INTERIOR BOARD OF LAND APPEALS

West Virginia Highlands Conservancy and National Wildlife Federation

155 IBLA 252 (July 25, 2001)

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WEST VIRGINIA HIGHLANDS CONSERVANCY
NATIONAL WILDLIFE FEDERATION

IBLA 96-120 Decided July 25, 2001

Petition for award of fees and expenses under section 525(e) of the Surface Mining Control and Reclamation Act of 1977. Appeal 96-07.

Petition denied.

1. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Final Order

   An order granting an Office of Surface Mining motion to remand an appeal of a decision on informal review denying a citizen complaint is a "final order" under 43 CFR 4.1290(a)(2).

2. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Standards for Award

   A petition for an award of costs and expenses, including attorney fees, filed pursuant to 43 CFR 4.1298(b), may be granted when there is a showing that petitioner prevails in whole or part, achieving at least some degree of success on the merits. If a petitioner fails to demonstrate some degree of success on the merits, the petition will properly be denied.

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, and L. Thomas Galloway, Esq., Boulder, Colorado, for petitioners; Sandra M. Lieberman, Esq., and Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

In November 1993 the West Virginia Highlands Conservancy and the National Wildlife Federation (petitioners) filed a citizen complaint with the Office of Surface Mining Reclamation and Enforcement (OSM) under 30 CFR 842.12, alleging that Valley Camp Coal Co. (Valley Camp) owned or controlled the surface mining operations conducted by Bufflick, Inc. (Bufflick), pursuant to West Virginia Permit No. U-6016-87, and that

Bufflick had not disclosed this relationship in its applications for permits to conduct surface mining operations. As relief, the petitioners sought to have OSM undertake the following action: conduct a Federal inspection; immediately block all Federal regulatory authorities from issuing any new permits to Valley Camp or its affiliates; commence proceedings under 30 CFR 773.15(b)(1) to rescind, or to prompt state regulatory authorities to rescind, all permits improvidently granted, transferred, or assigned to Valley Camp or its affiliates; and issue appropriate notices of violation or cessation orders and assess civil penalties as required by the Surface Mining Act and Federal regulations. In the alternative, petitioners sought to have OSM suspend permits held by Valley Camp or its affiliates until those companies fully disclose all entities related to them through common ownership and control and until they demonstrate that any and all related entities responsible for uncorrected violations or unpaid civil penalties have, at a minimum, entered into appropriate abatement agreements or penalty payment plans.

OSM's Charleston Field Office sent a ten-day notice reflecting these allegations to the West Virginia Division of Environmental Protection (West Virginia DEP). The West Virginia DEP responded that it found no ownership or control link between Valley Camp and Bufflick and that it was taking no further action. The Charleston Field Office informed petitioners that it deemed the West Virginia DEP response appropriate. 1/

Petitioners requested informal review by the Director of OSM. See 30 CFR 842.15. In July 1994 the Assistant Director of OSM denied petitioners' request and affirmed the Charleston Field Office findings. The Assistant Director's decision referred to "an unsigned, undated, and unfiled lease agreement between Valley Camp and New King Fuels" upon which petitioners had relied in arguing there was an ownership or control link between Valley Camp and Bufflick, finding that it did not support a finding of a presumption of control pursuant to 30 CFR 773.5(b)(6).

Petitioners appealed to this Board and filed a statement of reasons (SOR) for their appeal. See 30 CFR 842.15(d); 43 CFR 4.1282. 2/ Petitioners argued that West Virginia and OSM "looked for actual control in this case rather than examining the pertinent mining leases for the sort of 'capacity to control' upon which the Secretary's regulations and this Board's decision in S&M [S&M Coal Company v. OSM, 79 IBLA 350 (1984)] base the concept of 'ownership and control'." 3/ SOR at 8. Petitioners agreed with the OSM Assistant Director's conclusion that the terms of the sublease

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1/ Presumably the Charleston Field Office concluded that West Virginia had good cause for failure to take action to cause a violation to be corrected. See 30 CFR 842.11(b)(1)(B)(1).

2/ We docketed this appeal as IBLA 94-823.

