IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Dakota Resource Council, Plaintiff, vs. North Dakota Public Service Commission, Defendant, and Secretary of the Interior Sally Jewell, in her official capacity, Intervenor-Defendant.	)	**ORDER DENYING DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS** Case No. 1:12-cv-064

Before the Court is the Defendant's "Motion for Attorney's Fees and Costs" filed on October 10, 2013. See Docket No. 58. The Intervenor-Defendant filed a response on October 24, 2013. See Docket No. 62. The Plaintiff filed a response in opposition to the motion on October 24, 2013. See Docket No. 63. The Defendant filed a reply on October 31, 2013. See Docket No. 64. On November 7, 2013, the Plaintiff filed a motion for leave to file a surreply. See Docket No. 66. The Court granted the Plaintiff's motion for leave to file a surreply, with the understanding that the Defendant would be allowed to file a response to the surreply. No surreply was ever filed by the Plaintiff. For the reasons set forth below, the Court denies the motion for attorney's fees and costs.

I. BACKGROUND

On May 30, 2012, the Plaintiff, Dakota Resource Council, filed an action in federal district court against the North Dakota Public Service Commission ("PSC") under 30 U.S.C. § 1270(a).

See Docket No. 1. The Plaintiff alleged the PSC had a duty under 30 C.F.R. § 732.17(g) to provide to the U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("OSM") for review and approval certain guidance documents issued in furtherance of North Dakota's federally approved Surface Mining Control and Reclamation Act ("SMCRA") program. See 30 U.S.C. §§ 1201, *et seq*.

On November 12, 2012, the Plaintiff filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure based on the Defendants' failure to comply with the SMCRA regulations. See Docket No. 14. The Department of the Interior[1] filed a response to the Plaintiff's motion for summary judgment on December 21, 2012. See Docket No. 25. A cross motion for summary judgment was filed by the PSC on December 21, 2012. See Docket No. 23. A motion for summary judgment was also filed by the Department of the Interior on December 21, 2012. See Docket No. 26. The Plaintiff filed a response to the Defendants' cross-motions for summary judgment on January 29, 2013. See Docket No. 35. On March 29, 2013, the PSC and the Department of the Interior each filed a reply brief. See Docket Nos. 42 and 43.

A hearing on the summary judgment motions was held on August 16, 2013. The Court issued an order denying all of the Plaintiff's claims against the PSC, and granting the PSC's motion for summary judgment and the Intervenor-Defendant's motion for summary judgment on September 3, 2013. See Docket No. 52. On October 10, 2013, the PSC filed a motion for attorney's fees and costs pursuant to Section 520(d) of SMCRA (30 U.S.C. § 1270(d)), in the amount of $88,450.14. See Docket Nos. 58 and 59.

[1] On November 16, 2012, a motion to intervene as an intervenor-defendant was filed by the United States Department of the Interior. See Docket No. 16. The Department of the Interior was allowed to intervene on December 12, 2012. See Docket No. 21.

II. LEGAL DISCUSSION

SMCRA contains two fee-shifting provisions – Section 520(d) (30 U.S.C. § 1270(d)) for costs in a citizen suit, and Section 525(e) (30 U.S.C. §1275(e)) after review by the secretary. Under Section 520(d) of SMCRA, "[t]he court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 30 U.S.C. § 1270(d). Unlike many federal fee-shifting statutes which explicitly use a "prevailing party" standard, Section 520(d) allows for fees "whenever the court determines such award is appropriate." 30 U.S.C. § 1270(d); see Ohio River Valley Envtl. Coal., Inc. v. Green Valley Coal Co., 511 F.3d 407, 413 (4th Cir. 2007) ("Less commonly, a fee-shifting provision, such as SMCRA's, authorizes a fee award 'to any party, whenever the court determines such award is appropriate.'"). However, as the Fourth Circuit explained in applying Section 520(d) of SMCRA, an award is appropriate under this type of "whenever appropriate" fee provision "only when the fee claimant achieves 'some degree of success on the merits.'" Ohio River Valley Envtl. Coal., 511 F.3d at 413 (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 694 (1983)). In general, courts have broad discretion to determine whether an award of attorney's fees is appropriate. See Jones v. City of St. Clair, 804 F.2d 478, 481 (8th Cir. 1986) (describing a virtually identical attorney's fee provision in the Clean Water Act and noting "[t]he statute plainly vests the trial court with broad discretion").

