BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

SQUAW CREEK COAL COMPANY,	**)**	**Administrative Cause**
Claimant,	**)**	**Number: 13-055R**
	)	
vs.	**)**	
	)	
BIL MUSGRAVE,	**)**	**(Fee Petition)**
Respondent.	**)**	

ORDER AFFIRMING VALIDITY OF 312 IAC 3-1-13(d)(4); PROVIDING EVIDENTIARY PARAMETERS AND ESTABLISHING BRIEFING SCHEDULE

Validity of 312 IAC 3-1-13(d) and Applicable Standard of Review

A brief review of the history of the Indiana Surface Mining Control and Reclamation Act *("I-SMCRA")* is appropriate to establishing the validity of 312 IAC 3-1-13(d) under the authority of I.C. 14-34.

The Surface Mining Control and Reclamation Act ("SMCRA") was passed in 1977 "to provide a uniform nationwide program for the reclamation of land affected by surface coal mining operations." 30 U.S.C.A. § 1202.

> Uniformity is to be achieved, however, not through direct United States Department of the Interior control of surface mining across the nation, but rather through Interior Department oversight authority over state programs which must be at least as stringent as the federal program. 30 U.S.C.A. §§ 1253, 1271(d). If a state fails to develop a program, or fails to develop an acceptable program after the Secretary of the Interior has rejected a proposed program, the state will not obtain permanent regulatory authority, and a federal plan will be imposed. 30 U.S.C.A. § 1254; *Hodel v. Indiana* (1981), 452 U.S. 314, 319-20, 101 S.Ct. 2376, 2381, 69 L.Ed.2d 40, 48.[4] Once a state has obtained permanent regulatory authority, it must labor diligently to enforce its approved program vigorously, or the Interior Department will take over enforcement duties. 30 U.S.C.A. §§ 1254(b), 1271(b). Indiana achieved permanent regulatory authority, known as "primacy," on July 29, 1982. *See* 30 C.F.R. § 914.10 (1991).

Indiana Department of Natural Resources v. Krantz Brothers Construction Corp., 581 N.E.2d 935, (1991).

Indiana established its state program through the passage of the Indiana Surface Coal Mining and Reclamation Act ("I-SMCRA"), presently at I.C. 14-34, with the express intent to "implement and enforce the federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 through 1328)" I.C. 14-34-1-3(1).

In *Krantz*, the Indiana Court of Appeals recognized that "the first purpose of [I-SMCRA] is to implement and enforce SMCRA. Therefore, because our first goal in construing a statute is to give effect to the intent of the legislature, we will look to SMCRA and the federal rules adopted under it as we analyze [I-SMCRA]…" *Id. (emphasis added)*, See also *Peabody Coal Co. v. Indiana Department of Natural Resources,* 629 N.E.2d 925, (1994).

In *Krantz*, the Department and ultimately the Indiana Court of Appeals relied nearly exclusively upon a set of federal guidelines established by the Office of Surface Mining of the United States Department of Interior for the interpretation and implementation of a permit exemption in SMCRA associated with coal extraction incidental to the mining of other minerals in interpreting an equivalent provision in I-SMCRA.

Similarly, in *Peabody*, the court recognized that "the state laws and regulations must be no less stringent than, meet the minimum requirements of, include all applicable provisions of, and be no less effective than the SMCRA" in relying upon the analysis of the federal regulations associated with a violation of 30 CFR 715.17(a) by the Interior Board of Land Appeals in determining the validity of a violation issued by the Department of Natural Resources under an "analogous…regulation promulgated under the I-SMCRA…." At 931

