, 332-336; Electrical Fittings Corp. v. Thomas & Betts Co., 307 U. S. 241.

131 S.Ct. 2020.

As matters stand at this moment, the viewshed from the Kanawha State Forest, which is located to the south of Respondents' coal mining site, is virtually unaffected by Respondents' surface coal mining, for the simple reason that all mining occurred on the north side of the mountain adjacent to Kanawha State Forest and is, therefore, not visible from the south side of the mountain which faces Kanawha State Forest.

One day is all Keystone will need to clear cut the south side of the KD-2 mining site -- eliminating *in toto* the viewshed which caused the State Historic Preservation Office (SHPO) to withhold the joint approval required of W. Va. Code § 22-3-22 (d)(2) -- and allowing them to stand before a Court and announce that the case really is moot (at least for viewshed purposes). In that case, judicial review would in fact be defeated, the precise matter which caused the Supreme Court in *Roe v. Wade* to reject the argument for mootness, noting that "[o]ur law should not be that rigid."

The Circuit Court's January 29, 2016 decision's incorrectly dismissed the appeal as moot because of existing DEP cessation orders (which can be lifted without notice to Petitioners to permit mining to resume at any time in the ten-year life of the permit and destroy the viewshed interest sought to be protected) and because of reversible economic downturns in the coal industry which have temporarily made it unprofitable to mine coal (an economic event totally unrelated to the legal tests applicable to the issues on appeal).

Intervenor Keystone Industries, LLC stipulated in the Circuit Court on Janaury 8, 2016 that the only thing keeping them from mining, other than the temporary cessation order, was the recent downturn in price for coal. That price swing can be reversed in an equally brief, and equally unforeseen, time frame. Judicial orders should not be -- like Wall Street derivative products -- pegged to totally speculative price fluctuations. Moreover, Keystone argued, even if the cessation order were lifted, there would be no rush to mine coal; machinery would need to be mobilized, people hired, and other logistical matters addressed.

Any attempt to draw comfort from these casual economic assertions ignores the documented historical fact that Keystone commenced mining under the May 5, 2015 permit on that day, i.e., on May 5, 2014. (**App. at 212**). In the present case, the cessation

order would be lifted after Keystone had complied with whatever sanction DEP devised, but the timing of which compliance is and will remain totally within Keystone's control, which can be deferred until all mining resources are mustered and ready to go. In that case, as on May 5, 2015, Keystone will be ready for action and, under the order proposed by DEP, can go forward the day the cessation order is issued.

The January 29, 2016 decision's incorrectly dismissed the appeal because of purported "non-justiciability" citing this Court's decision in Case No. 14-1377 dismissing Petitioners appeal from a denial of a request for interim relief, at a time when this Court noted that interim relief was already in place, albeit from a different source.

Petitioners do not now seek interim relief; they seek an order invalidating the May 4, 2014 issuance of permit S300609, and the only time that ruling will have any value is now, i.e., when interim relief in the form of DEP temporary cessation orders preserve the viewshed sought to be protected by SHPO's objections, which were the basis for their refusal to jointly approve S300609, a refusal that invalidates S300609 under W. Va. Code § 22-3-22 (d)(2)

DEP argued at the January 8, 2015 hearing in this matter that the case was not "justiciable," a matter not asserted in his Response to Petitioners' Motion for Scheduling Order, and for which DEP cited no case authority whatsoever; the word "justiciable" appears nowhere in the West Virginia Supreme Court's decision in Case No. 14-1377.

The doctrine of justiciability is most often invoked in cases presenting inherently political questions, but even in those cases the U.S. Supreme Court has dealt with justiciability pragmatically, treating the justiciability argument as "little more than a play upon words." *Nixon v. Herndon*, 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759. In a case involving no less than the apportionment of state legislators under the equal protection

provisions of the Fourteenth Amendment, the U. S. Supreme Court in *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) dismissed the notion that the issues before it were not justiciable, holding that if the legal injury there "is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. 369 U.S. 210.

Plainly, this citizen appeal from a garden-variety surface mining permit, arising from the august quasi-judicial body known as the Surface Mining Board, presents no insurmountable barrier to relief. In the present case, the DEP Surface Mining Board (SMB) has issued a final decision on February 2, 2015 denying Petitioners' appeals from the DEP's May 4, 2014 issuance of surface mining permit S300609. That is all that is required for petitioners to seek judicial review of the SMB's February 2, 2015 order under W. Va. Code § 29A-5-4.

