

LAROSA FUEL COMPANY, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION
AND ENFORCEMENT

IBLA 96-251

Decided June 9, 2003

Petition for an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (2000), and its implementing regulations.

Petition granted.

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

Sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (2000), authorizes the award of attorneys' fees "as determined by the Secretary to have been reasonably incurred" for or in connection with a person's participation in an administrative proceeding under the Act.

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

When the regulatory authority terminates jurisdiction over an initial program permitted site in accordance with 30 CFR 700.11(d), that site is no longer considered a surface coal mining and reclamation operation, and, absent reassertion of jurisdiction, which would necessarily require a proper finding under 30 CFR 700.11(d)(2), the operator of that site would not be considered a "permittee," and would not be eligible for an award of costs and expenses, including attorneys' fee, as a permittee under 43 CFR 4.1294(c).

3. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award--Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Substantial Contribution

Under 43 CFR 4.1294(b), a person who initiates or participates in a proceeding under the Surface Mining Control and Reclamation Act of 1977 may be eligible for an award of costs and expenses, including attorneys' fees, from OSM where that person prevails in whole or in part, achieving at least some degree of success on the merits. However, to be entitled to an award the regulation requires that the record show that the person made a substantial contribution to a full and fair determination of the issues.

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

Under 43 CFR 4.1294(b), the phrase "any person, other than a permittee or his representative," may, in the proper circumstances, include a member of the coal mining industry, who is not the permittee in the proceeding for which an award of costs and expenses, including attorneys' fees, is sought.

APPEARANCES: Dean K. Hunt, Esq., Lexington, Kentucky, for petitioner; Wayne A. Babcock, Esq., Office of the Field Solicitor, United States Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

LaRosa Fuel Company, Inc. (LaRosa Fuel or Petitioner) has petitioned for an award of costs and expenses, including attorneys' fees, in the proceedings which culminated in this Board's decision in LaRosa Fuel Co. v. OSM, 134 IBLA 334 (1996).^{1/} The award is sought from the Office of Surface Mining Reclamation and

^{1/} Petitioner included in the amount sought for attorneys' fees the fees incurred in preparation of the petition. Such fees are compensable under 43 CFR 4.1295(b). In addition, Petitioner uses the term "costs" and the term "expenses" interchangeably. It
(continued...)

Enforcement (OSM), pursuant to section 525(e) of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1275(e) (2000), and its implementing regulations at 43 CFR 4.1290-4.1295.^{2/}

Background

On April 2, 1992, OSM issued Cessation Order (CO) No. 92-112-433-02 to LaRosa Fuel citing it for a failure to minimize disturbances to the prevailing hydrologic balance and to the quality and quantity of water in surface and ground water systems on lands previously mined by LaRosa Fuel under State initial program regulatory permit No. 79-76 and associated off-site areas in an area known as Kittle Flats in Randolph County, West Virginia. OSM further stated that LaRosa Fuel's failure to treat water discharges to meet effluent limitations was causing significant, imminent environmental harm to Cassity Fork and other downstream areas. OSM charged that LaRosa Fuel's actions were in violation of sections 515(b)(10) and 521(a)(1)(2) of SMCRA, 30 U.S.C. §§ 1265(b)(10) and 1271(a)(1)(2) (2000), and various regulations. As remedial action, OSM required LaRosa Fuel to immediately install, operate, and maintain adequate treatment facilities to treat acid mine drainage.

LaRosa Fuel sought review of the CO in the Hearings Division of the Department's Office of Hearings and Appeals. Following a hearing, Administrative Law Judge David Torbett issued a decision upholding the CO and denying temporary and permanent relief therefrom. LaRosa Fuel appealed to this Board, and, on January 30, 1996, we ruled in LaRosa that OSM had no jurisdiction to issue the CO. Accordingly, we vacated both Judge Torbett's decision and the CO and remanded the case to OSM. We based our ruling on our interpretation of 30 CFR 700.11(d), finding that OSM's jurisdiction over the area in question had terminated prior to the enforcement action and that OSM had failed to follow the necessary procedures to reassert jurisdiction over that area prior to issuing the CO.

