

Editor's note: 92 I.D. 1

DONALD ST. CLAIR ET AL.

IBLA 84-264

Decided January 2, 1985

Petition for payment of costs and expenses including attorney's fees under provision of 43 CFR 4.1290 and 4.1294.

Denied.

1. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

Appellants' failure to obtain any part of the benefit sought by their claims for relief prevents payment of their claim for reimbursement of costs, expenses, and attorney's fees pursuant to provision of 43 CFR 4.1290 and 4.1294.

2. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

Appellants' failure to make a substantial contribution to the resolution of pending claims for relief and to achieve some degree of success in prosecuting their claims before the Department bars award of attorney's fees under Departmental regulations and applicable law.

APPEARANCES: Mark Squillace, Esq., Washington, D.C., for petitioners;

Glenda R. Hudson, Esq., Office of the Solicitor, Washington, D.C., for Office of Surface Mining Reclamation and Enforcement.

84 IBLA 236

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Following this Board's decision in Donald St. Clair, 77 IBLA 283, 90 I.D. 496 (1983), in which a divided panel affirmed a decision of the Director of the Office of Surface Mining Reclamation and Enforcement (OSM), a petition for award of costs, expenses, and attorney's fees under provision of 43 CFR 4.1290(a)(2) and 4.1294(b) was filed on January 17, 1984. Petitioners are appellants who earlier, by way of citizen's complaint, sought relief in the form of a Federal inspection and enforcement action against Island Creek Coal Facility #25, and an investigation by OSM into the administration of the West Virginia surface mining program as conducted by the State. The relevant facts concerning the appeal are set out in the Board decision in St. Clair, supra at 285-93, 497-501. The three Board members empaneled to decide the appeal failed to agree concerning the reasons for the Board's decision, but affirmed the OSM decision without modification, in effect denying all appellants' claims. Id. at 301, 304, 315, 506, 507-08, 513.

Despite their apparent lack of success petitioners now seek payment of their attorney's fees and other costs and expenses in the amount of \$ 12,765.79. Citing Council of Southern Mountains v. OSM, 3 IBSMA 44, 88 I.D. 394 (1981), 1/ petitioners offer documentation to support the reasonableness

1/ Council, like this Board's prior decision in St. Clair, boasted three separate opinions, and was vacated and remanded for further action by memorandum opinion in Council of the Southern Mountains, Inc. v. Watt, No. 82-45 (E.D. Ky. Oct. 18, 1972). On Jan. 26, 1984, Under Secretary Simmons reversed so much of the Council decision as authorized award of attorney's fees, finding the Interior Board of Surface Mining and Reclamation Appeals had exceeded its authority by its award of attorney's fees. On Feb. 1, 1984, this Board, on remand, ordered the case to Hearings Division for fact finding and other

of the amount claimed in conformity to the court's decision in Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980). (In Copeland, a gender discrimination class action, the claimant was conceded to be entitled to an award of attorney's fees: The central question was the amount of the award. Id. at 889.)

The administrative appeal from which this request for award of attorney's fees arises began as a citizen's complaint brought by petitioners under 30 CFR 842.12. Petitioners now contend they made a substantial contribution to the outcome of the appeal before the Department so as to be entitled to an award of their costs. See 43 CFR 4.1290-4.1294. Thus, they point to the fact that the Board issued a decision on the merits of their appeal as proof that they have, in fact, obtained some of the relief sought by them, and characterize the decision as a procedural victory (Petition at 5). Further, they contend their participation in the administrative process accomplished a salutary result by precipitating development of a new water system for the area in which petitioners live, and encouraging a more careful administration of Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201-1328 (1982), by both OSM and the State of West Virginia (Petition at 6).

The petition for award of costs and expenses is opposed by the Departmental Solicitor who has filed a brief in opposition to the claim, relying

action as required by the order of remand from the district court. Council of the Southern Mountains, Inc. v. OSM, IBLA 83-612 Order dated Feb. 1, 1984. This order contains a detailed history of the Council decision and an analysis of the probable effect of subsequent review actions. The matter is now pending before the Hearings Division.

principally upon the Supreme Court decision in Ruckelshaus v. Sierra Club, 463 U.S. , 103 S. Ct. 3274 (1983), for the proposition that petitioners may not receive their costs at Government expense because they failed to exhibit "some degree of success on the merits" in their appeal before the Department (Solicitor's Brief at 3). The Solicitor also relies upon a proposed revision of Departmental rules published at 49 FR 4403 (Feb. 6, 1984) which purports to adopt the Ruckelshaus holding into a revision of 43 CFR 4.1290 and 4.1294. Since, as petitioners point out, the proposed revision was later withdrawn upon reconsideration of the matter by the Office of Hearings and Appeals, 49 FR 17043 (Apr. 23, 1984), this argument must be rejected. 2/ The primary issue framed by the opposing contentions now before the Board is, therefore, whether petitioners' success in the St. Clair appeal

2/ The withdrawn rule sought to apply the rationale of the Ruckelshaus opinion to section 525(e) of SMCRA by embodying it in 43 CFR 4.1290 and 4.1294. The amended rule was to have provided:

"§ 1290 Who may file.

"Any person who prevails in whole or in part, achieving at least some degree of success on the merits, may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in --

* * *

"(a) A final order being issued by administrative law judge; or

"(b) A final order being issued by the Board.

"2. The introductory language of § 4.1294 is revised to read as follows:

"§ 4.1294 Who may receive an award.

"Subject to the condition that the awardee shall have prevailed in whole or in part, achieving at least some degree of success on the merits, appropriate costs and expenses including attorney's fees may be awarded --" 49 FR 4403 (Feb. 6, 1984)."

The rule was proposed to be given both past and future effect, thus, the explanatory text provided by the Department stated this conclusion:

"Because the proposed rules are based on the unambiguous decision of the Court in Ruckelshaus, OHA intends to make the final rules effective as of the date this Proposed Rule is published in the Federal Register, and applicable to both pending and future proceedings. For this reason, petitioners under 43 CFR 4.1290-4.1296 are advised to review carefully, and to conform with, the decision of the Court in Ruckelshaus in any petition filed for an award of attorneys' fees under section 525(e) of SMCRA."

49 FR 4402 (Feb. 6, 1984) (emphasis in original).

was sufficient to entitle them to an award of attorney's fees as claimed, in whole or in part, under provisions of SMCRA and implementing Departmental regulations. This threshold question concerning the nature of the standard to be applied in award of attorney's fees under provision of section 525(e) of SMCRA and 43 CFR 4.1290-4.1294 must first be determined before consideration is given to the reasonableness of the amounts claimed.

The relevant statute, section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1982), provides for award of costs by the Secretary:

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper. ^{3/}

^{3/} This provision originated in the House of Representatives version of the bill which later became SMCRA. Commenting upon this provision of the law, the House Report observes:

"Section 525(e) provides for the award of costs, including attorneys' and expert witness fees, in the discretion of the Secretary. This section gives the Secretary authority to award attorneys' fees to compensate participants in the administrative process. The subsection does not require that the proceedings result in the finding of a violation nor does the fact that the Government was a party in an adjudicatory proceeding, or had caused the proceeding to be initiated, prevent an award under the terms of the subsection. It is the committee's intention that this subsection not be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens." (H.R. Rep. No. 218, 95th Cong., 1st Sess. 131 (1977).

"Good faith," however, is not a controlling factor in determining whether a claimant for attorney's fees merits an award. Nadeau v. Helgemoe, 581 F.2d 275, 280 (1st Cir. 1978). As the court observed in Nadeau at page 280:

"Attorney's fees are not designed merely to penalize defendants, see Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir. 1971), but to encourage injured individuals to seek judicial relief, Newman v. Piggee Park Enterprises, Inc., *supra*, 390 U.S. at 402, 88 S.Ct. 964. From this latter policy

Section 525(e) is implemented by the regulations codified at 43 CFR 4.1290(a)(2) and 4.1294(b) which provide in pertinent part:

(a) Any person may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in --

* * * * *

(2) A final order being issued by the Board.

and

Appropriate costs and expenses including attorneys' fees may be awarded --

* * * * *

(b) To any person other than a permittee or his representative from OSM, if the person initiates or participates in any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues.

In Ruckelshaus, supra, the Supreme Court, construing section 307(f) of the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982), providing for judicial review of the administrator's actions, held that "absent some degree of success on the merits by the claimant" an award of attorney's fees under the statutory grant of authority contained in the Act is not permitted. In Ruckelshaus the petitioners for attorney's fees had failed to obtain relief upon any of their claims on the merits. Footnote 1 of the Court's opinion,

perspective it makes no difference whether plaintiff's suit yields favorable out of court results because a good faith defendant is brought to understand the illegality of his conduct and alters his behavior or because an unrepentant defendant grudgingly signs a consent decree to avoid continued litigation expenses in a lost cause. The key issue is the provocative role of the plaintiff's lawsuit, not the motivations of the defendant."

103 S. Ct. 3275, states that the Court's interpretation of section 307(f) of the Clean Air Act is to be considered equally applicable to provisions of 16 enumerated statutes permitting award of attorney's fees, including SMCRA, section 520(d), which provides for judicial review in citizens' suits. The Court's opinion establishes that to be entitled to an award of attorney's fees under the enumerated statutes, a party must first prevail upon a substantial matter at issue in a controversy brought under the Act. The participation as a principal party or a win on a procedural point are not sufficient under the announced standard to merit any payment. 103 S. Ct. at 3279 n.9.

Although section 520(d) of SMCRA was not directly controlling in St. Clair since it provides for attorney's fees awards in cases involving judicial as distinguished from administrative review, it would be disingenuous to attempt to ignore the effect of the Ruckelshaus decision upon this application for award. Ruckelshaus clearly contemplates the Court's holding should apply in cases involving awards of attorney's fees under the 16 statutes which the Court finds to be "identical" to the Act construed by the opinion. Id. at 3275. Additionally, Ruckelshaus pointedly observes that another provision of the Clean Air Act, section 304(d) providing for "citizen suits" is to be construed in the same manner as section 307(f) of the Act, which allows costs only in those cases where judicial review of acts of the administrator has been sought.

Section 307(f), construed by Ruckelshaus, provides that "[i]n any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." The citizen suit provision of section 304(d)

which the Court finds entitled to similar effect, provides that "[t]he court, in issuing any final order * * * may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." In the SMCRA section relevant here, section 525(e), from which the Secretary's authority to award attorney's fees is derived, the word "appropriate" is not used: Instead, the Secretary is directed to make awards which are "proper." No distinction is made, however, by section 525(e) between the exercise of this judgment by the Secretary or the exercise of the same discretion by a reviewing judge. Both court and Secretary are required by section 525(e) to make such awards as each "deems proper." Further, the words "proper" and "appropriate" share equivalent meanings according to the Ruckelshaus opinion, which reasons at page 3276:

It is difficult to draw any meaningful guidance from § 307(f)'s use of the word "appropriate," which means only "specially suitable: fit, proper." Webster's Third International Dictionary. Obviously, in order to decide when fees should be awarded under § 307(f), a court first must decide what the award should be "specially suitable," "fit," or "proper" for. Section 307(f) alone does not begin to answer this question, and application of the provision thus requires reference to other sources, including fee-shifting rules developed in different contexts. As demonstrated below, inquiry into these sources shows that requiring a defendant, completely successful on all issues, to pay the unsuccessful plaintiff's legal fees would be a radical departure from longstanding fee-shifting principles adhered to in a wide range of contexts. [Emphasis in original; footnote omitted.]