In a citizen suit where a defendant is seeking fees, sources suggest a court should exercise its discretion to award fees only in instances where a plaintiff has brought frivolous or harassing actions. Three factors support a determination that the fee provision of Section 520(d) of SMCRA

authorizes awards to defendants only in such instances: 1) the legislative history of Section 520(d) of SMCRA; 2) the interpretation of SMCRA's other fee shifting provision, Section 525(e) (30 U.S.C. § 1275(e)); and 3) caselaw interpreting statutes with virtually identical "whenever appropriate" fee language to authorize awards against citizen plaintiffs only in instances where the plaintiff brought frivolous or harassing actions.

A. LEGISLATIVE HISTORY OF SECTION 520(d) OF SMCRA

The legislative history of Section 520(d) of SMCRA addresses the standard for determining whether to award attorney's fees to a prevailing defendant. See S. REP. NO. 95-128, at 59 (1977). In the House Report on the bill that ultimately became SMCRA, the House Committee on Interior and Insular Affairs construed the language at issue in this case. It first emphasized that Congress did not intend for the fee provision to serve as a disincentive to those seeking to enforce the Act:

> [Section 520(d)] is intended to allow the courts to provide the traditional remedy of reasonable counsel fee awards *to private citizens* who go to court to insure that the act's requirements are being met. *The provision will not deter citizens acting as private attorneys general from bringing good faith actions* to insure the bill is being enforced by the prospect of having to pay their opponent's counsel fees should they lose.

H. REP. NO. 95-218, at 90 (1977) (emphasis added).

The Committee then stated it intended to authorize a fee recovery by a prevailing defendant under Section 520(d) only in the context of a plaintiff who has brought suit in bad faith, such as for the purpose of harassing or embarrassing the defendant:

> Thus, it is the Committee's intention that this provision be construed consistently with the general principle that an award may be made to a defendant only if the plaintiff has instituted the action solely "to harass or embarrass" the defendant. U.S. Steel Corp. v. United States, 519 F.2d [359], 364 (3d Cir. 1975). If the plaintiff is "motivated by malice and vindictiveness" then the court may award counsel fees

> to the prevailing defendant. Carrion v. Yeshiva University, 535 F.2d 1058 (8th Cir. 1975) . . . . This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes.

Id.; see Special Rules Applicable to Surface Coal Mining Hearings and Appeals; Petitions for Award of Costs and Expenses Under Section 525(e) of the SMCRA, 65 Fed. Reg. 46389-01 (July 28, 2000) (to be codified at 43 C.F.R. pt. 4) (citing S. REP. NO. 95-128, at 59 (1977)) ("In many, if not most, cases in both the administrative and judicial forum, the citizen who sues to enforce the law, or participates in administrative proceedings to enforce the law, will have little or no money with which to hire a lawyer. If private citizens are to be able to assert the rights granted them by this bill, and if those who violate this bill's requirements are not to proceed with impunity, then citizens must have the opportunity to recover the attorneys' fees necessary to vindicate their rights. *Attorneys' fees may be awarded to the permittee or government when the suit or participation is brought in bad faith.*") (emphasis added). Thus, the legislative history of Section 520(d) indicates a fee award to a prevailing defendant in a citizen suit is appropriate only in limited circumstances where the plaintiff has brought the action in bad faith.

B. SECTION 525(e) OF SMCRA

SMCRA contains another fee-shifting provision -- Section 525(e) (30 U.S.C. § 1275(e)) -- which applies to administrative proceedings and, like Section 520(d), gives tribunals broad discretion in awarding attorney's fees to "either party" whenever "proper." 30 U.S.C. § 1275(e). The legislative history of Section 525(e) is similar to that of Section 520(d). See H. REP. NO. 95-218, at 131 (1977) ("It is the committee's intention that this subsection not be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens.").

The Office of Surface Mining Reclamation and Enforcement ("OSM") has issued regulations implementing Section 525(e). The regulations provide that OSM and permittees may recover attorney's fees only in instances of "bad faith" or when the action was brought "for the purposes of harassing or embarrassing" the government or the permittee.[2] 43 C.F.R. § 4.1294(c)-(e) (2008). OSM explained its understanding of the correct fee standard in connection with 43 C.F.R. § 4.1294(e), which allows the federal government to recover attorney's fees in certain circumstances. In response to comments, OSM concluded that "[t]he legislative history . . . reflects Congress[ional] intent to include the Government as a possible recepient [sic] of an award under certain limited circumstances." 43 Fed. Reg. 34,376, 34,386 (Aug. 3, 1978). However, OSM went on to recognize that different standards should apply to different categories of fee applicants:

> A number of commenters objected to what they characterized as a double standard for recovery. They argued that all persons should be eligible for an award under the same theory, and that the permittee should not be limited to an award only when bad faith is shown. While it is realized that the standards for an award are not the same for all parties, the legislative history . . . clearly states that an award may be made to the permittee only when the action is brought or participation is undertaken in bad faith.