^{1/} (...continued)

does not attempt to distinguish between the two in its itemization.

^{2/} In its petition, which it styled an application, LaRosa Fuel also claimed costs and expenses, including attorneys' fees, under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (2000). In its response to the petition, OSM opposed any award under that Act. In its reply, LaRosa Fuel dropped any claim for an award under that Act. Therefore, OSM's motion to dismiss the petition, as it related to EAJA, is moot.

OSM filed two separate motions to dismiss LaRosa Fuel's petition. First, it asserted that under 43 CFR 4.1294(c), a permittee could recover an award of costs and expenses from OSM only if it demonstrated that OSM took an enforcement action against it in bad faith or for the purposes of harassing or embarrassing the permittee. It argued that LaRosa Fuel made no attempt to show that OSM acted in bad faith.

Petitioner opposed the motion on a number of grounds. It stated that LaRosa Fuel was not a permittee at the time of the enforcement action and that, under SMCRA and 43 CFR 4.1294(b), a petitioner, who is not a permittee, is not required to show bad faith on the part of the government to qualify for an award. It also alleged that, to the extent such a showing is required under 43 CFR 4.1294(c), OSM did act in bad faith.

Second, OSM filed an alternative motion to dismiss the petition as premature because, under 43 CFR 4.1290, "a petition for an award of costs and expenses can only be submitted following a final order in a matter." (Motion to Dismiss at 3.) OSM's position was that, because the Board in its decision in LaRosa vacated the enforcement action of OSM and remanded the case, "final agency action has not been taken in the case." Id.

Prior to any ruling by the Board on OSM's motions, Petitioner filed a document styled "Renewal of Petitioner's Application for an Award of Costs and Expenses." Therein, it provided a copy of the memorandum opinion and order of the U.S. District Court for the Northern District of West Virginia in West Virginia Highlands Conservancy v. Babbitt, No. 1:96-CV-34, dated September 8, 1997, affirming the Board's decision in LaRosa and granting summary judgment. Petitioner asserted that its request for costs and expenses was ripe for consideration.

In an order dated November 17, 1997, the Board denied both motions to dismiss filed by OSM. We found that Petitioner had made an allegation of bad faith, and, thus, the petition could not be summarily dismissed based on an alleged failure to show bad faith. We also rejected OSM's argument that no final agency action had taken place, concluding that the Board's decision in LaRosa constituted a "final order" within the meaning of 43 CFR 4.1290(a)(2).

OSM also alleged that the matter was not ripe for review and moved that consideration be suspended because counsel for West Virginia Highlands Conservancy (WVHC), the intervenor in the underlying proceeding, had indicated that he intended to appeal the September 8, 1997, memorandum opinion and order of the district court. In our order, we denied that request and allowed OSM the opportunity to respond to the petition.

Counsel for WVHC filed an appeal of the district court's memorandum opinion and order on November 7, 1997. West Virginia Highlands Conservancy v. Babbitt, No. 97-2559 (4th Cir.). On December 7, 1998, the court vacated the district court's grant of summary judgment and remanded the case to the district court for dismissal. The court concluded that the matter was not ripe for review because resolution of the matter was likely to prove unnecessary because "OSM is currently attempting to reassert its jurisdiction over Kittle Flats." (Opinion at 5.) "Prior to a decision by OSM that it cannot or will not reassert jurisdiction, the IBLA's decision has not deprived the Conservancy of any rights under SMCRA." (Opinion at 6.)

Thereafter, on January 29, 1999, WVHC filed motions to stay the proceedings in various appeals pending before the Board (e.g., WVHC v. OSM, IBLA 95-554). Therein, WVHC made the representation that it "filed a petition for Secretarial review of the LaRosa decision." (Motion in IBLA 95-554 at 2.) In an order dated March 4, 1999, the Board suspended consideration of this case on the basis that Secretarial action on WVHC's petition could directly affect the outcome of the present case. We also directed OSM "to inform the Board immediately following the Secretary's resolution of the petition by submitting to the Board a copy of the written document acting on the petition. At that time, the Board will act expeditiously to resolve this case." On March 21, 1999, at the request of the Office of the Solicitor, Division of General Law, U.S. Department of the Interior, the Board forwarded the case file in the present case to that division.