3/ 30 CFR 773.5 defines "owned or controlled" under (a)(3) as "[h]aving any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations. See 30 CFR 773.5(b)(6).

agreement between Valley Camp and New King were dispositive but argued that those terms "compel an entirely different finding tha[n] OSM and West Virginia made in this case." (SOR at 9). According to petitioners, "Valley Camp had the 'capacity to control' Bufflick and New King. OSM and West Virginia erred in finding the Petitioner's evidence of ownership or control insufficient." (SOR at 14.) After setting out this summary of its arguments, petitioners sought to have "the Board reverse OSM's July 20, 1994, informal review decision, hold that Valley Camp owned or controlled the Bufflick/New King operation, and order OSM to conduct the immediate Federal inspection that the Petitioners requested at the outset of these proceedings." Id.

At OSM's request, we granted two extensions of time for it to file its response to petitioners' SOR. "In light of the issues raised," OSM stated, "additional time is required to coordinate the Government's response to the appeal." January 27 and March 7, 1995, Unopposed Motions for Extension of Time at 1. In May 1995, OSM filed a motion asking the Board to remand the case to OSM to allow OSM the opportunity to review the evidence presented by petitioners on appeal. "[T]he decision on appeal in this case was based on an incomplete record," OSM explained, and "[a] remand would allow the opportunity for further development of the record in this case and for the parties to have full opportunity to present information and documentation of their respective positions, so that OSM may make a fully informed decision in this matter." Motion at 1. In the alternative, OSM asked for an opportunity to respond, if the Board denied its request for a remand.

Valley Camp (which had intervened in the appeal) objected to OSM's motion, arguing that the terms of the New King sublease and the Bufflick sublease were virtually identical and therefore OSM had an adequate record for the Assistant Director's decision. On October 25, 1995, we set aside the Assistant Director's July 1994 decision and remanded the matter to enable OSM to develop a more complete record upon which it would rely when ruling on the petitioners' request for informal review.

In December 1995 petitioners filed a petition for an award of fees and expenses under section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994), and 43 CFR 4.1290 et seq. for their work on the citizen complaint. They argued that our October 25, 1995, order granting OSM's motion for remand was a final order under 43 CFR 4.1290(a)(2) because it disposed of their appeal in IBLA 94-823. They also argued that under 43 CFR 4.1294(b) they had "prevail[ed] in whole or in part, achieving at least some degree of success on the merits," and "made a substantial contribution to a full and fair determination of the issues" because their SOR for appeal in IBLA 94-823 caused OSM to recognize the basis for its July 1994 decision was inadequate because it had not examined the relevant lease provisions and to request us to remand so it could vacate the decision.

In January 1996 OSM filed a motion asking the Board to suspend consideration of the petition because the case "involve[d] certain issues which [were then] before the Board" in Kentucky Resources Council v. OSM, IBLA 94-161. We granted OSM's request.

On January 30, 1996, the Chief of OSM's Lexington Applicant/Violator System Office issued a decision finding there was no presumption that Valley Camp owned or controlled Bufflick because Valley Camp did not retain the right to receive the coal after mining and did not have the authority to determine the manner in which Bufflick conducted its surface mining. This decision was based on the review of the provisions of the Bufflick sublease and other arguments presented on appeal to this Board and to OSM after remand.

Petitioners then sought informal review of the January 30, 1996, decision. On April 18, 1996, OSM's Regional Director issued a decision affirming the January 30, 1996, decision issued by the Chief of OSM's Lexington Applicant/Violator System Office. Petitioners appealed the April 18, 1996, decision to this Board, and the appeal of this second decision was docketed as IBLA 96-450. The appeal docketed as IBLA 96-450 was dismissed on May 29, 1998, in response to a motion to dismiss filed by petitioners.

Following our January 1997, decision in Kentucky Resources Council v. OSM, 137 IBLA 345 (1997), rev'd Kentucky Resources Council, Inc. v. Babbitt, 997 F. Supp. 814 (E.D. Ky. 1998), OSM filed its answer to the petition for an award of fees. OSM argues that petitioners did not achieve any degree of success on the merits at any stage of the proceedings and therefore is not eligible for an award:

> Petitioners urge the Board to conclude that they prevailed in part because their appeal prompted OSM to recognize that its initial decision on informal review was based on an incomplete record. However, upon remand, OSM reaffirmed its initial decision based on the additional evidence it received. There-fore, if any credit for the remand can even be attributed to the Petitioners, the most that can be said is that the remand represented a minor procedural accomplishment, with no substantive impact whatsoever.

