

September 26, 2000

Mr. Robert L. Baum
Director
Office of Hearings and Appeals
U. S. Department of Interior
Room 111
4015 Wilson Boulevard
Arlington, Virginia 22203

Re: Special Rules Applicable to Surface Coal Mining Hearings and Appeals; Petitions for Award of Costs and Expenses Under Section 525(e) of the SMCRA

Dear Mr. Baum:

By way of introduction, the Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before federal agencies and Congress. Advocacy is also required by §612(a) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) to monitor agency compliance with the RFA. In that Advocacy is an independent office within SBA, the comments provided are solely those of the Office of Advocacy and do not necessarily reflect the views of SBA.

The Proposed Rulemaking

On July 28, 2000, the Department of Interior, Office of Hearings and Appeals (OHA), published a proposed rulemaking, *Special Rules Applicable to Surface Coal Mining Hearings and Appeals; Petitions for Award of Costs and Expenses Under Section 525(e) of the SMCRA*, in the Federal Register, Vol. 65, No. 146, p.46389. The proposed rule amends OHA's rules governing who may receive an award of costs and expenses, including attorney's fees, under section 525(e) of the Surface Mining Control and Reclamation Act of 1977. Under the proposed rule, an applicant for a permit may only receive an award from the Office of Surface Mining Reclamation and Enforcement (OSM) if OSM denies the application in bad faith and for the purpose of harassing or embarrassing the applicant. OSM asked OHA to amend the current regulations in response to Administrative Judge Burski's opinion in Skyline Coal v. OSM, 150 IBLA 51 (1999). The Office of Advocacy asserts that the proposed rulemaking may violate the original intent of attorney's fee provision of the Surface Mining Control and Reclamation Act (SMCRA), the requirements of Equal Access to Justice Act (EAJA), and the requirements of the RFA.

OHA Misinterpreted Skyline Coal v. OSM

Background

In Skyline Coal v. OSM, Skyline Coal had requested a permit to mine coal. OSM denied the request. Skyline sought administrative review of the denial. During the review process, OSM agreed that Skyline's permit application could be approved. Administrative Law Judge Torbett, therefore, sustained Skyline's request for review.

Subsequently, Skyline filed a petition for an award of costs and expenses under 525(e) of SMCRA, 30 U.S.C. 1275(e) and implementing regulations 43 CFR 4.1201. OSM opposed the petition, arguing that Skyline was a permittee and could only receive attorney's fees if it could demonstrate that OSM denied the petition in bad faith. Skyline argued that it was an applicant for a permit, not a permittee. Therefore, it was entitled to an award as a person who had initiated a review proceeding. Judge Torbett rejected OSM's argument, noting that an applicant for a permit does not become a permittee until the permit is issued.

The Interior Board of Land Appeals affirmed the decision. In doing so, IBLA stated that OSM's conclusion that coal operators can recover fees and expenses only if they prove bad faith is not supported by the legislative history, does not follow from the differentiation and is not supported in view of the fact that a coal company may be a "person" as well as a "permittee".

In his concurring opinion, Judge Burski stated that if OSM was dissatisfied with the decision, it should seek an amendment to the regulations that would accord with its interpretation of SMCRA. Advocacy asserts that this statement in the concurring opinion is dictum. Statements that are not necessary to the decision constitute dictum and have no binding or precedential impact. Since the statement was not a portion of the leading opinion, it is not an integral part of the holding. In no way should it be considered a binding directive. Moreover, the leading opinion found that there was no statutory basis or legislative history to support OSM's assertion that an applicant for a permit may only receive attorney's fees if the applicant can prove that OSM denied the application in bad faith and for the purpose of harassing or embarrassing the applicant. If the statute is clear and unambiguous the agency must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). For the agency to do otherwise would be a clear abuse of discretion.

The SMCRA Does Not Nullify the Requirements of the Equal Access to Justice Act

Under the Equal Access to Justice Act, a small business that falls within the criteria of the EAJA is entitled to attorney's fees if the government agency was not substantially justified in its actions. 5 U.S.C. § 504. There is no requirement that there be a showing of bad faith and intent to harass on the part of the government. In enacting the Equal Access to Justice Act, Congress intended to "encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses." Spencer v. N.L.R.B., 712 F.2d 539, 549-50 (D.C.Cir.1983), cert. denied, > 466 U.S. 936, 104 S.Ct. 1908, 80 L.Ed.2d 457 (1984).

Congress believed that achievement of that end would promote three more general goals. First, Congress hoped to provide relief to the victims of abusive governmental conduct, to enable them to vindicate their rights without assuming enormous financial burdens. Second, it sought to reduce the incidence of such abuse; it anticipated that the prospect of paying sizeable awards of attorneys' fees when they overstepped their authority and were challenged in court would induce administrators to behave more responsibly in the future. Third, by exposing a greater number of governmental actions to adversarial testing, Congress hoped to refine the administration of federal law--to foster greater precision, efficiency and fairness in the interpretation of statutes and in the formulation and enforcement of governmental regulations. *Id.*, at 550. (Citations Omitted). The burden of proving that its position was substantially justified, both in agency proceedings and in litigation, rests with the Government. *Wilkett v. Interstate Commerce Commission*, 844 F.2d 867 (D.C.Cir.1988).