SCCC is accurate when it proclaims that through its enactment of I-SMCRA the Indiana General Assembly "made clear its unequivocal intent to avoid federal control of Indiana surface coal mining and reclamation." *Krantz* at 937. However, this reality is not consistent with SCCC's conclusion that "Indiana law, not federal law, governs…", which encourages wholesale disregard for federal interpretation of similar provisions of SMCRA. I-SMCRA establishes a program intended to be coordinated with SMCRA, a federal program designed to establish uniformity in the regulation of surface coal mining and reclamation through "state programs which must be at least as stringent as the federal program". I-SMCRA was established for the purpose of "[achieving] permanent regulatory authority" through the establishment of requirements necessary "to meet the Federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 through 1328)", and the further coordination mandates that relevant federal law and regulations as well as the interpretation of federal law and regulations be considered in construing I-SMCRA. Contrary to SCCC's urgings, it is clear that provisions of I-SMCRA equivalent to counterpart federal provisions of SMCRA are required to be interpreted in a manner consistent with the Office of Surface Mining of the United States Department of Interior's interpretation of equivalent SMCRA provisions.

However, the necessity to look to the interpretation of SMCRA in analyzing I-SMCRA does not negate the requirement that an administrative rule must be in harmony with the rule's authorizing statute. (See *Krantz* at 940, stating "Krantz rightly argues that OSM's guidelines cannot supersede any conflicting federal or state statutes and regulations… Just as an agency rule out of

harmony with the relevant statute will not be enforced neither will a guideline out of harmony with relevant statutes or regulations be enforced.”). What remains to be examined is SCCC’s contention that 312 IAC 3-1-13(d)(4) is void as a result of inconsistency with its authorizing statute, I.C. 14-34-15-10.

I.C. 14-34-15-10 is facially neutral with respect to who may seek a recovery of costs and expenses as well as in terms of who may be responsible for the payment of costs and expenses.

> Sec. 10. Whenever an order is issued:
> (1) under this chapter or under IC 13-4.1-11 (before its repeal); or
> (2) as a result of an administrative proceeding under this article or under IC 13-4.1 (before its repeal) instituted at the request of a person;
> the court, resulting from judicial review, or the commission may assess against either party to the proceeding an amount of money, determined by the commission, equal to the aggregate amount of all costs and expenses, including attorney's fees, reasonably incurred by the person for or in connection with the person's participation in the proceedings, including any judicial review of agency actions.

As SCCC aptly points out, the relevant portions of 312 IAC 3-1-13, authorized by I.C. 14-34-15-10, vary the ability to seek an award of costs and expenses as well as the liability for the payment of costs and expenses based, in part, upon the identity and the role of the party to the proceeding.

> Sec. 13. (a) This section governs an award of costs and expenses reasonably incurred, including attorney fees, under IC 14-22-26-5, IC 14-24-11-5, IC 14-34-15-10, or IC 14-37-13-7.

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> …
>
> (d) Appropriate costs and expenses, including attorney fees, may be awarded under IC 14-34-15-10 only as follows:
> (1) To any person from the permittee if the person initiates or participates in an administrative proceeding reviewing enforcement and a finding is made by the administrative law judge or commission that
> (A) a violation of IC 14-34, a rule adopted under IC 14-34, or a permit issued under IC 14-34 has occurred or that an imminent hazard existed; and
> (B) the person made a substantial contribution to the full and fair determination of the issues. However, 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.
> (2) To a person from the department, other than to a permittee or the permittee's authorized representative, who initiates or participates in a proceeding and who

> prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that the person made a substantial contribution to a full and fair determination of the issues.
> (3) To a permittee from the department if 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.
> (4) To a permittee from a person where the permittee demonstrates that the person initiated a proceeding under IC 14-34-15 or participated in the proceeding in bad faith for the purpose of harassing or embarrassing the permittee.
> (5) To the department where it demonstrates that a person sought administrative review or participated in a proceeding in bad faith and for the purpose of harassing or embarrassing the department.

SCCC, focusing solely upon the language of I.C. 14-34-15-10 concludes that "by placing unauthorized conditions on the recovery of costs and expenses by certain parties, [312 IAC 3-1-13] contradicts the party-neutral standard furnished by [I.C. 14-34-15-10]." SCCC concludes that this contradiction presents an "irreconcilable conflict" between the statute and administrative rule that renders 312 IAC 3-1-13(d) invalid.

