



WEST VIRGINIA HIGHLANDS CONSERVANCY, INC. v. OSM  
(ON JUDICIAL REMAND)

181 IBLA 31

Decided March 31, 2011



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

WEST VIRGINIA HIGHLANDS CONSERVANCY, INC.  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT  
(ON JUDICIAL REMAND)

IBLA 2009-314

Decided March 31, 2011

Judicial remand of a petition for award of costs and expenses, including attorney fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (2006), and its implementing regulations.

Petition denied.

1. Surface Mining Control and Reclamation Act of 1977:  
Administrative Procedure: Findings--Surface Mining  
Control and Reclamation Act of 1977: Attorney Fees/  
Costs and Expenses: Standards for Award

Under 43 C.F.R. § 4.1294(b), one who initiates or participates in a proceeding under SMCRA may be eligible for an award of costs and expenses, including attorney fees, from OSM, where that person prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that the record demonstrates, by a preponderance of the evidence, that such person made a substantial contribution to a full and fair determination of the issues.

2. Surface Mining Control and Reclamation Act of 1977:  
Administrative Procedure: Burden of Proof--Surface  
Mining Control and Reclamation Act of 1977: Attorney  
Fees/Costs and Expenses: Substantial Contribution

A petitioner for costs and expenses, including attorney fees, bears the burden to establish specific facts proving that it has made a substantial contribution to a full and fair determination of the issues.

3. Appeals: Jurisdiction--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Applicability: Enforcement Provisions

As an appellate administrative forum, the Board has authority to consider, *sua sponte*, whether OSM has acted within the scope of its jurisdiction and, if the question cannot be resolved on the record before it, to remand the matter for consideration of that question.

4. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints--Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Substantial Contribution

Whether a petitioner for costs and expenses, including attorney fees, has substantially contributed to a full and fair determination of the issues is a question of fact committed by statute to the Board's discretion.

5. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints--Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Substantial Contribution

The test of whether a party has made the requisite substantial contribution under 43 C.F.R. § 4.1294(b) is whether there is a causal nexus between the petitioner's actions and the relief obtained, the determination of which depends upon the totality of the circumstances.

6. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints--Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Substantial Contribution

The filing of an appeal, in and of itself, does not establish, by a preponderance of the evidence, that a citizen seeking an award of costs and expenses, including attorney fees, has substantially contributed to a full and fair determination of the issues; and an award of costs and expenses, including attorney fees, will not be granted

where the totality of circumstances demonstrates that the petitioner performed no appreciable work that assisted the Board in deciding an appeal; because, in that circumstance, the petitioner has failed to establish a causal nexus between its work on the appeal and the relief obtained.

APPEARANCES: Walton D. Morris, Esq., Charlottesville, Virginia, and Thomas Galloway, Esq., Boulder, Colorado, for Petitioners; Wayne A. Babcock, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE ROBERTS

This case comes to the Board from the U.S. District Court for the Northern District of West Virginia, on remand <sup>1</sup> of our December 30, 2005, Order, which denied the Petition for an Award of Costs and Expenses (Petition) of West Virginia Highlands Conservancy (WVHC) associated with its citizen's complaint in *West Virginia Highlands Conservancy (WVHC)*, 165 IBLA 395 (2005) (the underlying appeal).<sup>2</sup> That complaint pertained to a previously mined surface mining site, identified as Interim Permit 78-84 (Permit 78-84), held by LaRosa Fuel Co., Inc. (LaRosa or LaRosa Fuel).<sup>3</sup>

WVHC filed its Petition on June 27, 2005, pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or Act), 30 U.S.C. § 1275(e) (2006), and its implementing regulation, 43 C.F.R. § 4.1294(b), which provides that costs and expenses, including attorney fees, may be awarded to a citizen who initiates or participates in an administrative proceeding under the Act, "who prevails in whole or in part, achieving at least some success on the merits, upon a finding that he has substantially contributed to a full and fair determination of the

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<sup>1</sup> See *West Virginia Highlands Conservancy, Inc. v. Kempthorne (WVHC v. Kempthorne)*, No. CA 2:06CV11 (STAMP), 2007 WL 2752695, at \*7 (N.D.W.Va., Sept. 20, 2007), *aff'd*, *WVHC v. Kempthorne*, 569 F.3d 147 (4th Cir. 2009).

<sup>2</sup> That appeal was docketed as IBLA 95-570. WVHC's Petition was originally docketed as IBLA 2005-204.

<sup>3</sup> LaRosa was issued a surface mining permit for the site under the Interim Program administered by OSM immediately following passage of SMCRA. Interim permits were issued under SMCRA's interim program regulations, and were effective until adoption of permanent Federal or State regulatory programs was accomplished. See, e.g., *Delmar Atkins v. OSM*, 128 IBLA 1, 5 (1993); *Gateway Coal Co. v. OSM*, 118 IBLA 129, 147-48, 98 I.D. 70, 79-80 (1991).

issues.” *Id.* The District Court reversed our December 2005 Order determining that WVHC failed to meet the requirement in 43 C.F.R. § 4.1294(b) of “achieving at least some success on the merits,” and remanded the case for a factual determination of whether, under that regulation, WVHC had “made a substantial contribution to a fair and full determination of the issues” with respect to “achieving the Board’s decision to remand for further development of the record.” *WVHC v. Kempthorne*, Slip op. at 18, 2007 WL 2752695, at \*7.

In this opinion, we deny WVHC’s Petition. Considering the totality of circumstances, we find that WVHC has not met its burden of establishing specific facts proving that it substantially contributed to a full and fair determination of issues in our decision to remand the underlying appeal. We more fully explain below.

## I. BACKGROUND

### A. Summary of the Legal Context

The critical legal context can be condensed into a few essential points, most of which were addressed in greater detail in the underlying appeal, *WVHC*, 165 IBLA at 401-06, and in two Board opinions which preceded it: (1) *LaRosa Fuel Co., Inc. v. OSM (LaRosa Fuel Co. v. OSM)*, 134 IBLA 334 (1996), *aff’d sub nom. West Virginia Highlands Conservancy, Inc. v. Babbitt and LaRosa Fuel, Inc. (WVHC v. Babbitt)*, No. 1:96CV34 (N.D.W.Va. Sept. 8, 1997); *vacated and remanded for dismissal* (IBLA decision not ripe for review), *WVHC v. Babbitt*, 161 F.3d 797 (4th Cir. 1998); *dismissed* (N.D.W.Va. May 6, 1999); and (2) *Cheyenne Sales Co., Inc. v. OSM (Cheyenne Sales Co. v. OSM)*, 163 IBLA 30 (2004), *aff’d, Cheyenne Sales Co. v. Norton*, No. 2:04CV74 (STAMP), 2007 WL 773904 (N.D.W.Va. Mar. 9, 2007).