B. SHPO's "Joint Approval" of S300609 Was Required As A Matter of Law, and Was Consistently Withheld Throughout the DEP Application Process.

1. SHPO's express rejections of S300609 in November 2013 and February 2014, were not nullified by failing to respond to DEP's May 1, 2014 disagreement with SHPO, or DEP's May 5, 2014 issuance of S300609, 26 days in advance of a purported 30-day deadline for SHPO to repeat its objections for yet a third time.

W. Va. Code § 22-3-22 (d)(2) provides in pertinent part that no surface mining which adversely affects any publicly owned places included in the national register of historic sites, shall be permitted "*unless approved jointly by the [DEP] director and the federal, state or local agency with jurisdiction over the park, the historic site or natural landmark*." Because SHPO never "approved jointly" permit S300609, DEP's issuance of surface mining permit S300609 was an *ultra vires* act in violation of the explicit statutory requirement that SHPO "approve jointly" the issuance of surface mining permits that

affect sites on the National Registry of Historic Sites.

Regulations governing the exercise of SHPO's discretion to approve, or disapprove, generally require that SHPO respond to proposed projects that affect historic sites within 30 days of receiving relevant information. (App. 90, 167). Here, SHPO in November 2013 (App. 165) and February 2014 (App. 166) objected to the viewshed impact on the Kanawha State Forest Historic District, in each instance on a timely basis. The only matter with respect to which SHPO did not respond – within 30 days or at any other time – was a May 1, 2014 letter (App. 166) from DEP stating that DEP rejected SHPO's November 2013 and February 2014 analysis, and had decided to issue permits S300609, unilaterally.

The Circuit Court's holding that SHPO had failure to respond within 30 days to DEP's May 1, 2014, i.e., letter by May 31, 2014, constituted a constructive joint approval was erroneous as a matter of law. Here SHPO's objections to S300609 were explicitly recited in November 2013 and February 2014 correspondence with DEP, which DEP acknowledge receiving but simply disagreed with in a May 1, 2014 letter. Further the thirty day deadline for response did not expire until May 31, 2014 – fully 26 days ***after*** the DEP's May 5, 2014 issuance of surface mining permit S300609.

The National Park Service (NPS) of the United States Department of Interior lists the 1,500 acre "Kanawha State Forest Historic District" in the National Registry of Historic Sites. (App. 90) And there is no serious dispute that SHPO is the authority with authority to assess the impact of a proposed surface mine on an historic site.[2]

West Virginia Code of State Regulations, CSR § 82-2-5, entitled "State Review Process," provides that "The Division of Culture and History will review all undertakings permitted, funded, licensed or otherwise assisted, in whole or in part, by

the state for the purposes of furthering the duties outlined in W. Va. Code § 29-1-8. Further, the West Virginia Surface Mining Reclamation Rule provides in CSR § 3.19, entitled "Effect on Historic Places and Archaeological Sites," that:

> Where the proposed surface coal mining operation will adversely affect any publicly owned park, any place listed on the national Register of Historic Places or archaeological sites, the Secretary **shall transmit to** the Federal, State or **local agencies with jurisdiction** over the park or historic place the applicable parts of the permit application, together with **a request for the agency's approval or disapproval** of the operation. Consideration and coordination of the permit review shall be in accordance with the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.) and the Archaeological Resource Protection Act of 1979 (16 U.S.C. 470 et seq.).

38 CSR § 3.19 (emphasis added).

DEP's own "Permit Handbook" also acknowledges that W. Va. Code § 22-3-22 (d)(2) "requires joint approval by DEP and SHPO of the issuance of permits for surface mining operations," and that "DEP will submit to SHPO for its review any permit applications for surface mining operations…" In fact, DEP routinely forwarded SHPO's comments on permit S300609 to Keystone, and returned Keystone's responses to SHPO, over the five year history of the application from 2009 through 2014.