On March 24, 2003, the Director of the Office of Hearings and Appeals received a copy of a letter dated March 20, 2003, from Hugo Teufel III, Associate Solicitor, Division of General Law, to Walton D. Morris, Jr., Esq., counsel for WVHC, informing Morris that "the Secretary has declined to take jurisdiction" of the LaRosa Fuel case. The Director forwarded his copy of that letter to this Board. On April 8, 2003, the Office of the Solicitor, Division of General Law, returned the record in this case to the Board.

Applicable Law

[1] Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2000), authorizes the award of costs and expenses, including attorneys' fees to any person "as determined by the Secretary to have been reasonably incurred" by such person for or in connection with his participation in any administrative proceeding under the Act. It further provides that such costs and expenses, including attorneys' fees, may be assessed "against either party" as the Secretary "deems proper." In order to establish procedures and provide standards for such awards, the Secretary promulgated procedural regulations at 43 CFR 4.1290-4.1295.

In those regulations at 43 CFR 4.1294, the Secretary established the conditions under which he would consider requiring OSM to pay costs and expenses, including attorneys' fees:

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

* * * * *

(b) From OSM to any person, other than a permittee or his representative, who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such a person made a substantial contribution to a full and fair determination of the issues.

(c) To a permittee from OSM when the permittee demonstrates that OSM issued an order of cessation, a notice of violation or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee * * *.

Arguments of the Parties

Petitioner asserts that under the broad language of section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2000), it is entitled to an award of costs and expenses because such awards may be granted to "any party" who participated in an administrative proceeding. It contends that such awards are not limited to citizens' groups who participate in such proceedings, but are also available to "members of the regulated industry." (Petition at 3, n.1.) In support of that statement, Petitioner cites Florida Power & Light Co. v. Costle, 683 F.2d 941, 943 (5th Cir. 1982), alleging that in that case the court construed section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f) (Supp. 1979), providing for fee awards in judicial proceedings, to allow an award of attorneys' fees and costs to a member of the regulated industry. In the case for which fees and costs were sought, Florida Power & Light Company successfully sued the Environmental Protection Agency (EPA).^{3/} The court relied on the broad language

^{3/} The court stated at 942:

Authorization for an award of costs incurred in such review proceedings [judicial review of EPA actions in approving or promulgating any implementation plan under sec. 110, of the Clean Air Act, 42 U.S.C. § 7410 (Supp. 1979)] is found in section 307(f), 42 U.S.C. § 7607(f):

In any judicial proceeding under [Section 307], the court may award costs of litigation (including reasonable

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of section 307(f) and the legislative history, which provided that the intent of the provision was not only to discourage frivolous litigation but also to encourage litigation which would assure proper implementation and administration of the Clean Air Act, to conclude that "[t]here is no indication that Congress meant to limit Section 307(f) awards to public interest groups." *Id.* at 943.

Petitioner also cites Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983), in which the Supreme Court construed the same provision of the Clean Air Act to mean that, in order to qualify for an award, the moving party had to demonstrate that it achieved at least some degree of success on the merits of the action. Petitioner argues that it is eligible for an award of attorneys' fees and expenses under section 525(e) of SMCRA and 43 CFR 4.1294 because it both achieved some degree of success on the merits and made a substantial contribution to a full and fair determination of the issues in the proceeding.

In its response to the petition, OSM characterizes Petitioner's argument as follows:

LaRosa Fuel contends that because it prevailed on the procedural issue that OSM's jurisdiction over the subject mine site had terminated due to a state bond release and OSM had not reinstated jurisdiction prior to taking enforcement action against it, the company was not a permittee and, accordingly, entitled to an award of costs and expenses as a citizen participant in an administrative proceeding.

(Response at 6-7.) OSM describes that argument as "novel," but it asserts that "there is no indication that Congress intended such an artful construction of the attorneys' fees provision." *Id.* at 7.