The opinion goes on to conclude that in the absence of a contrary expressed intention by Congress, the statutory authorization for payment of attorney's fees cannot be used as a device "to depart from the long-established rule that complete winners need not pay complete losers for suing them." Id. at 3279.

Petitioners take the position that administrative appeals before the Department should, however, be treated differently, especially in view of the Departmental rules which establish that the standard for payment is whether a party has made a "substantial contribution" to a "determination."

Preceding passage of SMCRA, Congressmen Seiberling and Udall engaged in colloquy concerning, among other things, the relationship between the attorney fee award provisions of sections 520(d) and 525(e):

Mr. SEIBERLING. Are there any standards or guidelines for the Secretary to use to determine which persons are to be awarded costs?

Mr. UDALL. The Secretary would have broad discretion. It would normally be appropriate for him to award costs to a person whose participation has contributed substantially to a full and fair consideration of the facts and issues involved in the proceeding, taking into account, where appropriate, the financial resources of the participant. In general, an award would be governed by the same kinds of considerations as would govern a court in a court action, as outlined in the last two paragraphs of page 90 of the committee report. [Emphasis added.]

123 Cong. Rec. 12,877 (1977).

Page 90 of the report cited by Congressman Udall does not explicitly concern section 525(e); rather it speaks to section 520. H.R. Rep. 218, 95th Cong., 1st Sess. 90 (1977). However, reference to the analysis of section 520 in connection with the interpretation of section 525(e), in the emphasized text, evinces congressional intent that section 525(e) should be interpreted and applied in the same manner as section 520(d).

Other Federal decisions indicate that the rule respecting payment of attorney's fees under statutory grants of authority contained in Acts of

Congress should be reasonably consistent of application, because it is the nature of the statutory grant itself, rather than the forum in which the attorney's fees may be incurred, that is controlling. For example, in Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933 (1983), the Court emphasizes the importance of success in relation to an award of attorney's fees based upon a statutory grant of authority to award fees. In Hensley, an opinion dealing with an award under the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (1982), the Court found that the amount of an award to a partially successful litigant must reasonably reflect the degree of success obtained by him. The Hensley Court, while dealing with a different statutory provision than appears in section 525(e) of SMCRA, states the nature of the initial inquiry to be made in cases where awards of fees are sought under statutory authorization at page 1939:

A plaintiff must be a "prevailing party" to recover an attorney's fee under § 1988. The standard for making this threshold determination has been framed in various ways. A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (CA1 1978).^{8/} This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

8. See also Bushe v. Burkee, 649 F.2d 509, 521 (CA7 1981), cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1982); Sethy v. Alameda County Water Dist., 602 F.2d 894, 897-898 (CA9 1979) (per curiam). Cf. Taylor v. Sterrett, 640 F.2d 663, 669 (CA5 1981) ("[T]he proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought"). [Footnote 7 omitted.]

The nature of cases which involve a statutory authorization for attorney's fees is further analyzed in Hensley in a separate opinion by Justice Brennan,

concurring in part and dissenting in part, which explains the basic purpose of these statutory grants:

In Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 269, 95 S.Ct. 1612, 1627, 44 L.Ed.2d 141 (1975), this Court held that it was beyond the competence of judges to "pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others." Congress, however, has full authority to make such decisions, and it responded to the challenge of Alyeska by doing the "picking and choosing" itself. Its legislative solution legitimates the federal common law of attorneys fees that had developed in the years before Alyeska by specifying when and to whom fees are to be available.
2/

2. Because of this selectivity, statutory attorney's fee remedies such as those created by § 1988 and its analogues bear little resemblance to either common-law attorney's fee rule: the "American Rule," under which the parties bear their own attorney's fees no matter what the outcome of a case, or the "English Rule," under which the losing party, whether plaintiff or defendant, pays the winner's fees. They are far more like new causes of action tied to specific rights than like background procedural rules governing any and all litigation. This fundamental distinction has often been ignored. [Emphasis supplied; footnote 1 omitted.]

103 S. Ct. at 1944-45.

Considering, then, petitioners' claim for award of costs as a "new cause of action tied to specific rights," the threshold inquiry in this case should be whether petitioners have, by the results reached in this Board's decision in St. Clair, obtained a right to claim payment of fees from the Department. Phrased in the language of the applicable Departmental regulations, the question is properly stated in terms of whether petitioners have, by achieving a measurable success, made a "substantial contribution" to the resolution of the issues as determined by the decision in St. Clair.

As the Court's opinion in Ruckelshaus observes, the court decisions have not been uniform in establishing standards for payment of attorney's fees based upon statutory authority. Ruckelshaus approaches this problem using the rubric "prevailing party" to consider the basis for awards generally. After considering numerous cases which apply the "prevailing party" standard differently, this conclusion concerning the observed disparity in making awards is reached:

These various interpretations of the "prevailing party" standard provide a ready, and quite sensible, explanation for the Senate Report's discussion of § 307(f). Section 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties -- parties achieving some success, even if not major success. ^{9/} Put differently, by enacting § 307(f), Congress intended to eliminate both the restrictive readings of "prevailing party" adopted in some of the cases cited above and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed "essentially" on "central issues."

9. Of course, we do not mean to suggest that trivial success on the merits, or purely procedural victories, would justify an award of fees under statutes setting out the when "appropriate" standard. Rather, Congress meant merely to avoid the necessity for lengthy inquiries into the question whether a particular party's success was "substantial" or occurred on a "central issue."

103 S. Ct. at 3279.

While the Ruckelshaus opinion is persuasive in the context of this petition, obviously it does not directly construe section 525(e) or a similar provision of the Clean Air Act. The provision of the Act before the Ruckelshaus Court concerned only the award of fees in judicial proceedings. As was observed by Congressman Udall, supra, many of the same considerations

must be given to awarding fees in administrative proceedings as are material to such awards for the conduct of cases in court. Much, however, that takes place at the administrative level will involve different work, much of it of an informal nature, to which different standards of judgment must be applied. Quasi-judicial proceedings before the Interior Boards of Appeal will be easier to measure by the standard announced in Ruckelshaus, for example, than some work done before the Bureaus and Offices of the Department. Because of the preliminary nature of much that is done before the executive can act, it is difficult to declare as a general proposition that the Ruckelshaus rubric requiring "success on the merits" will have any value in establishing standards for costs awards in administrative proceedings.

The sense of the Ruckelshaus decision, however, which requires that a party achieve some part of a declared objective by the means of legal action before becoming entitled to an award, is now clearly relevant to decisions by the Secretary in cases arising under 43 CFR 4.1290 and 4.1294. Obviously, as is always true, the facts of each case must be considered before a decision can be formulated concerning the degree of success actually achieved and whether, in each case, an award would be reasonable. For example, in Council of the Southern Mountains, Inc. v. Watt, No. 82-45 (E.D. Ky. Oct. 18, 1982), an unreported memorandum decision construing SMCRA section 525(e), the district court found that citizens' complaints by Council had resulted in administrative activity by OSM. The court found that as a result Council's contributions to certain orders issued by OSM were substantial and ordered compensation to be made following necessary fact finding by the Department into the reasonable amount of the costs incurred (District Court Memorandum Opinion at 6). Obviously, the Secretary's task in deciding what constitutes

a "substantial contribution" by applicants for relief in administrative proceedings cannot be so easily described or limited, though the manner in which awards of fees under statutory authority are made by the courts is instructive. 4/

[1] In this case, petitioners stated three claims for relief in which they sought Federal inspection, enforcement, and investigation of alleged SMCRA violations by Island Creek Coal Facility #25 causing contamination of their water supply. None of the sought-after relief was obtained from OSM. While a decision on appeal affirming OSM was given on the merits it was, according to a stated complaint at page 4 of their petition, wholly unsatisfactory to petitioners. Despite this circumstance, petitioners now claim to see a procedural victory in the form of an adverse decision on the merits, the rendering of which is characterized by them to be "perhaps the most significant legal issue before the Board" on appeal (Petition at 5). While a decision on the merits of their appeal was undoubtedly a desired feature of the final decision sought by petitioners, it was never, until now, their declared goal. 5/

If any proceeding before this Department which results

4/ The dissenting opinion of the Chief Administrative Judge in Council of the Southern Mountains, Inc. v. OSM, 88 I.D. at 399-400, points out that the apparent intent of SMCRA is to permit award of costs and expenses, if reasonable and proper, regardless of the office or bureau of the Department where a party may seek to prosecute an administrative action for relief. See also the supplementary information supplied at the time of publication of 43 CFR 4.1290-4.1294 at 43 FR 34386 (paragraph 4) indicating participation in "any proceeding" may provide a basis for award of costs. 5/ It is not unreasonable, so far as proceedings before this Board are concerned, to speak of a decision "on the merits." Proceedings before the Board tend to become formal, and, in this case, the issues on appeal were framed by extensive briefs in addition to the administrative record developed by the agency whose action was under review. The appeal work before this Board, however, is not the only Departmental action for which petitioners seek an

in a decision may be considered to have been the result of a substantial contribution by a party seeking relief from the Secretary, then the establishment of a regulatory standard that only a "substantial contribution" merits payment of attorney's fees becomes meaningless. Petitioners' argument that the provisions of 43 CFR 4.1290 and 4.1294 are "broader" than the provision of section 307(f) of the Clean Air Act construed by Ruckelshaus is probably correct. Quite clearly, however, reviewed in the light of recent court decisions the regulatory provisions of 43 CFR 4.1290-4.1294 require some showing be made that petitioners achieved some degree of success through their official dealings with the Department. It is not unreasonable to require, within the regulatory scheme here applicable, that petitioners show they have achieved some of the benefit they sought in bringing this action before the Department. See, e.g., Nadeau v. Helgemoe, supra.

Petitioners argue that a water treatment facility is now to be constructed by the State for petitioners' community. There is, however, no apparent connection between their action brought before the Department and this proposed action by the State, though petitioners suggest a connection "must" exist (Petition at 7). Why this is so is simply not explained by them. The record does not establish any connection between petitioner's complaint and current plans for a new water facility.

award. The bill presented with the petition is also for work done before OSM and the West Virginia administrators, and includes travel to West Virginia and expenses incurred while counsel visited the Island Creek Coal Facility #25 plant and vicinity. The reasonableness of these charges is not addressed by this opinion, because of the result reached. Certainly, however, as the district court decision in Council points out, work done prior to appeal to this Board is, in a proper case, compensable. See also note 4.