Id.; see also 50 Fed. Reg. 47,222, 47,223 (Nov. 15, 1985). Although OSM has not implemented a regulation addressing Section 520(d), the similarities between Sections 520(d) and 525(e) support the conclusion that the same standard should be applied to both provisions when determining whether to award attorney's fees.

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[2] A comparable provision is included in North Dakota's approved regulatory program. See N.D. Admin. Code § 69-05.2-01-07(5) ("Appropriate costs and expenses, including attorneys' fees, may be awarded: . . . (e) To the commission where it demonstrates that any person applied for review pursuant to North Dakota Century Code Section 38-14.1-30 or that any person participated in the proceeding in bad faith and to harass or embarrass the government.").

C. CONSISTENT COURT INTERPRETATIONS OF SIMILAR FEE PROVISIONS

As the drafters of SMCRA recognized, Section 520(d) should "be construed consistently with the history of similar Federal statutes providing for award of attorneys' fees in citizen suit actions." H. REP. NO. 95-218, at 90 (1977). Many other environmental statutes have fee provisions similar to Section 520(d) of SMCRA. See Toxic Substances Control Act, 15 U.S.C. § 2618(d); Endangered Species Act ("ESA"), 16 U.S.C. §1540(g)(4); Clean Water Act, 33 U.S.C. § 1365(d); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d); Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. § 6972(e); Clean Air Act, 42 U.S.C. §§ 7604(d) and 7607(f); and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5).

Courts have generally recognized the special role of citizen complainants in these similar statutes and have consistently approved awards for defendants only in instances where the plaintiffs brought frivolous or harassing actions. See Browder v. City of Moab, 427 F.3d 717, 723 (10th Cir. 2005) (discussing the standard for recovery of attorney's fees under the RCRA and the Clean Water Act, and noting "Defendants may only be awarded attorney's fees if the district court finds that either of the claims were 'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so'"); Citizens for a Better Env't v. Steel Co., 230 F.3d 923, 931 (7th Cir. 2000) (finding a defendant under the Emergency Planning and Community Right-To-Know Act "is entitled to recover its legal expenses only if [the plaintiff's] suit was frivolous, groundless, pursued in bad faith, or maintained after its baselessness became apparent"); Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1095-96 (9th Cir. 1999) (holding that a prevailing defendant is entitled to fees under the ESA only if the plaintiff's lawsuit is frivolous). The Eighth Circuit has also adopted a similar standard in determining whether to award a defendant fees under

a "whenever appropriate" fee provision. See Sierra Club v. City of Little Rock, 351 F.3d 840, 846-47 (8th Cir. 2003) (denying defendant's request for expert fees under the Clean Water Act, 33 U.S.C. § 1365(d), because the plaintiff's claims were "not frivolous, unreasonable or without foundation").

D. DAKOTA RESOURCE COUNCIL'S CLAIMS AGAINST THE PSC

This action was commenced by Dakota Resource Council, a non-profit organization, on behalf of certain members who live, work, and recreate in areas directly affected by surface coal mining and reclamation operations in North Dakota. The SMCRA citizen suit provision provides a court the authority to award costs of litigation "whenever the court determines such award is appropriate." See 30 U.S.C. § 1270(d). The legislative history, regulatory history, and case law discussed above demonstrates strong Congressional and agency intent to protect the role of citizen plaintiffs by authorizing awards of attorney's fees and costs against the plaintiff only when a plaintiff acted in bad faith or with the intent to embarrass or harass the agency. The award of attorney's fees and costs in a citizen suit is left to the broad discretion of the court based on the circumstances surrounding commencement of the suit.

The PSC has made no allegations of bad faith on the part of Dakota Resource Council in this matter. Further, even though the Court found in favor of the PSC, thereby allowing an award of attorney's fees and costs, SMCRA provides a court "may award costs of litigation" when "the court determines such award is appropriate." See 30 U.S.C. § 1270(d). Attorney's fees and costs are not mandatory or automatic. The Court finds Dakota Resource Council did not act in bad faith or with the intent to embarrass or harass the PSC in bringing this citizen suit on behalf of its

members. The Court further finds an award of attorney's fees and costs payable to the PSC is not appropriate under the circumstances.

III. CONCLUSION

The Court has carefully reviewed the entire record, the parties' filings, the applicable legislative history, and the relevant case law. For the reasons set forth above, the Court **DENIES** the Defendant's "Motion for Attorney's Fees and Costs" (Docket No. 58).

IT IS SO ORDERED.

Dated this 16th day of January, 2014.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court