(Answer at 2.) Acknowledging that "some degree of success on the merits" is "not measured by whether a party succeeds with respect to every claim or at every stage of a proceeding, but whether it succeeds on some claim or at some stage," Natural Resources Defense Council, Inc. (NRDC) v. OSMRE, 107 IBLA 339, 366, 96 I.D. 83, 97 (1989), OSM argues that "[n]one of the results that [petitioners] desired in filing [their] citizen complaint and subsequent appeal have been achieved, and [petitioners] cannot claim that [their] actions involving the Department had any beneficial result." Id. at 13. Absent any degree of success on the merits, OSM concludes, petitioners are not entitled to an award for a purely procedural victory. Id. at 14-15.

In reply, petitioners argue that 30 CFR 842.15(a) provides for informal review by the Director of OSM of an OSM decision not to conduct a Federal inspection or take appropriate enforcement action. They contend that the only available relief in a proceeding to review an OSM decision not to take appropriate action is to have that decision set aside or

vacated, either by the Director of OSM on informal review or, if he or she declines to do so, by the Board on appeal under 30 CFR 842.15(d). Stating that a citizen complaint alleging an ownership or control relationship requires OSM to make a complete investigation of the circumstances of that relationship, they contend that when a complete investigation does not occur and the OSM Director affirms the resulting OSM decision, a Board order setting aside the OSM Director's action is "success" on appeal. Petitioners argue that

> Petitioners successfully demonstrated that OSM did not undertake the necessary investigation to determine a critical threshold question in properly administering the Surface Mining Act: specifically, whether Valley Camp owned or controlled surface coal mining operations conducted under Permit No. U-6016-87. In doing so, the Petitioners in this case served a key purpose of a Federal environmental statute by ensuring that OSM fulfilled its duty to implement the statute responsibly and correctly. The Petitioners are "prevailing parties" under [National Wildlife Federation v. Hanson, 859 F.2d 313, 316-17 (4th Cir. 1988)] regardless of the final outcome of OSM's actions on remand.

(Petitioners' Reply at 19.) The petitioners further contend that the relief they sought and obtained "cannot be properly characterized as 'purely' procedural rather than 'substantive.' The 'substance' of such appeals is the question of whether OSM must revisit its handling of a citizen complaint. Relief which compels that result or authorizes OSM to provide it voluntarily is not a preliminary 'procedural' victory." Id. at 21-22. They argue that, even if OSM's re-investigation is termed a procedural victory, petitioners "have achieved substantive success under Hanson because OSM abandoned its initial decision and conducted a Federal inspection of Valley Camp's ownership or control of Permit No. U-6016-87. They are both entitled to and eligible for the award of costs and expenses." Id. at 22. Petitioners conclude by requesting that we permit them to supplement their petition with a statement of the hours their attorneys spent and the expenses they incurred since filing the petition.

OSM filed a Memorandum in Opposition to petitioners' Reply. It states that the reason it requested a remand was that the petitioners did not provide a copy of the sublease between Valley Camp and Bufflick. (Memorandum at 2.) According to OSM, the petitioners' view that their appeal resulted in a reversal of OSM's decision not to undertake a Federal inspection exaggerates the Board's order and overstates their role in obtaining it. Id. According to OSM, the petitioners argue as though the purpose of their appeal was to point out OSM's failure to review the lease and other information, but, in fact, their appeal was focused on establishing that OSM had drawn the wrong conclusion about the ownership and control relationship. Id. at 3. The Hanson decision is distinguishable, OSM argues, because in Hanson the Government had failed to perform its statutory duties and upheld petitioners' charges of error, and in this case the Board simply set aside and remanded the agency's decision. Id. at 4-5. Nothing in the legislative history, preamble, or case law supports

petitioners' argument that they are eligible for an award, OSM concludes. Id. at 6.