The initial regulatory program under SMCRA became applicable to West Virginia surface coal mining operations on May 3, 1978. *WVHC*, 165 IBLA at 396; *LaRosa Fuel Co. v. OSM*, 134 IBLA at 338. LaRosa was issued Permit 78-84 in 1978, and completed mining in 1979. *WVHC*, 165 IBLA at 396. In January 1981, the Secretary approved West Virginia’s permanent regulatory program, with several conditions. 46 Fed. Reg. 5915, 5954-56 (Jan. 21, 1981); *see* 30 C.F.R. § 948.10. In March 1983, the State legislature enacted amendments to the West Virginia Surface Coal Mining and Reclamation Act, including the addition of a proviso, commonly known as the Colombo (or Columbo) Amendment, to § 20-6-26(c)(3) of that Act, later recodified as § 22A-3-23(c)(3). *WVHC*, 165 IBLA at 397. The Colombo Amendment permitted release of a mining operator’s performance bond held by the State if postmining water quality at the site was equal to or better than premining water quality, even if the effluent discharge did not meet the requirements of then

current regulatory standards.<sup>4</sup> *Id.* Pursuant to the Colombo Amendment, the West Virginia regulatory program released LaRosa's performance bond for Permit 78-84 in October 1983. *Id.*

Between May 3, 1978, and November 2, 1988, OSM held concurrent jurisdiction with West Virginia over its surface coal mining sites,<sup>5</sup> but apparently did not initiate Federal enforcement action with respect to the quality of drainage emanating from Permit 78-84. *WVHC*, 165 IBLA at 396-97.<sup>6</sup> In the meantime, on July 11, 1985, OSM determined that the Colombo Amendment was inconsistent with section 519(c)(3) of SMCRA, 30 U.S.C. § 1269(c)(3) (2006),<sup>7</sup> and issued notice that the State provision was "preempted and superceded" by section 519(c)(3). *See* 50 Fed. Reg. 28319, 28344 (July 11, 1985). But, approximately 3 years later, on November 2, 1988, at the same time it relinquished concurrent jurisdiction with the States, OSM promulgated 30 C.F.R. § 700.11(d), which provides, among other things, that once a state releases a coal operator's bond, OSM is authorized to reassert jurisdiction over such sites only if the bond release was "based upon fraud, collusion, or a misrepresentation of fact."<sup>8</sup> 30 C.F.R. § 700(11)(d)(2); *see LaRosa Fuel Co.*

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<sup>4</sup> For a complete history and analysis of the Colombo Amendment, *see Cheyenne Sales Co. v. OSM*, 163 IBLA at 33-36.

<sup>5</sup> *See LaRosa Fuel Co. v. OSM*, 134 IBLA at 348 (citing *OSM v. Calvert & Marsh Coal Co., Inc.*, 95 IBLA 182, 189 (1987); *Grafton Coal Co.*, 3 IBSMA 175, 181, 88 I.D. 613, 616 (1981)).

<sup>6</sup> In *WVHC*, 165 IBLA at 396-97 n.1, we noted that an OSM reclamation specialist who visited the site in March 1980 reported that the site was one of the better operations he had visited "in quite a while," but he also stated that discharge from one of the sedimentation ponds "measured a pH of 4.46, a violation of effluent limits."

<sup>7</sup> That section provides that the final portion of a performance bond may not be released "until all reclamation requirements of [30 U.S.C. Chapter 25] are fully met."

<sup>8</sup> 30 C.F.R. § 700.11(d) provides, in its entirety:

(1) A regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, when:

(i) The regulatory authority determines in writing that under the initial program, all requirements imposed under subchapter B of this chapter have been successfully completed; or

(ii) The regulatory authority determines in writing that under the permanent program, all requirements imposed under the applicable regulatory program have been successfully completed or, where a performance bond was required, the regulatory authority has made a

(continued...)

v. OSM, 134 IBLA at 344-47. Thus, the Board held that bond releases arising under the Colombo Amendment *before* it was “preempted and superceded,” that is, before July 11, 1985, or *subsequent to* December 2, 1988, the effective date of 30 C.F.R. § 700.11(d),<sup>9</sup> will be honored unless OSM makes a finding that the State’s determination not to reassert jurisdiction was arbitrary and capricious, based upon a finding of fact that the written determination referred to in 30 C.F.R. § 700.11(d)(1)(i) “was based on fraud, collusion, or a misrepresentation of material fact.” *See LaRosa Fuel Co. v. OSM*, 134 IBLA at 351; *Cheyenne Sales Co. v. OSM*, 163 IBLA at 51-53.<sup>10</sup>

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<sup>8</sup> (...continued)

final decision in accordance with the State or Federal program counter-part to part 800 of this chapter to release the performance bond fully.

(2) Following a termination under paragraph (d)(1) of this section, the regulatory authority shall reassert jurisdiction under the regulatory program over a site if it is demonstrated that the bond release or written determination referred to in paragraph (d)(1) of this section was based upon fraud, collusion, or misrepresentation of a material fact.

<sup>9</sup> Regulation 30 C.F.R. § 700.11(d) was suspended between June 3, 1991, and May 11, 1992, because the District of Columbia District Court struck down the regulation in *National Wildlife Federation (NWF) v. Dep’t of the Interior*, 1990 WL 134495 (D.D.C. 1990). *See* 56 Fed. Reg. 25036, 25037 (June 3, 1991). OSM appealed that decision, and in *NWF v. Lujan*, 950 F.2d 765 (D.C. Cir. 1991), the D.C. Court of Appeals reversed. OSM reinstated the rule effective May 11, 1992. *See* 57 Fed. Reg. 12461-62 (Apr. 10, 1992).

<sup>10</sup> Cheyenne’s bond was released by the State on May 29, 1987, after OSM preempted the Colombo Amendment, but before 30 C.F.R. § 700.11(d) became effective. *Cheyenne Sales Co. v. OSM*, 163 IBLA at 53 n.10. In *Cheyenne*, the Board held that OSM properly reasserted jurisdiction pursuant to 30 C.F.R. § 700.11(d)(2) because West Virginia’s release of Cheyenne’s bond was based upon a written determination that contained a “misrepresentation of a material fact”; that is, in releasing Cheyenne’s performance bond after the Colombo Amendment had been preempted, the State erroneously relied on the standard articulated in the Colombo Amendment instead of the effluent limitations then in place. *Id.* As we discuss in further detail *infra*, we distinguished the facts in *WVHC* from those in *Cheyenne* because, as in *LaRosa*, the State had released the performance bond prior to the effective date of preemption. *WVHC*, 165 IBLA at 403-04; *see also Cheyenne Sales Co. v. OSM*, 163 IBLA at 52, quoting *LaRosa Fuel Co. v. OSM*, 134 IBLA at 351.

*B. The Underlying Appeal*

WVHC filed its citizen's complaint concerning former Permit 78-84 on May 13, 1994. *WVHC*, 165 IBLA at 397. The complaint alleged that the permit site was discharging acid mine drainage in violation of hydrologic protection provisions of SMCRA. *Id.* at 396. In the complaint, WVHC noted that the State had released LaRosa's bonds for the site in 1983, but "contended that the bond release was not properly based in the approved State program and did not terminate OSM's jurisdiction over the site." July 29, 2005, OSM "Answer to Petition for Awards and Expenses" filed in IBLA 95-570 at 2. Following receipt of the complaint, OSM issued a 10-day notice (TDN) to the State in May 1994 to which the State responded, stating that it had no jurisdiction to investigate WVHC's complaint because LaRosa's final performance bond had been released; that the release "was not based on fraud, collusion, or misrepresentation of a material fact"; and, therefore, that West Virginia Surface Mine Regulation § 38-2-1.2(c) "regarding reassertion of jurisdiction was not applicable."<sup>11</sup> *Id.* at 397. In rejecting the State's response, OSM made the following finding, which we quoted verbatim:

The response to violation #1 has been determined to be arbitrary, capricious, or an abuse of discretion under the State program in that you have failed to take action to cause the violation(s) to be corrected or to show good cause for such failure. The determination that the response is inappropriate is based on the fact that OSM has reason to believe that discharges from LaRosa Fuel Company, Inc., permit number 84-78 have and continue to violate the hydrologic protection requirements of the Federal initial regulatory program and the State's approved permanent regulatory program. The State has failed to show that discharges from the site complied with the effluent limitations set forth in the [Clean Water Act's National Pollutant Discharge Elimination System (NPDES)] program at final release. The [S]tate's decision to release LaRosa's performance bond does not affect the State's responsibility to take enforcement action against LaRosa for its continued failure to meet applicable effluent limitations and water quality standards.

