



COALEX STATE INQUIRY REPORT - 328

July 1995

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TOPIC: ATTORNEYS' FEES

INQUIRY: Please locate SMCRA-related cases from August, 1994 through July, 1995 that rule on the award of attorneys' fees.

SEARCH RESULTS: COALEX and LEXIS were used to research this Report which updates several earlier COALEX Reports on attorneys' fees. Included here are federal, state and administrative decisions ruling on the award of attorney's fees for SMCRA-related and other environmental law cases as well as copies of the earlier Reports (included without attachments).

FEDERAL CASE LAW

KEY TRONIC CORP. v U.S., 114 S Ct 1960 (1994). [Excerpt]

CERCLA-related case.

PALUMBO v WASTE TECHNOLOGIES INDUSTRIES, 1994 U.S. App LEXIS 29355 (4th Cir 1994).

RCRA-related case.

CITIZENS FOR A SUITABLE HIGHWAY v FORBES, 1995 U.S. App LEXIS 1178 (9th Cir 1995).

Clean Water Act-related case.

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY v WINDALL, 51 F 3d 1179 (3rd Cir 1995).

Clean Water Act-related case.



POWDER RIVER BASIN RESOURCE COUNCIL v BABBITT, 54 F 3d 1477 (10th Cir 1995).

"Section 1270(d) [of SMCRA] allows a court to assess costs against a party whenever it determines an award is appropriate. Nevertheless, a party must achieve at least some measure of success to warrant an attorney's fees award. See *Ruckelshaus*, 463 U.S. at 688. Here, plaintiff did not extract any of the requested relief from the United States. Plaintiff asked the court to order the federal defendants to take one of the allegedly mandatory requirements in 30 C.F.R. 732,13(j)(4). The only action taken by the federal defendants, though, was approving Wyoming's revised attorney's fees plan. This action did not conform to any of the relief requested by plaintiff. Plaintiff did not prevail and therefore is not entitled to recover attorney's fees from the federal defendants."

The case was remanded "for a determination of whether attorney's fees may appropriately be assessed against the state".

INTERIOR ADMINISTRATIVE DECISIONS

SAVE OUR CUMBERLAND MOUNTAINS, 127 IBLA 245, IBLA 88-519, 89-420 (1993).

HEADNOTES: "In order for one who participates in an administrative proceeding reviewing an enforcement action to receive an award of costs and expenses under 43 CFR 4.1294(a)(1), there must be a determination that (1) a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed; (2) the participant made a substantial contribution to the full and fair determination of the issues; and (3) the contribution was separate and distinct from the contribution made by the person initiating the proceeding."

GATEWAY COAL CO. v OSM, 131 IBLA 212, IBLA 91-243 (1994).

HEADNOTES: "No rational exists to justify an award of attorneys' fees from a permittee for work performed by petitioner's counsel challenging OSM's decision to vacate a notice of violation issued to the permittee."

SUNNYSIDE COGENERATION ASSOCIATED v OSM, Docket No. DV 94-11-R (1995).

"Sunnyside argues that it is entitled to an award of attorney's fees because OSM's enforcement actions against it were taken in bad faith and for purposes of harassing or embarrassing Sunnyside. However, Sunnyside effectively concedes that it is not entitled to attorney's fees if the NOV is valid."

The NOV was found to be valid.



STATE CASE LAW

MCDONALD LAND & MINING CO. AND SKY HAVEN COAL, INC. v DEPT. OF ENVIRONMENTAL RESOURCES (DER), 1995 Pa. Commw. LEXIS 362 (Pa Commw Ct 1995).

The court affirmed the ruling of the Environmental Hearing Board:

"[T]he Board held that Section 4(b) [of Pennsylvania SMCRA] provides for an award of fees only in proceedings brought pursuant to Section 4, which encompasses appeals from a permit denial, a bond release denial or a bond forfeiture, and not enforcement actions. Inasmuch as the compliance orders issued by the Department were enforcement actions, the Board held, McDonald and Sky Haven could not be awarded the fees and costs generated by their appeals therefrom. The Board further held that, given that McDonald failed to distinguish between the fees incurred in its appeal from the compliance order and its appeal from the bond release denial, it could receive no award under Section 4(b) of SMCRA."

PENNSYLVANIA DEPT. OF ENVTL. RESOURCES v MCDONALD LAND & MINING CO., 1995 Pa. Commw. LEXIS 363 (Pa Commw Ct 1995).

The court affirmed the Board's awarding McDonald attorney's fees and costs under Section 3 of Pennsylvania's Costs Act.

STATE EX REL. WEST VIRGINIA HIGHLANDS CONSERVANCY, INC. v WEST VIRGINIA DIV. OF ENVTL. PROTECTION, 457 SE 2d 88 (WV Ct App 1995).

SYLLABUS: "1. Costs and attorney's fees may be awarded in mandamus proceedings involving public officials because citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed nondiscretionary duties.

"2. Attorney's fees may be awarded to a prevailing petitioner in a mandamus action in two general contexts: (1) where a public official has deliberately and knowingly refused to exercise a clear legal duty, and (2) where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command."

POWDER RIVER BASIN RESOURCE COUNCIL v WYOMING ENVTL. QUALITY COUNCIL, 869 P 2d 435 (Wy 1994).

The state court reversed the Wyoming Environmental Quality Council's ruling upholding the Wyoming Department of Environmental Quality's (DEQ) decision "that the agency had no authority to provide attorney's fees to citizen-group Powder River Basin Resource Council ('Powder River') after Powder River substantially prevailed in its administrative action against DEQ."



PENNSYLVANIA ADMINISTRATIVE CASES

TOWNSHIP OF HARMAR v COMMONWEALTH OF PENN., DEPT. OF ENVTL. RESOURCES (DER), 1994 Pa. Environ. LEXIS 53, EHB Docket No. 90-003-MJ (1994).

SYNOPSIS: "A petitioner is entitled to costs and attorney fees under Sec. 4(b) of SMCRA where the following four criteria are met: a final order has been issued, the applicant for fees and costs was the prevailing party, the applicant achieved some degree of success on the merits, and the applicant made a substantial contribution to a full and final determination of the issues."

LUCCHINO v COMMONWEALTH OF PENN., DEPT. OF ENVTL. RESOURCES, 1994 Pa. Environ. LEXIS 83, EHB Docket No. 91-0117-E (1994).

SYNOPSIS: "Appellant's Petition under Section 4(b) of SMCRA for reimbursement of attorneys fees and costs is granted to the extent that Appellant has proven entitlement thereto. Where the Appellant fails to show that his counsel's fees are reasonable based on comparable fees in the legal market place, reimbursement of attorneys fees will be denied."

MCDONALD LAND & MINING, INC. AND SKY HAVEN COAL, INC. v COMMONWEALTH OF PENN., DEPT. OF ENVTL. RESOURCES, 1995 Pa. Environ. LEXIS 5, EHB Docket No. 89-096-MJ consolidated with 89-556-MJ, 89-596-MJ, 89-597-MJ (1995).

SYNOPSIS: "The Board denies Sky Haven's application for award of attorney fees and costs filed under Section 4(b) of SMCRA in connection with Sky Haven's successful challenge to the Department's issuance of two compliance orders. By its plain language, Sec. 4(b) does not apply to all actions under SMCRA but only to proceedings which arise under Sec. 4(b) of the act, which deals exclusively with permitting and bonds."

MCDONALD LAND & MINING, INC. AND SKY HAVEN COAL, INC. v COMMONWEALTH OF PENN., DEPT. OF ENVTL. RESOURCES, 1995 Pa. Environ. LEXIS 7, EHB Docket No. 89-096-MJ consolidated with 89-556-MJ, 89-596-MJ, 89-597-MJ (1995).

SYNOPSIS: "McDonald's application for an award of attorney fees and expenses under Sec. 4(b) of [SMCRA], Act of May 31, 1945, as amended, 52 P.S. Sec. 1396.1 et seq., at Sec. 1396.4(b), is denied. McDonald's application fails to distinguish between fees and expenses incurred in connection with its appeal of a bond release denial, which are recoverable under Sec. 4(b) and those fees and expenses incurred in connection with its appeal of the Department's issuance of a compliance order, which are not recoverable under Sec. 4(b). McDonald does, however, qualify for an award under the Costs Act in the maximum amount of \$ 10,000."



BETH ENERGY MINING COMPANY v COMMONWEALTH OF PENN., DEPT. OF ENVTL. RESOURCES, 1995 Pa. Env'tl. LEXIS 11, EHB Docket No. 87-131-MR (1995).

SYNOPSIS: "[A] party does not incur attorney's fees and costs if it has no obligation to pay those expenses."

MEDUSA AGGREGATES CO. v COMMONWEALTH OF PENN., DEPT. OF ENVTL. RESOURCES, 1995 Pa. Envir'n. LEXIS 31, EHB Docket No. 94-324-E (1995).

SYNOPSIS: "A petition for attorney fees and costs filed under Sec. 4(b) of SMCRA and Sec. 307(b) of CSL is deficient on its face when it fails to contain any evidence from which the Board may assess the accuracy and reasonableness of the fees sought to be recovered by the petitioner".

MISC.

ANNOTATION, "Award of Attorneys' Fees Pursuant to Secs. 520(d), 520(f), 525(e), or 703(c) of [SMCRA]", 89 ALR Fed 170 (1994).

COALEX REPORTS

COALEX STATE INQUIRY REPORT - 120, "Attorneys' fees" (1989).

COALEX STATE INQUIRY REPORT - 163, "Attorneys' fees" (1990).

COALEX STATE INQUIRY REPORT - 180, "Attorneys' fees in non-enforcement, non-adversarial proceedings" (1991).

COALEX STATE INQUIRY REPORT - 220, "Petitions for costs, expenses and attorney's fees" (1992).

COALEX STATE INQUIRY REPORT - 233, "Suspension or revocation of permit for insufficient information; liability for attorney's fees" (1992).

COALEX STATE INQUIRY REPORT - 266, "Attorneys' fees (Updates: 120, 163, 180 & 220)" (1993).

COALEX STATE INQUIRY REPORT - 281, "Eligibility for attorney's fees" (1994).

ATTACHMENTS

- A. KEY TRONIC COPR. v U.S., 114 S Ct 1960 (1994). [Excerpt]
- B. PALUMBO v WASTE TECHNOLOGIES INDUSTRIES, 1994 U.S. App LEXIS 29355 (4th Cir 1994).



- C. CITIZENS FOR A SUITABLE HIGHWAY v FORBES, 1995 U.S. App LEXIS 1178 (9th Cir 1995).
- D. PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY v WINDALL, 51 F 3d 1179 (3rd Cir 1995).
- E. POWDER RIVER BASIN RESOURCE COUNCIL v BABBITT, 54 F 3d 1477 (10th Cir 1995).
- F. SAVE OUR CUMBERLAND MOUNTAINS, 127 IBLA 245, IBLA 88-519, 89-420 (1993).
- G. GATEWAY COAL CO. v OSM, 131 IBLA 212, IBLA 91-243 (1994).
- H. SUNNYSIDE COGENERATION ASSOCIATED v OSM, Docket No. DV 94-11-R (1995).
- I. MCDONALD LAND & MINING CO. AND SKY HAVEN COAL, INC. v DEPT. OF ENVIRONMENTAL RESOURCES (DER), 1995 Pa. Commw. LEXIS 362 (Pa Commw Ct 1995).
- J. PENNSYLVANIA DEPT. OF ENVTL. RESOURCES v MCDONALD LAND & MINING CO., 1995 Pa. Commw. LEXIS 363 (Pa Commw Ct 1995).
- K. STATE EX REL. WEST VIRGINIA HIGHLANDS CONSERVANCE, INC. v WEST VIRGINIA DIV. OF ENVTL. PROTECTION, 457 SE 2d 88 (WV Ct App 1995).
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- N. LUCCHINO v COMMONWEALTH OF PENN., DEPT. OF ENVTL. RESOURCES, 1994 Pa. Environ. LEXIS 83, EHB Docket No. 91-0117-E (1994).
- O. MCDONALD LAND & MINING, INC. AND SKY HAVEN COAL, INC. v COMMONWEALTH OF PENN., DEPT. OF ENVTL. RESOURCES, 1995 Pa. Environ. LEXIS 5, EHB Docket No. 89-096-MJ consolidated with 89-556-MJ, 89-596-MJ, 89-597-MJ (1995).
- P. MCDONALD LAND & MINING, INC. AND SKY HAVEN COAL, INC. v COMMONWEALTH OF PENN., DEPT. OF ENVTL. RESOURCES, 1995 Pa. Environ. LEXIS 7, EHB Docket No. 89-096-MJ consolidated with 89-556-MJ, 89-596-MJ, 89-597-MJ (1995).
- Q. BETH ENERGY MINING COMPANY v COMMONWEALTH OF PENN., DEPT. OF ENVTL. RESOURCES, 1995 Pa. Envtl. LEXIS 11, EHB Docket No. 87-131-MR (1995).
- R. MEDUSA AGGREGATES CO. v COMMONWEALTH OF PENN., DEPT. OF ENVTL. RESOURCES, 1995 Pa. Environ. LEXIS 31, EHB Docket No. 94-324-E (1995).
- S. ANNOTATION, "Award of Attorneys' Fees Pursuant to Secs. 520(d), 520(f), 525(e), or 703(c) of [SMCRA]", 89 ALR Fed 170 (1994).
- T. COALEX STATE INQUIRY REPORT - 120, "Attorneys' fees" (1989).
- U. COALEX STATE INQUIRY REPORT - 163, "Attorneys' fees" (1990).
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