Petitioners' Surreply Brief states that they were not required to furnish OSM a copy of the sublease between Valley Camp and Bufflick, and that all that was required was a written statement giving OSM a reasonable basis to believe that Valley Camp owned or controlled Bufflick. Petitioners acknowledge that, in their SOR, they argued that under the Valley Camp-New King sublease, Valley Camp had the capacity to control the operations on the permit. They contend that, instead of attempting to answer the SOR, OSM asked for a remand of the matter, admitting that the decision on appeal was based on an incomplete record, stating that "OSM proposed (and subsequently conducted) a procedure that conformed precisely to a Federal inspection of ownership or control." (Surreply Brief at 4.) According to the petitioners, "[w]hat actually happened here is that, in an effort to immunize itself from liability for an attorney fee award, OSM contrived to conduct a Federal inspection under the guise of completing informal review." Id. at 5. They urge the Board to find that OSM's admission that its July 1994 decision was based on an incomplete record is as serious an error as the court found the agency made in Hanson and argue that "there is no rational ground for distinguishing a voluntary remand from one ordered in another case in which the agency resists to the bitter end." Id. at 7.

[1] We have no trouble concluding that our October 25, 1995, order vacating OSM's July 1994 decision and granting OSM's motion to remand IBLA 94-823 was a final order under 43 CFR 4.1290(a)(2). Kentucky Resources Council, Inc. v. Babbitt, supra at 818 (E.D. Ky. 1998); Harvey A. Catron, 146 IBLA 31, 34 (1998); Hylton v. OSMRE (On Reconsideration), 145 IBLA 167, 170 (1998); Kentucky Resources Council v. OSM, supra at 349, 351, reversed on other grounds, Kentucky Resources Council, Inc. v. Babbitt, supra.

[2] Having determined that our remand can be considered a final order, we must consider whether petitioners are eligible for an award of fees and expenses under section 525(e) of the Surface Mining Control and Reclamation Act of 1977, and, if they are eligible, whether they are entitled to an award.

In West Virginia Highlands Conservancy, 152 IBLA 66, 74 (2000), the Board stated:

> The eligibility determination focuses on whether the petitioners have shown that they achieved at least some degree of success on the merits. [NRDC v. OSMRE, 107 IBLA] at 365, 96 I.D. at 97. In this case the ultimate relief sought in petitioners' underlying citizen's complaint, i.e., the reclamation of the five ZY and Careers minesites, was attained through the reclamation agreement between WVDEP and Pittston's subsidiary. See Hylton v. OSM (On Reconsideration), supra. Since petitioners achieved some degree of success on the merits of their complaint, they have established that they are eligible for a fee award. Id.

The remaining question is whether petitioners are entitled to an award, i.e., whether they made a substantial contribution to a full and fair determination of the issues. NRDC, 107 IBLA at 368, 96 I.D. at 99; see also Hylton v. OSM (On Reconsideration), supra. The key to resolving this query rests on the existence of a causal nexus between petitioners' actions in prosecuting the Board appeal and the relief obtained, the determination of which depends on the totality of the circumstances. Kentucky Resources Council, Inc. v. Babbitt, 997 F. Supp. at 820-21. The mere pendency of an appeal at the time relief is granted does not suffice; there must be a causal link between the appeal and the relief attained. Id. at 819.

As can be seen, in West Virginia Highlands Conservancy, the Board found that WVHC was eligible for a fee award because it had achieved some degree of success on the merits.

In this case, petitioners filed their citizen complaint alleging an ownership or control relationship between Valley Camp and Bufflick and seeking to have OSM conduct a Federal inspection, block issuance of new permits to Valley Camp, rescind all permits improvidently granted, transferred, or assigned to Valley Camp, issue notices of violation or cessation orders, assess civil penalties, or in the alternative, suspend Valley Camp pending disclosure of all entities related to Valley Camp through common ownership and control and until they demonstrate that related entities responsible for uncorrected violations or unpaid civil penalties have entered into appropriate abatement agreements or penalty payment plans. When OSM's Charleston Field Office issued its determination that the West Virginia DEP decision to take no further action was appropriate, based on West Virginia DEP's statement that it found no ownership or control link between Valley Camp and Bufflick, the petitioners sought informal review by the OSM Director of the determination alleging that the record demonstrated an ownership or control relationship, asking OSM to: reverse the Charleston Field Office finding that the state regulatory authority had demonstrated good cause in refusing to hold Valley Camp responsible for outstanding violations on the Bufflick site; determine that Valley Camp controlled Bufflick; link Valley Camp to the Bufflick mine site and the outstanding violations on that site, thus "permit blocking" Valley Camp unless and until an appropriate abatement plan is agreed upon; and require Valley Camp to amend its permit applications to include the Bufflick site as a controlled entity. The OSM Director's July 1994 informal review decision affirmed the Charleston Field Office decision.