*Id.* at 398 (quoting Administrative Record (AR), Tab 5).

The State requested informal review, but did not submit documentation confirming that it had properly released LaRosa's bond, although it submitted a "detailed statement of reasons" (SOR) asserting that "neither the State nor OSM could properly reassert jurisdiction over the site." *WVHC*, 165 IBLA at 398. Our

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<sup>11</sup> This regulation is identical to 30 C.F.R. § 700.11(d)(2). *WVHC*, 165 IBLA at 398.

decision in *WVHC* quoted the following language from the State's SOR relating to its finding that it lacked authority to reassert jurisdiction:

There is no dispute that the release of the performance bonds and the termination of agency jurisdiction over the site in question w[ere] based on written determinations that all statutory and regulatory requirements had been complied with. Accordingly, the provisions for reassertion of jurisdiction as set forth in current federal regulations at 30 CFR 700.11(d) are applicable to OSM. West Virginia has adopted the same provisions into our rules at CSR 38-2-1.2(c).

*Id.* (quoting AR, Tab 7, June 24, 1994, letter at 3). The State further responded that "the site was in compliance with applicable effluent limitations in effect at the time of the bond release and that "bond release was granted on the basis that the water quality from the reclaimed mine site was equal to or better than that which existed prior to the mining operation." *Id.*

On October 5, 1994, OSM's Deputy Director concluded that "the State agency had not taken appropriate action and ordered a Federal inspection." *WVHC*, 165 IBLA at 399. In doing so, he rejected the argument raised by the State that the bond release terminated the regulatory jurisdiction over the permit. *Id.* In support, he relied upon two 1992 decisions from the Hearings Division, Office of Hearings and Appeals, involving LaRosa Fuel Co., Inc., and Cheyenne Sales Co.<sup>12</sup> *Id.* OSM investigators subsequently conducted an inspection of the effluent discharge from former Permit 78-84, but did not find any evidence of violations of effluent standards under SMCRA. *Id.*

Subsequently, *WVHC* filed a request for informal review of the OSM Field Office decision. *WVHC*, 165 IBLA at 399. *WVHC* argued, *inter alia*, that OSM had not properly conducted the investigation and that "the mine site remained a surface coal mining operation because no regulatory authority had made a written determination that the requirements of the initial program regulations had been met at the site." *Id.* In its May 15, 1995, decision denying *WVHC*'s request, OSM rejected the claim that the refusal to take further action "constituted a termination of jurisdiction with respect to the site," but declined to conduct further inspections or monitoring, stating that it planned to undertake an agency-wide policy review to determine its overall approach to issues involving "the agency's implementation of the Clean Water Act." *Id.* *WVHC* appealed that determination to the Board.

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<sup>12</sup> These are the decisions that the Board later overturned in *LaRosa Fuel Co. v. OSM*, 134 IBLA at 334, and affirmed as modified in *Cheyenne Sales Co. v. OSM*, 163 IBLA at 30.

In remanding the appeal on jurisdictional grounds, our decision held:

In the context of this case, we must conclude the OSM inspection was premature in the absence of a determination by OSM that the decision by the State not to reassert jurisdiction was arbitrary, capricious, or an abuse of discretion based on a factual finding that the determination was based upon fraud, collusion, or misrepresentation of a material fact.

*WVHC*, 165 IBLA at 405 (citing *LaRosa Fuel Co, Inc.*, 134 IBLA at 346). We noted comments to the final rule that stated: “Should the State decline to reassert jurisdiction under § 700.11(d)(2), [OSM] will determine whether or not the State’s decision not to reassert jurisdiction was arbitrary, capricious, or an abuse of discretion under the approved State program.” *Id.* at 405 n.5. But we also observed that “West Virginia’s response to the TDN contained no copy of a written determination that applicable requirements had been successfully completed” as required by 30 C.F.R. § 700.11(d)(1)(i), and that “the State provided no evidence of pre-mining water quality to support its assertion that there was ‘no significant difference between pre-mining and post-mining quality for any parameter,’” noting that “[s]uch evidence would be relevant in determining whether there was a ‘misrepresentation of a material fact’ that would trigger the obligation to reassert jurisdiction under 30 C.F.R. § 700.11(d)(2).” *Id.* at 406. “In *LaRosa*, 134 IBLA at 348,” we had stated, “the written finding was incorporated in the bond release form utilized by the State in releasing the bond,” but “in the instant case, the record contain[ed] only a copy of the cover letter for the bond release; it [did] not include a copy of the bond release or any other document containing the necessary written finding.” *Id.* at 406 n.6.<sup>13</sup> We accordingly remanded the matter to OSM to determine “whether jurisdiction terminated,” and “whether or not a basis for reasserting jurisdiction had been established” under 30 C.F.R. §§ 700.11(d)(1)(i) and (d)(2), respectively. *Id.* at 406.

### C. *WVHC’s Petition for Award and Expenses in IBLA 2005-204*

*WVHC* subsequently filed a Petition for an Award of Costs and Expenses pursuant to 43 C.F.R. § 4.1290. Our December 30, 2005, Order in IBLA 2005-204 denied *WVHC’s* Petition on the ground that the organization had failed to achieve even partial success on the merits of its appeal in *WVHC*, 165 IBLA at 395. *WVHC* appealed to the Federal District Court for the Northern District of West Virginia.

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<sup>13</sup> It is unclear why OSM’s record in the underlying appeal did not include the written determination, as the State submitted the cover letter for the release and argued vehemently on informal review that the proper written determinations were in fact made. In any event, on remand the correct documentation was submitted, and OSM found that it had no basis upon which to reassert jurisdiction. See n.14 *infra*.

The District Court reversed our determination, holding that under the principles set forth in *WVHC v. Norton*, 343 F.3d 239 (4th Cir. 2003), our remand of OSM's disposition of the underlying citizen's complaint was itself indicative that WVHC had achieved at least partial success on the merits of the underlying litigation, and therefore, WVHC was, as a matter of law, eligible for an award. *WVHC v. Kempthorne*, CA No. 2:06CV11 (STAMP), slip op. at 16-18, 2007 WL 2752695 at \*6-\*7. The remaining question, the Court stated, was whether WVHC was *entitled* to an award under 43 C.F.R. § 4.1294(b) because it had "substantially contributed to a full and fair determination of the issues." *Id.*, slip op. at 18, 2007 WL 2752695 at \*7. That was a question of fact committed by statute to the Board's discretion, the Court held, quoting *WVHC v. Norton*, 343 F.3d at 348. *Id.*, slip op. at 14, 2007 WL 2752695 at \*6. Also quoting *Norton*, *id.* at 347, the District Court held that the "key to a finding of substantial contribution [to a full and fair determination of the issues] is 'the existence of a causal nexus between petitioners' actions in prosecuting the Board appeal and the relief obtained,'" and accordingly remanded the case to this Board "for further proceedings on the issue of substantial contribution." *WVHC v. Kempthorne*, slip op. at 16, 19; 2007 WL 2752695 at \*6, \*8.

## II. ARGUMENTS OF THE PARTIES

In its Brief on Remand (OSM Brief), OSM contrasts the more "typical" situation, where the Board rules on the merits of a complainant's grievance, from the instant situation where, OSM argues, the "principal issue" was not decided, but the case was remanded to determine a preliminary issue, rendering the success merely "an interlocutory procedural step" that "actually undermined WVHC's claims." OSM Brief at 7-8, 10. OSM argues that, under *Farrar v. Hobby*, 506 U.S. 103, 114 (1992), the "tribunal in awarding fees 'is obligated to give primary consideration' to the result as compared to the purposes of the litigation . . . ." *Id.* at 9. Here, OSM claims, "[t]he 'success' was not sought, intended, or even, ultimately, beneficial to WVHC's interests." *Id.* at 10.<sup>14</sup> WVHC's contribution in achieving a remand was "so negligible as to be uncompensable," OSM claims, as it accomplished "nothing it claimed in its appeal." *Id.* at 9.