OSM points out that under the American rule on attorneys' fees each party litigant pays his own fees and expenses absent a statutory provision to the contrary. Statutory exceptions to the American rule, OSM contends, are strictly construed against the party requesting fee shifting and "the general rule is not deemed to have been abandoned unless the legislative intent is clear," citing Ruckelshaus v. Sierra Club, *supra*, at 685, and Utah International v. Department of the Interior, 643 F.Supp. 810, 817 (D. Utah 1986). (Response at 7.) "This is particularly true where a party is requesting that the government pay its costs and expenses, since this constitutes a waiver of sovereign immunity." *Id.*

^{3/} (...continued)

attorney and expert fees) whenever it determines that such award is appropriate.

OSM cites Utah International Inc. v. Department of the Interior, *supra*, at 821, stating that the court therein recognized the broad language of section 525(e) and indicated that in such circumstances it is incumbent on the tribunal to examine the circumstances surrounding the enactment of the legislation. OSM states that while the legislative history regarding the attorneys' fee provisions of SMCRA is limited, it "indicates congressional intent to provide for fees shifting to members of the coal mining industry only in the extraordinary circumstances of bad faith actions designed to harass such persons." (Response at 7.)

OSM examines the legislative history of SMCRA regarding attorneys' fees and the use by Congress therein of the term "citizen."^{4/} It states that the usage of that term indicates Congressional intent to distinguish between "the citizens living in the coal fields and persons engaged in the regulated community." (Response at 9.) It

^{4/} In particular, OSM quotes from a House Report on H.R. 2, which eventually became SMCRA, and a Senate Report. Those provide in pertinent part, as follows:

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. * * * 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.

H.R. Rep. No. 95-218, 95th Cong., 1st Sess. at 88-89 (1977).

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.

S. Rep. No. 128, 95th Cong., 1st Sess. 59 (1977).

contends that attorneys' fee provisions were intended to encourage citizen participation in the enforcement of SMCRA. In this case, OSM argues, LaRosa Fuel was not supporting enforcement of SMCRA but was opposing enforcement. As such, it asserts, LaRosa Fuel was not one of the citizens that Congress intended to benefit by fee shifting.

OSM dismisses Petitioner's reliance on Florida Power, stating that "[t]he different legislation, different nature of the litigation, and especially the different legislative history interpreted make that decision inapplicable to this case." (Response at 10.)

Congressional intent regarding the payment of costs and expenses to a member of the regulated community, OSM asserts, is expressed in the language of S. Rep. No. 128, quoted in relevant part in note 4, supra, limiting recovery to those cases in which the suit or the participation is in bad faith. This limitation, OSM contends, is replicated in 43 CFR 4.1294(c), which further requires that the bad faith action must be for the purpose of harassing or embarrassing the permittee.

OSM argues that LaRosa Fuel's attempt to evade the limitations of 43 CFR 4.1294(c), by claiming that it is not a permittee, ignores reality. OSM states that it cited LaRosa Fuel as the permittee of the "subject operation" and that LaRosa Fuel's participation in the proceeding was as the permittee cited for a violation of SMCRA. (Response at 11.) LaRosa Fuel was not, OSM contends, "a member of the general public aiding enforcement of the regulatory scheme." Id. OSM asserts that, in the context of the underlying proceeding, LaRosa Fuel must be considered to be a permittee and, thus, precluded from claiming costs and expenses under 43 CFR 4.1294(b).

LaRosa Fuel is not entitled to costs and expenses under 43 CFR 4.1294(c), because OSM acted in good faith in issuing the CO and pursuing the enforcement action, OSM argues. OSM charges that LaRosa Fuel's allegation of bad faith on the part of OSM is "strained and baseless." (Response at 11.)

In reply, Petitioner challenges OSM's reading of the legislative history of SMCRA, arguing that there is nothing in that legislative history to support the restrictive interpretation espoused by OSM. Petitioner contends that to the extent the legislative history "demonstrates a Congressional intent to make a distinction between permittees and others, it has already been considered by the Secretary and included in OHA's regulations." (Reply at 4.) It states that Florida Power, which OSM dismisses as inapplicable, involves the same provision of the Clean Air Act interpreted in Ruckelshaus, on which OSM relies. It also contends that the court in Save Our Cumberland Mountains v. Hodel, 826 F.2d 43 (D.C. Cir. 1987), found the interpretations of the Clean Air Act fee awards provision applicable to SMCRA.