Contrary to SCCC's position, the Respondent, Bil Musgrave ("Musgrave"), argues that I.C. 14-34-15-10 should be considered in conjunction with the broader based I-SMCRA framework established by I.C. 14-34-1-3(1 & 9), I.C. 14-34-1-4, and I.C. 14-34-2-1(1)(A) as well as the requirements placed upon the State of Indiana in its effort to establish "primacy", or exclusive jurisdiction over surface coal mining and reclamation.

SMCRA requires of a State program as follows:

> Each state in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, …shall submit to the Secretary…a State program which demonstrates that such State has the capability of carrying out the provisions of this Act and meeting its purposes through –
> (1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act;
> (2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which sanctions shall meet the minimum requirements of this Act, including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;
> …
> (4) a State law which provides for the effective implementations, maintenance, and enforcement of a permit system, meeting the requirements of this title for the

> regulation of surface coal mining and reclamation operations for coal on lands within the State.
> …
> (7) rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.

30 U.S.C. 1253.

The Indiana General Assembly, in its effort to meet the requirements of 30 U.S.C. 1253, determined:

> Sec. 3. It is the purpose of this article to do the following:
> (1) Implement and enforce the federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 through 1328).
> …
> (9) Assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the state.

I.C. 14-34-1-3.

> Sec. 4. (a) It is the purpose of this article to establish requirements that are not more stringent than the requirements required to meet the Federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 through 1328).
> (b) The director and the commission may not adopt a rule under this article that is more stringent than corresponding provisions under the Federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 through 1328).

I.C. 14-34-1-4.

> Sec. 1. The commission shall do the following:
> (1) Adopt rules under IC 4-22-2 that do the following:
> (A) Effectuate the purposes of this article.
> …

I.C. 14-34-2-1.

Against the backdrop of SMCRA's mandates and I-SMCRA's intent to comply with those mandates by maintaining requirements that are "not more stringent" *(I.C. 14-34-1-4)* but are "no less stringent than, meet the minimum requirements of, include all applicable provisions of, and [are] no less effective than the SMCRA" (*Peabody* at 931, see also 30 CFR 730.5(a) and (b)), Musgrave offers that 312 IAC 3-1-13(d), which is entirely consistent with its counterpart in SMCRA (43 CFR 4.1294), is completely in accord with I.C. 14-34-15-10.

Construction of administrative rules proceeds according to the same principles as are applicable to the construction of statutes. *Indiana-Kentucky Elec. Corp. v. Indiana Dep't of Envtl. Mgmt.*, 820 N.E.2d 771, 777 (Ind. Ct. App. 2005); *Peabody Coal Company v. Indiana Dept. of Natural Resources*, 629 N.E.2d 925, 930. Consequently, 312 IAC 3-1-13 enjoys a presumption of validity and SCCC bears the burden of demonstrating the invalidity of the rule. *American Nat. Bank v. Ind. Dept of Highways*, 439 N.E.2d 1129,

1132, (1982), *Best Lock Corp. Review Board*, 572 N.E.2d 520, 527-528, (Ind. Ct. App. 1991). Each of the parties correctly asserts that 312 IAC 3-1-13 must be interpreted in a manner consistent with the intent of the legislature. *Indiana Dep't of Envtl. Mgmt. v. Boone County Resources Recovery Sys.*, 803 N.E.2d 267, 273 (Ind. Ct. App. 2004), *State v. Oddi-Smith*, 878 N.E.2d 1245, 1248 (Ind. 2008) citing *Hendrix v. State*, 759 N.E.2d 1045 (Ind. 2001).

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Where Musgrave and SCCC differ in their analysis and consequently in their conclusions is the manner in which the legislative intent associated with 312 IAC 3-1-13 is to be ascertained. SCCC focuses solely upon I.C. 14-34-15-10, which is but one section of I.C. 14-34. Conversely, Musgrave considers I.C. 14-34-15-10, in context with the overriding purpose for the enactment of I-SMCRA as expressed within the entirety of I.C. 14-34. It has been clearly established that a "statute should be examined as a whole, avoiding excessive reliance upon a strict literal meaning or the selective ready of individual words. The court presumes that the legislature intended for the statutory language to be applied in a logical manner consistent with the statute's underlying policy and goals." *Oddi-Smith* at 1248 (internal citation omitted). Similarly, "the cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used." *Indiana-Kentucky Elec. Corp.*, supra at 777, citing *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Dep't of Envtl. Mgmt.*, 806 N.E.2d 14, 20 (Ind. Ct. App. 2004).