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<sup>14</sup> As requested by the Board, OSM produced the letter decision it forwarded to the State subsequent to our remand of *WVHC*, 165 IBLA at 395, concerning the State's 1994 response to OSM's TDN. In that decision, OSM declined to reassert jurisdiction. It found that the State's 1994 response to the TDN was not arbitrary, capricious, or an abuse of discretion, because, on remand, the State produced the written determination generated at the time of the bond release, which supported its decision. Aug. 4, 2005, Letter Decision by the Director, CFO, to the West Virginia Department of Environmental Protection.

OSM next focuses on the issue of causation, or “causal nexus,” contending that, where causation is a factor, the question “generally is whether a cause is so closely connected with the result and of such significance that the law justifies imposing liability.” OSM Brief at 11. In this case, WVHC made *no* contribution to the Board’s *sua sponte* decision other than filing the appeal, OSM stresses. *Id.* Citing *Sierra Club v. Environmental Protection Agency*, 322 F.3d 718, 726 (D.C. Cir. 2003), OSM argues that the petitioner’s action must be a “substantial” or “significant” cause of the relief granted. *Id.* Conversely, OSM maintains, “but for” causation alone—that is, but for the filing of the appeal, the remand would not have happened—is insufficient to establish that WVHC’s contribution was “substantial.” *Id.* at 11-12. Even if the “but for” hurdle could be overcome and the Board should find that “substantial causation” is not required by the “substantial contribution” clause, WVHC’s contribution would be at best nominal and insufficient to justify an award, OSM argues. *Id.* at 11, 13-15. In such a circumstance, OSM urges, the standard for an award under the clause should be whether the petitioner provided “significant assistance to the Board in resolution of issues.” *Id.* at 12. In this case, OSM emphatically states, WVHC made *no* contribution to the Board’s decision to remand the case. *Id.* Citing the Board’s decision in *Natural Resources Defense Council*, 107 IBLA 339, 368-69 (1985), OSM argues that where the determinative substantive issues were neither raised nor litigated by petitioner, its contribution to a full and fair determination is nominal at best. *Id.* at 12-15.

In response, WVHC argues that the law of the case is that the Board must consider “whether the Conservancy made a substantial contribution toward achieving the Board’s decision to remand for further development of the record” without regard to the outcome of the remand. Petitioner’s Response Brief on Remand (WVHC Response) at 11 (emphasis by WVHC omitted). WVHC quotes the District Court’s holding that “substantial contribution may be found where a causal connection exists between the petitioner’s prosecution of the Board appeal and the relief granted”; and maintains that a “causal nexus between appeal and relief unquestionably exists” because WVHC’s appeal succeeded in causing the Board to “identify and correct perceived agency error.” *Id.* at 8-9, 17 (emphasis by WVHC omitted). WVHC claims that OSM’s Brief clouds the issue by confusing “causal nexus” with “causation” as it is used in tort law. *Id.* at 18. According to WVHC, nothing in the Court’s opinion can be construed to require a petitioner to demonstrate that its actions were “the sole cause” of the Board’s remand; rather, the term means that filing of its appeal was “a cause among several” that contributed to the Board’s remand. *Id.* at 17 (citing *Kentucky Resources Council, Inc. v. Babbitt (KRC v. Babbitt)*, 997 F. Supp. 814, 820-21 (E.D. Ky. 1998)). WVHC asserts that even though the onus is on OSM in every case to establish regulatory jurisdiction, in this case its appeal of OSM’s informal review decision on the merits is the only reason the jurisdictional issue came to the Board’s attention at all. *Id.* at 15-16, 21-22.

“The only question actually before the Board,” WVHC asserts, is “where the Board affords relief to an appellant based on an issue that the Board raises *sua sponte*, without first affording the parties an opportunity to brief that issue, must the Board subsequently interpret the ‘substantial contribution’ requirement . . . to require nothing more than competent prosecution of the administrative appeal in question?” WVHC Response at 12-13. “Here,” WVHC insists, “the result obtained was the set-aside of an adverse OSM informal review decision, in circumstances where OSM’s flawed investigation of its own regulatory jurisdiction rendered that relief all that the Conservancy could obtain.” *Id.* at 22. WVHC argues that the legislative history of SMCRA indicates strong support for citizen actions to ensure that SMCRA is properly enforced; that Congress did not intend that a citizen’s complaint result in the finding of a violation in order for fees to be awarded; and that to deny a fee award under these facts would “discourage good faith actions on the part of interested citizens.” *Id.* at 3, 13-14, 16. Moreover, in WVHC’s view, “[o]bscure flaws in OSM’s assertion or reassertion of jurisdiction were not issues the Conservancy could reasonably have been expected to challenge in its administrative appeal—especially in view of West Virginia’s failure to contest OSM’s informal review decision reaffirming the agency’s claim to active jurisdiction of LaRosa Fuel’s mine.” *Id.* at 14-15.

### III. ANALYSIS

[1] Section 525(e) of SMCRA authorizes the Secretary, “as he deems proper,” to award citizens and others “costs and expenses, including attorneys’ fees,” that the Secretary determines “to have been reasonably incurred . . . for or in connection with . . . participation in any administrative proceeding under the Act.” 30 U.S.C. § 1275(e) (2006). The conditions under which fees are “proper” are found in the regulations implementing section 525(e), 43 C.F.R. §§ 4.1290-1296. Under 43 C.F.R. § 4.1294(b), a person other than a permittee who initiates or participates in a proceeding under SMCRA may be eligible for an award from OSM of costs and expenses, including attorney fees, where that person prevails in whole or in part, achieving at least some degree of success on the merits. To be entitled to an award, however, the regulation requires that the record demonstrate that the person made “a substantial contribution to a full and fair determination of the issues.” *LaRosa Fuel Co. v. OSM*, 159 IBLA 203, 207-08 (2003).<sup>15</sup>

#### A. WVHC’s Burden of Proof

[2] A petitioner for costs and expenses, including attorney fees, bears the burden to establish specific facts showing that it has made a substantial contribution

<sup>15</sup> In *LaRosa Fuel Co. v. OSM*, 159 IBLA at 216, the jurisdictional issue was “raised and briefed by LaRosa Fuel,” and the Board found that LaRosa had made “a substantial contribution to a full and fair determination of the issues.”

to a full and fair determination of the issues. *E.g.*, *National Wildlife Federation (NWF) v. OSM*, 177 IBLA 315, 319 (2009) (the Board placed the burden of proof upon petitioners “to establish the specific factual issues regarding their involvement” in the underlying matter “between OSM and the Pittston Coal Company.”).

*B. The Board’s Authority to Issue a Sua Sponte Remand on Jurisdictional Grounds*

[3] We begin our analysis of the parties’ arguments with respect to the well-settled legal maxim that a court at any stage in the proceedings may address jurisdictional issues, and even if the issue has not been properly raised by a party, an appellate court *sua sponte* may consider all bases for the lower court’s jurisdiction. *Consolidation Coal Co. v. United States*, 351 F.3d 1374, 1378 (Fed. Cir. 2003).<sup>16</sup> Similarly, with regard to OHA’s jurisdiction over SMCRA proceedings, the Board has stated that

any pending administrative review proceeding must be dismissed . . . if the facts show that OHA lacks jurisdiction . . . . Th[is] obligation . . . applies whether or not the lack of jurisdiction was affirmatively raised by any of the parties, and failure to assert lack of jurisdiction at the beginning of administrative review will not diminish the obligation of the administrative forum to dismiss the proceeding.