Petitioner argues that the only legitimate question for consideration in the present case is whether it is eligible for an award under 43 CFR 4.1294(b) or (c).

Petitioner charges that OSM is wrong in asserting that it is a permittee. It states that it received a final bond release for permit No. 79-76 on July 30, 1984, and that it did not hold a permit for the land in question at the time OSM issued its CO on April 2, 1992. Because it was not a permittee, LaRosa Fuel asserts, it is eligible for an award under 43 CFR 4.1294(b). Furthermore, it contends that it has complied with the standards set forth in that regulation.

In the alternative, Petitioner argues that, even if the Board were to find that it was a "permittee," it would be entitled to an award under 43 CFR 4.1294(c) because OSM acted in bad faith in issuing the CO. In support of its allegation of bad faith, it contends that OSM waited nearly eight years after permit release to issue the CO in question at which time most of the records regarding mining and water monitoring at the site no longer existed, the site itself had been changed by events taking place following the completion of mining in 1979, and witnesses' memories of events were stale. In addition, Petitioner asserts that Judge Torbett found that there was no evidence that permit release had been obtained by misrepresentation or fraud, a finding, it contends, is supported by the testimony of OSM inspector, William Berthy.

By waiting eight years and then issuing an imminent danger CO, Petitioner argues, OSM sought to avoid its own regulations, which require deference to the actions of the state regulatory authority and establish a procedure for reassertion of jurisdiction. Those facts, it contends, show that OSM's actions against it were taken in bad faith.

Discussion

LaRosa Fuel's petition presents the issue of whether a member of the coal mining industry may recover costs and expenses from OSM when it seeks review of an enforcement action, initiated after the company received final bond release from the State regulatory authority, and succeeds.

Petitioner argues that the language of section 525(c) of SMCRA is broad in scope and allows an award to "any person." It points out that "person" is defined in SMCRA as "an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." 30 U.S.C. § 1291(19) (2000). As a corporation, LaRosa Fuel asserts, it clearly falls within the definition of person.

While the broad language of section 525(e) of SMCRA is the starting point for consideration of issues concerning awards of costs and expenses under SMCRA, the Secretary has provided further guidance for awards through the promulgation of regulations at 43 CFR 4.1290-4.1296, which address, inter alia, who may receive an

award. The legislative history of SMCRA played a large role in the development of those regulations, as explained in the preamble to those regulations, as proposed:

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 [of Hearings and Appeals] 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.

43 FR 15444 (Apr. 13, 1978).

[2] The preamble to the final rulemaking explained that the majority of the comments received on the proposed rulemaking related to proposed 43 CFR 4.1294-- who may receive an award. The Department rejected the suggestion that the entire section should be deleted in favor of a substitution of the statutory language of section 525(e) on the basis that the suggested change "did not answer any of the questions raised by the statutory language." 43 FR 34385 (Aug. 3, 1978). The Department explained that the final rules had been revised to reflect who pays for an award and the finding necessary in making an award. Those revisions included the addition of subsections (b) and (c) to 43 CFR 4.1294.^{5/} The Department further stated: "While it is realized that the standards for an award are not the same for all parties, the legislative history, as set forth above, clearly states that an award may be made to the permittee only when the action is brought or participation is undertaken in bad faith." 43 FR 34386 (Aug. 3, 1978).

Thus, under the regulations, the Department limited the ability of a permittee to recover an award of costs and expenses to situations involving bad faith on the part of OSM. OSM contends that LaRosa Fuel is a permittee because "OSM obviously cited LaRosa Fuel as the permittee of the subject operation." (Response at 11.) However, the fact that OSM cited LaRosa Fuel as a permittee does not make LaRosa Fuel a permittee. The permanent program regulations define a permittee as "[a] person holding or required by the Act or this chapter to hold a permit to conduct surface coal mining and reclamation operations issued by a State regulatory authority pursuant to a

