

Office of the Secretary, Interior

§4.1101

service, hand delivery or telefax to (703) 235-8349;

(2) If you file a document by telefax, you must send an additional copy of your document to the IBLA using the U.S. Postal Service, a private delivery or courier service or hand delivery so that it is received within 5 business days of your telefax transmission.

(c) If you are an appellant, in addition to meeting the requirements of paragraph (b) of this section, you must agree in writing in your request to extend the period in which the Department must issue a final decision in your appeal under §4.906 by the amount of time for which you are requesting an extension.

(d) If you are any other party, the IBLA may require you to submit a written agreement signed by the appellant to extend the period in which the Department must issue a final decision in the appeal under §4.906 by the amount of time for which you are requesting an extension.

(e) The IBLA has the discretion to decline any request for an extension of time.

(f) You must serve your request on all parties to the appeal.

[64 FR 26259, May 13, 1999, as amended at 67 FR 4368, Jan. 30, 2002]

Subpart K [Reserved]

Subpart L—Special Rules Applicable to Surface Coal Mining Hearings and Appeals

AUTHORITY: 30 U.S.C. 1256, 1260, 1261, 1264, 1268, 1271, 1272, 1275, 1293; 5 U.S.C. 301.

SOURCE: 43 FR 34386, Aug. 3, 1978, unless otherwise noted.

GENERAL PROVISIONS

§4.1100 Definitions.

As used in the regulations in this subpart, the term—

(a) *Act* means the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445 *et seq.*, 30 U.S.C. 1201 *et seq.*

(b) *Administrative law judge* means an administrative law judge in the Hearings Division of the Office of Hearings and Appeals appointed under 5 U.S.C. 3105 (1970).

(c) *Board* means the Board of Land Appeals in the Office of Hearings and Appeals.

(d) *OHA* means the Office of Hearings and Appeals, Department of the Interior.

(e) *OSM* and *OSMRE* mean the Office of Surface Mining Reclamation and Enforcement, Department of the Interior.

[43 FR 34386, Aug. 3, 1978, as amended at 49 FR 7565, Mar. 1, 1984; 59 FR 1488, Jan. 11, 1994; 67 FR 61509, Oct. 1, 2002]

§4.1101 Jurisdiction of the Board.

(a) The jurisdiction of the Board, as set forth in §4.1(b)(3), and subject to §§4.21(d) and 4.5, includes the authority to exercise the final decisionmaking power of the Secretary under the act pertaining to—

(1) Applications for review of decisions by OSM regarding determinations concerning permits for surface coal mining operations pursuant to section 514 of the act;

(2) Petitions for review of proposed assessments of civil penalties issued by OSM pursuant to section 518 of the act;

(3) Applications for review of notices of violation and orders of cessation or modifications, vacations, or terminations thereof, issued pursuant to section 521(a)(2) or section 521(a)(3) of the act;

(4) Proceedings for suspension or revocation of permits pursuant to section 521(a)(4) of the act;

(5) Applications for review of alleged discriminatory acts filed pursuant to section 703 of the act;

(6) Applications for temporary relief;

(7) Petitions for award of costs and expenses under section 525(e) of the act;

(8) Preliminary findings concerning a demonstrated pattern of willful violations under section 510(c) of the act;

(9) Suspension or rescission of improvidently-issued permits;

(10) Challenges to ownership or control listings or findings;

(11) Determinations under 30 CFR part 761;

(12) Appeals from orders or decisions of administrative law judges; and

(13) All other appeals and review procedures under the act which are permitted by these regulations.

§ 4.1102

(b) In performing its functions under paragraph (a) of this section, the Board is authorized to—

- (1) Order hearings; and
- (2) Issue orders to secure the just and prompt determination of all proceedings.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61509, Oct. 1, 2002]

§ 4.1102 Construction.

These rules shall be construed to achieve the just, timely, and inexpensive determination of all proceedings consistent with adequate consideration of the issues involved.

§ 4.1103 Eligibility to practice.

(a) An administrative law judge or the Board may determine the eligibility of persons to practice before OHA in any proceeding under the act pursuant to 43 CFR part 1.

(b) If an administrative law judge or the Board determines that any person is not qualified to practice before OHA, the administrative law judge or the Board shall disqualify the person and report the disqualification to the Director of OHA.

(c) Upon receipt of a report under paragraph (b) of this section, the Director of OHA may request the Solicitor to initiate a disciplinary proceeding under 43 CFR 1.6.

§ 4.1104 General rules relating to procedure and practice.

Proceedings in OHA under the act are subject to the general rules relating to procedures and practice in subpart B of this part.

§ 4.1105 Parties.

(a) All persons indicated in the act as parties to administrative review proceedings under the act shall be considered statutory parties. Such statutory parties include—

(1) In a civil penalty proceeding under § 4.1150, OSM, as represented by the Office of the Solicitor, Department of the Interior, and any person against whom a proposed assessment is made who files a petition;

(2) In a review proceeding under §§ 4.1160 through 4.1171, 4.1180 through 4.1187, 4.1300 through 4.1309, 4.1350 through 4.1356, 4.1360 through 4.1369,

43 CFR Subtitle A (10–1–11 Edition)

4.1370 through 4.1377, 4.1380 through 4.1387 or 4.1390 through 4.1394 of this part, OSM, as represented by the Office of the Solicitor, Department of the Interior, and—

(i) If an applicant, operator, or permittee files an application or request for review, the applicant, operator, or permittee; and

(ii) If any other person having an interest which is or may be adversely affected files an application or request for review, the applicant, operator, or permittee and the person filing such application or request;

(3) In a proceeding to suspend or revoke a permit under § 4.1190 *et seq.* OSM, as represented by the Office of the Solicitor, Department of the Interior, and the permittee who is ordered to show cause why the permit should not be suspended or revoked; and

(4) In a discriminatory discharge proceeding under § 4.1200 *et seq.* OSM, as represented by the Office of the Solicitor, Department of the Interior, any employee or any authorized representative of employees who files an application for review, and the alleged discriminating party, except where the applicant files a request for the scheduling of a hearing under § 4.1201(c) only such applicant and the alleged discriminating party.

(5) In an appeal to the Board in accordance with 43 CFR 4.1280 through 4.1286 from a determination of the Director of OSM or his or her designee under 30 CFR 842.15(d) or a determination of an authorized representative under 30 CFR 843.12(i), the permittee of the operation that is the subject of the determination and any person whose interests may be adversely affected by the outcome on appeal and who participated before OSM. A person who wishes his or her identity kept confidential under 30 CFR 842.12(b) is responsible for maintaining that confidentiality when serving documents in accordance with § 4.1109.

(b) Any other person claiming a right to participate as a party may seek leave to intervene in a proceeding by filing a petition to do so pursuant to § 4.1110.

(c) If any person has a right to participate as a full party in a proceeding under the act and fails to exercise that

Office of the Secretary, Interior

§ 4.1108

right by participating in each stage of the proceeding, that person may become a participant with the rights of a party by order of an administrative law judge or the Board.

[43 FR 34386, Aug. 3, 1978, as amended at 56 FR 2142, Jan. 22, 1991; 59 FR 1488, Jan. 11, 1994; 59 FR 54362, Oct. 28, 1994]

§ 4.1106 Hearing sites.

Unless the act requires otherwise, hearings shall be held in a location established by the administrative law judge; however, the administrative law judge shall give due regard to the convenience of the parties or their representatives and witnesses.

§ 4.1107 Filing of documents.

(a) Any initial pleadings in a proceeding to be conducted or being conducted by an administrative law judge under these rules shall be filed, by hand or by mail, with the Hearings Division, Office of Hearings and Appeals, Department of the Interior, 801 North Quincy Street, Arlington, Va. 22203.

(b) Where a proceeding has been assigned to an administrative law judge, the parties will be notified by the Chief Administrative Law Judge of the name and address of the administrative law judge assigned to the case and thereafter all further documents shall be filed with the Administrative Law Judge, Office of Hearings and Appeals, at the address designated in the notice.

(c) Any notice of appeal, petition for review or other documents in a proceeding to be conducted or being conducted by the Board shall be filed, by hand or by mail, with the Board of Land Appeals, Office of Hearings and Appeals, 801 North Quincy Street, Arlington, Va. 22203.

(d) Any person filing initial pleadings with the Hearings Division or a notice of appeal with the Board shall furnish an original and one copy. Any person filing other documents with OHA shall furnish only an original.

(e) Any person who has initiated a proceeding under these rules before the Hearings Division or filed a notice of appeal with the Board shall file proof of service with the same in the form of a return receipt where service is by registered or certified mail, or an acknowledgement by the party served or

a verified return where service is made personally. A certificate of service shall accompany all other documents filed by a party in any proceeding.

(f) The effective filing date for documents initiating proceedings before the Hearings Division, OHA, Arlington, VA, shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

(g) The effective filing date for a notice of appeal or a petition for discretionary review filed with the Board shall be the date of mailing or the date of personal delivery, except the effective filing date for a notice of appeal from a decision in an expedited review of a cessation order proceeding or from a decision in a suspension or revocation proceeding shall be the date of receipt of the document by the Board. The burden of establishing the date of mailing shall be on the person filing the document.

(h) The effective filing date for all other documents filed with an administrative law judge or with the Board shall be the date of mailing or personal delivery. The burden of establishing the date of mailing shall be on the person filing the document.

[43 FR 34386, Aug. 3, 1978, as amended at 45 FR 50753, July 31, 1980; 46 FR 6942, Jan. 22, 1981; 49 FR 7565, Mar. 1, 1984; 67 FR 4368, Jan. 30, 2002]

§ 4.1108 Form of documents.

(a) Any document filed with OHA in any proceeding brought under the act shall be captioned with—

(1) The names of the parties;

(2) The name of the mine to which the document relates; and

(3) If review is being sought under section 525 of the act, identification by number of any notice or order sought to be reviewed.

(b) After a docket number has been assigned to the proceeding by OHA, the caption shall contain such docket number.

(c) The caption may include other information appropriate for identification of the proceeding, including the permit number or OSM identification number.

§ 4.1109

(d) Each document shall contain a title that identifies the contents of the document following the caption.

(e) The original of any document filed with OHA shall be signed by the person submitting the document or by that person's attorney.

(f) The address and telephone number of the person filing the document or that person's attorney shall appear beneath the signature.

(g) Documents filed under this subpart must conform to the requirements of § 4.401(d).

[43 FR 34386, Aug. 3, 1978, as amended at 75 FR 64669, Oct. 20, 2010]

§ 4.1109 Service.

(a)(1) Any party initiating a proceeding in OHA under the Act shall, on the date of filing, simultaneously serve copies of the initiating documents on the officer in the Office of the Solicitor, U.S. Department of the Interior, representing OSMRE in the state in which the mining operation at issue is located, and on any other statutory parties specified under § 4.1105 of this part.

(2) The jurisdictions, addresses, and telephone numbers of the applicable officers of the Office of the Solicitor to be served under paragraph (a)(1) of this section are:

(i) For mining operations in Alabama, Arkansas, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, Texas, and Virginia: Field Solicitor, U.S. Department of the Interior, 800 S. Gay Street, Suite 800, Knoxville, Tennessee 37929; Telephone: (865) 545-4294; FAX: (865) 545-4314.

(ii) For mining operations in Maryland, Massachusetts, Michigan, Ohio, Pennsylvania, Rhode Island, and West Virginia: Field Solicitor, U.S. Department of the Interior, Three Parkway Center, Suite 385, Pittsburgh, Pennsylvania 15220; Telephone: (412) 937-4000; FAX: (412) 937-4003.

(iii) For mining operations in Alaska, Colorado, Idaho, Montana, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming, including mining operations located on Indian lands within those states: Regional Solicitor, Rocky Mountain Region, U.S.

43 CFR Subtitle A (10-1-11 Edition)

Department of the Interior, 755 Parfet Street, Suite 151, Lakewood, CO 80215; Telephone: (303) 231-5353; FAX: (303) 231-5363 or 231-5360.

(iv) For mining operations in Arizona, California, and New Mexico, including mining operations located on Indian lands within those states except for the challenge of permitting decisions affecting mining operations located on Indian lands in those states: Regional Solicitor, Southwest Region, U.S. Department of the Interior, 505 Marquette Avenue, NW., Suite 1800, Albuquerque, NM 87102; Telephone: (505) 248-5600; FAX: (505) 248-5623.

(v) For the challenge of permitting decisions affecting mining operations located on Indian lands within Arizona, California, and New Mexico: Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, 755 Parfet Street, Suite 151, Lakewood, CO 80215; Telephone: (303) 231-5353; FAX: (303) 231-5363 or 231-5360.

(3) Any party or other person who subsequently files any other document with OHA in the proceeding shall simultaneously serve copies of that document on all other parties and persons participating in the proceeding.

(b) Copies of documents by which any proceeding is initiated shall be served on all statutory parties personally or by registered or certified mail, return receipt requested. All subsequent documents shall be served personally or by first class mail.

(c) Service of copies of all documents is complete at the time of personal service or, if service is made by mail, upon receipt.

(d) Whenever an attorney has entered an appearance for a party in a proceeding before an administrative law judge or the Board, service thereafter shall be made upon the attorney.

[43 FR 34386, Aug. 3, 1978, as amended at 45 FR 50753, July 31, 1980; 52 FR 39526, Oct. 22, 1987; 56 FR 2142, Jan. 22, 1991; 56 FR 5061, Feb. 7, 1991; 59 FR 1488, Jan. 11, 1994; 59 FR 42774, Aug. 19, 1994; 60 FR 58243, Nov. 27, 1995; 61 FR 40348, Aug. 2, 1996; 67 FR 61510, Oct. 1, 2002; 75 FR 64669, Oct. 20, 2010]

§ 4.1110 Intervention.

(a) Any person, including a State, or OSM may petition for leave to intervene at any stage of a proceeding in OHA under the act.

(b) A petitioner for leave to intervene shall incorporate in the petition a statement setting forth the interest of the petitioner and, where required, a showing of why his interest is or may be adversely affected.

(c) The administrative law judge or the Board shall grant intervention where the petitioner—

(1) Had a statutory right to initiate the proceeding in which he wishes to intervene; or

(2) Has an interest which is or may be adversely affected by the outcome of the proceeding.

(d) If neither paragraph (c)(1) nor (c)(2) of this section apply, the administrative law judge or the Board shall consider the following in determining whether intervention is appropriate—

(1) The nature of the issues;

(2) The adequacy of representation of petitioner's interest which is provided by the existing parties to the proceeding;

(3) The ability of the petitioner to present relevant evidence and argument; and

(4) The effect of intervention on the agency's implementation of its statutory mandate.

(e) Any person, including a State, or OSM granted leave to intervene in a proceeding may participate in such proceeding as a full party or, if desired, in a capacity less than that of a full party. If an intervenor wishes to participate in a limited capacity, the extent and the terms of the participation shall be in the discretion of the administrative law judge or the Board.

§ 4.1111 Voluntary dismissal.

Any party who initiated a proceeding before OHA may seek to withdraw by moving to dismiss at any stage of a proceeding and the administrative law judge or the Board may grant such a motion.

§ 4.1112 Motions.

(a) Except for oral motions made in proceedings on the record, or where the

administrative law judge otherwise directs, each motion shall—

(1) Be in writing; and

(2) Contain a concise statement of supporting grounds.

(b) Unless the administrative law judge or the Board orders otherwise, any party to a proceeding in which a motion is filed under paragraph (a) of this section shall have 15 days from service of the motion to file a statement in response.

(c) Failure to make a timely motion or to file a statement in response may be construed as a waiver of objection.

(d) An administrative law judge or the Board shall rule on all motions as expeditiously as possible.

§ 4.1113 Consolidation of proceedings.

When proceedings involving a common question of law or fact are pending before an administrative law judge or the Board, such proceedings are subject to consolidation pursuant to a motion by a party or at the initiative of an administrative law judge or the Board.

§ 4.1114 Advancement of proceedings.

(a) Except in expedited review proceedings under § 4.1180, or in temporary relief proceedings under § 4.1266, at any time after commencement of a proceeding, any party may move to advance the scheduling of a proceeding.

(b) Except as otherwise directed by the administrative law judge or the Board, any party filing a motion under this section shall—

(1) Make the motion in writing;

(2) Describe the exigent circumstances justifying advancement;

(3) Describe the irreparable harm that would result if the motion is not granted; and

(4) Incorporate in the motion affidavits to support any representations of fact.

(c) Service of a motion under this section shall be accomplished by personal delivery or by telephonic or telegraphic communication followed by mail. Service is complete upon mailing.

(d) Unless otherwise directed by the administrative law judge or the Board, all parties to the proceeding in which the motion is filed shall have 10 days from the date of service of the motion

§4.1115

to file a statement in response to the motion.

(e) Following the timely receipt by the administrative law judge of statements in response to the motion, the administrative law judge may schedule a hearing regarding the motion. If the motion is granted, the administrative law judge may advance pleading schedules, prehearing conferences, and the hearing, as deemed appropriate: *Provided*, A hearing on the merits shall not be scheduled with less than 5 working days notice to the parties, unless all parties consent to an earlier hearing.

(f) If the motion is granted, the Board may, if it deems such action to be appropriate, advance the appeal on its calendar and order such other advancement as may be appropriate, including an abbreviated schedule for briefing or oral argument.

§4.1115 Waiver of right to hearing.

Any person entitled to a hearing before an administrative law judge under the act may waive such right in writing. Where parties are directed by any rule in these regulations to file a responsive pleading on or before a specified time, any party who fails to file such responsive pleading by the time specified, may be deemed to have waived his right to a hearing. Unless all parties to a proceeding who are entitled to a hearing waive, or are deemed to have waived such right, a hearing will be held.

§4.1116 Status of notices of violation and orders of cessation pending review by the Office of Hearings and Appeals.