*McPeck Mining v. OSM*, 101 IBLA 389, 392-93 (1988); *see also Delight Coal Company*, 1 IBSMA 186, 196, 86 I.D. 321, 326 (1979); *Eastern Associated Coal Corp.*, 4 IBMA 1, 15, 82 I.D. 22, 28 (1975). As the appellate administrative forum having jurisdiction over appeals involving OSM’s authority under SMCRA, the Board has the inherent authority to consider, *sua sponte*, whether OSM has acted within the scope of its jurisdiction and, if the question cannot be resolved on the record before it, to remand the matter to OSM for consideration of that question.

But WVHC argues that the Board’s *sua sponte* remand deprived it of any opportunity to brief the issue, thereby unfairly denying it an opportunity to substantively participate in the determination, “in contrast to the Board’s neutral stance on the reassertion of jurisdiction issue in decisions both before and after the

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<sup>16</sup> In that case the Court of Federal Claims dismissed, for lack of jurisdiction, coal producers’ action alleging that reclamation fees charged against them pursuant to the newly enacted reclamation fee regulation, 30 C.F.R. § 870.12(a) (2003), were an “unlawful taking” under the Fifth Amendment to the United States Constitution; the Federal Circuit reversed and remanded, finding that the Court of Federal Claims had jurisdiction under the Tucker Act, 28 U.S.C. § 1491 (2006). *See Consolidation Coal Co. v. United States*, 351 F.3d at 1376-79.

remand decision in this case,” in *WVHC*, 166 IBLA 39, 44-45 (2005), and *WVHC*, 164 IBLA 260, 266-67 (2005). *WVHC* Response at 15. However, those decisions do not support *WVHC*’s argument. In fact, in both cases, the Board emphasized that reassertion of jurisdiction under 30 C.F.R. § 700.11(d) was *not* at issue. *WVHC*, 166 IBLA at 44; *WVHC*, 164 IBLA at 266-67. Thus, *WVHC*’s assertion that these cases establish that, in deciding the underlying case, the Board veered from its own precedent “of taking a neutral stance” on the jurisdictional question, is simply incorrect.

Nevertheless, because both cases are instructive concerning the larger context in which *WVHC*’s petition for fees now before us has arisen, we will briefly address them here. *WVHC*’s complaint in *WVHC*, 166 IBLA at 39, referred to a number of surface mining permits held by either LaRosa Fuel or Cheyenne Sales that were issued in the mid- to late-1970’s, either before SMCRA was passed or during the time that OSM held concurrent jurisdiction under SMCRA with West Virginia, when the State was subject to interim SMCRA regulations. What the permits at issue<sup>17</sup> had in common, in addition to their age and inactive status, was that they encompassed “Colombo amendment sites,” *i.e.*, locations where the State had released operator performance bonds under the aegis of the Colombo Amendment. *Id.* at 40. *WVHC* alleged in its citizen’s complaint, *inter alia*, that OSM had failed to require West Virginia to enforce its approved program at the Colombo sites, or, in the alternative, to assume Federal enforcement at those sites. *Id.* at 41. In an opinion affirming OSM’s decision declining to conduct regular monthly and quarterly Federal inspections, the Board stated that, to the extent *WVHC* was raising issues involving Colombo Amendment sites that had already been decided against it in other appeals, the doctrine of administrative finality would foreclose such matters, and that, in some instances, cases involving OSM’s reassertion of jurisdiction over old mine sites were still pending. *Id.* at 44. We ultimately determined that the citizen’s complaint in that appeal alleged a systemic flaw in West Virginia’s enforcement program, and that such challenges are not properly raised via the TDN procedure. *Id.*

*WVHC*, 164 IBLA at 260, involved *WVHC*’s attempt, via a citizen’s complaint, to secure “alternative enforcement action” under 30 C.F.R. § 845.15(b)(2) and 30 C.F.R. § 715.17(a), after LaRosa’s appeal of OSM’s inspection under the TDN procedure and subsequent issuance of a notice of violation and a failure to abate

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<sup>17</sup> See *WVHC*, 166 IBLA at 40 and 42, listing Cheyenne’s permit 63-77 (adjudicated in *Cheyenne Sales Co. v. OSM*, 163 IBLA at 30, 32); LaRosa’s Kittle Flats permits 97-73 and 109-74 (not adjudicated because mining ceased prior to the effective date of SMCRA); La Rosa’s Kittle Flats permits 98-74 and 79-76 (at issue in *WVHC*, 134 IBLA at 334, 337, 341-42); and La Rosa’s permits 84-78 (adjudicated in the underlying case—*WVHC*, 165 IBLA at 395), and 15-79 (at issue in *WVHC*, 164 IBLA at 260, 261).

cessation order regarding LaRosa's Permit 15-79. Referring to *LaRosa Fuel Co. v. OSM*, 134 IBLA at 334, the Board unequivocally stated that the issue of whether OSM could properly reassert jurisdiction to undertake enforcement under 30 C.F.R. § 700.11(d)(2) with respect to that permit was *not* before us, as La Rosa's application for review "registering challenges to OSM's jurisdiction" was then currently pending in the Hearings Division of OHA. *WVHC*, 164 IBLA at 266. The Board held that OSM had complied with 30 C.F.R. § 845.15(b)(2) when it forwarded "the matter to the Office of the Solicitor for referral to the Department of Justice" for pursuit of injunctive relief, and to the NPDES regulatory authority to determine whether an NPDES permit was required under 30 C.F.R. § 715.17(a).<sup>18</sup> *WVHC*, 164 IBLA at 270-76.

Thus, while neither opinion supports the proposition for which *WVHC* cites them, both cases demonstrate that during the early and mid-1990's, attorneys for *WVHC* filed a series of citizen complaints pertaining to the issue of OSM's oversight of a number of West Virginia surface coal mining sites mined in the 1970's.<sup>18</sup> What these sites had in common was that the State had released the operators' performance bonds under the standard articulated by the Colombo Amendment. It is with this perspective in mind that we take up the question of whether *WVHC* made a "substantial contribution to a full and fair determination of the issues" in this case.

### C. The "Substantial Contribution" Clause

[4] Whether a petitioner for costs and expenses, including attorney fees, has substantially contributed to a full and fair determination of the issues is a question of fact committed by statute to the Board's discretion. *WVHC v. Norton*, 343 F.3d at 248; *WVHC v. Kempthorne*, *supra*, slip op. at 14, 2007 WL 2752695 at \*6. The District

<sup>18</sup> An appeal taken by *WVHC* to the U.S. District Court for the Northern District of West Virginia, then to the Fourth Circuit Court of Appeals, yielded a decision by the Fourth Circuit that, until it was determined whether OSM properly had jurisdiction over the site, the matter was not ripe for review. *WVHC v. Kempthorne*, 221 Fed.Appx. 220, 2007 WL 749671 (4th Cir. 2007) (not selected for publication in the Federal Reporter). Likewise, in *WVHC v. Babbitt*, 161 F.3d at 800, the Fourth Circuit determined that *WVHC*'s appeal of the *LaRosa Fuel Co. v. OSM*, 134 IBLA at 334, was not "ripe for review" prior to a decision by OSM that it could not or would not reassert jurisdiction.

<sup>19</sup> *WVHC* requested and the Board granted suspensions in a number of those appeals pending the outcome of *WVHC*'s appeals in *LaRosa Fuel Co. v. OSM*, 134 IBLA at 334. *E.g.*, *WVHC*, 166 IBLA at 44 n.8; *WVHC*, 165 IBLA at 403; *WVHC*, 164 IBLA at 265-66 (also suspended upon motion of *WVHC* pending the outcome in *Cheyenne Sales Co.*, 163 IBLA at 30).