[2] Petitioners also argue that their complaint and the proceedings had before the Department were in some way instructive to the State and OSM, which are said to have "gained a new appreciation" for citizen complaints as a result of petitioners' appeal (Petition at 6). While this Board would hesitate to deny that the Government agencies concerned were capable of learning from experience, a desire to instruct these two agencies was never a stated objective of the citizen's complaint in this case. The reason for the fragmented decision in St. Clair was a confused and partial record which resulted, quite simply, in a failure of petitioners' case. As the Solicitor's brief points out, the contamination of petitioners' water supply and the operation of the Island Creek Coal Facility #25 were never connected. Petitioners were denied all the relief sought in their complaint. No Federal inspection was ordered, no enforcement action was required by OSM, and no investigation by OSM of the West Virginia program was made. It is apparent from the record of this appeal that whatever success petitioners achieved towards their stated goal of an unpolluted water source was the result of other negotiation by them or other action taken on their behalf. Their citizen's complaint before the Department came to nothing. They did not appeal from the adverse determination of their claim. As a result, the decision against them became final in all respects. Consequently, their participation before the Department cannot be found to be "substantial," in the sense in which that word is used in 43 CFR 4.1294(b). It has not been shown to have operated as a catalyst to effect changes sought in their community water system or to have promoted favorable agency action tending to achieve that result. (See, e.g., Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 429 (8th Cir.1970), where the court, though refusing a sought-after injunction, found plaintiff's action had prompted action by plaintiff's

employer in furtherance of the relief claimed.) Because the Board finds petitioners failed to make a substantial contribution to the determination reached in this case, and failed to achieve substantial success in the prosecution of their claims before the Department, arguments addressed to the reasonable amount of costs and the propriety of the methods of computation are not reached.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals, 43 CFR 4.1, the petition for award of costs and expenses is denied.

Franklin D. Arness
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

R. W. Mullen
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

The putatively simple question presented by this appeal is whether appellants have shown their entitlement to an award of attorneys' fees under section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1982), for work performed in the course of litigating the appeal decided in Donald St. Clair, 77 IBLA 283, 90 I.D. 496 (1983). In order to decide this question, however, it is, as the majority opinion suggests, first necessary to determine the standard to be applied in determining entitlement. In this regard, it must be noted that the statute simply authorizes assessment of such costs and expenses as the Secretary "deems proper." In adopting procedures to implement this statutory mandate, the Department promulgated a regulation which, inter alia, authorized an award upon issuance of a final order by this Board to any person (other than the permittee or his representative) "if the person initiates or participates in any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues." 43 CFR 4.1294(b) (emphasis supplied).

It seems reasonably clear from a reading of the existing regulation 1/ that there is no requirement that an individual prevail on any issue as a pre-condition to an award of fees from the Office of Surface Mining Reclamation

1/ The suggestion by counsel for OSM that we should apply a proposed regulation in derogation of one actually in effect at the time the cause of action arose cannot be credited. Regulations are relevant only when they are in effect, not before they are promulgated or after they have been repealed. See Smelser v. BLM, 75 IBLA 44 (1983).

and Enforcement (OSM). On the contrary, the only regulatory requirement is that the individual must "make a substantial contribution" to the determination of the issues involved in a specific case. Thus, the Board's holding herein that an individual must show some quantum on success on the substantive issues involved must be read as a repudiation of the approach formerly undertaken by the Department in determining entitlement to attorneys' fees, as presently codified in the regulations. The initial question, then, is whether the Board is correct.

In this regard, it is my view that the effect of the United States Supreme Court decision in Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983), is to invalidate the instant regulation to the extent it purported to invest the Department with authority to grant attorneys' fee awards in those instances where the applicant had failed to preponderate on any substantive issue. Initially, it must be granted that the Ruckelshaus decision, by its own terms, merely determined the scope of section 520(d) of SMCRA. ^{2/} Thus, it is necessary, in the first instance, to determine whether the interpretation of that provision controls the interpretation of section 525(e) of SMCRA.

^{2/} The dissent's attempt to discount the Ruckelshaus holding as merely dictum runs afoul not only of the Court majority's express declaration that its interpretation of section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f) (1982), "controls" the construction of the term "appropriate" in, inter alia, section 520(d) of SMCRA (id. at 3274, 3275-76 n.1), but ignores, as well, the dissenters' criticism of the majority for failing to examine the legislative history of each of the 16 enumerated statutes prior to concluding that all 16 statutes limited fee awards to prevailing parties. Id. at 3286 n.13 (Stevens, J., dissenting).

Facially, the language of the two provisions is notably similar. Thus, section 520(d) provides, in relevant part, that "[t]he court * * * may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." Section 525(e) of SMCRA provides:

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.

I think it important to emphasize that, while section 520(d), by its nature, applied only to court suits and compensation which might fairly be provided to citizens bringing suit, section 525(e) actually covers both administrative and judicial proceedings. There is, however, no distinction in the language of section 525(e) between the standard to be applied by a court and that to be utilized by the Secretary. Both are authorized to award costs where they deem it "proper." Thus, absent a showing that Congress intended different standards to apply to judicial grants of costs vis-a-vis administrative determinations within the confine of section 525(e), the result of a holding that section 525(e) did not require "some degree of success" on the merits for administrative grants of costs and expenses would be to establish a bifurcated rule for awarding costs in judicial proceedings initiated under SMCRA. Thus, a citizen suing under section 520(d) must, consistent with Ruckelshaus,

show "some degree of success" to obtain costs before the court while an individual proceeding under section 525(e), before the same court, need not make such a showing. Conceptually, it is difficult to see why Congress would make such a distinction. Functionally, I do not believe that it so intended.

First, with respect to the question whether Congress intended differing standards to govern the awards of costs in judicial vis-a-vis administrative contexts under section 525(e), I would suggest that the fact that authorization for the award of costs is contained in a single sentence under the same rubric (as the court or Secretary "deems proper") would seem to foreclose any argument that separate standards were to be invoked depending upon the forum of review. Nor does anything in the legislative history even remotely suggest such an intent. Indeed, the legislative history set forth both in the majority and the dissenting opinions relating to section 525(e) contains not a shred of evidence that Congress thought it was enacting two different tests for the award of costs under section 525(e).

This being the case, the issue then resolves itself into a consideration of whether or not Congress intended to establish a different standard for suits brought under section 520(d) and those appeals brought under section 525(e).

The dissent raises many important considerations which might have impelled Congress to obviate the need for an individual to show "some degree of success" on the merits as a precondition for an award of costs. The problem, however, is that these considerations apply equally to actions brought

under either section 520 or section 525. The Supreme Court in Ruckelshaus clearly held that Congress had not dispensed with the requirement that "some degree of success" on the merits be achieved insofar as section 520(d) was concerned. To the extent that the dissent is premised on an analysis that Congress did so intend, it becomes necessary to show a Congressional intent to differentiate between section 520(d) and section 525(e), since the Supreme Court has definitively established that section 520(d) subsumes a requirement that the party seeking an award of costs show "some degree of success." Not only do I feel that the dissent has not succeeded in establishing such a bifurcated intent, the quoted exchange between Representatives Udall, Bauman, and Seiberling, to my mind, undercuts the existence of such a possible dichotomy.

Thus, as the majority points out, in discussing the scope of section 525(e), Representative Udall expressly referenced part of the legislative history of section 520(d) as indicative of the kinds of considerations which would govern awards. Considering all of the legislative history to this point, I think it clear that Congress intended the same standards to apply in adjudications under either section and thus, the Supreme Court's decision in Ruckelshaus on the scope of section 520(d) must be considered equally controlling as to the scope of section 525(e). To the extent that the dissent contends otherwise, I would suggest its real argument is not with this Board but with the Supreme Court. 3/

3/ I do not mean to suggest that the fact that the Supreme Court has decided an issue means, ipso facto, that it has decided the issue correctly. As Justice Jackson noted over a quarter of a century ago: "We are not final

Having said this, however, I find it impossible to subscribe to the majority view that the Ruckelshaus requirement that there be "some degree of success" as a precondition to an award of attorneys' fees can be engrafted onto the present regulatory language as an added fillip. Judge Irwin's analysis of the regulatory history shows, beyond peradventure, that the drafters of the regulation did not intend the regulation to require "some degree of success" on the merits as a prerequisite for obtaining an award of costs. In eschewing the "some degree of success" standard, the regulation chose instead to require the party seeking the award to establish that he or she "made a substantial contribution to a full and fair determination of the issues." 43 CFR 4.1294(b). It seems clear to me that, to the extent that this regulatory scheme rejected the imposition of a requirement that a party show "some degree of success on the merits," the regulations were contrary to the statute as they authorized the disbursement of Government funds in excess of the Congressional mandate, as effectively interpreted in Ruckelshaus. Such regulations cannot stand.

While it has been long recognized in this Department that a duly promulgated regulation has the force and effect of law and is, therefore, binding even on the Department (McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955)), the binding effect of the regulation is operative only where the regulation

fn. 3 (continued)

because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result). But, regardless whether we view a decision of the Supreme Court as correct or erroneous, we are nonetheless bound to follow it in our adjudications.

has been adopted pursuant to statutory authority. Thus, as this Board has recognized, where a regulation lacks any statutory basis it can be accorded no validity whatsoever. See Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981). It is impossible to read Ruckelshaus without coming to the conclusion that, to the extent 43 CFR 4.1294(b) authorizes an award of attorneys' fees to a claimant in the absence of any degree of success on the merits, it trespasses beyond the proper scope of SMCRA's statutory mandate. Thus, regardless of the exact language employed in the regulation, this Board may only authorize an award if it determines that appellant had "some degree of success on the merits." ^{4/}

As noted above, however, the majority, ignoring that the present regulation was the product of a knowing rejection of the "some degree of success" standard, and, thus, simply not in accord with the statutory mandate, attempts to "save" the present regulation by emending it to include in addition to a requirement that the party show "a substantial contribution" another requirement that the individual show "some degree of success on the merits." This, to my mind, is regulation writing in its most pristine form and, as such, not properly within the scope of this Board's authority.

^{4/} The dissent's suggestion that the voiding of the instant regulation runs afoul of the decision in McKay v. Wahlenmaier, *supra*, must be rejected out-of-hand. That case dealt with regulations which had been lawfully promulgated pursuant to congressionally delegated authority. Where, as here, a regulation is promulgated beyond the scope of the authority of an agency, such regulation does not have the force and effect of law, but rather is a nullity, not only without the Department, but within as well. See Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979); United States v. Mississippi, 578 F. Supp. 348, 352 (S.D. Miss. 1984); Continental Oil Co., 70 I.D. 473 (1963).

Can it be contravened that 43 CFR 4.1294(b) as it has now been interpreted bears scant resemblance to the regulation promulgated by those officials of the Department in whom such authority is vested? Did they intend to write the regulation the majority now promulgates? Of course not.

It may be that a regulation along the lines fashioned by the majority may, one day, commend itself to those charged with its issuance. I would submit, however, that it is for them to decide this question and not this Board. The regulation, as written, does not comport with the Supreme Court's analysis in Ruckelshaus. Thus, that regulation is of no force or effect. It is beyond our power to "save" the regulation by "changing" it.

We are, therefore, faced with a regulatory lacuna as there is no longer a valid regulation occupying the field. In such a situation, it is my view that we have no choice but to determine appellants' entitlement to an award of fees based on the simple standard enunciated in Ruckelshaus that they must show "some degree of success on the merits" of their claim.