Clearly 312 IAC 3-1-13(d) provides for the recovery of costs and expenses under I-SMCRA in a manner that is consistent with the ability to recover costs and expenses under SMCRA. The validity of 312 IAC 3-1-13(d) is also consistent the Indiana General Assembly's expression of intent to establish a program to "implement and enforce the federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 through 1328)" (I.C. 14-34-1-3), which required the establishment of "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of [SMCRA]" as well as the establishment of "rules and regulations consistent with regulations issued by the Secretary pursuant to [SMCRA]" (30 U.S.C. 1253(1 & 7).

It is determined that 312 IAC 3-1-13(d) is valid. Consequently, SCCC's fee petition will be controlled by 312 IAC 3-1-13(d)(4), which specifies as follows:

> (d) Appropriate costs and expenses, including attorney fees, may be awarded under IC 14-34-15-10 only as follows:
> …
> (4) To a permittee from a person where the permittee demonstrates that the person initiated a proceeding under IC 14-34-15 or participated in the proceeding in bad faith for the purpose of harassing or embarrassing the permittee.

<u>Evidence Appropriate to a Determination of "Bad Faith for the Purpose of Harassing or Embarrassing" SCCC</u>

At the May 1, 2013 prehearing conference in the instant matter, Musgrave, by counsel, objected to SCCC's ability to rely upon evidence of Musgrave's having previously initiated multiple proceedings against SCCC in support of a finding of "bad faith for the purpose of harassing" SCCC. Musgrave contended that SCCC's evidence of "bad faith" or an intent to harass SCCC should be limited solely to matters arising in the context of the proceeding underlying SCCC's fee petition, *Musgrave v. Squaw Creek Coal Co., et al*, 964 N.E.2d 891 (Ind. Ct. App. 2012). During the prehearing conference the administrative law judge notified the parties that if it was her conclusion that 312 IAC 3-1-13(d)(4) is valid such that in order for SCCC to prevail it would be obligated to establish that Musgrave acted in "bad faith for the purpose of harassing or embarrassing" SCCC that she would "provide the parties with parameters and limitations as to the extent of evidence that SCCC may rely upon…"

This determination begins with I.C. 4-21.5-3-26, which provides in part:

> …Upon proper objection, the administrative law judge shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts. In the absence of proper objection, the administrative law judge may exclude objectionable evidence…

Furthermore, the administrative law judge initiated a brief survey of litigation involving awards of sanctions and fees for the initiation or continuance of litigation in "bad faith for the purpose of harassing or embarrassing."

As previously discussed, matters considered under SMCRA and the associated federal regulations directly relate to the interpretation of I-SMCRA and associated administrative rules. In *Delta Mining Corp. v. OSM*, 3 IBSMA 252, (1981), Delta Mining Corp., a permittee, initiated a proceeding seeking to recover costs and expenses following successfully challenging a Notice of Violation and Cessation Order issued by OSM. In this context, Delta, as the permittee, was entitled by 43 CFR 4.1294(c) to such an award upon proving that OSM acted "in bad faith and for the purpose of harassing or embarrassing" Delta. In *Delta Mining Corp.* the only evidence of bad faith and harassment presented by Delta related to the fact that a similar enforcement action taken by OSM against another unrelated permittee had also been vacated for the same reason that the enforcement action against Delta had been vacated. Delta argued that this occurrence on two occasions involving two different permittees constituted evidence of OSM's "attitude of bureaucratic arrogance."