Court held that the “key to a finding of substantial contribution [to a full and fair determination of the issues] is ‘the existence of a causal nexus between petitioners’ actions in prosecuting the Board appeal and the relief obtained.’” *WVHC v. Kempthorne*, *supra*, slip op. at 16, 2007 WL 2752695 at \*6 (quoting *WVHC v. Norton*, 343 F.3d at 247). That is the law of this case. Our initial task is to determine how to apply that law to the facts before us.<sup>20</sup>

1. *Causal Nexus: Definitions.* Because this term is so central to our analysis, we will carefully examine it. A “cause” is generally understood to mean something that produces an effect or result. *Black’s Law Dictionary* 250 (9th ed. 2009). “Causality” is “the relationship between cause and effect,” and “causal” is

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<sup>20</sup> The arguments presented by the parties regarding how the “substantial contribution” clause should be interpreted are not new. In *Donald St. Clair*, 84 IBLA 236, 92 I.D. 1 (1985), the Board addressed the issues raised by the Supreme Court in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), which held that a party must at least partially prevail in order to qualify for costs and expenses, including attorney fees, under statutory grants similar to that of section 525(e) of SMCRA. *Id.* at 687. *St. Clair* involved a “catalyst question,” *i.e.*, whether the citizen’s complaint was generative of the substantive actions undertaken by various agencies. Since that time, the “catalyst issue” has become defined in terms of whether the petitioner can establish a “causal nexus” between its participation in administrative proceedings before the Department and the substantive outcome ultimately achieved, and the Board’s precedent relative to that question is the same as we have cited here. *See, e.g., NWF v. OSM*, 177 IBLA at 332-33.

*St. Clair* included a majority decision, two concurring opinions, and a dissent discussing the impact of *Ruckelshaus* on the language of 43 C.F.R. § 1294(b), which, at the time, included the “substantial contribution” clause as the *only* criterion for an award of fees, as one concurring judge noted. *Donald St. Clair*, 84 IBLA at 258, 92 I.D. at 13, A.J. Burski, concurring. The dissenting opinion provides some useful perspective about the legislative debate concerning how a citizen’s contribution should be measured. The dissent notes that, in debate, in a question from Representative Seiberling regarding what would be the “standards or guidelines for the Secretary to use to determine which persons are to be awarded costs,” Representative Udall replied: “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 . . .*” (Emphasis modified.) 84 IBLA at 278, 92 I.D. at 24. The dissent then considers what that phrase means, using as a guideline how it has been interpreted in other legislative, administrative, and judicial contexts. *See Donald St. Clair*, 84 IBLA at 282-84, 288-96, 92 I.D. at 26-27, 30-34.

that which arises from a cause. *Id.* at 249. A “nexus” is “a connection or link, often a causal one.” *Id.* at 1142. Thus the term “causal nexus” is broadly used to describe an effect or outcome that “arises from” or is “engendered by” a particular cause. *E.g.*, *Insurance Co. of North America v. Federal Express Corp.*, 189 F.3d 914, 922 (9th Cir. 1999). In other words, “causal nexus” connotes the presence of a connecting link between a particular cause and a particular effect.

If the issue were simply whether there is a “causal nexus” between WVHC’s appeal and the remand, then we would have to conclude that the remand indeed was “engendered by,” or “arose out of” the appeal. But case law establishes that the concept of “causal nexus” as it is used to describe “whether an individual has substantially contributed to a full and fair determination” signifies *more* than the concept that the initiating cause (the appeal) engenders the dispositive effect (the remand): “[T]he key to a finding of substantial contribution is ‘the existence of a causal nexus between petitioners’ actions in *prosecuting* the Board appeal and the relief obtained,” *WVHC v. Norton*, 343 F.3d at 247 (citing *WVHC*, 152 IBLA at 66, 74 (2000), *aff’d* 69 Fed.Appx 624, 2003 WL 21640371 (4th Cir. 2003), and *KRC v. Babbitt*, 997 F. Supp. at 820-21). Thus, it is incumbent upon us to consider WVHC’s *prosecution* of the underlying appeal.

*Black’s* defines “*prosecution*” as “[t]he commencement and carrying out of any action.” *Black’s Law Dictionary* 1341 (9th ed. 2009). Thus, the process involves *two* steps: “commencement” and “*carrying out.*” Under *WVHC v. Norton*, 343 F.3d at 247-48, it is that *intermediate* connecting link—that is, the petitioner’s “*work on the appeal*”—that establishes whether a party has made a “*substantial* contribution to a full and fair determination of the issues.” (Emphasis added.)

[5] 2. *The Causal Nexus Test.* Consistent with that holding, the Board has held that “[t]he test of whether a party made the requisite [substantial] contribution” under 30 C.F.R. § 4.1294(b) “is whether there is a ‘causal nexus’ between the petitioner’s actions and the relief obtained, *the determination of which depends upon the totality of the circumstances.*” (Emphasis added.) *NWF v. OSM*, 177 IBLA at 332; *Citizens Coal Council*, 168 IBLA 220, 229 (2006); *David Ruth*, 164 IBLA 253, 255 (2005); *WVHC*, 152 IBLA at 74.<sup>21</sup> Thus, our second task is to consider the totality

<sup>21</sup> In *KRC v. Babbitt*, 997 F. Supp. at 820-21, favorably cited in *WVHC v. Norton*, 343 F.3d at 247, the District Court held that there must be a showing that “the appeal had some bearing on the actions ultimately taken by OSM officials . . . . In other words, there must be a *causal nexus between the plaintiffs’ actions in prosecuting the appeal to the Board and the corrective actions taken by OSM.*” (Emphasis added.) Yet the remanding court here, with the Fourth Circuit’s affirmance, has instructed the  
(continued...)

of the facts and circumstances surrounding how WVHC prosecuted WVHC, 165 IBLA at 395, the underlying appeal.

*D. WVHC's Work on the Appeal, Considering the Totality of Circumstances*

1. *The Larger Legal Context.* As we have already noted, the underlying appeal is one among several resulting from WVHC's initiation of a number of citizen complaints raising legal questions pertaining to the intersection between 30 C.F.R. § 700(11)(d) and West Virginia's Colombo Amendment. In order to consider the totality of facts and circumstances surrounding WVHC's work on the underlying appeal, we find it not only enlightening but necessary to consider the larger context in which it arose, particularly in terms of WVHC's persistence in a course of action, or legal strategy, that, as time elapsed, became increasingly legally untenable. We will summarize the legal context as it unfolded chronologically, beginning with the Board's decision in *Appolo Fuels, Inc. v. OSM*, 125 IBLA 369, 100 I.D. 63 (1993).

On March 31, 1993, the Board issued the decision in *Appolo Fuels, supra*, which affirmed an administrative law judge's decision vacating a Notice of Violation and Cessation Order issued by OSM against Appolo Fuels and finding that OSM's jurisdiction over the site in issue had terminated under 30 C.F.R. § 700.11(d). In *Appolo*, the Board reviewed, "at some length, the rationale behind the eventual adoption of 30 C.F.R. § 700.11(d)(1)," and held that agency comments accompanying the final rule unequivocally indicate that bond releases approved prior to the effective date of the regulation are not invalidated by the language of the rule requiring a State to issue a written determination that all requirements of the Act had been met, but OSM would presume that all requirements of the Act had been met "absent clear and convincing evidence to the contrary." *See generally Appolo Fuels, Inc.*, 125 IBLA at 380-89, 100 I.D. 69-73 (material quoted from 125 IBLA at 380, 386, 100 I.D. at 69, 70, 72); *see also* 52 Fed. Reg. 24094 (June 26, 1987), 53 Fed. Reg. 44356-63 (Nov. 2, 1988).