Petitioners' then appealed to this Board. In their SOR, petitioners argued that "Valley Camp had the 'capacity to control' Bufflick and New King, and that OSM and West Virginia erred in finding the Petitioner's evidence of ownership or control insufficient." (SOR at 14.) After setting out this summary of their arguments, petitioners sought to have "the Board reverse OSM's July 20, 1994, informal review decision, hold that Valley Camp owned or controlled the Bufflick/New King operation, and order OSM to conduct the immediate Federal inspection that the Petitioners requested at the outset of these proceedings." Id.

After reviewing the SOR, OSM asked the Board to remand the case to allow OSM the opportunity to review the evidence presented by petitioners on appeal. In the alternative, OSM asked for an opportunity to respond if the Board denied its request for a remand. The Board granted the OSM request and remanded the case to allow OSM the opportunity to review the evidence presented by petitioners and issue a new decision.

On January 30, 1996, the Chief of OSM's Lexington Applicant/Violator System Office issued a decision finding there was no presumption that Valley Camp owned or controlled Bufflick because Valley Camp did not retain the right to receive the coal after mining and did not have the authority to determine the manner in which Bufflick conducted its surface mining. This decision was made after review of the provisions of the Bufflick sublease, which had been referred to but not made a part of petitioners SOR, and other arguments presented on appeal to this Board and to OSM after remand.

Petitioners requested informal review of the Chief of OSM's Lexington Applicant/Violator System Office January 30, 1996, decision. On April 18, 1996, OSM's Regional Director issued a decision affirming the January 30, 1996, decision. Petitioners appealed the April 18, 1996, decision to this Board, and this second decision was docketed as IBLA 96-450. The appeal docketed as IBLA 96-450 was dismissed on May 29, 1998, in response to a motion to dismiss filed by petitioners.

In their request for attorney fees petitioners claim, for the first time, that their intent was to have this Board direct OSM to review all of the evidence. We do not accept this belated argument. As OSM noted: "[T]he Petitioners' appeal did not claim that OSM failed to review the complete record, and did not seek a remand for purposes of reviewing additional evidence." (Answer at 14.)

If petitioners can claim any success in this case, it would be a reach to describe it as a "minor procedural accomplishment." (See Answer at 2.) Petitioners did not convince us that OSM erred in any substantive way. When seeking a remand OSM admitted that it had not examined the sublease between Valley Camp and Bufflick. 4/ However, we made no ruling on the merits of the appeal, but merely held that, as a procedural matter, OSM should be afforded the opportunity to examine the sublease and other documents and evidence tendered by petitioners in the context of its

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4/ On appeal to this Board, intervenor Valley Camp stated that the Valley Camp/New King sublease, which was a part of the record, and the Valley Camp/Bufflick sublease were "identical in all material respects." (Valley Camp Memorandum In Opposition to OSM's Motion for Remand at 4.)

ownership or control link determination. OSM reviewed the documents petitioners cited as demonstrating an ownership or control link between Valley Camp and Bufflick and found that no ownership or control link existed. There was no finding that Valley Camp had the capacity to control Bufflick and New King, or that OSM and West Virginia erred in finding the Petitioner's evidence of ownership or control insufficient. The July 20, 1994, informal review decision was not reversed. OSM did not conduct the Federal inspection that the Petitioners requested at the outset of their proceedings. In summary, Petitioners failed to achieve any degree of success on the merits of their complaint. Having failed to achieve any degree of success on the merits of their complaint, petitioners are not eligible for an award of attorney fees. We need not address the issue of entitlement.

