

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE PROPOSED)
REVISION OF CHAPTER V OF THE)
DEPARTMENT OF ENVIRONMENTAL) STATEMENT OF PRINCIPAL
QUALITY RULES OF PRACTICE AND) REASONS FOR ADOPTION
PROCEDURE)

The Wyoming State Program for the regulation of coal mining under the Federal Surface Mine Control and Reclamation Act (P.L.95-87) was conditionally approved by the Secretary of the Interior on November 26, 1980. One of the conditions of approval was that the State:

...establish requirements which are consistent with the Federal attorneys' fees and intervention regulation in 43CFR Part 4. (45FR78684)

Based on a petition to repeal this requirement submitted to the Federal Office of Surface Mining by several western states (46FR54761), Wyoming has not addressed this program deficiency since its initial attempt to comply by modifying the Rules of Practice and Procedure in August of 1982. OSM has never ruled on the western states' petition. This deficiency, Condition "C", is the only State Program condition that remains unresolved. It continues to be an oversight issue with the Office of Surface Mining.

The specific deficiency in the Rules of Practice and Procedure is the lack of a mechanism to award costs and expenses against the Department. The federal rules require that costs and expenses may be awarded to:

To any person other than a permittee or his representative from OSM, if the person *initiates or participates in any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues.* (43CFR4.1294(b))

The Director petitioned the Environmental Quality Council for rule making to address this deficiency in the State Program. He found that the current Rules of Practice and Procedure lacked the following federally required commitments:

1. to award expenses, when appropriate, **to any person from the Department;**
2. to award expenses, when appropriate, **to the permittee from the Department;**

3. to award expenses, when appropriate, to the Department from a person;
4. to apply the awarding of expenses, when appropriate, to any enforcement proceeding, as required by W.S. 35-11-437(f) and P.L.95-87;

The Director also suggested that, inasmuch as the State's programmatic position on this issue has always been that the Environmental Quality Council should determine whether an award for costs and expenses was appropriate, that the Council should make the finding as to whether the petitioner "...made a substantial contribution to a full and fair determination of the issues" in any administrative proceeding (see SoPR 5/26/82, N. Freudenthal). This finding is already required for administrative proceedings that review enforcement actions (RP&P Ch.V, Sec. 2.a(1) and (2)).

The proposed amendment to Chapter V, Section 2.(a) (3) was revised based on public comment. The reason for this suggested change is that it further clarifies the role a participant must play to receive payment and it more closely parallels the federal language. Subsections (4) and (5) are proposed for adoption as originally presented.

The proposed amendment was further revised by the Council at their October 22, 1992 meeting by adding the words "contested case" before the word "proceeding" in Chapter V, Section 2.(a)(3). This change was made in order to clarify that fees may be awarded only in contested cases, as opposed to rulemaking hearings. The Council also added a comma before the word "other" and after the word "representative" in the same provisions. This was an editorial change.

Amended subsections to Chapter V are as follows:

(3) To any person, other than the permittee or his representative, from the Department if the person initiates or participates in any **CONTESTED CASE** proceeding under the Act as it provides for regulation of surface coal mining and reclamation operations in accordance with P.L. 95-87, **WHO PREVAILS IN WHOLE OR IN PART, ACHIEVING AT LEAST SOME DEGREE OF SUCCESS ON THE MERITS** and the Council finds that the person substantially contributed to a full and fair determination of the issues.

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

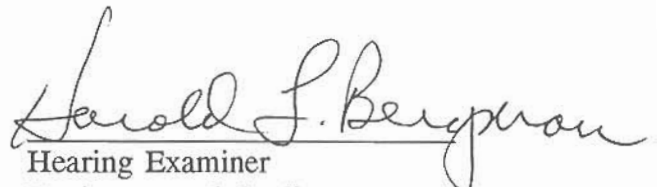
(5) To the Department where it demonstrates that a person initiated or participated in reviewing of any enforcement action in bad faith for the purpose of harassing or embarrassing the Department.

Conclusion

The Environmental Quality Council, in accordance with the authority granted to it by W.S. 35-11-112 As Amended, and having complied with the provisions of the Wyoming Administrative Procedures Act, finds as follows:

1. These rules provide for the regulation of surface coal mining and reclamation operations in accordance with the requirements of P.L. 95-87.
2. These rules and regulations are as effective as those promulgated by the Secretary of the Interior pursuant to P.L. 95-87.
3. These regulations are necessary and appropriate to preserve and exercise the primary responsibilities and rights of the State of Wyoming; to retain for the State the control over its air, land, and water resources and secure cooperation between agencies of the State and Federal Government in carrying out the policy and purposes of the Environmental Quality Act.
4. These regulations are reasonable and necessary for the effectuation of W.S. 35-11-101 through W.S. 35-11-1304, As Amended.
5. These rules and regulations are necessary and appropriate to protect the public health, safety, welfare, and environment of the State of Wyoming.

Dated this 29th day of October, 1992.


Harold J. Bergman
Hearing Examiner
Environmental Quality Council