^{5/} In final rulemaking effective Dec. 16, 1985, the Department amended 43 CFR 4.1294(b) to conform with the ruling of the United States Supreme Court in Ruckelshaus v. Sierra Club, supra, that, absent some degree of success on the merits, it is not appropriate to award attorneys' fees.

state program * * *." 30 CFR 701.5. The initial regulatory program regulations at 30 CFR Part 710 do not contain a definition of "permittee." However, those regulations provide at 30 CFR 710.11(a)(2)(i) that "[a] person conducting coal mining operations shall have a permit if required by the State in which he is mining * * *." LaRosa Fuel had the necessary permit required by the State of West Virginia. As we noted in LaRosa: "The regulations provide at 30 CFR 843.11(a)(1) that OSM 'shall immediately order a cessation of surface coal mining and reclamation operations, or the relevant portion thereof,' if certain conditions, practices, or violations exist. (Emphasis added.) Where jurisdiction has terminated, a minesite is no longer considered a surface coal mining and reclamation operation." 134 IBLA at 352, n.18. Further, we concluded that "the State's written finding in its bond release terminated the jurisdiction of both the State regulatory authority and OSM in its oversight role." 134 IBLA at 350. Absent reassertion of jurisdiction, which would necessarily require a proper finding under 30 CFR 700.11(d)(2), LaRosa Fuel could not have been considered a "permittee" in 1992 when OSM issued the CO in this case or at any time during the administrative review proceeding that resulted in our 1996 decision.^{6/} For that reason, LaRosa Fuel is not eligible for an award of costs and expenses, including attorneys' fees, as a permittee under 43 CFR 4.1294(c). It may recover from OSM, if at all, only under 43 CFR 4.1294(b).

[3] Under 43 CFR 4.1294(b), any person, other than a permittee or his representative, is eligible for an award from OSM when that person initiates or participates in any proceeding under SMCRA and prevails, in whole or in part, achieving at least some degree of success on the merits. Further, the Department must find that the person made a substantial contribution to a full and fair determination of the issues.

Petitioner states that both section 525(e) of SMCRA and 43 CFR 4.1294(b) use the term "any person," and that it is a "person," as defined in SMCRA, 30 U.S.C. § 1291(19) (2000). In addition, it initiated the underlying administrative proceedings by filing an application for review of, and temporary relief from, the CO. OSM contends, however, that LaRosa Fuel is not a "person," in the sense that Congress intended to authorize awards "to members of the coal mining industry only in the extraordinary circumstances of bad faith actions designed to harass such persons." (Response at 7.) Despite OSM's contention, we note that the legislative history of SMCRA, in announcing the restriction referred to by OSM, uses the word "permittee," as does 43 CFR 4.1294(c). The phrase used by OSM--"member of the coal mining industry"--is much more inclusive than the word "permittee." As we found above, LaRosa Fuel was not a permittee in the underlying proceedings.

^{6/} We need not decide in this case what the effect of reassertion of jurisdiction by OSM and the sustaining of an OSM enforcement action might have had, if any, on this petition for costs and expenses. There is no evidence in the record that OSM has reasserted jurisdiction over the site in question in accordance with the regulations.

[4] OSM's contention that "members of the coal mining industry" are only eligible for awards from OSM in the context of 43 CFR 4.1294(c) is not supportable. The Board rejected a similar contention in Skyline Coal Company v. OSM, 150 IBLA 51 (1999), a decision issued by the Board while consideration of this petition was suspended. In Skyline, the Board expressly held that the definition of "person" in 30 U.S.C. § 1291(19) (2000) includes coal companies and that a coal company applying for a permit application who seeks review of a denial of that application is a person who may properly petition for an award of costs and expenses, including attorneys' fees, under 43 CFR 4.1294(b). 150 IBLA at 55-56. As the Board stated in Skyline: "As a coal company, Skyline is clearly within the category of "person" under the Act, and as such is not excluded from the ambit of 43 C.F.R. § 4.1294(b) unless it is also a permittee." Id. at 56. In that case, Skyline was an applicant for a specific permit and not a permittee.

As we held above, La Rosa Fuel was not a permittee in the underlying proceeding. It initiated the proceeding in this case, not as a permittee, but as a member of the coal mining industry seeking to vindicate its rights under the regulations and to assure OSM's compliance with those regulations.