This having been said, however, it becomes necessary to examine the question whether appellants did achieve "some degree of success on the merits" so as to permit an award of fees. While appellants admit that they did not agree with certain aspects of the Board's decision, 5/ they suggest that

5/ Appellants, however, have not sought reconsideration on any of these points. Thus, whether or not they agree with the Board's resolution of these issues is a matter of no moment. The question is whether the ruling which the Board actually issued vindicated appellants' claim to some extent, not whether the ruling which appellants sought would have done so.

"having rendered a decision on the merits of appellants' claims the Board necessarily agrees with appellants on their claim that they need not exhaust their state administrative remedies before challenging OSM's failure to act." This, appellants suggest, was the most important legal issue before the Board.

The majority rejects this ground for recovery, noting that any such victory as may have been obtained on this issue was purely procedural in nature. It is difficult to quarrel with the majority on this point. Regardless of the importance which appellants may ascribe to a ruling that it is not necessary to exhaust state administrative remedies as a precondition of obtaining review of the refusal by OSM to conduct a Federal inspection, the simple fact remains that a determination as to the availability of review in a specific forum is intrinsically distinguishable from a finding that appellants have shown "some success on the merits of an appeal." In other words, appellants can scarcely contend that the reason they appealed from the adverse decision of the OSM Director was simply to establish that they could appeal. On the contrary, appellants filed their appeal for the express purpose of obtaining a reversal of the decision of the OSM Director not to conduct a Federal inspection. This relief they did not obtain. Appellants should not be heard to argue that they have established their entitlement to an award for attorneys' fees simply because the Board rejected their claim on its merits rather than dismissing their appeal out of hand.

Moreover, regardless of the amount of effort which appellants and counsel for OSM expended in briefing the issue of whether exhaustion of state

remedies was a prerequisite to Board review, I feel constrained to suggest that the question was one which was fairly simple to resolve. Indeed, not one of the three opinions entered in the case saw fit to even mention OSM's contention and, in this regard, the unanimous silence is eloquent testimony of how poorly based this Board found OSM's contentions to be. ^{6/} Our rejection of OSM's position could not fairly serve as a basis for an award of fees under section 525(e) of SMCRA, even were we able to apply the regulatory standard that a participant must show a substantial contribution in the adjudicative process.

Thus, the ambit of our inquiry is properly limited to an analysis of whether appellants achieved some success on the merits of their claim, i.e., that the OSM State Director should have ordered a Federal inspection of Island Creek Coal Preparation Facility #25. There were two independent elements of this claim. First, appellants suggested that, since the State Director had declared in his March 3, 1982, letter to the West Virginia Department of Natural Resources (DNR), that he had "reason to believe that an imminent danger exists in Ragland," the OSM State Director should have, at that time, ordered a Federal inspection. Second, appellants argued that, notwithstanding the failure of the OSM State Director to initially order a Federal inspection, the inspection conducted by DNR was so fatally defective

^{6/} One can only speculate as to the reason the Interior Board of Surface Mining and Reclamation Appeals (IBSMA) saw fit to grant oral argument on this point. However, the fact that IBSMA may have erred on the side of excessive caution so that all points of view, regardless of how implausible, might be fully explored should not give rise to any independent right of compensation for appellants. See Council of Southern Mountains v. OSM, 3 IBSMA 44, 61, 88 I.D. 394, 403 (Frishberg, J., dissenting in part).

that a Federal inspection should have been ordered by the State Director under 30 CFR 842.11(b)(1)(ii)(B).

In attempting to determine whether appellants met with some degree of success on the merits of the appeal, it quickly becomes obvious that the absence of a majority opinion confuses an already complex matter. In such circumstances, I think it is necessary to compare the approach of all three opinions to discern what underlying rationale controlled the ultimate disposition of the appeal.

Insofar as the first issue was concerned, the lead opinion, authored by Judge Henriques, found that the language used by the State Director in the March 3 letter was "merely a recitation (albeit, perhaps an ill advised one) of the language presented in the complaint" and did not represent a personal conclusion of the State Director that he had reason to believe an imminent danger existed. Id. at 297, 90 I.D. at 503. Judge Arness, in his concurring opinion, was critical of the lead opinion's interpretation of the March 3 letter, suggesting that OSM's argument before the Board was based on "the clarity of hindsight." Id. at 303, 90 I.D. at 507. This opinion noted, however, that subsequent developments show that any conclusion of the State Director on the existence of an imminent danger was not shown to be founded in fact. Id. For myself, I was unconvinced that any error whatsoever occurred when the OSM State Director wrote that he had reason to believe an imminent danger existed, as it was my view that the expression utilized by the State Director was a term of art mandated by the regulations.

Id. at 306-08, 90 I.D. at 508-09. Thus, two opinions rejected appellants' contention that the terminology used by the OSM State Director was inconsistent with his failure to order an immediate inspection while the third opinion suggested that, even though the language might have been inconsistent with his failure to act, the facts necessary to support a finding by the State Director that an imminent danger existed were not shown to exist in this record. It is clear that appellants did not prevail on the first ground of their complaint.

Concerning the second argument, the crux of contention centered on the question whether appellants' March 23 request for informal review provided sufficient information for OSM to have reversed its earlier decision. The lead opinion expressed the view that the analysis of the OSM Director, which accompanied his refusal to order a Federal inspection, showed that OSM had carefully considered all of the factors and that the record supported the conclusion that the water problems at Ragland could not be linked to Island Creek's operations. Id. at 301, 90 I.D. at 505. Judge Arness did not directly deal with this issue, beyond noting his disagreement with the lead opinion's assertion that "OSM had done all it reasonably could to resolve the problem." He declined to order a Federal inspection, however, on the grounds that "[s]ince the record indicates the investigation and cooperation between the various agencies is continuing, there seems little point, under the circumstances, to require a Federal inspection now." Id. at 304, 90 I.D. at 507-08.

My own review of the record led me to conclude that appellants had established that there were marked deficiencies in the DNR inspection which had been conducted in response to the filing of the citizen's complaint. On the other hand, I, too, concurred in the view, that, considering the on-going activities of both the State and Federal Government, no public benefit would be served by ordering a Federal inspection. It seems clear to me that two of the Judges who decided this matter declined to order a Federal inspection because of the unlikelihood it would be beneficial given the situation then existing concerning Ragland's water problems. In effect, subsequent activities by State and Federal regulatory agencies had basically served to vitiate the utility of appellants' requested relief.

However, I do not believe that the mere fact that appellants were unsuccessful in obtaining the requested relief can be absolutely preclusive on the question whether they have shown entitlement to attorneys' fees, even under the Supreme Court's Ruckelshaus decision. As the Court was careful to note, where the action of citizen complainants in pursuing their claim resulted in a "voluntary" abatement of the objected conduct, fees may be awarded even though no final judgment favorable to the complainants was ever entered by a court. Ruckelshaus v. Sierra Club, supra at 3278 n.8. The reason for this, of course, is that a citizen complainant should not be deprived of reasonable fees and costs incurred in filing an action which leads to amelioration of a perceived violation merely because an agency chose to correct the condition during the pendency of litigation rather than after the entry of an adverse judgment. To the extent, therefore, that ameliorative

action, even though in one sense it be deemed "voluntary," is, in fact, a direct result of allegations raised in a citizen's complaint, such action must be considered within the framework of the complainants' original contentions in order to ascertain whether or not they have achieved some success on the merits of their complaint.

The ultimate question, therefore, is whether the actions of the agencies which were deemed to preclude the relief sought by appellants in our first decision were taken as a result of the citizens' complaint herein. Upon close examination of this question, I have concluded that such actions as were undertaken, while compatible with certain desires of appellants, were substantially the result of independent considerations rather than a result of appellants' complaint.

The real gravamen of appellants' complaint was that Island Creek Coal Company was responsible for contaminating Ragland's water supply through discharging water containing polyacrylamides into an abandoned underground mine. That Ragland's water supply was contaminated was never in doubt; that Island Creek's activities were, in some way, responsible has yet to be established. Nothing which appellants have submitted has served to establish a linkage between Island Creek's discharge and Ragland's water problems. Our refusal to grant appellants any relief was not occasioned by any action of State and Federal agencies which established such a connection, but rather was the result of independent actions by those agencies attempting to clear up Ragland's water problems, some of which actions had been initiated prior

to the filing of appellants' complaint, regardless of the source of the problem.

The record before the Board is as devoid of proof of appellants' basic allegation that Island Creek was responsible for the water contamination now as it was when the petition for review was denied in 1982. While I have expressed my personal view in our earlier decision that DNR did not provide the type of inspection contemplated by the Act, I cannot ignore the reality that not only have appellants failed to show that Island Creek was responsible for Ragland's problems, but they now admit that a Federal inspection (which might establish that fact) would not be beneficial. I do not see how appellants can, consistent with Ruckelshaus v. Sierra Club, supra, maintain their petition for an award of fees under the facts of this case.

Accordingly, for the reasons expressed herein, I concur with the denial of the petition for an award of fees.

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE HARRIS CONCURRING IN THE RESULT:

The key question presented by this case is what is the effect of Ruckelshaus v. Sierra Club, 463 U.S. ___, 103 S. Ct. 3274 (1983), on the Board's disposition of the petition for award of costs and expenses. The majority holds that Ruckelshaus imposes an additional requirement on petitioners beyond the regulatory requirement of 43 CFR 4.1294(b). On the other hand, Judge Burski finds that the Ruckelshaus standard supplants the regulation, while Judge Irwin concludes Ruckelshaus has no effect, and the case is controlled by the regulatory standard of substantial contribution.

My position is that the Ruckelshaus case neither adds a requirement nor negates the regulation. Although, as pointed out by Judge Irwin, Ruckelshaus interprets a different word in a different statute, I am not willing to dismiss it as having no effect as he has done. Likewise, there is no need to rush to accept it. However, to the extent Ruckelshaus represents the recent opinion of the highest Court on the subject of attorneys' fee awards, it must be scrutinized closely to determine if it provides useful guidance.

In section II of his dissenting opinion, Judge Irwin quotes from the legislative history of the Federal Water Pollution Control Act Amendments of 1972 which stated that courts could award fees where it was in the public interest. 1972 U.S. Code Cong. & Ad. News 3747. It was further stated:

The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award costs of

litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

Id. Judge Irwin subsequently concludes, "'Substantial contribution to full and fair consideration,' like 'in the public interest,' and 'meritorious' implies that something less than 'some success on the merits' is sufficient for an award of fees in an administrative proceeding under the surface mining act." (Emphasis in original.) Judge Irwin considers substantial contribution to be a different and less stringent standard than the Ruckelshaus standard.