The SMCRA does not prevent a qualified party from recovering attorney's fees pursuant to EAJA. In *Citizen's for Responsible Resource Development v. Watt*, 579 F. Supp. 431 (MD Ala, 1983) the court addressed the issue of whether EAJA applied to actions under SMCRA. In that matter, the agency argued that EAJA was inapplicable to actions under the SMCRA because the SMCRA had its own provisions for the recovery of attorney's fees. The court dismissed the agency's arguments by drawing analogies to other cases that raised similar challenges and finding that Congress' objective in enacting EAJA was to expand instances where an award of attorney's fees would be appropriate. Accordingly, if the party is unable to obtain fees pursuant to the fee provisions of SMCRA, it may be able to recover fees pursuant to EAJA.

The Office of Advocacy asserts that the proposal should reflect and clarify that it will in no way interfere with a qualified party's ability to recover fees pursuant to EAJA. Failure to do so promotes confusion that may discourage the public from challenging an unreasonable action for fear of incurring large litigation fees -- a fear which EAJA was originally designed to prevent and address. Such a failure may ultimately interfere with a small entity's willingness to participate in the surface mining industry, which, in turn, may interfere with the competitive marketplace.

The Proposed Rule Does Not Comply with the Requirements of the RFA

The RFA requires agencies to consider the impact that a proposed rulemaking will have on small entities. If the proposal is expected to have a significant economic impact on a substantial number of small entities, the agency is required to prepare an initial regulatory flexibility analysis (IRFA). See, 5 U.S.C § 603. If a proposal is not expected to have a significant economic impact on a substantial number of small entities, Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA or FRFA. If the head of the agency makes such a certification, the agency must publish the certification in the Federal Register at the time of the publication of the general notice of proposed rulemaking along with a statement providing the factual basis for the certification. See,5 U.S.C. §605(b).

In the proposed rule, OHA certified that the rule would not have a significant economic impact on a substantial number of small entities. For the basis of the certification, OHA stated:

“This determination is based on the findings that the proposed revisions will not significantly change costs to industry and will not affect state or local governments. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets for the reasons stated above. Only a few applicants for surface coal mining permits would be expected to apply for a permit, have their applications denied by OSM, prevail on administrative review of the denial, and be able to demonstrate that OSM's denial was based on bad faith and for the purpose of harassing or embarrassing the applicant, and an even smaller number of these applicants would be small entities.” Fed Reg. at 46389

The Office of Advocacy asserts that the basis for the certification is inadequate in that it addresses the wrong issue. The issue is not the number of applicants that will prevail and be able to demonstrate that OSM's denial was in bad faith and for the purposes of harassing or embarrassing the applicant. The issue is the number of applicants that may be denied, prevail on appeal and receive attorney's fees under the current regulations versus the applicants that may be denied, prevail on appeal, and not receive attorney's fees because of the proposed higher standard. In short, how many applicants will be unable to recover their attorney's fees and how much money will those applicants expend in attorney's fees because of the new proposal. Until OHA analyses and addresses that issue, it cannot meet its obligations under the RFA.

The Office of Advocacy recommends that OHA perform a threshold economic analysis on those issues using data from prior proceedings. That data should be within the control of the agency. If the threshold analysis reveals that there is a significant economic impact, OHA must perform an IRFA and publish it in the Federal Register for public comment. If the threshold analysis indicates that there is not a significant economic impact on a substantial number of small entities, OHA may certify the rule. However, it must publish the new certification along with the factual basis that supports the certification. The factual basis should include information such as the average number of applications filed, average number of applications denied, the average number of appeals granted, the average number of petitions for attorney's fees granted and the average amount of attorney's fees expended in these types of cases. Advocacy suggests that OHA review data over the last decade to assure an accurate reflection of the potential economic impacts. Without such information, the public cannot provide meaningful comments on the proposal and OHA cannot meet its obligations under the RFA.

Conclusion

The Office of Advocacy asserts that this proposed rulemaking has serious implications to the administrative process that need to be considered fully and not simply implemented in response to dictum in a concurring opinion in an administrative matter. To implement this rulemaking as proposed would go beyond the statute and the intent of Congress. The agency has an obligation under the APA to uphold the intent of Congress in interpreting the statute.

Moreover, the agency also has an obligation under the RFA to perform a proper economic analysis to determine the economic impact that this proposal will have on permit applicants that challenge the denial of their application. Without the information, the public cannot provide meaningful comments or alternative solutions to the problem.

Finally, it would be appropriate to include a statement to the effect this rule in no way interferes with a qualified party's ability to recover fees under EAJA and that the rule in no way qualifies the language of EAJA. This clarification will eliminate confusion and allow the agency to review the issue as it pertains to parties that are allowed to recover under EAJA. By doing so, Interior will be meeting its obligations under EAJA and the RFA.

Thank you for the opportunity to comment on this proposal. If you have any questions, please feel free to contact us. Please place a copy of these comments in the record.

Sincerely,

Jere W. Glover
Chief Counsel
Office of Advocacy

Sincerely,

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation