STATE OF ILLINOIS
DEPARTMENT OF MINES AND MINERALS
LAND RECLAMATION DIVISION

IN RE:	)
	)
MIDCONTINENTAL FUELS, INC.,	)
MINE #2	)
SURFACE COAL MINING AND	)
RECLAMATION OPERATIONS	)
PERMIT NO. 275	)

ORDER

This Matter comes to me pursuant to two Petitions for the award of costs and fees, one of which Petition was filed by the Illinois Department of Mines and Minerals (hereinafter "Department"), the other of which was filed by Mid-Continental Fuels, Inc. (hereinafter "Mid-Continental"). Both Mid-Continental and the Department petition for the award of costs and expenses against John Gordon, Gordon & Price, Inc. and/or Claude White, and both Mid-Continental and the Department premise their respective Petitions upon Section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (hereinafter "SMCRA"), 30 U.S.C. 1275(e), and Section 8.07(f) of the Illinois Surface Coal Mining Land Conservation and Reclamation Act (hereinafter "State Act"), 225 ILCS 720/8.07(f).

§8.07(f) of the State Act provides that:

> [w]henever 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 Department 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 by the court (resulting from judicial review) or the Department (resulting from administrative proceedings) **on the basis of the importance of the proceeding and the participation of the parties to the efficient and effective enforcement of this Act**. (225 ILCS 720/8.07(f)) (Emphasis added)

§525(e) of SMCRA provides that:

> [w]henever an order is issued under this section, or as a result of any administrative proceeding under this chapter, 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. (30 U.S.C. §1275(e))

I think it is clear that the criteria contained within the federal statute for assessing costs and expenses differs from the criteria contained within the State statute. The federal statute appears to leave the determination of the assessment to the total discretion of the Secretary or the court, depending upon the applicable forum in which the litigants find themselves. In contrast, the State Act requires that the forum assessing costs and expenses premise such assessment upon a consideration of the "importance of the proceeding and the participation of the parties to the efficient and effective enforcement of [the State] Act."

I find that the provision of SMCRA governing the assessment of costs and expenses is **not** applicable to a proceeding under the State Act brought within the purview of either the administrative agency (**i.e.**, the Department) or a State court. Thus, both Mid-Continental's and the Department's petitions premised upon such statute are hereby denied.

The more difficult question is the request for costs and expenses premised upon the State Act. Claude White urges within his "Response to Petition for Award and Costs and Expenses" that:

> SMCRA was enacted by Congress to "insure the protection of the public interest through effective control of surface coal mining operations." 30 U.S.C. §1202(m). Congress, however, allowed the individual states to assume exclusive jurisdiction over the regulation of surface coal mining operations. To qualify, each state had to submit to the Secretary of the Interior "a state program which demonstrates that such State

has the capability of carrying our the provisions of this (Federal) Act and meeting its purposes through -...rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." 30 U.S.C. §1253.

Illinois chose to enact its own Surface and Coal Mining Land Conservation and Reclamation Act (presently codified at 225 ILCS 720 et seq.). Therefore, it promulgated surface mining regulations which are to "be construed to fully comply and be consistent with the requirements of the Federal Surface Mining Control and Reclamation Act of 1977." 225 ILCS 720/1.07. The Illinois regulations were approved by the Secretary of the Interior in 1984.

> The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § §1201-1328, establishes rules for strip mining of coal. A state may regulate in the federal government's stead if it uses criteria 'in accordance with' the Act and 'consistent with' the federal implementing regulations. 30 U.S.C. §1253(a)(1), (3), & (7)....On April 4, 1984, the Secretary approved the Illinois program. 49 Fed.Reg. 13494 (1984). [**Illinois South Project, Inc. v. Hodel**, 844 F.2d 1286, 1287-88 (7th Cir.1988).

Since the Illinois regulations are to "be construed to fully comply and be consistent" (225 ILCS 720/1.07) with the requirements of the Federal SMCRA, legislative history and judicial interpretation centering around the SMCRA are appropriate authority for interpreting the proper application of the Illinois regulations. The fact that both petitioners cite the Federal statute as authority for their petitions strongly reinforces this proposition. Accordingly, this [i.e, White's] memorandum of law extensively cites to the legislative history surrounding the Federal fee shifting regulation (30 U.S.C. §1275(e)), as well as judicial interpretation of the statute in illustrating the proper application of the Illinois fee shifting statute (225 ILCS 720/8.07(f)). (See, "White's Response to Petition for Award of Costs and Expenses," pp.3,4)

White forcefully argues that:

> [s]ince the Department was in effect the adjudicator at the hearing, it does not qualify for reimbursement under the fee shifting statute. "In administrative proceedings the 'parties' include the mine operator and any intervenors; the agency (state or federal) is not a 'party' to the proceedings in which it is adjudicator." **Illinois South Project, Inc. v. Hodel**, 844 F.2d 1286, 1294 (7th Cir.1988); see also **Utah International, Inc. v. Dep. [sic] of the Interior**, 643 F.Supp. 810 (D.Utah 1986) (fees could not be assessed against Department of the Interior since it was not a party to proceeding). (See, "White's Response to Petition for Award of Costs and Expenses," p.7)

The Department counters by citing §1843.22[1] of its Rules and Regulations (62 Ill.Adm. Code Ch.I, §1843.22), which specifically provides, in part, that:

> [a]ppropriate costs and expenses including attorney's fees may be awarded:
>
> 1) To any person from the permittee if:
>
> A) The person initiates any administrative proceedings reviewing enforcement actions, upon a finding that a violation of the State Act, regulations or permit has occurred, or that an imminent hazard existed, or to any person who participates in an enforcement proceeding where such a finding is made if the hearing officer determines that the person made a substantial contribution to the full and fair determination of the issues; or
>
> B) The person initiates or participates in any proceeding under the State Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues.
>
> 2) To a permittee **from the Department** when the permittee demonstrates that the Department issued a cessation order, 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; or
>
> 3) To a permittee from any person where the permittee demonstrates that the person initiated a proceeding under Section 8.07 of the State Act or participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee.
>
> 4) **To the Department** where it demonstrates that any person applied for review pursuant to Section 8.07 of the State Act or that any party participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the Department. (See, 62 Ill.Adm. Code Ch.I, §1843.22(e)) (Emphasis added)

The Seventh Circuit Court of Appeals' decision in **Illinois South Project, Inc. v. Hodel**, 844 F.2d 1286 (1988) gives me pause as to the enforceability of §1843.22 of the

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[1]§1843.22 of the Department's regulations is erroneously entitled, "Petitions for Award of costs and expenses under section 525(e) of the federal act." As indicated above, the federal statute is inapplicable to the instant cause of action, since §1843.22 has effectively replaced such federal statutory provision.

Department's regulations. In **Illinois South Project**, the Seventh Circuit (in construing the federal SMCRA fee shifting statute) stated:

> [o]nly "parties" need pay attorneys' fees under these sections. The Act does not specify what this means, but there is a logical implication. In administrative proceedings the "parties" include the mine operator and any intervenors; **the agency (state or federal) is not a "party" to the proceeding in which it is adjudicator**. In judicial proceedings, however, the agency may become a "party", as the defendant in the case, and the parties before the agency may not be parties in court (unless they intervene). Thus when a person objecting to the award (or terms) of a permit prevails against the mine operator before the agency, the mine operator is responsible for the prevailing party's attorneys' fees (if any be awarded), and when a person prevails in court against the agency, then the agency is presumptively answerable in fees.
>
> Illinois has a statute and regulation adopting this approach. Ill.Rev.Stat. ch.96½ ¶7908.05 provides that if a court declares that the mining regulator has violated the law, then it may require the agency to pay attorneys' fees to the prevailing party. No statute authorizes the award of fees against the agency to a party who pervails [sic] in proceedings before the agency, and in Illinois the doctrine of governmental immunity therefore would bar such an award.[2] The state's regulations, 62 Ill.Adm.Code §1843.22(e), provide that the mine operator must pay the attorneys' fees of prevailing parties in the administrative proceedings (if fees are otherwise appropriate). This tracks the federal statute: the mine operator pays when it is the party before the agency, as the agency pays when in turn it becomes the party in court. The system is "in accordance with" the Act, and the Secretary approved it. 49 Fed.Reg. 13518 (1984) (See, **Illinois South Project**, 844 at 1294) (Emphasis added)

I, like Respondent White and the Seventh Circuit Court of Appeals, have difficulty with the concept that an Illinois administrative agency has the power to award attorneys fees to itself (and against litigants who are required to seek administrative relief from such administrative agency). The fact that the administrative agency uses an "outside" hearing officer or ALJ does not, in my opinion, completely eviscerate my sense that awarding attorneys fees and expenses to a state administrative agency within the context of the administrative process itself is (for lack of a better word)... "incestuous."

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[2]The Court of Appeals appears to ignore the fee-shifting statute contained within the Illinois Administrative Procedures Act. (See, 5 ILCS 100/10-55)

It is one thing to have a fee-shifting statute or regulation which requires a governmental agency to pay a litigant's attorneys fees (as in the situation where a state agency fails to adhere to its own promulgated regulations, see, e.g., §10-55 of the Illinois Administrative Procedure Act (5 ILCS 100/10-55); it is quite another for a governmental agency to impose attorneys fees against a litigant in favor of the administrative agency. The most obvious danger of the latter type of agency power would be the extreme likelihood that litigants' access rights to the administrative procedures administered by the agency would be significantly "chilled." The fact that administrative decisions are vested with a semblance of presumed correctness (e.g., "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct," see, 735 ILCS 5/3-110) only italicizes the potential for abuse or prejudice when an agency is empowered to award itself attorneys fees.

Further, I have real difficulties with the standard enunciated within §1843.22(e) of the Department's regulations purporting to define the circumstances wherein attorneys fees might be awarded to the Department. How does a litigant go about "embarrassing" the Department by participating within an administrative proceeding? And how does a litigant "harass" the Department by participating within an administrative hearing, especially when the Department possesses the power to strike pleadings, to enjoin wrongful actions of a litigant, and to deny affirmative relief in the context of contested matters.

With all that said, I am utterly convinced that neither Respondent White nor Respondent Gordon "embarrassed" or "harassed" the Department by means of their precipitation of and participation in the administrative hearing conducted on December 7,

1993. Although the Department alleges that Respondents White and Gordon precipitated the December 7, 1993 administrative hearing in "bad faith" (and premised upon the frivolous nature of the Respondent's arguments therein, there appears to be at least a semblance of merit to such allegation), I cannot envision ruling that either White or Gordon either "harassed" or "embarrassed" the Department.[3] I do not believe under any circumstance here that awarding attorneys fees and expenses to the Department against the Respondent would withstand judicial scrutiny, and therefore I am summarily denying the Department's Motion.

By summarily denying the Department's Motion, I do not wish to imply that in particularly egregious circumstances, a Circuit or Appellate Court could not sanction by contempt particularly vexatious or vituperative pleadings filed by a litigant by assessing the amount of public monies spent by a State agency in defending against such vacuous pleadings. I simply do not believe that the role of an administrative agency is one in which it wields the power to economically sanction (in favor of itself) the litigants who come before it.

Which leaves Mid-Continental's "Petition for Award of Costs and Expenses." Respondent White asserts that Mid-Continental's "Petition" fails to comport with §1843.22(e). (See, "White's Response to Petition for Award of Costs and Expenses," pp.8,9) Mid-Continental, on the other hand, urges that "Mid-Continental has satisfied the prerequisites for the award [of fees and expenses] pursuant to sec. 525(e) of SMCRA." (See, Mid-Continental Fuels, Inc.'s Reply to White's Response to Petition for Award of Costs and

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[3]Note that §1843.22(e) requires **both** a finding of bad faith **and** that a request for review was filed **for the purpose** of "harassing or embarrassing the Department."

Expenses," "Summary," p.6) But as I have already ruled, sec. 525(e) of SMCRA is inapplicable to the inquiry presented herein.

§1843.22(c) of the Department's rules and regulations describes the required contents of a petition for costs and expenses, and said regulations states:

> [a] petition filed under Section 1843.22 shall include the name of the person from whom costs and expenses are sought and the following shall be submitted in support of the petition:
>
> 1) An affidavit setting forth in detail all costs and expenses including attorney's fees reasonably incurred for, or in connection with, the person's participation in the proceeding;
>
> 2) Receipts or other evidence of such costs and expenses; and
>
> 3) **Where attorney's fees are claimed , evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, and the experience, reputation and ability of the individual or individuals performing the services**. (See, 62 Ill.Adm. Code Ch.I, §1843.22(c)) (Emphasis added)

Mid-Continental's "Petition" does not comport with such content requirements.

Further, in light of the State statutory criteria set forth within Section 8.07(f) of the Illinois Surface Coal Mining Land Conservation and Reclamation Act, 225 ILCS 720/8.07(f) (i.e., "on the basis of the importance of the proceeding and the participation of the parties to the efficient and effective enforcement of this Act"), I am hereby denying Mid-Continental's "Petition." I do not believe that the short hearing conducted on December 7, 1993 was the type of proceeding the legislature had in mind when it empowered the Department to shift the onus of paying costs and expenses. This case did not present issues so "important," nor was the participation of Mid-Continental within the administrative proceeding of such a nature that materially affected the "efficient and effective enforcement of [the] Act," that would

substantiate the award of costs and expenses. For the reasons stated above, the Department's and Mid-Continental's respective petitions for costs and fees are hereby denied. IT IS SO ORDERED.

Dated: 11/7/94

Michael W. O'Hara
Hearing Officer

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Order was mailed certified to the following at the last known address of:

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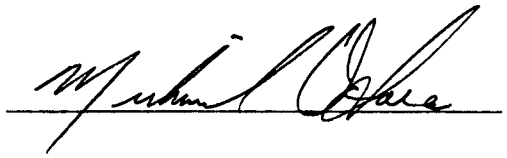
by enclosing the same in an envelope addressed to them as shown above, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois on November 7, 1994.



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