In Ruckelshaus, supra at 3278 n.8, the Court interpreted language similar to that quoted above

1/ and stated:

The approval of fee awards in "legitimate" actions offers respondents little comfort: "legitimate" means "being exactly as proposed: neither spurious nor false," which does not describe respondents' claims in this case. Respondents contend, however, that Congress intended the term "appropriate" to encompass situations beyond those mentioned in the legislative history, and, therefore, that the term reaches even totally unsuccessful actions. This is, of course, possible, but not likely. Congress found it necessary to explicitly state that the term appropriate "extended" to suits that forced defendants to abandon illegal conduct, although without a formal court order; this was no doubt

1/ That language was from a 1970 Senate report. The Court quoted from it as follows:

"The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970)." (Emphasis in original.)

viewed as a somewhat expansive innovation, since, under then-controlling law, see infra, some courts awarded fees only to parties formally prevailing in court. We are unpersuaded by the argument that this same Congress was so sure that "appropriate" also would extend to the far more novel, costly and intuitively unsatisfying result of awarding fees to unsuccessful parties that it did not bother to mention the fact. If Congress had intended the far-reaching result urged by respondents, it plainly would have said so, as is demonstrated by Congress' careful statement that a less sweeping innovation was was adopted. [Emphasis in original.]

This language indicates that the Court endorsed the concept of allowing the awarding of fees where citizens have commenced a suit, but without any formal judgment, the complained of action or inaction has been successfully corrected.

To the extent Ruckelshaus endorses such an award, I believe it is reconcilable in this case with the Department's regulatory standard. In a situation where the objectionable action or inaction has been corrected following the initiation of a citizens' complaint, but without the order of a tribunal, the citizens would not traditionally be considered the "winning" party in the sense that no judgment would have been entered in their favor. 2/

The question in such a case, as posed by Judge Burski, is whether the corrective action was taken as a result of the citizens' complaint. If the complainants can make such a showing, I propose they have satisfied the regulatory standard of substantial contribution. 3/ Therefore, Ruckelshaus,

2/ In the preamble to the proposed procedural regulations the Department was clear in stating that it did not consider the award of fees to be limited to the "winning party." 43 FR 15444 (Apr. 13, 1978). In addition, the preamble to the final procedural regulations specifically stated that settlement of a case would not preclude an award. 43 FR 34386 (Aug. 3, 1978).

3/ This is clearly not the only situation in which an award may be made on the basis of the substantial contribution standard; however, it is the one which is applicable herein.

rather than adding a requirement, or negating the regulatory requirement, or having no effect at all, provides guidance in defining the Departmental standard. I would find that where, after reviewing the record of a citizens' complaint case and subsequent petition for fees, it may be concluded that actions related to the citizens' contentions were taken as a result of the complaint, petitioners have made a substantial contribution to a full and fair determination of the issues, despite the fact they may not have received a formal judgment on the merits of their claim.

In the present case petitioners filed a citizens' complaint with OSM on February 25, 1982, charging (1) Island Creek Coal Company's activities had caused and were causing water contamination in the Ragland Public Service District, and (2) the contamination constituted an imminent threat to the health and safety of the public and a significant imminent environmental harm to water resources. Petitioners sought an immediate Federal inspection. Donald St. Clair, 77 IBLA 283, 286-87 (1983). OSM responded to petitioners' complaint stating that OSM had been involved in the Ragland water problem since August 1979, that other State and Federal agencies subsequently became involved, and that it was effectively rejecting appellants' complaint. The Board affirmed that decision. Although petitioners received a ruling from the Board affirming the denial of their complaint, the record shows that various actions were taken by certain agencies to address Ragland's water problems. The question presented is whether these actions were taken as a result of the citizens' complaint. If so, then petitioners would be entitled to an award under 43 CFR 4.1294(b). In that regard I agree with Judge Burski's analysis in which he concludes that petitioners have failed to establish that the actions of the various agencies in addressing Ragland's water problems

were undertaken as a result of their complaint, notwithstanding that some of those actions took place after the filing of the complaint.

To the extent the majority decision establishes a new standard for the award of fees based on the necessity of showing some degree of success on the merits and a substantial contribution to a full and fair determination of the issues, I dissent from that holding. However, since I agree that the petition for fees should be denied, I must concur in the result.

Bruce R. Harris
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I. Introduction

The majority hold that the Supreme Court's decision in Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983), requires applicants for attorney fees and costs for their participation in administrative proceedings under the surface mining act must "achieve some part of a declared objective by the means of legal action before becoming entitled to an award." Donald St. Clair, 84 IBLA at 248, 91 I.D. at __ (1984). Judge Burski is bolder and asserts that Ruckelshaus means "that, to the extent 43 CFR 4.1294(b) authorizes an award of attorneys' fees to a claimant in the absence of any degree of success on the merits, it trespasses beyond the proper scope of SMCRA's statutory mandate." Id. at 259, 91 I.D. at __. Thus, the majority add a requirement for gaining an award not contained in the regulations while Judge Burski dismisses the regulations as invalid. For their part, Judge Harris and Chief Judge Horton make a valiant attempt to reconcile Ruckelshaus and the regulation under the circumstances of this case.

The majority actually make several statements about what applicants must show. While these statements leave no doubt that something more than substantial contribution must be shown, they leave considerable doubt about what it is. First the majority say the primary issue is "whether petitioners' success * * * was sufficient." Id. at 239, 91 I.D. at __ (emphasis added). Then they say the question is properly stated in terms of "whether petitioners have, by achieving a measurable success, made a 'substantial contribution.'" Id. at 246, 91 I.D. at __ (emphasis added). Then they acknowledge that "it

is difficult to declare as a general proposition that the Ruckelshaus rubric requiring 'success on the merits' will have any value in establishing standards for costs awards in administrative proceedings." Id. at 248, 91 I.D. at __. Then they say it is not unreasonable to require "that petitioners show they have achieved some of the benefit they sought" in bringing the action. Id. at 250, 91 I.D. at __ (emphasis added). Finally the majority conclude that no award is proper because petitioners "failed to make a substantial contribution to the determination reached in this case, and failed to achieve substantial success in the prosecution of their claims." Id. at 252, 91 I.D. __ (emphasis added). This confusing and contradictory set of statements raises more problems than it solves. It certainly seems possible to interpret the majority to mean an applicant must do more than even Ruckelshaus demands, i.e., not only achieve substantial success on the merits but also make a substantial contribution. It also appears an applicant not only must be at least partly victorious at the end of the litigation but also must have stated in its initial complaint what the objectives of the litigation were. Apparently success is to be measured against the degree to which these stated objectives were met, in order to determine whether it was "substantial."

While Judge Burski's abandonment of the present standard may be more direct, his authority for doing so is mere ipse dixit. After bowing in the direction of the rule of law by citing McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955), he turns his back on it in this case by citing Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981). Whatever one thinks of his theory that we are authorized to declare a regulation invalid, it simply ignores history, set forth below, to suggest the regulation involved in this

case "lacks any statutory basis" so that it "can be accorded no validity whatsoever."

In their rush to embrace Ruckelshaus, however, the majority of my colleagues have evidently forgotten first principles. As long as "substantial contribution" is the standard in our regulations for determining whether an award of attorney fees and other expenses is proper, we are bound by that standard. If some other standard based on Ruckelshaus is to be substituted for the "substantial contribution" standard, that must be done by rulemaking. We are not free to amend our present rules by adjudication of this case. "So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." United States v. Nixon, 418 U.S. 683, 696 (1974). ^{1/}

Not only is the de facto amendment of the "substantial contribution" standard improper; it is unnecessary. That standard is clearly based on the history of the Surface Mining Act and regulations and has a different meaning than the Ruckelshaus standard. Therefore, Ruckelshaus neither governs the result in this case nor requires a change in the existing standard for awarding fees and expenses in administrative proceedings. This is clear from the history of the Act and the regulations, from an understanding of the term "substantial contribution," and from an analysis of the decision in Ruckelshaus. These topics are discussed below.

^{1/} It should not be necessary to point out that this principle, unlike the one in Ruckelshaus, has been established for over 30 years. See Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954); Service v. Dulles, 354 U.S. 363, 388 (1957); Vitarelli v. Seaton, 359 U.S. 535, 540, 547 (1959).

II. The History of the Act and the Regulations

A. The History of the Act.

An appreciation for when it is proper to award fees and expenses in administrative proceedings depends on an understanding of the history of the provisions authorizing such awards. Since this history is not comprehensively set forth elsewhere, it is useful to do so as a basis for demonstrating that it dictates a different approach than does Ruckelshaus.

Several versions of a surface mining act failed to win approval before P.L. 95-87 was approved in 1977. Some of those versions contained provisions authorizing attorney fees and costs in citizen suits. ^{2/} H.R. 2, the House bill that was eventually enacted as P.L. 95-87, did not originally have such a provision, however. Testimony was therefore offered to the House Subcommittee on Energy and the Environment in February and March 1977 advocating inclusion of such authority. ^{3/} In addition, the suggestion was made to extend this authority to administrative proceedings.

We further suggest that the Secretary be empowered to award reasonable attorneys fees and costs against the operator in administrative proceedings under H.R. 2 where the operator has violated the law, and a person or his representative who is directly affected by the mining activity of the operator made

^{2/} See, e.g., section 223(d), H.R. 11500, 93d Cong., 2d Sess. (1974). See also H.R. Rep. No. 1072, 93d Cong., 2d Sess. 143-44 (1974).

^{3/} See, e.g., Hearings before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs, House of Representatives, 95th Cong., 1st Sess., on H.R. 2, Serial No. 95-1, Part IV, at 111-12 (statement of Edward Weinberg) and 486 (testimony of J. Davitt McAteer and L. Thomas Galloway).

a substantial contribution to the outcome of the proceeding in the opinion of the Secretary. ^{*/}

^{*/} Reasonable attorneys' fees and costs also should be awarded to the person or his representative for judicial proceedings, reviewing agency determinations, under the same standards as awards in the administrative proceedings themselves. [^{4/}]

This suggestion was the genesis of the present section 525(e). ^{5/} In explaining this section of the bill the House committee report on H.R. 2 stated:

Section 525(e) provides for the award of costs, including attorneys' and expert witness fees, in the discretion of the Secretary. This section gives the Secretary authority to award attorneys' fees to compensate participants in the administrative process. The subsection does not require that the proceedings result in the finding of a violation nor does the fact that the Government was a party in an adjudicatory proceeding, or had caused the proceeding to be initiated prevent an award under the terms of the subsection. It is the committee's intention that this subsection not be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens. ^{6/}

Three observations about this statement are relevant to the question of when an award of costs should be deemed proper. First, the committee stated that an award does not depend on whether a proceeding results in the finding of a violation. Secondly, neither initiation of nor participation in a proceeding by the Government precludes an award. Both these statements imply

^{4/} Id. at 486-87.

^{5/} Section 525(e), 91 Stat. 512, provides:

"(e) Whenever an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper." ^{6/} H.R. Rep. No. 95-218, dated Apr. 22, 1977, at 131.

that compensation may be made when citizens participate in a proceeding, not merely when they vindicate their rights. (As discussed below, not just any participation deserves an award; it must make a substantial contribution to a full and fair consideration of the facts and issues.) Finally, the committee clearly states an intention that the section not be interpreted in a way that would discourage participation by citizens.

In an effort to clarify this new provision, Representative Seiberling engaged Representative Udall in a discussion of it during the House debate on the bill on April 29, 1977. Since portions of this colloquy are discussed by the majority, it is set out in full.