This case is not sufficiently similar to National Wildlife Federation v. Hanson, supra, to justify the conclusion that our remand was sufficient cause for the award of attorney fees. In Hanson, the court awarded attorney fees based on a remand, saying that "since the district court is not empowered to substitute its judgment for that of the agency * * * the NWF obtained all of the relief that the District Court had the Authority to render." Id. at 317. This Board has the authority to direct OSM to conduct a Federal inspection, and could have ordered that inspection. Paul F. Kuhn, 120 IBLA 1 (1991); W.E. Carter; 116 IBLA 262 (1990). 5/

In addition it is our opinion that OSM's request was valid and in the best interest of all of the parties. If, on remand, OSM had determined that it had erred in its initial decision, and that Valley Camp had the "capacity to control" Bufflick and New King, it would either have directed West Virginia to conduct an inspection or conducted a Federal inspection. If an inspection had been deemed warranted, the award of attorney fees would have been warranted. By taking the initiative and requesting a remand, OSM would have expedited the matter and avoided the accumulation of further attorney fees.

On the other hand, if we had denied OSM's request for the remand, it would have been reasonable for us to grant a OSM's unopposed alternative motion to allow further briefing in response to the allegations raised in petitioners' SOR. There is no reason to believe that this additional briefing would not have addressed the very allegations raised in the SOR which prompted the request for a remand. That is, OSM would have investigated the allegations that there were contractual obligations amounting to "control," responded to them, and argued for the same conclusion OSM reached on remand. In either event, OSM would have investigated the allegations made in the SOR. The second appeal was taken because OSM

5/ Petitioners recognized this Board's ability to substitute its judgment for that of the agency when they sought to have this Board "reverse OSM's July 20, 1994, informal review decision, hold that Valley Camp owned or controlled the Bufflick/New King operation, and order OSM to conduct the immediate Federal inspection that the Petitioners requested at the outset of these proceedings." (SOR at 14.)

once again found it unnecessary to conduct an inspection of Bufflick's surface mining operations. No inspection was undertaken or ordered in response to either the arguments or the evidence presented by the appellants.

If, in the initial appeal, OSM had argued that the evidence presented on appeal did not support a finding that there was capacity to control and this Board had affirmed OSM, no attorney fees would be awarded. This Board remanded the case to allow OSM the opportunity to reverse its prior decision if it found evidence of control. It did not, and on remand the decision to not conduct a Federal inspection was reaffirmed.

To award attorney fees in this case is not only unwarranted, it would not be in the best interest of the Department, and would not aid in or encourage the early resolution of disputes. If OSM is concerned that it might have erred, it is best that it be allowed to correct that error at the earliest date, thus avoiding further legal fees on appeal and further litigation before this Board. To award attorney fees merely because a case is remanded, even when, on remand, OSM determines that it did not err and does not change its initial decision, will have the effect of discouraging a request for remand, which would be sought only when OSM has found error and confesses judgment. On the other hand, if the remand request results in an affirmance which is appealed, and that affirmance is reversed, the appellant has the right to seek attorney fees for all of the actions, including the initial appeal.

We therefore deny the petition. As a result, there is no reason for us to grant OSM's request to file a supplemental statement concerning the number of hours and rates claimed within thirty days from receipt of this decision.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for an award of fees and expenses is denied.

R.W. Mullen
Administrative Judge

I concur

Bruce R. Harris
Deputy Chief Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

Based on information that Valley Camp owned or controlled Bufflick, Inc., whose permit had been revoked and who was responsible for unabated violations and unpaid civil penalties, petitioners requested OSM's Charleston Field Office to conduct an inspection of permits held by Valley Camp under 30 CFR 842.12.

OSM sent a ten-day notice to West Virginia's Division of Environmental Protection (DEP). The DEP replied that it had investigated, including a review of "[t]he lease between Valley Camp, Bufflick, and New King Fuel," had found insufficient information to support a presumption of control by Valley Camp, and would take no further action.

The Charleston Field Office informed petitioners that it found this response "appropriate," and petitioners requested informal review by the Director of OSM.