As previously stated, LaRosa Fuel received a bond release from the State regulatory authority for permit No. 79-76 in 1984. At that time the State regulatory authority had the regulatory responsibility to determine when reclamation under the initial regulatory program had been successfully completed:

From 1984 to November 1988, the State's written finding and bond release had no effect on OSM's jurisdiction because OSM possessed independent enforcement jurisdiction over initial program sites and a State bond release had no effect on its jurisdiction. See OSM Brief at 42; OSM v. Calvert & Marsh Coal Co., Inc., 95 IBLA 182, 189 (1987); Grafton Coal Co., 3 IBSMA 175, 181 (1981). Nevertheless, the present record contains no evidence of any enforcement action taken by OSM against LaRosa Fuel's Kittle Flats permits during that time period, despite a number of oversight inspections. In fact, following an inspection of Kittle Flats in 1985 and issuance of a 10-day notice to the State citing a failure to meet effluent limitations, OSM expressly declined to take any action "since [the] State has assumed liability for the site and is pursuing action to correct the violation" (Exh. P-63; see Tr. 39-40).

Both OSM and WVHC argue that the 1988 rulemaking did not change the policy as expressed in the Calvert & Marsh case that only successful completion of reclamation according to Federal initial regulatory program standards could terminate OSM's jurisdiction and that OSM never lost jurisdiction in this case because the site in question

was not reclaimed to initial program standards at the time of bond release.

However, if, as argued by OSM and WVHC, OSM never lost jurisdiction because a particular site allegedly had not been reclaimed, there would never be a need for a procedure for reassertion of jurisdiction as outlined in the 1988 rulemaking; OSM could, in its oversight role, bring enforcement actions against operators at any time, even after final bond release, just as before the rulemaking. Such a position is inconsistent with the purpose [of] the rulemaking which sought to eliminate the confusion, disagreements, and second-guessing that had developed because there was not an established point at which regulatory jurisdiction ended under the Act for both the State regulatory authority and for OSM. See 53 FR 44356 (Nov. 2, 1988); 52 FR 24092 (June 26, 1987). [Footnotes omitted.]

LaRosa Fuel Co. v. OSM, 134 IBLA at 348-49.

We concluded in LaRosa that the State's written finding in its bond release terminated the jurisdiction of both the State regulatory authority and OSM in its oversight role, and, regardless of whether OSM disagreed with that determination, it was binding until jurisdiction was properly reasserted under the regulations at 30 CFR 700.11(d).

In this case, we must conclude that La Rosa Fuel is eligible under 43 CFR 4.1294(b) for an award as a "person" who initiated a proceeding under SMCRA, if the other standards of that regulation are met.

That regulation requires that the person prevail in whole or in part in the proceeding, achieving at least some degree of success on the merits. LaRosa Fuel did, in fact, prevail on the question of OSM's jurisdiction to issue the CO. Although OSM characterizes that question as a "procedural issue" (Response at 6), a party is considered to be a prevailing party for purposes of awarding attorneys' fees when it essentially succeeds in obtaining the relief it sought on "central issues." See Ruckelshaus v. Sierra Club, 463 U.S. at 688. That is the case here. LaRosa Fuel succeeded in having the CO vacated on the basis of a central issue in the underlying proceeding--OSM's jurisdiction to take enforcement action. In this case, that question was substantial and of first impression.

The regulation also requires a finding that the person seeking the award made a substantial contribution to a full and fair determination of the issues. We make such a finding. The issue of jurisdiction was raised and briefed by LaRosa Fuel and it made a substantial contribution to a full and fair determination of the issues in this case.

For the above stated reasons, we conclude that LaRosa Fuel is entitled, under the circumstance of this case, to an award from OSM of costs and expenses, including attorneys' fees.