On December 27, 1993, Administrative Law Judge David Torbett issued his decision sustaining OSM's Cessation Order issued to LaRosa and citing it, among

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<sup>21</sup> (...continued)

Board to address the "causal nexus" between WVHC's prosecution and the Board's decision to remand *without regard* to the substantive outcome upon remand. Although we do not necessarily agree that this approach is required by either the Supreme Court's decision in *Ruckelshaus v. Sierra Club*, 463 U.S. at 688 n.9 ("we do not mean to suggest that . . . purely procedural victories[] would justify an award of fees under statutes setting out the when 'appropriate' standard") or by other Federal jurisdictions (e.g., the Eastern District of Kentucky), it is nonetheless the law of the case and is what our focus is here.

other things, for “failure to minimize disturbances to the prevailing hydrologic balance” at the Kittle Flats mine site. *LaRosa Fuel Co. v. OSM*, 134 IBLA at 335, 336. In *LaRosa*, OSM and WVHC were in agreement that OSM had unfettered authority to enforce Federal interim program regulations on mine sites where the State had released the operator’s bond and later refused to reassert jurisdiction under OSM’s ten day notice procedures.<sup>22</sup> This approach was buttressed by the fact that the complaint at issue in *LaRosa* was initiated by WVHC on December 27, 1991, during the period of time in which § 700.11(d) was invalidated by *NWF v. Dep’t of the Interior*, 1990 WL 134495, (see n.9, *supra*); and by the fact that *Appolo Fuels* did not involve a State law that essentially established a regulatory standard with respect to postmining water quality that differed from the interim regulatory program. See *LaRosa Fuel Co. v. OSM*, 134 IBLA at 346.

But in May 1992, subsequent to the Federal Circuit Court’s ruling in *NWF v. Lujan*, 950 F.2d at 765, OSM reinstated § 700.11(d). And, in March 1993, the Board unequivocally stated in *Appolo Fuels* that if OSM wished “to challenge the termination of State regulatory jurisdiction over an interim program permit” that occurred prior to the adoption of permanent program regulations, “OSM must establish, consistent with 30 C.F.R. § 700.11(d)(2), that the written determination was based on fraud, collusion, or a misrepresentation of a material fact.” *Apollo Fuels v. OSM*, 125 IBLA at 389, 100 I.D. at 73-74.

In May 1994, over a year after the Board decided *Appolo Fuels* and 5 months subsequent to Judge Torbett’s ruling affirming the cessation order in *LaRosa Fuel Co. v. OSM*, WVHC filed its citizen’s complaint at issue in the underlying case. *WVHC*, 165 IBLA at 397.

The Board issued the *LaRosa* decision reversing Judge Torbett on January 30, 1996. *LaRosa Fuel Co. v. OSM*, 134 IBLA at 334. Both OSM and WVHC argued in *LaRosa* that the fuel company had “not fulfilled its obligations and that by applying for [bond] release it was guilty of misrepresentation,” but the Board stated that OSM overstepped its legal boundary at the point in time when it failed to render a determination regarding its authority to reassert jurisdiction under 30 C.F.R.

<sup>22</sup> In *LaRosa Fuel Co. v. OSM*, 134 IBLA at 349, the Board stated:

Both OSM and WVHC argue that the 1988 rulemaking did not change the policy as expressed in . . . [*OSM v. Calvert & Marsh [Coal Co. Inc.]* 95 IBLA at 189], 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.

§ 700.11(d)(2), and held that the cessation order “must be considered a nullity and vacated because the record fails to show that OSM had jurisdiction over permit 79-76 at the time . . . of [its] issuance[.]” *Id.* at 350 n.17, 351. Consistent with its holding in *Appolo Fuels*, the Board pointed out that OSM’s issuance of a cessation order to LaRosa Fuel ran afoul of § 700.11(d)(2) because OSM assumed enforcement of LaRosa’s Permit 79-76 without making a finding “that the State’s determination not to reassert jurisdiction was arbitrary, capricious or an abuse of discretion[,] . . . based upon OSM’s factual finding that the written determination ‘was based on fraud, collusion or misrepresentation of a material fact.’” *LaRosa Fuel Co. v. OSM*, 134 IBLA at 351.

As the original complainant, WVHC sought judicial review of *LaRosa*, and the Board’s decision was affirmed in *WVHC v. Babbitt*, No. 1:96-CV-34 (N.D.W.Va., Sept. 8, 1997). WVHC appealed that decision, and filed a motion to suspend consideration of the underlying appeal and several others involving similar issues, pending the outcome of judicial review of *LaRosa*, which WVHC believed would “either be dispositive” or “require resolution of the legal issues in a substantially different legal context than now exists.” *WVHC*, 165 IBLA at 403 (quoting WVHC’s Motion to Stay Proceedings at 2). By order dated April 14, 1998, the Board suspended consideration of the underlying appeal.

On December 7, 1998, the Fourth Circuit Court of Appeals vacated the District Court’s decision in *WVHC v. Babbitt*, 161 F.3d at 797, and remanded the case to the District Court for dismissal of the civil action because it found that the appeal was not ripe for review and that “judicial resolution was likely to prove unnecessary because OSM was currently attempting to reassert its jurisdiction over the mine site and that, prior to a decision by OSM that it could not or would not reassert jurisdiction, the Board’s decision had not deprived WVHC of any rights under SMCRA.” *WVHC*, 165 IBLA at 403.

On January 29, 1999, WVHC renewed its request with the Board for a stay of the proceedings in the underlying case, stating that it had filed a petition under 43 C.F.R. § 4.5 for Secretarial review of the Board’s decision in *LaRosa Fuel Co. v. OSM*, 134 IBLA at 334, and the underlying appeal remained suspended. *WVHC*, 165 IBLA at 403. Over 4 years later, on March 20, 2003, the Associate Solicitor, Division of General Law, informed WVHC that the Secretary declined to take jurisdiction over the Board’s January 1996 decision in *LaRosa*, observing that “*LaRosa Fuel* is still pending before OSM” and that “the jurisdictional issue raised in the IBLA’s 1996 decision remains pending before the IBLA in another case, *Cheyenne Sales Co., Inc. v. [OSM.]*” *WVHC*, 165 IBLA at 403.

On September 2, 2004, the Board issued the decision in *Cheyenne Sales Co. v. OSM*, 163 IBLA at 30. As we pointed out in n.10 *supra*, although in *Cheyenne* OSM had

requested that the Board reconsider the reasoning set forth in *LaRosa*, the Board found it unnecessary to do so because, in contrast to *LaRosa*, the written determination upon which the bond release in *Cheyenne* was based contained a “misrepresentation of material fact,” as it stated that all reclamation requirements had been successfully completed. See *Cheyenne Sales Co. v. OSM*, 163 IBLA at 52-53. Moreover, the Board emphasized that the bond release in *Cheyenne* was made *after* OSM published the final rule in August 1985 preempting and superseding the Colombo Amendment. *Id.* at 53-54 n.10.

Our remand of the underlying appeal to OSM for a jurisdictional inquiry pursuant to 30 C.F.R. § 700.11(d)(2) relied on *LaRosa*. *WVHC*, 165 IBLA at 405. *WVHC*’s appeals of *La Rosa*, including the denial of its petition for Secretarial review, were exhausted over 2 years prior to issuance of the Board’s decision in *WVHC*. Our decision in *Cheyenne*, in which we rejected OSM’s plea that we reconsider our interpretation of 30 C.F.R. § 700.11(d) in *LaRosa* and *Appolo Fuels*, was decided on September 2, 2004, over 8 months prior to the issuance of our decision in the underlying appeal. See *Cheyenne Sales Co. v. OSM*, 163 IBLA at 30, 51.