SHPO voiced its initial objections to S300609 in June 2009 and consistently reaffirmed those objections throughout the permit process. In a November 6, 2013 letter to DEP, SHPO objected to the issuance of surface mining permit S300609 on the grounds that it adversely impacted the viewshed from the Kanawha State Forest Historic District, a site listed on the National Register of Historic Sites. (App. 166)

On February 20, 2014, in response to the latest round of submissions from Keystone, SHPO renewed its objection to KD-2 on architectural grounds, i.e., viewshed impacts. (**App. 82**) On May 1, 2014, DEP responded to SHPO's February 20, 2014

letter (and the substance of the November 6, 2013 letter incorporated therein), with a letter rejecting SHPO's analysis on the purported ground that the historic district, as currently defined in historic boundaries, was not impacted by the KD-2 mine site. (**App. 84**)

On May 5, 2014, the Department of Environmental Protection -- without the "joint approval" of the State Historic Preservation Office expressly required by W. Va. Code § 22-3-22(d)(2) -- unilaterally issued surface mining permit S300609 to Keystone Industries, LLC which commenced clear cutting of the mountain side one day later, on May 6, 201, (App. 92) asserting that the KD-2 mine site was not viewable from the Kanawha State Forest Historic District (**App. 45).**

Notwithstanding the requirement of W. Va. Code § 22-3-22 (d)(2), and its own regulations, the DEP stated its disagreement with the grounds for SHPO's withholding of approval on May 1, 2014, and issued permit no. S300609 four days later on May 5, 2014. In other words, at the time of the May 5, 2014 issuance of S300609, SHPO still had 26 days in which to respond to the DEP May 1, letter.

Thus, even under DEP's tortured reading of the requirements of SHPO concurrence, the May 5, 2014 permit was invalid on the date issued, because it had neither SHPO's express joint approval (denied in November 2013 and February 2014), nor SHPO's "constructive" joint approval for failing to send DEP a letter by May 31, 2014 reiterating the positions stated in the prior November and February and already rejected by DEP unilateral decision to go forward with S300609, regardless of the statutory requirement that DEP obtain SHPO's "joint approval."

DEP, Keystone and Revelation argued below that the requirement that SHPO voice objections within 30 days of receipt of comments, was not satisfied in this case,

because SHPO never responded to the DEP May 1, 2014 letter. Such a response would have been due, DEP, Keystone and Revelation all agree, on May 31, 2014. But DEP issued permit S300609 on May 5, barely four days after its own May 1 letter to SHPO, and 26 days prior to the expiration of the purported 30-day deadline in which to respond to the May 1 letter.

To be sure, the requirement of W. Va. Code § 22-3-22 (d)(2) for joint approval by SHPO applied on May 5 to the issuance on that date of S300609. The permit was effective immediately and Keystone/Revelation commenced work the next day. SHPO's purported "approval" by silence 25 days later cannot be retroactively invoked to legitimize what is clearly an *ultra vires* act on May 5, 2014. The assertion of DEP, Keystone and Revelation that SHPO, despite having already stated the grounds for its objection to S300609 in November 2013, and having reiterated those objections in February 2014, was nonetheless required to restate those objections on or before May 31, 2014 – some 26 days after DEP issued S300609 – is patently frivolous.

DEP's citation of Keystone's demonstrably incompetent viewshed "expert" analysis, as grounds for DEP's May 1, 2014 dismissal of SHPO's objections to S300609, was clearly erroneous, and cannot save the SMB denial of Petitioners' administrative appeal, where Keystone's consultant assessed the viewshed impact on the Kanawha State Forest Historic District of *the wrong mine* (Rush Creek not KD-2 permitted by S300609), and *from the wrong direction* (looking from the mine to the historic district instead of looking at the mine from the historic site).

DEP's May 5, 2014 issuance of S300609 cannot be rationalized on the ground that the KD---2 mine project would have no impact on the Kanawha Forest Historic District. The viewshed analysis submitted by Keystone's paid---for---opinion expert

(**App. 104, 327**) ------ and cited by Keystone relentlessly for the proposition that SHPO didn't know what it was talking about ------ was itself demonstrably incompetent. First, the purported "expert" analyzed the viewshed impact between the KSF historic district and the Rush Creek mine site, ***not the KD---2 mine site*** which is the subject of permit S300609. Indeed, SHPO specifically noted in its November 6, 2013 letter objecting to DEP's issuance of S300609, that the architectural viewshed report submitted by Keystone's hired architectural expert, had analyzed the wrong site.

Specifically, DEP's May 1, 2014 letter rejecting SHPO's grounds for objection was itself based on a demonstrably incompetent viewshed analysis by Keystone's purported expert (who assessed viewshed impact by reference to the wrong coal mine, and backwards, from the point of view of the mine looking at the historic site, not looking from the historic site at the coal mine). SHPO's November 2013 objection) pointed out that:

> With regards to mapping, the map provided by the company includes a green line that the legend indicates is a "property line." Please clarify to whom this property belong. We also request that the applicant clarify the consultant exactly where the proposed project will be as the current submission from the consultant incorrectly identifies the proposed project as an already permitted area.