The Assistant Director of OSM, in his July 1994 decision responding to petitioners' request for informal review, stated that he had reviewed "a 2-page signed, dated and filed lease agreement between Valley Camp and Bufflick that appears to be an exhibit to a lease entered into in 1975 between Valley Camp and the heirs of a Mr. Ward." The Assistant Director concluded:

> * * * [A]n analysis of the lease between Bufflick and Valley Camp does not support a finding of a presumption of control pursuant to 30 CFR 773.5(b)(6).
>
> After an analysis of all documents, I have determined that the 2-page lease agreement between Valley Camp and Bufflick, Inc., did not give Valley Camp the authority to control Bufflick, Inc., or its operation. As a result of this finding, I am denying your request and affirming the CHFO's [Charleston Field Office's] finding that there is no 30 CFR 773.5(b)(6) presumption of control link of Valley Camp over Bufflick.

Assistant Director's July 20, 1994, decision at 1-2.

On appeal to us, petitioners argued that the terms of the lease compelled a different conclusion. Section 6.02, for example, provided that no material change from, or operations outside the scope of, an approved plan of operation could be made without Valley Camp's prior approval. Statement of Reasons for Appeal at 9-12.

When it filed its motion requesting that we remand petitioners' appeal from the Assistant Director's decision, OSM stated that his decision had relied upon the 2-page lease agreement between Valley Camp and Bufflick but that OSM had "determined that its decision was inadequately supported, and may therefore be open to question with respect to its reliability."
Motion at 3.

It has become apparent that the '2-page lease' was merely a property description of the premises covered by a sublease between Valley Camp and Bufflick, which was dated February 14, 1987. The actual sublease between Valley Camp and Bufflick, to which this exhibit refers, was not part of the record reviewed by the agency. The actual sublease, which defined the relationship between the parties, would be of primary importance in analyzing that relationship for purposes of the ownership and control rule at 30 CFR 773.5.

Id. at 3-4. "Under the circumstances," OSM stated, "the agency believes that the best course of action would be to remand the matter to OSM in order to develop an adequate record upon which to make a fully informed decision." Id. at 4.

OSM proposed that it would vacate the Assistant Director's July 1994 decision so that the matter would again be before OSM in response to petitioners' April 1994 request for informal review of the Charleston Field Office's January 1994 finding. Upon remand, OSM would refer the matter to its Applicant/Violator System Office for it "to develop an adequate record with respect to the issue of any ownership and control relationship," to consider evidence and arguments presented by the parties, and to make a new decision. Id.

On October 25, 1995, we set aside the Assistant Director's July 1994 decision, stating:

* * * OSM acknowledges that it based the appealed decision on an inadequate record and that this shortcoming may undermine the validity of the decision. While Valley Camp contends that the record was sufficient for OSM's purposes, the absence of the sublease between Valley Camp and Bufflick from the record reviewed by the Assistant Director casts significant doubt on the reliability of his informal review decision. We have no interest in discouraging OSM from developing complete records for its decisions.

The sublease between Valley Camp and Bufflick contains information critical to OSM's evaluation of the propriety of CHFO's finding that WVDEP [the West Virginia DEP] took appropriate action or had good cause for failing to take action in response to the [ten-day notice]. * * * Without that information, OSM cannot adequately analyze whether WVDEP's conclusion that no ownership or control links exist between Valley Camp and Bufflick was arbitrary, capricious, or an abuse of discretion since that document depicts the relationship between the two parties. That a virtually identical sublease between Valley Camp and New King was included in the case file before the Assistant Director does not cure the omission because there is no indication that the Assistant Director knew that the Bufflick sublease tracked the New King sublease. In fact,

> the Assistant Director's decision clearly reveals that he considered the 2-page property description to embody the agreement between Valley Camp and Bufflick and that his decision was grounded on this erroneous assumption.

Order of October 25, 1995, at 4. We remanded the matter to enable OSM to develop a complete record upon which to make a decision on petitioners' request for informal review. Id.