2. *WVHC Failed to Make a Substantial Contribution.* Given the totality of the circumstances, we must conclude that *WVHC* has not met its burden. *WVHC* concedes that its prosecution of or work on the appeal in *WVHC*, 165 IBLA at 395, did not involve an analysis of jurisdictional issues under 30 C.F.R. § 700.11(d), but argues that the Board’s *sua sponte* remand of the case deprived it of an opportunity to submit substantive argument on the question; moreover, *WVHC* maintains, the filing of the appeal itself was the ultimate cause of the remand, which corrected OSM’s mistaken approach to the entire matter. In other words, *WVHC* would have us ignore the facts that we have just reviewed in detail and assume that it would have submitted substantive argument on the jurisdictional issues involved *but for* the Board’s *sua sponte* remand. Such an approach would involve a distortion of the requirement that there be a causal nexus between *WVHC*’s actions and the relief obtained. The facts of record show that *WVHC*’s *only* involvement was to file a citizen’s complaint and subsequent appeal. We agree with the following summation offered by OSM in its Brief on Remand:

The matter was remanded by the Board, at its own initiative, for a determination of jurisdiction that resulted in a finding that jurisdiction had terminated, as the Board anticipated, and, also, that there was no basis for reasserting jurisdiction. Thus, the remand resulted in establishing that *WVHC*’s complaint had no basis, because OSM no longer has jurisdiction over the mine site. In fact, the remand reversed not only OSM’s position on the jurisdiction over the mine site, but also *WVHC*’s position, since OSM and *WVHC* shared the same position on this matter at the outset of the matter. Thus, under the circumstances of this case,

WVHC's "success" was so minimal that it can hardly be deemed any success, since it completely defeated its claim. The "success" was not sought, intended, or even, ultimately, beneficial to WVHC's interests. WVHC achieved nothing it desired in the action.

OSM's Brief on Remand at 9-10.

More specifically, WVHC did not file its appeal in the underlying matter to secure a ruling from the Board as to the effect of the Colombo Amendment upon OSM's jurisdiction under 30 C.F.R. § 700.11(d)(2); it appealed to obtain a reversal of the Deputy Director's decision on the merits, which upheld the Field Office findings that there were no SMCRA violations of effluent standards in the drainage from the permit area. At the time, OSM and WVHC were of like mind concerning the jurisdictional issue, which OSM had already decided in WVHC's favor. It therefore was not in WVHC's interest to assist the Board in addressing the jurisdictional question.

WVHC pleads that "[o]bscure flaws in OSM's assertion or reassertion of jurisdiction were not issues the Conservancy could reasonably have been expected to challenge in its administrative appeal—especially in view of West Virginia's failure to contest OSM's informal review decision reaffirming the agency's claim to active jurisdiction of LaRosa Fuel's mine." WVHC Response at 14-15. First, we note that West Virginia was not entitled to an appeal to this Board from OSM's rejection, on informal review, of its response to the TDN. *See* 30 C.F.R. §§ 842.11(b)(1)(iii)(A); 842.11(b)(1)(iii)(C). More importantly, based upon the foregoing analysis, we conclude that the battle over reassertion of jurisdiction in the Colombo Amendment cases was *precisely* the point, and, at the time WVHC filed the appeal, it had won the battle.

WVHC readily admits that the impetus for its complaint was to force the State to regulate mine areas that had been released from bond under the Colombo Amendment. It states in its Petition that, "[b]eginning in 1992, as part of an effort to compel OSM to take enforcement action at surface coal mining and reclamation operations that [the West Virginia Department of Environmental Protection] refuses to regulate based on the so-called 'Colombo Amendment,' the Conservancy's counsel researched, prepared, and filed the citizen complaint at the core of this case." WVHC Petition for Award at 10. WVHC's position has consistently been that OSM should undertake to enforce Federal effluent standards in West Virginia mining areas released from bond as the result of the Colombo Amendment; it therefore was not aggrieved by OSM's failure to analyze the jurisdictional question under 30 C.F.R. § 700.11(d)(2).<sup>23</sup>

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<sup>23</sup> Had WVHC made a tactical decision to the contrary at any time before the Board issued the decision in the underlying appeal, it could have so informed the Board.

But, as the preceding summary of the larger legal context makes clear, WVHC did not win the war. In spite of WVHC's attempts to obtain administrative and judicial rulings to the contrary, regulation 30 C.F.R. § 700.11(d) has been in effect since December 2, 1988, and has been upheld and applied in the context of the Colombo controversy except, as we have already pointed out, for an approximate 11-month period between June 3, 1991, and May 11, 1992, after the D.C. District Court struck down the regulation in *NWF v. Dep't of the Interior*, 1990 WL 134495. OSM appealed that decision, and in *NWF v. Lujan*, 950 F.2d at 765, the D.C. Circuit reversed the District Court. See n.9 *supra*. L. Thomas Galloway, who is seeking fees in this action, was lead counsel for NWF on that case. Indeed, both attorneys representing WVHC have special litigation expertise in administrative and Federal litigation involving SMCRA, and have been involved in major litigation involving SMCRA from its inception, both from the points of view of OSM and citizen complainants, and they undertook litigation of the underlying appeal with full knowledge of the risks involved. See Declarations of L. Thomas Galloway and Walton D. Morris attached to the Petition for an Award of Costs and Expenses in IBLA 95-570.

In support of its petition for fees, WVHC argues that, "given OSM's flawed analysis of its regulatory jurisdiction of LaRosa Fuel's mine site, . . . the Conservancy obtained all the relief it could have . . . . The error that the Board identified in the investigation of regulatory jurisdiction was OSM's, not the Conservancy's." Petitioner's Response at 19. We would indeed be unobservant if we failed to point out that OSM's "flawed analysis," with which WVHC registered no disagreement at the time, granted the relief WVHC sought—an immediate oversight inspection of LaRosa's Permit 78-84 site—relief to which it was not entitled unless and until OSM issued a written determination setting forth the basis for reasserting jurisdiction. It was only when the inspection yielded no violations of effluent discharge standards under SMCRA that WVHC registered discontent with OSM's approach, in the form of an appeal to this Board.

WVHC urges the Board to rule in its favor on the basis that, had it not filed the appeal, OSM's erroneous decision would not have come to light. But this approach ignores the regulatory requirement that the contribution be *substantial*. The Petitioner here performed no appreciable work that assisted the Board in rendering its decision. In *Donald St. Clair*, the majority opinion stated:

If *any* proceeding before this department which results 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.

*Donald St. Clair*, 84 IBLA at 249-50, 92 I.D. at 9 (emphasis added). This observation remains sound.

[6] Accordingly, we hold here that the filing of an appeal, in and of itself, does not establish, by a preponderance of the evidence, that a citizen seeking an award of costs and expenses, including attorney fees, has substantially contributed to a full and fair determination of the issues; and such an award will not be granted where the totality of circumstances demonstrates that the Petitioner provided no appreciable work that assisted the Board in deciding an appeal; in that circumstance, the petitioner has failed to establish a causal nexus between its work on the appeal and the relief obtained. In the final analysis, our ruling does not discourage citizens from filing meritorious complaints; it encourages the attorneys representing them to exercise a finer discrimination in the prosecution of those complaints.

#### IV. CONCLUSION

In conclusion, considering the totality of circumstances, we find that WVHC has not met its burden to establish that it “substantially contributed to a full and fair determination of the issues” under 43 C.F.R. § 4.1294(b), and therefore is not entitled to an award of costs and expenses, including attorney fees.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the June 25, 2005, Petition for an Award of Costs and Expenses for work in IBLA 95-570 is denied.

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge