

FEDERAL REGISTER: 50 FR 47222 (November 15, 1985)

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Hearings and Appeals (OHA)

43 CFR Part 4

Petitions for Award of Costs and Expenses Under Section 525(e) of the Surface Mining Control and Reclamation Act of 1977

ACTION: Final rule.

SUMMARY: By this rule, the Office of Hearings and Appeals (OHA) in the Department of the Interior (DOI) revises 43 CFR 4.1294(a)(1) to more clearly define the conditions under which costs and expenses (including attorneys' fees) may be awarded, and 43 CFR 4.1294(b) to conform with a recent decision in which the United States Supreme Court held that absent some degree of success on the merits by a claimant, it is not "appropriate" for a court to award attorneys' fees. The affected rules govern petitions for the award of costs and expenses under section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), *30 U.S.C. 1201*, et seq.

EFFECTIVE DATE: December 16, 1985.

FOR FURTHER INFORMATION CONTACT: John H. Kelly, Deputy Director, Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203; Telephone (703) 235-3810.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of Section 4.1294(a)(1)
- III. Discussion of Section 4.1294(b)
- IV. Other Comments
- V. Future Rulemaking Actions
- VI. Procedural Matters

I. BACKGROUND

OHA published its proposed amendments to these regulations on pages 21470-71 of the Federal Register of May 24, 1985, indicating that comments would be accepted through June 24, 1985. Four letters containing comments were received.

Section 525(e) of SMCRA, *30 U.S.C. 1275(e)*, provides that "[w]henver an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper." (Emphasis added.)

To establish procedures governing petitions for the award of costs and expenses under section 525(e), OHA promulgated rules which appear at 43 CFR 4.1290-4.1296. These existing rules were proposed on April 13, 1978, *43 FR 15441*; the final rules were published on August 3, 1978, *43 FR 34376*.

The existing rules specify who may file for an award (Section 4.1290), the time and place for filing (Section 4.1291), the contents of a petition for an award (Section 4.1292), the time for filing an answer (Section 4.1293), who may receive an award (Section 4.1294), what an award may include (Section 4.1295), and appeals procedures (Section 4.1296).

An examination of the Department's existing rules was prompted by the decision of the United States Supreme Court in *Ruckelshaus v. Sierra Club*, *463 U.S. 680 (1983)*, which held in a statutory context similar to section 525(e) of SMCRA that an award of costs and expenses is conditioned upon a party prevailing in whole or in part in the underlying

proceeding. The authors of this final rulemaking are John H. Kelly, Deputy Director, and James R. Kleiler, Attorney-Adviser, Office of Hearings and Appeals.

II. DISCUSSION OF SECTION 4.1294(a)(1)

The rule revises Section 4.1294(a)(1) regarding awards from a permittee to a person who initiates or participates in an administrative proceeding reviewing an enforcement action that results in a finding that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed. OHA proposed amendment of the current regulation because it did not adequately distinguish the contribution made by a participating person from that contribution made by an initiating party. It is not the intent of OHA that a person who participates in but does not initiate an administrative proceeding under Section 4.1294(a)(1) receive an award if such person's contribution is essentially the same as that of the initiating party. Rather, it is OHA's intent that an award be made to such person only if the person's contribution is separate and distinct from that of the initiating party, and the regulation has been revised to make that intent explicit. The final regulation contains other revisions made to satisfy concerns raised by the comments.

Each commenter criticized the proposed rules for failing to make the requirement that a party prevail in whole or in part, achieving some degree of success on the merits, applicable to fees awarded to any person from the permittee. Such a revision of subsection (a)(1) is unnecessary to conform the regulation to the Ruckelshaus decision because the regulation has always required "a finding that a violation of the act, regulations or permit has occurred, or that an imminent hazard existed." Meeting this requirement is comparable to a showing of some degree of success on the merits.

Two comments noted that the existing regulation and the proposed revision refer to "administrative proceedings reviewing enforcement actions" with respect to a person initiating a proceeding, but refer to "enforcement proceeding" with respect to a person who participated in but did not initiate a proceeding. The comments questioned whether this difference in language referred to different types of proceedings. Although the regulation was never intended to refer to two different types of proceedings, the text of the regulation has been revised to eliminate this perceived ambiguity.

Two comments expressed concern that if ten counts are charged against a permittee but a person initiating the proceeding prevailed on only one, that person should receive from the permittee only costs applicable to the one count on which he prevailed. While the extent to which a party prevails on the merits is certainly relevant in determining the amount of an award, we find such a consideration is best addressed on a case by case basis. Thus, no revision of the regulation has been made to accommodate the concern raised by these comments.

One comment suggested that the initiator should be required to make a contribution separate and distinct from OSM in order to be eligible to recover an award of costs. The final regulation was not revised to accommodate this comment. However, the requirement that a contribution be "substantial" precludes an award if a contribution simply duplicates that of OSM.

One comment expressed concern that a permittee may be assessed fees for a violation which occurred as a result of inadequate enforcement by OSM. The commenter noted that many portions of SMCRA and its regulations are unclear and that OSM issues to its inspectors internal guidelines which are not binding regulations. The comment objects that a permittee would be exposed to "an award of fees for activities on the part of OSM in resolving an enforcement action under ambiguous regulations." Nevertheless, where there has been a finding that a violation of the Act has occurred, OHA does not consider it appropriate to shield a permittee completely from liability for costs and expenses. Any mitigating circumstances are best addressed on a case-by-case basis. No revision of the regulation was made in response to this comment.

III. DISCUSSION OF SECTION 4.1294(b)

Currently, Section 4.1294(b) provides that costs and expenses may be awarded from OSM to persons other than the permittee, if the person "made a substantial contribution to the full and fair determination of the issues," but does not contain criteria with regard to the degree of success on the merits to be achieved for such awards. In view of the court's decision in Ruckelshaus, OHA proposed to revise paragraph (b) of Section 4.1294 to state explicitly that eligibility to receive an award is "subject to the condition that the person shall have prevailed in whole or in part, achieving at least some degree of success on the merits." The proposed rule, however, had deleted the requirement that the person make "a substantial contribution to a full and fair determination of the issues." In *Carson-Truckee Water Conservancy District v.*

Secretary of the Interior, 748 F. 2d 523, 526 (9th Cir. 1984), cert. denied sub nom. Pyramid Lake Paiute Tribe of Indians v. Carson-Truckee Water Conservancy District, XXXX U.S. XXXX 105 S. Ct. 2139 (1985), the court affirmed the denial of an award to a prevailing party and expressly rejected the contention that the Ruckelshaus decision had eliminated the requirement that a person make a "substantial contribution" to be eligible for an award. Furthermore, neither the proposed nor final rules have deleted the "substantial contribution" requirement for Section 4.1294(a), and in consideration of concerns raised by comments concerning differing standards among the various subsections of Section 4.1294, the "substantial contribution" requirement is restored to subsection (b) of the final rulemaking.

IV. OTHER COMMENTS

The commenters note that fees may be recovered from OSM or a permittee by a person who makes a substantial contribution and shows some degree of success on the merits, but that a permittee cannot receive an award of costs and expenses unless the party to be assessed has acted "in bad faith for the purpose of harassing or embarrassing the permittee." See 43 CFR 4.1294 (c), (d). The comments suggest that it is unfair to subject an award to a permittee to a stricter standard than the one applied to other parties. The same objections were raised when these rules were originally proposed in 1978 and the answer remains the same: "While it is realized that the standards for an award are not the same for all parties, the legislative history * * * clearly states that an award may be made to the permittee only when the action taken is brought or participation is undertaken in bad faith," citing S. Rep. No. 128, 95th Cong., 1st Sess. 59 (1977). 43 FR 34386 (Aug. 3, 1978).

V. FUTURE RULEMAKING ACTIONS

On November 20, 1980, a number of western states filed a petition for rulemaking with the Office of Surface Mining Reclamation and Enforcement (OSM) requesting repeal of 43 CFR 4.1294(b) as it applies to the states under 30 CFR 840.15. Although OSM sought public comment on the petition (46 FR 58464 (Dec. 1, 1981)), no further action has been taken on the petition. Issuance of this rule is not intended to preclude further examination of OHA's rules in 43 CFR 4.1290-4.1296 governing the award of attorneys' fees in view of the pending rulemaking petition, particularly the question of the waiver of sovereign immunity.

VI. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3507.

Executive Order 12291

The DOI has examined this rule according to the criteria of Executive Order 12291 (Feb. 17, 1981) and has determined that it is not major and does not require a regulatory impact analysis because the incidence of petitions for Departmental awards and expenses since enactment of the authorizing legislation has been small, both in absolute number and relative to the total number of administrative review proceedings.

Regulatory Flexibility Act

The DOI has also determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., that this rule will not have a significant economic impact on a substantial number of small entities, in view of the small incidence of petitions for Departmental awards of costs and expenses since the passage of the authorizing legislation.

National Environmental Policy Act

The DOI has determined that this rule will not significantly affect the quality of the human environment on the basis of the categorical exclusion of regulations of a financial or procedural nature set forth at 516 DM 2 Appendix 1, Section 1.10.

LIST OF SUBJECTS IN 43 CFR PART 4

Administrative practice and procedure, Lawyers, Surface mining.

Authority: Pub. L. 95-87, 91 Stat. 445, 30 U.S.C. 1201 et seq.

Accordingly, 43 CFR Part 4, Subpart L, is revised as follows:

Dated: October 24, 1985.

Ann McLaughlin, Under Secretary.

PART 4 -- DEPARTMENTAL HEARINGS AND APPEALS PROCEDURES

SUBPART L -- SPECIAL RULES APPLICABLE TO SURFACE COAL MINING HEARINGS AND APPEALS

1. The authority citation for Part 4, Subpart L, is revised to read as follows:

Authority: *30 U.S.C. 1256, 1260, 1261, 1264, 1268, 1271, 1272, 1275, 1293; 5 U.S.C. 301.*

Any other authority citations contained in Subpart L are removed.

2. Section 4.1294 is amended by revising paragraphs (a)(1) and (b) to read as follows:

SECTION 4.1294 - WHO MAY RECEIVE AN AWARD.

* * * * *

(a) * * *

(1) The person initiates or participates in any administrative proceeding reviewing enforcement actions upon a finding that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed, and the administrative law judge or Board determines that the person made a substantial contribution to the full and fair determination of the issues, except that a contribution of a person who did not initiate a proceeding must be separate and distinct from the contribution made by a person initiating the proceeding; or

* * * * *

(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 person made a substantial contribution to a full and fair determination of the issues.

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