Mr. SEIBERLING: Mr. Chairman, I wish to engage in a colloquy with the chairman of the committee. I wonder if the distinguished chairman of the committee would answer several questions about the Secretary's discretion to award costs of participation under section 525(e). As I understand it, the Secretary is the one to make the determination. Is that correct?

Mr. UDALL: Yes; that is correct. In the initial administrative proceeding, the Secretary would have discretion to make the assessment. If the agency action is reviewed in the courts, then, of course, it would be appropriate for the courts to review the assessment and award, under the usual standards for review of an administrative action. In addition, the courts could assess and award costs for a person's participation in the judicial review.

Mr. SEIBERLING: Are there any standards or guidelines for the Secretary to use to determine which persons are to be awarded costs?

Mr. UDALL: The Secretary would have broad discretion. It would normally be appropriate for him to award costs to a person whose participation has contributed substantially to a full and fair consideration of the facts and issues involved in the proceeding, taking into account, where appropriate, the financial resources of the participant. In general, an award would be governed by the same kinds of considerations as would govern a court in a court action, as outlined in the last two paragraphs of page 90 of the committee report.

Mr. BAUMAN: Mr. Chairman, if the gentleman will yield, the gentleman from Arizona has just addressed himself to section 525(e) and I believe the gentleman from Maryland was the one who offered the language which allowed the Court to assess the costs against either party as the Court deemed proper. I am not quite sure, although I listened to the remarks the gentleman made, it was the intention of the offerer of that amendment that either party could receive compensation. That was the intention of the entire committee debate, and that the Court would have the right to determine that. It was never the intention that this section of the bill should expand the scope of the Secretary of the Interior's authority as defined by the Administrative Procedure Act.

Mr. SEIBERLING: Mr. Chairman, if the gentleman will yield, this is entirely consistent with that, and while I did not agree with the gentleman's amendment, I obviously have to recognize that the amendment does permit an award to either party, but the same principles of equity should be followed by the Secretary as would govern a court in deciding the extent to which the award should be made.

Mr. BAUMAN: It is my understanding the Administrative Procedure Act would govern the extent to which the Secretary could make an award of costs.

Mr. SEIBERLING: To the extent it does, but it does not go into detail as to the kinds of considerations that would enter into a decision by the Secretary.

Mr. BAUMAN: I am sure though that law provides general equity.

Mr. SEIBERLING: But the Secretary has discretion and there obviously has to be some way he is going to use his discretion and he is going to resort to the Court precedents, I presume, in a particular case to determine whether to award costs, for example, if somebody is bringing an objection purely for vexatious purposes, the Secretary ought to take that into consideration and not give him the award of costs.

Mr. UDALL: Mr. Chairman, if the gentleman will yield, the gentleman believes the intent of the author of the amendment was the same as mine.

Mr. BAUMAN: I have a strong feeling that the gentleman from Arizona's intention governs in all matters pertaining to this bill. [7/ Emphasis added.]

7/ 123 Cong. Rec. 12,877 (1977).

The majority quote the underlined portion of this colloquy and conclude that "reference to the analysis of section 520 in connection with the interpretation of section 525(e) * * * evinces congressional intent that section 525(e) should be interpreted and applied in the same manner as section 520(d)." Donald St. Clair, supra at 244, 91 I.D. at __. I think a reading of the colloquy as a whole, plus an understanding of the background of the questions raised in it, indicates the majority conclusion is incorrect. First, since fees and costs for administrative proceedings were a new addition to the bill it is logical that Representative Udall would cite to the passage in the committee report on citizen suit attorney fee provisions in other legislation as a frame of reference for his colleagues in responding to Representative Seiberling's second question. Secondly, as both the colloquy and the paragraphs from the committee report indicate, there were several issues that had been discussed in connection with authorizing the award of fees and costs in citizen suits, including how to discourage frivolous or harassing suits and when to authorize awards to various parties. The committee report paragraphs concerning section 520(d) authority to award costs in citizen suits read:

The court in issuing any final order may award litigation costs (including reasonable attorneys and expert witness fees) to any party whenever appropriate. This provision is intended to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who go to court to insure that the act's requirements are being met. The provision will not deter citizens acting as private attorneys general from bringing good faith actions to insure the bill is being enforced by the prospect of having to pay their opponent's counsel fees should they lose. It is the committee's intention that this section be construed consistently with the history of similar Federal statutes providing for awards of attorneys' fees in citizen suit actions. See Senate Report No. 414, 92d Congress, 2d session, 1972 United States Code Congressional and Administration [sic] News 3747 (Water Pollution Control Act Amendments of 1972);

Senate Report No. 451, 92d Congress, 2d session. 1972 United States Code Congressional and Administration [sic] News 4249-50 (Marine Protection, Research and Sanctuaries Act of 1972).

Thus, it is the Committee's intention that this provision be construed consistently with the general principle that an award may be made to a defendant only if the plaintiff has instituted the action solely "to harass or embarrass" the defendant. United States Steel Corp. v. United States, 519 F.2d 354, 364, (3d Cir. 1975). If the plaintiff is "motivated by malice and vindictiveness" then the court may award counsel fees to the prevailing defendant. Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976). Thus, if the action is not brought in bad faith such fees should not be allowed. See Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975); see also, Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971); affixed [sic] without published opinion, 468 F.2d 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes. [8/]

As these paragraphs make clear, the committee in this context was concerned in the first paragraph with when an award may be made to a plaintiff and, in the second, when one might be made to a defendant. In the first paragraph the committee refers to the legislative history of two analogous citizen suit attorney fee provisions when indicating how section 520(d) is to be interpreted. The legislative history of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) stated:

Concern was expressed that some lawyers would use section 505 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.

[8/ H.R. Rep. No. 95-218, supra note 6, at 90.

The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions. [9/ Emphasis added.]

The legislative history of the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA) states:

"[I]n issuing a final order in any such suit the court may award certain costs of litigation to any party when it concludes, in its discretion, that such an award is appropriate (e.g., if the plaintiff shows that the suit was meritorious, and not filed for the sake of mere harassment)." 10/ (Emphasis added.)

In referring to these statutes in its April 1977 report, the Committee might well have had in mind the then-recent (February 1977) decision of the U.S. District Court for the District of Rhode Island awarding fees under these provisions of the FWPCA and the MPRSA (33 U.S.C. §§ 1365(d), 1415(g)(4) (1982)). In Save Our Sound Fisheries Association v. Callaway, 429 F. Supp. 1136, 1145-46 (D.R.I. 1977), Chief Judge Pettine wrote, concerning whether an award of attorneys' fees was appropriate:

In a similar situation, where Congress passed a remedial program and provided for enforcement in large measure through citizen enforcement, without the possibility of damages, the Supreme Court has ruled that the Congressional intention was what fees were to be awarded unless plaintiffs acted in bad

9/ S. Rep. No. 414, 92d Cong., 2d Sess. 1972, U.S. Code Cong. & Ad. News 3747.

10/ S. Rep. No. 451, 92d Cong., 2d Sess. 1972, U.S. Code Cong. & Ad. News 4249-50.

faith, or litigated vexatiously. Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S. Ct. 964, 19 L.Ed.2d 1263 (1968) (per curiam). Newman is strong authority for this Court's holding that both the FWPCA and MPRSA contemplate the award of fees absent exceptional circumstances as detailed in Newman, supra. * * *

* * * * *

* * * The legislative history of both the FWPCA and MPRSA also amply support this holding. See S. Rep. No. 92-411 [sic], supra, 1972 U.S. Code Cong. and Admin. News, p. 3747 (FWPCA); S. Rep. No. 92-451, 92nd Cong., 2nd Sess., 1972 U.S. Code Cong. and Admin. News, pp. 4249-50 (MPRSA). [Footnotes omitted.]

Considering both the statements in the legislative histories of the FWPCA and the MPRSA to which Representative Udall referred and the words with which he referred to them in his response to Representative Seiberling's question about standards for the award of costs under section 525(e), it is evident that Representative Udall intended that "contributed substantially to a full and fair consideration of the facts and issues involved" in an administrative proceeding be a standard similar to the "in the public interest" standard referred to in connection with the FWPCA and the "meritorious" one referred to in connection with the Marine Sanctuaries Act. These are the "same kinds of considerations as would govern a court" that Representative Udall indicated would "in general" guide the Secretary's discretion for administrative proceedings under section 525(e). Acknowledging this, however, does not lead to the majority's conclusion that section 525(e) is to be interpreted and applied in the same manner as section 520(d). Representative Udall enunciated a different standard for a different institution of Government to make a similar exercise of discretion. Resorting to "Court precedents," as Representative Seiberling put it in response to Representative Bauman's question regarding when a defendant might receive an award, does not

mean the Secretary must do the same under section 525(e) as a court would under section 520(d).

Thus, the legislative history of section 525(e), while related to that of section 520(d), does not support the majority's effort to bind section 525(e) to section 520(d) and, thus, to a standard based on Ruckelshaus. Indeed, the history supports a different and less stringent standard. "Substantial contribution to full and fair consideration," like "in the public interest," and "meritorious," implies that something less than "some success on the merits" is sufficient for an award of fees in an administrative proceeding under the Surface Mining Act. Reading this phrase as meaning what the Ruckelshaus opinion recently interpreted "appropriate" to mean in a different context is simply an attempt to rewrite the legislative history, not to interpret it.

The Congress recognized that availability of attorney fees and costs for participation in any administrative proceeding under the Surface Mining Act is vital to effective public participation under the Act, thus helping assure compliance with the Act's provisions:

The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State regulatory authority or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing. Moreover, a number of decisions to be made by the regulatory authority in the designation and variance processes under the Act are contingent on the outcome of land use issues which require an analysis of various local and regional considerations. While citizen participation is not, and cannot be a substitute for governmental authority, citizen involvement in all phases of the

regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information. In addition, providing citizen access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the Act.

In many, if not most, cases in both the administrative and judicial forum, The citizen who sues to enforce the law, or participates in administrative proceedings to enforce the law, will have little or no money with which to hire a lawyer. If private citizens are to be able to assert the rights granted them by this bill, and if those who violate this bill's requirements are not to proceed with impunity, then citizens must have the opportunity to recover the attorneys' fees necessary to vindicate their rights. Attorneys' fees may be awarded to the permittee or government when the suit or participation is brought in bad faith.[^{11/} Emphasis added.]

This general statement about attorney fees, along with the House committee's statement that section 525(e) is "not to be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens," are a clear recognition that effective regulation of activities as dispersed, site-specific, and unsuitable to automatic monitoring as surface mining activities are depends to a significant extent on the cooperation and involvement of citizens who are affected by them. Any presumption in favor of the Department's ability to manage effectively without public participation disappears upon reading of its failure to assess and collect civil penalties. ^{12/} But such cooperation and involvement by the public are

^{11/} 1 S. Rep. No. 128, 95th Cong., 1st Sess. 59 (1977); see also H.R. Rep. No. 95-218, supra note 6, at 88.

^{12/} See "Breakdowns in the Department of the Interior's Civil Penalty Assessment and Collections Program Have Adversely Affected the Enforcement of the Surface Mining Control and Reclamation Act of 1977, Sixty-Second Report by the Committee on Government Operations, 98th Congress, 2d Session, House Report 98-1146, Oct. 5, 1984."; see also "To Review Assessment and Collection of Civil Penalties by the Department of the Interior Under the Surface Mining Control and Reclamation Act, Hearing Before a Subcommittee of the Committee on Government Operations House of Representatives Ninety-eighth Congress, Second Session, June 13, 1984."

discouraged by a requirement that to be compensated for participation in an administrative proceeding before a regulatory authority a person must do more than make a substantial contribution to a full and fair consideration of the issues raised in that proceeding.

B. The History of the Regulation.

When the Department proposed rulemaking to implement section 525(e), the preamble recited the substance of the legislative history discussed above and stated explicitly that a citizen "might * * * substantially contribute and be compensated, even if the citizen were not the winning party."

The legislative history of the Act is clear that section 525(e) of the Act is intended to encourage public participation in the administrative process. Such a provision is designed to encourage citizens to bring good faith actions to insure that the Act is being properly enforced. It is the intention of the Office that these proposed rules not be interpreted to discourage good faith actions on the part of interested citizens.

The Office has utilized the legislative history of the Act, Federal statutes, and various court cases concerning the awarding of attorneys' fees in arriving at these proposed rules.

The Surface Mining Act and its legislative history appear to authorize awards of costs and expenses on the basis of two theories. One theory might be characterized as fee shifting, in which the person adjudged to have violated the law might be required to pay the cost and expenses of the party affected by the wrong. For example, if a permittee violated the Act to the detriment of a citizen, costs and expenses might be awarded against the permittee and in favor of the citizen. The second theory might be referred to as a Government compensation theory and would allow for Government payment to citizens for their participation in administrative proceedings where there has been a substantial contribution to a determination of the issues. In this situation, a citizen might intervene in or initiate a proceeding and substantially contribute and be compensated, even if the citizen were not the winning party.

While the proposed regulations do not specifically address these two theories, comments are invited concerning any addition

or different language which will assist the Office in implementing section 525(e) of the Act. [13/]

The preamble to the regulations, as finally promulgated, indicates that the Department accepted comments suggesting clarification of what showing was necessary to receive an award from a permittee or the Government:

Still other commenters recognized a basic flaw in § 4.1294 in that it did not specify who would pay the fees and what showing was necessary to receive an award. These commenters suggested limited changes to § 4.1294 to rectify the situation. As a result of these comments, § 4.1294 has been revised to reflect who will pay the award and the finding that is necessary in making the award. Section 4.1294(a) was changed to state that any person may receive an award from the permittee under certain circumstances. There are three circumstances under which such an award may be made -- (1) The person initiates a review proceeding and there is a finding of violation of the Act, regulations, permit or a finding that an imminent hazard existed; (2) If such a finding is made and the person participated in an enforcement proceeding, there is a further finding by the administrative law judge or the Board that the person made a substantial contribution to a full and fair determination of the issues; and (3) If a person files an application for review of alleged discriminatory acts, and there is a finding of discriminatory discharge or other acts of discrimination. A new subsection (b) was added to provide that any person, other than the permittee or his representative, may receive payment from OSM if the person initiates or participates in any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues. [14/ Emphasis added.]

The preamble also stated clearly that "the manner of disposition" of a case, e.g., settlement, would not preclude an award of costs. [15/]

13/ 43 FR 15441, 15444 (Apr. 13, 1978). Proposed rule 43 CFR 4.1294(a)(3) provided that appropriate costs and expenses could be awarded to any person "[w]ho participates in an administrative proceeding upon a finding that that person made a substantial contribution to the full and fair determination of the issues." Id. at 15456.

14/ 43 FR 34376, 34385-86 (Aug. 3, 1978).

15/ Id. at 34385.

Thus, these regulations and their history clearly establish the "substantial contribution" standard for an award of costs for participation in an administrative proceeding. These regulations have not been amended, so this standard is the governing one.

III. The Meaning of "Substantial Contribution to a Full and Fair Determination of the Issues Involved"

The antecedents of the substantial contribution standard discussed in the legislative history of the Surface Mining Act indicate what it means. In 1975, in part to relieve uncertainty about the Federal Trade Commission's authority to promulgate substantive rules, 16/ Congress enacted the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. 17/ Section 202(h) of that law authorized the Commission to make rules to

provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole. [18/ Emphasis added.]

The purposes of this provision were set forth as follows:

16/ See National Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343 (D.D.C. 1972), rev'd, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 94 S. Ct. 1475 (1974).

17/ P.L. 93-637, 88 Stat. 2183-2203.

18/ 88 Stat. 2197. The Federal Trade Commission's rules are found in 16 CFR 1.17.

Compensation for Certain Representation.

In order to provide to the extent possible that all affected interests be represented in rulemaking proceedings so that rules adopted thereunder best serve the public interest, the FTC is authorized to provide compensation for reasonable attorneys and expert witness fees and other costs of participating in rulemaking proceedings. The FTC could pay such compensation to any person who has or represents an interest which would not otherwise be adequately represented in such proceeding, and representation of which is necessary for a fair determination of the proceeding taken as a whole and who but for the compensation would be unable effectively to participate in such proceeding because such person would otherwise not be able to afford the cost of such participation.

Not more than 25 percent of the amount paid as such compensation in any fiscal year could be paid to persons who the proposed rule would regulate or who represent the interests of such persons.

No more than \$1 million could be expended for such compensation in any fiscal year. Because the utilization of these funds may be critical to the full disclosure of material facts in rulemaking proceedings, the conferees expect the Commission to assign a high priority to their proper expenditure. [19/ Emphasis added.]

The Federal Trade Commission developed guidelines that set forth the standards applied in reviewing applications in advance of rulemaking for compensation under section 202(h) of the Magnuson-Moss Act that were adopted by the Commission's Bureau of Consumer Protection in May 1977 after extensive comments from consumer groups, industry, congressional committees, and members of the public. 20/ These guidelines indicate several factors the Commission

19/ 1974 U.S. Code Cong. & Ad. News 7768.

20/ 42 FR 30480 (June 14, 1977), corrected in 42 FR 32839 (June 28, 1977).

considered in evaluating whether an applicant would make a substantial contribution to adequate representation. 21/

21/ "Third, the statutory requirement that without the particular applicant the interest will not be adequately represented means that the quality of an application is relevant. The Bureau must determine that it is reasonably likely that the applicant can competently represent its interest.

"It is, however, entirely possible that an applicant might make a significant contribution to a proceeding without making representation of an interest completely adequate. The test is not whether a particular applicant will make representation of an interest fully adequate, but whether the representation will make a substantial contribution to the adequacy of the representation.

"For these reasons, the Bureau must evaluate the substance of applications so it can determine that the applicant can reasonably be expected to make a sufficient contribution to the adequacy of the representation of the interest.

"Because of the diverse proceedings involved, the great variation in interests and applicants, and the need to give applicants sufficient flexibility to develop their own theories and approaches, it is impossible to establish mechanistic standards for evaluating the substance of applications. Both applicants and Bureau staff must meet short deadlines. The basic schedule for rulemaking hearings set forth in Part I does not always allow applicants to develop their proposals as thoroughly as they might like and does not allow Commission staff to impose elaborate information requirements on them. Nor does it allow for the extensive negotiations that characterize grant or contract processes.

"To meet the statutory standards while minimizing delays and uncertainty, the Bureau has evolved a set of possible factors to assist its determination. These factors are guides, not arbitrary tests.

"(1) Point of view. Key issues in rulemaking proceedings often involve sophisticated questions about the true nature of different consumer interests. Evidence that an applicant has a point of view, not already represented by the FTC staff attorneys or any other party, that would help illuminate these issues can be favorable.

"(2) Specificity. The more clearly an applicant sets forth the particular issues in the proceeding it intends to address, the point of view of the interest it represents, the nature of the information it intends to develop or introduce, and the identities and qualifications of the personnel working on the project or serving as experts, the more likely it is to be funded. Without such information, the Bureau cannot make the required findings.

"(3) Relation between the applicant and the interest. The statute does not establish any criteria for determining whether an applicant truly represents the interest involved; however, the Bureau must examine the bona fides of the representation in examining adequacy. An industry trade association that claims to represent consumers would be viewed skeptically, and vice versa, for example.

"(4) Constituency. It can be a favorable factor if the applicant is a membership organization or is supported by cash contributions from the public or from a particular constituency. The willingness of individuals to support

In both the sessions following passage of the Magnuson-Moss Act, Congress considered bills authorizing Federal agencies "to award reasonable attorneys' fees, expert witnesses' fees, and other costs of participation incurred by eligible persons in any agency proceeding whenever public participation in the proceeding promotes or can reasonably be expected to promote a full and fair determination of the issues involved in the proceeding." An eligible person was defined as one who "represents an interest the representation of which contributes or can reasonably be expected to contribute substantially to a fair determination of the proceeding, taking into account the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interests." 22/ (Emphasis added.) In introducing hearings on this bill, Senator Kennedy stated:

fn. 21 (continued)

the applicant provides some evidence that the organization is indeed responsive to their interest and raises a presumption that the group will continue to represent its constituency's interest in the future.

"(5) Experience and expertise in the substantive area. If an applicant has been involved in the subject area in some fashion and has developed some competence on the issues presented by the rulemaking proceeding because of this involvement, there is better reason to think that its contribution will be valuable than if it has shown no prior interest in the area.

"(6) Experience in trade regulation matters generally. If an applicant has not been involved in a substantive area but has been involved in analogous problems and has demonstrated competence in procedure and general approach, its experience should be taken into account.

"(7) General performance and competence. If the applicant has not been active in the subject area or in analogous proceedings, demonstrated ability in other activities is relevant, as is evidence that the applicant has technical capability to perform the activities it proposes. An applicant requesting funds to perform survey research should prove its competence in conducting surveys, or in knowing whom to hire for survey work. A request for funds for cross-examination should establish the expertise of the proposed cross-examiner."

Id. at 30482.

22/ See proposed section 558(c) and (d)(1) of Title 5, U.S. Code, reprinted in "Public Participation in Federal Agency Proceedings, S. 2715," Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 94th Congress, Second Session, on S. 2715, pp. 144-45.

The legislative authority for an agency to support direct public involvement in agency proceedings was first embodied in the Magnuson-Moss "Consumer Product Warranty and Federal Trade Commission Improvement Act," enacted in the last session of the Congress. That law authorized the FTC directly to reimburse citizens groups involved in rulemaking proceedings for their costs of participation. S.2715 would extend this authority to cover all types of proceedings, before all agencies and departments of the Government. [23/]

The testimony on these bills was voluminous, but some of the most succinct, relevant to this case, was given by the late United States Circuit Judge Harold Leventhal. He said, in response to a question whether the bill would increase his workload:

I view [the bill] as a means of compensating those people who really make a contribution. And the effort involved in determining who makes a contribution is not that great.

* * * * *

I take note in my paper that on 12 applications FTC passed on in the fall of 1975, they denied 7 and granted 5. Some were granted in part and some in whole. And I think it is just a part of our doing our job. You say: "Who is helping me? How much are they helping me?" The agency knows and the court knows. It is not that much of a mystery. [24/]

fn. 22 continued)

By "full and fair determination" the sponsors meant the "general responsibility of agencies, consistent with their organic statutes, to bring enforcement actions, decide disputes, formulate regulations, or take other actions in such a manner as will most fairly and efficiently achieve the agencies' statutory mandates and best promote the interests of the public." S. Rep. No. 94-863, 94th Cong., 2d Sess., at 19.

23/ Hearings, supra note 22, at 3. In the 95th Congress, when the Surface Mining Act was enacted, S. 270 was the analogous bill in the Senate, which again held hearings. In the House of Representatives, the Subcommittee on Administrative Law and Governmental Relations held several days of hearings on a companion bill, H.R. 3361, and later the full Committee on the Judiciary (of which Representative Seiberling was a member) held hearings on H.R. 8798, which incorporated H.R. 3361.

24/ Id. at 81-82.

His paper characterizes the nature of "some of our most helpful presentations" by "public interest groups": "careful development of pertinent statutes, administrative practice, and scientific testimony"; "clear and helpful analysis"; "careful and thorough research, probing and discriminating, presented without overstatement or misstatement * * * items involved were hard to find and comprehend"; "impressive evidentiary submission on the effects." In the context of discussing adjusting fees for quality of work in another case, Judge Leventhal added:

We acknowledged that considerable time had been spent, and that an award was appropriate because of the farmers benefited and the benefit of stopping unauthorized agency action. But we tempered the award not only because of questions as to amount of time spent, but our own appraisal that counsel had offered a useful general approach but left the court with a considerable research requirement. [25/]

Testimony about the contribution of the first citizens group to participate in a rulemaking before the FTC under the Magnuson-Moss Act illustrates what constituted a substantial contribution from their perspective:

Through the questioning and cross-examination of witnesses, we were able to establish the current plight of consumers. We were able to place on the public record a clear statement of the consumer view of the proposed rule. We documented the inadequacy of current laws and regulations and the ineffectiveness of enforcement of current laws. We raised doubts as to the viability of the counterarguments presented by the opponents to the rule. In that same vein, we believe we performed an important function in grounding the abstract and academic lines of questioning often initiated by both the Commission and industry representatives. Again and again, we returned the discussion to the basic points of actual consumer experience and consumer rights. Through our

25/ Id. at 87-89.

research and questioning, we presented a complete picture of the industry's consumer protection needs. [26/]

Rex E. Lee, Esq., then Assistant Attorney General, Civil Division, Department of Justice, urged a qualification of the substantial contribution standard in his testimony:

We suggest the following language for your consideration in conjunction with administrative fee award provisions:

Any award authorized by an agency in its unreviewable discretion shall be limited to that portion of the fees and costs which were reasonably expended in presenting specific issues, information, or other data which substantially contributed to a fair determination of the proceeding.

While language of this type may place some added burden on the agency concerned to review the particular contribution of the parties appearing before it, it is far preferable to a situation where the public treasury offers a blank check to every participant to develop issues, testimony, and other efforts, regardless of the relevance, merit, or reasonableness thereof. A similar provision should be included in any legislation authorizing awards of fees for judicial review proceedings. [27/]

As a final example, Samuel R. Berger, Esq., pointed out several cases in his testimony in which awards had been made to parties who had acted as catalysts or contributed statistical data or theories of a case that have helped the courts resolve the controversies: 28/

Third, it should be noted that the concept of awarding fees to individuals and groups whose role has been to act as clarifying voices or helpful participants has been recognized by a number of courts in the analogous context of litigation. Although

26/ Id. at 10. (Statement of Ms. Elizabeth Lederer, Co-Director, Grievance Department, San Francisco Consumer Action.)

27/ Id. at 113.

28/ Id. at 59-60.

most of the attorneys' fee statutes that pertain to litigation speak of awarding fees to "prevailing parties" or "successful" litigants, some courts have recognized the importance of awarding attorneys' fees where a participant has acted merely as a "catalyst" for change or otherwise advanced the resolution of the controversy. For example, in Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3rd Cir. 1970), cert. denied, 401 U.S. 911 (1971), the Court recognized the importance of awarding attorneys' fees to a committee of coal miners whose activities had helped bring about the institution of various lawsuits by the United Mine Workers Welfare Fund, to recover moneys due the Fund. On remand, the District Court found that the activities of the committee, which was not the plaintiff, contributed to the institution of the legal actions that produced the substantial recovery by the Fund and awarded the committee attorneys' fees. In Hargrove v. Caddo Parish School Board, No. 17,630 (W.D. La., June 13, 1972) the court recognized the appropriateness of awarding fees to plaintiff-intervenors in a school board reapportionment case even though the court did not adopt the plan proposed by those plaintiff-intervenors. The Court stated:

Plaintiff-intervenors . . . by their intervention and diligent efforts throughout these proceedings, have performed a service both to the court and to the people of Caddo Parish. Plaintiff-intervenors, and the court itself, raised the issue of the prohibition against dilution of black voting strength with which any redistricting plan must comply. Further, plaintiff-intervenors through the skill of their counsel and the use of an expert witness raised the level of accuracy of the "one man one vote" mandate by demonstrating the statistical problems of employing voter registration data and made known to the court as well as the Board the availability of block data, without which the court approved plan could not be designed.

In Citizens Association of Georgetown v. Washington, 383 F. Supp. 136, 145 (D.D.C. 1974), although the plaintiffs failed to prove that the 1977 air quality standards under the Clean Air Act would be violated by the construction of two buildings on the Georgetown waterfront, the court awarded the plaintiff attorneys' fees because the litigation had demonstrated "to the public a record of inaction and action delayed on the part of the District of Columbia Government in implementing the Clean Air Act."

These courts have recognized the substantial public interest that can be served when the decisionmaking process on issues of broad public interest reflects the input of interested and informed citizens. [29/]

29/ Id. at 63.

Thus, the meaning of the "substantial contribution" standard may be derived from the Magnuson-Moss Act and the guidelines under it, from the language of S. 2715 and similar bills being considered contemporaneously with the proposed Surface Mining Act that were the specific source of the language of the standard, and from the testimony of those familiar with public participation before courts and administrative agencies describing what constituted substantial contributions in their experience. ^{30/} Clearly, it is a general standard; a variety of contributions could be considered substantial, depending on the circumstances of different cases. In any case, as Grantland Rice would have said, the question is not whether a participant wins or loses, but how he plays the game.

IV. Ruckelshaus Does Not Govern the Award of Costs for Participation in
Administrative Proceedings Under the Surface Mining Control and Reclamation Act

The Supreme Court's decision in Ruckelshaus concerned the standard for awarding costs in citizen suits under the Clean Air Act based on its interpretation of the legislative history of that Act. The legislative history of those provisions, of course, differs from that of section 525(e) governing awards in administrative proceedings under the Surface Mining Act. The Court's footnote stating that its interpretation of "appropriate" under the Clean Air Act controls the construction of that standard under several other statutory sections, including section 520(d) of the Surface Mining Act, is

^{30/} For a discussion of the rationale for encouraging public interest activity and the role of fee shifting in public interest litigation, see Percival and Miller, "The Role of Attorney Fee Shifting in Public Interest Litigation," 47 Law and Contemporary Problems 233 (1984).

dictum. Indeed, without any analysis of the legislative histories of those statutes, it is at best hypothesis. The legislative history of section 525(e) is different from that of section 520(d), and the term in section 525(e) is different from the one the Court construed in Ruckelshaus. The decision in this case is not legitimately governed by a decision interpreting a different word in a different law. Whether the award of costs for participation in an administrative proceeding under the Surface Mining Act is deemed "proper" depends on an assessment of whether there was a substantial contribution to a full and fair determination of the issues involved, as is explained above, not on whether the participant can claim "some degree of success on the merits." 31/

V. Conclusion

In 1976, responding to the question, "What is the cause of the general reluctance within agencies to award these kinds of fees," Benjamin Hooks, then Commissioner of the Federal Communications Commission, answered candidly:

The usual answer would be the reason the agency is opposed to consumer intervention is because they are protective of the industries that they regulate and there is sort of a pal type relationship between the regulator and the regulated. I don't know whether that is quite true * * * the complaints from those

31/ For comments on Ruckelshaus, see "Ruckelshaus v. Sierra Club: Muddying the Waters of Fee-Shifting in Federal Environmental Litigation," 11 Pepperdine Law Review 441 (1984); "Environmental Law -- Ruckelshaus v. Sierra Club: Attorneys' Fees Awards to Nonprevailing Litigants are not 'Appropriate' under the Clean Air Act," 1984 The Journal of Corporation Law 965; "Attorney's Fees and Ruckelshaus v. Sierra Club: Discouraging Citizens from Challenging Administrative Agency Decisions," 33 The American University Law Review 775 (1984); "Awards of Attorneys' Fees to Nonprevailing Parties under the Clean Air Act -- Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983)," 59 Washington Law Review 585 (1984).

we regulate would hardly back up the assumption that we are in bed with them.

On the other hand, I do think this much is a fact. I have been in Government long enough to be almost a bureaucrat, but I do get the impression that the people in Government have the feeling that the folks who represent the consumer interests are somehow wild and outside of the system and that they don't represent the right folks somehow. They don't cut their hair quite right or there is something about them that is not just kosher so it seems that the resistance is more to the idea of an intrusion. It seems to me what the FCC has said is that, if the public is going to be protected, we can do it; we don't need your help really. So I think it is sort of a pride of authorship more than overly protective regulation. But from my own experience, I feel this may be alleviated to a further point.

It may be, finally, a lack of professionalism. Many consumer groups come from the grass roots. Their language, their expressions are not quite keeping with courtroom decorum and dignity. They don't quite measure up to the expected standards. So there is a little suspicion of them and we want to know where they came from and who they are representing. [32/]

Since this is the first time this Board has considered a petition for an award of costs for participating in an administrative proceeding under the Surface Mining Act, it would be premature to conclude that these attitudes will govern its response to such petitions. Rather, I suspect that the result in this case was motivated by a belief that this petition should not be granted based on the record. That may well be right, although that conclusion is at least partially undermined by the unexplained absence of the lengthy oral argument transcript. 33/ What is not right is that the wrong standard was employed in arriving at that conclusion. Rather than attempting to determine whether the petitioner had made a "substantial contribution to a full and fair determination of the issues involved in this proceeding" -- the

32/ Hearings, *supra* note 22, at 98-99.

33/ Donald St. Clair, 77 IBLA 283, 293 n.7, 90 I.D 496, 501 n.7 (1983).

standard of our regulations based on the Surface Mining Act -- the majority of the Board have either amended or abandoned the regulation and imposed a higher standard not based on the Act or its legislative history. The analysis should have been directed to the questions suggested in the discussion of the meaning of substantial contribution in section III above, not to whether the petitioner prevailed. 34/ Because it was not, I dissent.

Will A. Irwin
Administrative Judge

34/ While I of course applaud Judge Harris' adherence to the substantial contribution standard, I must point out that determining whether "actions related to the citizens' contentions were taken as a result of the [citizens'] complaint" not only poses nice questions of how such causation is to be demonstrated but, more importantly, constitutes only one possible basis upon which a substantial contribution could be made in this or any case.