App. at 80-81 (emphasis added).

Additionally, even the most superficial review of the purported "expert" viewshed analysis discloses the simple fact that and the viewshed was assessed from the wrong direction, i.e., by looking from the mine site (albeit the wrong one) to the KSF historic district, not as required for a viewshed analysis, from the view sought to be protected and towards the mine site impacting it., a fact noted by SHPO and expressly identified as a fatal error in SHPO's November 2013 objections.

To the extent that Circuit Court affirms SMB's holding that SHPO approval was

not required, because the proposed mining activity had no impact on the Kanawha State Forest Historic District, and based totally on the ill-informed conclusions of Keystone's incompetent expert – looking the wrong direction from the wrong mining site – the Cirucit Court order was clearly erroneous and cannot be affirmed.

C. DEP's *Ex Parte* Revision of S300609 Violated DEP Regulations Denied Appellants' of Their Right to Due Process

DEP conducted an unconstitutional and *ex parte* revision of permit S300609 – without notice to these Petitioners – while Petitioners were prosecuting the administrative appeal before the SMB denied Appellants due process. At a June 26, 2014 hearing on Petitioners' stay request, Mr. Tom Wood, Director of the Oak Hill, WV office of the DEP that reviewed the Keystone surface water run off analysis (SWROA), conceded that permit no. S300609, issued on May 5, 2014, was predicated on Keystone's improper use of a 2006 soil survey which had been superseded by the 2013 soil survey. In that same hearing, Wood testified on January 26, 2104 that no decision had been made to require Keystone to prepare a new SWROA.

At a second stay hearing on July 24, 2014, the DEP simply announced that the Keystone application had been modified on July 21, 2014 to reflect the use of the 2013 soil survey. And at an August 20 hearing on the merits of Petitioners' appeal of the May 5, 2014 permit, a Keystone expert engineering witness stated that the firm was able to proceed with the amendment to the permit – without public notice or an opportunity to comment – because the matter was deemed to be a "minor" modification (even though it upgraded the classification of 58.7% of the land subject to the permit).

The Circuit Court's November 25, 2014 opinion held that, because Petitioners had failed to submit factual evidence that the July 21, 2014 revision of Keystone's SWROA

analysis was a significant departure from the original permit or resulted in a significant impact on health, safety or the hydrologic balance, the Petitioners failed to demonstrate clear legal error, a requirement for prohibition relief.

A surface water run off analysis is, by definition, a matter assessing the hydrologic impact of a proposed mining activity. No "evidence" is required to show that SWROA's affect "hydrologic" balance; hydrologic balance is the center piece of all SWROA's. A SWROA is basically a "before and after" analysis of the impact of proposed mining activity. The objective is to minimize flood risk, and the legal requirement for issuance of a surface mining permit is that the SWROA demonstrates that there is "no net increase" is surface water run off.

In the present case, Petitioners appeal to the SMB was predicated on the fact that Keystone filed a SWROA based upon a 2006 soil survey that had been superseded in 2013, many months prior to the May 5, 2014 issuance of permit S300609. Petitioners alleged, and no evidence to the contrary was submitted in any public hearing, that 58% of the KD-2 mining site was upgraded from Class C to Class A as a result of the 2013 soil survey. The higher the class of a soil, the greater its absorptive capacity, i.e., the "before" characteristic of a site. If an applicant wishes to satisfy the regulatory requirement of "no net increase," there is a natural bias in favor of beginning the analysis with the worst possible soil, i.e. , soil with zero absorptive capacity, a bad "before" status that minimizes the "after" mining impact analysis and increases the likelihood of a finding of "no net increase" in run off.

The legal question presented at SMB was whether a permit revision that altered a matter relating to "hydrologic" balance was permissible under DEP regulations at 38 CSR 3.28 which expressly provide that, in determining whether to treat a

proposed permit revision as significant (requiring notice) or insignificant (not requiring notice to affected parties), the determination shall be guided by criteria including whether the revision may result in a significant impact on the hydrologic balance in the area. 38 CSR 3.28.b.1.B.

As a matter of law, any revision of a SWROA "may" result in a significant impact on hydrologic balance. And where the issue of the adequacy of the initial SWROA is a central issue in a pending appeal before the SMB, that matter must, as a matter of law, be treated as significant and involving another criteria for determination of significance, i.e., an individual's legal right to receive notice. 38 CSR 3.28.b.1.E.