Permittee, Dennis R. Patrick, similarly sought an award of fees under 43 CFR 4.1294(c) urging that OSM's bad faith and intent to harass was supported by evidence that OSM contributed to a newspaper article, provided contradictory information regarding citizen complaints, disparate treatment between himself and another unrelated permittee cited with a similar violation. *Dennis R. Patrick v. OSM*, 1 IBSMA 248, (1979).

At issue in *Chaudhry v. Gallerizzo*, 174 F.3d 394, (4th Cir, 1999) was Gallerizzo's claim for fees under section 1692k(a)(3) of the Fair Debt Collection Practices Act, which specifies that the

court may award reasonable attorney's fees to a defendant when it is determined that the Plaintiff brought the actions "in bad faith and for the purpose of harassment." In determining that the Chaudhrys' allegations that Gallerizzo made false, deceptive and misleading statements in violation of § 1692e of the FDCPA were brought in bad faith for the purpose of harassment the district court considered only evidence associated with that exact action.

The Legal Services Corporation Act provides that a defendant may be awarded attorney fees and costs expended in defense of an action "commenced or pursued for the sole purpose of harassment of the defendant." *Flora v. Moore*, 461 F. Supp. 1104, 1118, (1978). Title VII, §706(k), as interpreted by the Supreme Court in *Christiansburg, Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, (1978), authorizes an award of attorney fees to a defendant who prevails in a Title VII action and who can establish that the plaintiff's actions was "frivolous, unreasonable or without foundation, even without a finding of subjective bad faith." It is acknowledged by the administrative law judge that 312 IAC 3-1-13(d)(4) does require determination of bad faith and that the proof necessary to an award of fees under Title VII and the Legal Services Corporation Act vary from the proof necessary under 312 IAC 3-1-13(d)(4). However, the evidence considered by the court in *Flora* is worthy of consideration.

The court in *Flora* references various aspects of the plaintiffs actions in pursuing the proceeding including their continued efforts at extensive discovery and the presentation of voluminous evidence associated with their efforts to establish the suit as a class action despite the court having previously denied the maintainability of a class action suit. The court further considered that the EEOC (Equal Employment Opportunity Commission) had determined with respect to the same or similar allegations that there was "no reasonable ground to believe that the five individual plaintiffs had a basis for a discrimination suit…" In addition, the court also "note from the records and files of our court, the same attorneys representing these five plaintiffs, after losing the class action issue, instituted….another action against the same hospital." At 1121.

Based upon I.C. 4-21.5-3-26 along with consideration of the evidence considered by courts addressing the issue of attorney fees, costs or sanctions for the initiation or continuation of proceedings in bad faith for the purpose of harassment or embarrassment the administrative law judge concludes that SCCC will not be limited with respect to the evidence it may introduce in support of its allegation that Musgrave initiated the underlying proceeding (*Musgrave v. Squaw Creek Coal Co., et al*, 964 N.E.2d 891 (Ind. Ct. App. 2012)) in bad faith for the purpose of harassing or embarrassing SCCC except that such evidence must be relevant and material to the administrative law judge's determination. Specifically, such evidence may include:

1. Evidence of events directly related to but preceding Musgrave's initiation of the underlying action;
2. Evidence of other actions initiated by Musgrave involving SCCC;
3. Evidence of the manner in which Musgrave pursued the actions initiated;
4. Evidence of statements made or activities engaged in by Musgrave that are relevant and material to SCCC's allegation that the underlying action was initiated in bad faith for the purpose of harassing or embarrassing SCCC.

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Briefing Schedule

1. In accordance with the previous agreement of the parties for the submission of all evidence in written form, the parties are hereby permitted to present additional evidence with respect to the following three issues:
    a. Musgrave's "bad faith for the purpose of harassing or embarrassing" SCCC;
    b. Whether SCCC actually incurred the expenses claimed in its fee petition.
    c. The reasonableness of the fees claimed by SCCC.
2. SCCC's evidentiary submission shall be filed not later than October 7, 2013;
3. Musgrave's evidentiary submission shall be filed not later than November 7, 2013;
4. SCCC's shall be permitted an opportunity to file a rebuttal evidence not later than November 21, 2013.

Dated: September 5, 2013