Petitioners' eligibility for an award of costs and expenses depends on their showing "that the appeal had some bearing on the actions ultimately taken by OSM officials. * * * In other words, there must be a causal nexus between the plaintiffs' actions in prosecuting the appeal to the Board and the corrective actions taken by OSM." Kentucky Resources Council, Inc. v. Babbitt, 997 F. Supp. 814, 820 (E.D. Ky. 1998). In our decision in that case, Kentucky Resources Council v. OSM, 137 IBLA 345 (1997), we quoted OSM's position

> that eligibility for an award requires that a citizen "show success on the merits of the Board appeal, i.e., that there was either a procedural or a substantive infirmity in OSM's handling of a citizen's complaint (or both) and that, as a result of the citizen's filing an appeal with the Board, the citizen made a substantial contribution to the resolution of the issues" (OSM Answer at 29). If subsequent to the filing of an appeal, but before the Board addresses the merits of the controversy, OSM takes some of the action requested by appellant, OSM concedes fees could be awarded if a causal nexus can be shown between the prosecution of the appeal and the action taken by OSM.

137 IBLA at 351. Although the District Court approved that standard, it disagreed with our application of it in that case.

Petitioners' request to OSM in this case was not a request to investigate whether there was an "on-the-ground" violation, e.g., a failure to reclaim an unstable highwall, as in Harvey A. Catron, 146 IBLA 31 (1998), or failure to replace a water system, as in Jerry Hylton v. OSM (On Reconsideration), 154 IBLA 167 (1998). Rather, petitioners requested an investigation of whether there was an ownership or control relationship between Valley Camp and Bufflick because, if there was, the permit-blocking and permit revocation provisions of the regulations would come into play. The nature of an investigation whether there is an on-the-ground violation differs from an investigation whether there is an ownership or control relationship. Determining whether there is a relationship involves, at a minimum, examining all the essential legal documents. Overlooking such a document, or mistaking a property description for a lease, is a substantive infirmity.

In the context of a request to investigate whether there is an ownership or control relationship, the procedure, i.e., a thorough investigation, including examining all essential legal documents, is the substance.

When, in response to an appeal, OSM acknowledges a significant infirmity in conducting the investigation and proposes to do it properly, petitioners have succeeded on the merits because they have vindicated the right they requested under 30 CFR 842.12 in the first place.

To deny an award of costs and expenses in this context because no relationship was ultimately found to exist confounds procedure and substance. Had petitioners not appealed the OSM Assistant Director's July 1994 decision and filed their argument concerning the lease, OSM would not have realized it had not actually evaluated the sublease between Valley Camp and Bufflick. The characterization of the result of petitioners' appeal as a minor procedural accomplishment contradicts the acknowledgment in OSM's motion for remand that the July 1994 decision was inadequately supported and that the decision was "open to question with respect to its reliability." More importantly, it ignores the fact that decisions about ownership or control relationships cannot be made without all relevant evidence in hand.

Petitioners' appeal caused OSM to ask us to set aside and remand its July 1994 decision so that it could gather all the evidence and re-evaluate its decision. The record does not indicate, and OSM does not suggest, that it would have taken this step on its own initiative. Because the record was not complete, we could not review the matter de novo, and because, as an appellate tribunal, it is not our place to determine such issues as whether there is an ownership or control relationship in the first instance, setting aside and remanding was the only affirmative relief available to petitioners on appeal. Fred D. Zerfoss, 81 IBLA 14 (1984); California Association of Four-Wheel Drive Clubs, 30 IBLA 383 (1977). That is the "causal nexus between [petitioners]' actions in prosecuting the appeal to the Board and the corrective actions taken by OSM." Kentucky Resources Council, Inc. v. Babbitt, supra at 820-21. Under the circumstances of this case, I would conclude that petitioners succeeded at the stage of their appeal to us, i.e., they achieved "at least some degree of success on the merits," and are eligible for an award under 43 CFR 4.1294(b). Natural Resources Defense Council, Inc. v. OSMRE, 107 IBLA 339, 365-68, 96 I.D. 83, 97-98 (1989).

I would further conclude that they are entitled to an award because they "made a substantial contribution to a full and fair determination of the issues," i.e., whether there was an ownership or control relationship. Natural Resources Defense Council, Inc. v. OSMRE, 107 IBLA at 368-9, 96 I.D. at 99 (1989). That OSM ultimately concluded there was no ownership or control relationship does not vitiate petitioners' contribution to a full and fair determination of the issue throughout the proceeding.

I dissent.

Will A. Irwin
Administrative Judge