On July 221, 2014 – literally in the middle of the SMB appeal reviewing the adequacy of Keystone's SWROA, the DEP issued an order (following the conclusion of an ex parte proceeding at DEP to which Appellants were given no notice) approving a revision of the SWROA. (**App. at 122**). That proceeding violated DEP regulations governing amendments to permits recited at 38 CSR 3.28.b.1.E.

Apart from the noted regulations above, elementary due process requires that litigants to a proceeding such as the appeal to SMB, be given notice of and an opportunity to participate meaningfully in the ongoing administrative process to amend a permit then on appeal. The *ex parte* amendment approved by DEP fails the minimal due process standard of the Fifth and Fourteenth Amendments to the United States Constitution. *Holcomb v. Lykens*, 337 F.3d 217 (2nd Cir. 2003)("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"); *Burr v. New Rochelle Municipal Housing Authority*, 479 F.2d 1165 (2d Cir. 1973)(tenants of a municipal public housing project held constitutionally entitled to present views opposing rent increases before they became effective).

D. The Rules of Civil Procedure and Trial Court Rule 24 Barred the Circuit Court from granting Revelation's request to withdraw from the Petition for Judical Review below, one day after Revelation's motion was filed, and before Appellants had an opportunity to object.

On April 20, 2014, Revelation moved to withdraw from the proceedings below, stating that it had surrendered its lease of the KD-2 mining site, and withdrawn its request to be assigned permit S300609. (**App. 130**). One day later, on April 21, 2014, the Circuit Court issed an order granting Revelation's motion. (**App. 138**). Appellants were not asked to agree to the motion to withdraw, and in fact did not agree to it. Revelation's similar motion before this Court in the proceeding relating to the denial of a writ of prohibition in Case No. 14-1337 was opposed by Appellants' and this Court denied the motion.

The Rules of Civil Procedure afforded Appellants an opportunity to file an opposition to the Revelation motion, upon notice of hearing, at a time in advance of the hearing. No hearing was noticed. Additionally, Trial Court Rule 24 affords a party five days in which to indicate objection to a proposed order. All of these procedural practices were by-passed by the 24-hour turn around on Revelation's motion. The Circuit Court's April 21, 2014 was not designated an interim order final for purposes of Revelation and subject to appeal under Rule 54 (b) "upon an express finding that there is no just reason for delay and upon an express direction for the entry of judgment." This Court should without hesitation reverse the April 21, 2014 Circuit Court order granting Revelation permission to withdraw from these proceedings. Their counsel has been served copies of all pleadings in this appeal.

VIII. CONCLUSION

This Court should reverse the Circuit Court's dismissal of Appellants' petition for judicial review. Moreover, the issues before the Circuit Court were all legal issues, not engaging any fact determination by the Circuit Court, and are fully ripe for review and adjudication by this Court. DEP clearly had no authority to issue surface mining permit S300609 without SHPO's joint approval, and the reasons cited for disregarding SHPO's explicit disapproval of S300609 are frankly frivolous. No evidentiary issue is presented with regards to the facts underlying SHPO's refusal to approve S300609 or the patently unconstitutional ***ex parte*** revision of the surface water run off analysis, critical to the safety of Appellants residing in Loudendale, a small community which suffered devastating flooding in 2003, and lies literally in the sights of this unlawfully permitted surface mining project.

Respectfully submitted,

APPELLANTS

By Counsel

William V. DePaulo, Esq. #995
179 Summers Street, Suite 232
Charleston, WV 25301
Tel: 304-342-5588
Fax: 304-342-5505
william.depaulo@gmail

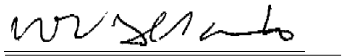
IX. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Brief was mailed, postage pre-paid, this 31st day of May, 2015, to the following:

Jason Wandling, Esq. WV State Bar #9259
Department of Environmental Protection
601 57th St. SE
Charleston, WV 25304
Tel: 304-926-0499 x1446 Fax: 304-926-0461
jason.e.wandling@wv.gov

Christopher S. Smith, Esq. WV State Bar #3457
Hoyer, Hoyer & Smith, PLLC
22 Capitol Street
Charleston , WV 25301
Tel: 304- 344-9821 Fax: 304-344-9519
ralph@hhsmlaw.com

E. Forest Jones, Jr., Esq. WV State Bar # 1916
Jones & Associates
P. O. Box 1989
Charleston, WV 25327
Tel: 304-343-9466 Fax: 304-345-2456
efjones@efjones.com



William V. DePaulo