We turn now to a determination of the amount of the award. Petitioner originally sought \$122,888.75 in attorneys' fees and \$9,647.19 in costs. On May 24, 1996, it amended its petition, increasing its attorneys' fees \$1,300.00 to \$124,188.75 and its costs and expenses \$17,269.00 to \$26,916.19.^{7/} In its response to the petition, OSM requested that the Board deny the petition. In the alternative, it requested that the Board reduce the amount requested by LaRosa Fuel, based on its assertion that LaRosa Fuel should not be entitled to an award against OSM for litigating issues solely against WVHC. Specifically, it identifies those matters as responding to and opposing WVHC's discovery requests and standing in the case. OSM stated that the amount of time spent on those items was not precisely determinable from the supporting records provided by LaRosa Fuel. However, it estimated that approximately 70 hours claimed for Dean K. Hunt, Esq., 78 hours for Michele M. Whittington, Esq., and 19 hours for Karen F. Black were spent on matters solely related to WVHC.^{8/}

Petitioner responds:

In this proceeding, the Intervenor and the OSM were wholly aligned and there was no meaningful distinction that can be made between the arguments made by one or the other. The cessation order issued by the OSM was issued at the request of the Intervenor and the two parties worked together to coordinate their presentation throughout the administrative proceedings. The OSM and the Intervenor presented virtually the same position throughout and, with the exception of LaRosa

^{7/} The increased attorneys' fees reflected work to prepare a response to OSM's motions. LaRosa Fuel states that additional expenses were inadvertently omitted from the petition. It lists those expenses, as follows, providing copies of each invoice:

Sturm Environmental Services: Invoice #016610	\$2,936.00
Sturm Environmental Services: Invoice #016855	\$2,936.00
Sturm Environmental Services: Invoice #017033	\$2,784.80
Donald Strieb: October 12, 1992 Invoice	\$7,213.00
Total	\$15,869.80

Our review of the copies of those invoices shows the amount listed on Invoice #016855 to be \$4335.20, rather than \$2,936.00. Therefore, we have adjusted the total additional itemized expenses included in the amended petition to \$17,269.00.

^{8/} OSM did not take issue with any other aspect of the amounts claimed by LaRosa Fuel for attorneys' fees and expenses.

Fuel's opposition to the Intervenor's standing, there was no "separate and distinct" work effort related specifically to Intervenor.

(Reply at 11.) We must agree with Petitioner. The case record shows that OSM and WVHC were closely aligned in their presentation of the case against LaRosa Fuel. However, LaRosa Fuel does agree that OSM should not be obligated to compensate it for attorneys' fees related solely to WVHC. LaRosa Fuel itemizes those hours, with supporting documentation, at 35.75 hours for Hunt, 52.25 hours for Whittington, and 7 hours for Black. In a document styled "Second Amended Application for Award of Costs and Expenses," which accompanied its reply, Petitioner withdraws the amount of \$9,486.25 from its request for fees. OSM has not challenged that figure. Subtracting \$9,486.25 from Petitioner's previous fee total request of \$124,188.75 results in \$114,702.50 in requested fees. However, in the same document, Petitioner amends the petition to include additional fees in the amount of \$3,960.00 for time spent in preparing the reply. OSM has not challenged that amount. Adding that amount to the above total equals \$118,662.50 in requested fees.

Thus, the documentation submitted by Petitioner supports an award of attorneys' fees in the amount of \$118,662.50 and \$26,916.19 in costs and expenses for a total award of \$145,578.69.^{2/}

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition is granted and petitioner is awarded a total of \$145,578.69.

Bruce R. Harris
Deputy Chief Administrative Judge

^{2/} There is some inconsistency between these totals and the amounts set forth in the concluding paragraph of the "Second Amended Application for Award of Costs and Expenses." Therein, Petitioner states that it incurred attorneys' fees in the amount of \$117,362.50 and "expenses" in the amount of \$19,703.19 and requests an award in the total amount of \$137,065.69. It appears that Petitioner's final total for attorneys' fees may have excluded the additional \$1,300 in attorneys' fees claimed in the first amended application, which added to \$117,362.50 totals \$118,662.50. As for costs and expenses, the record documentation supports an award of \$26,916.19. If Petitioner believes that certain costs and expenses should be reduced or excluded, it should present that information to the Board within 15 days of receipt of this decision and the Board will modify the award.

I concur:

C. Randall Grant, Jr.
Administrative Judge