Except where temporary relief is granted pursuant to section 525(c) or section 526(c) of the act, notices of violation and orders of cessation issued under the act shall remain in effect during the pendency of review before an administrative law judge or the Board.

§4.1117 Reconsideration.

A party may file a motion for reconsideration of any decision of the Board under this subpart within 60 days after the date of the decision. The provisions

43 CFR Subtitle A (10–1–11 Edition)

of §4.403 apply to a motion filed under this paragraph.

[75 FR 64669, Oct. 20, 2010]

EVIDENTIARY HEARINGS

§4.1120 Presiding officers.

An administrative law judge in the Office of Hearings and Appeals shall preside over any hearing required by the act to be conducted pursuant to 5 U.S.C. 554 (1970).

§4.1121 Powers of administrative law judges.

(a) Under the regulations of this part, an administrative law judge may—

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas;
- (3) Issue appropriate orders relating to discovery;
- (4) Rule on procedural requests or similar matters;
- (5) Hold conferences for settlement or simplification of the issues;
- (6) Regulate the course of the hearing;
- (7) Rule on offers of proof and receive relevant evidence;
- (8) Take other actions authorized by this part, by 5 U.S.C. 556 (1970), or by the act; and
- (9) Make or recommend decisions in accordance with 5 U.S.C. 557 (1970).

(b) An administrative law judge may order a prehearing conference—

- (1) To simplify and clarify issues;
- (2) To receive stipulations and admissions;
- (3) To explore the possibility of agreement disposing of any or all of the issues in dispute; and
- (4) For such other purposes as may be appropriate.

(c) Except as otherwise provided in these regulations, the jurisdiction of an administrative law judge shall terminate upon—

- (1) The filing of a notice of appeal from an initial decision or other order dispositive of the proceeding;
- (2) The issuance of an order of the Board granting a petition for review; or
- (3) The expiration of the time period within which a petition for review or an appeal to the Board may be filed.

Office of the Secretary, Interior

§ 4.1130

§ 4.1122 Conduct of administrative law judges.

Administrative law judges shall adhere to the "Code of Judicial Conduct."

§ 4.1123 Notice of hearing.

(a) An administrative law judge shall give notice to the parties of the time, place and nature of any hearing.

(b) Except for expedited review proceedings and temporary relief proceedings where time is of the essence, notice given under this section shall be in writing.

(c) In an expedited proceeding when there is only opportunity to give oral notice, the administrative law judge shall enter that fact contemporaneously on the record by a signed and dated memorandum describing the notice given.

§ 4.1124 Certification of interlocutory ruling.

Upon motion or upon the initiative of an administrative law judge, the judge may certify to the Board a ruling which does not finally dispose of the case if the ruling presents a controlling question of law and an immediate appeal would materially advance ultimate disposition by the judge.

§ 4.1125 Summary decision.

(a) At any time after a proceeding has begun, a party may move for summary decision of the whole or part of a case.

(b) The moving party under this section shall verify any allegations of fact with supporting affidavits, unless the moving party is relying upon depositions, answers to interrogatories, admissions, or documents produced upon request to verify such allegations.

(c) An administrative law judge may grant a motion under this section if the record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows that—

(1) There is no disputed issue as to any material fact; and

(2) The moving party is entitled to summary decision as a matter of law.

(d) If a motion for summary decision is not granted for the entire case or for all the relief requested and an evidentiary hearing is necessary, the ad-

ministrative law judge shall, if practicable, and upon examination of all relevant documents and evidence before him, ascertain what material facts are actually and in good faith controverted. He shall thereupon, issue an order specifying the facts that appear without substantial controversy and direct such further proceedings as deemed appropriate.

§ 4.1126 Proposed findings of fact and conclusions of law.

The administrative law judge shall allow the parties to a proceeding an opportunity to submit proposed findings of fact and conclusions of law together with a supporting brief at a time designated by the administrative law judge.

§ 4.1127 Initial orders and decisions.

An initial order or decision disposing of a case shall incorporate—

(a) Findings of fact and conclusions of law and the basis and reasons therefore on all the material issues of fact, law, and discretion presented on the record; and

(b) An order granting or denying relief.

§ 4.1128 Effect of initial order or decision.

An initial order or decision shall become final if that order or decision is not timely appealed to the Board under § 4.1270 or § 4.1271.

§ 4.1129 Certification of record.

Except in expedited review proceedings under § 4.1180, within 5 days after an initial decision has been rendered, the administrative law judge shall certify the official record of the proceedings, including all exhibits, and transmit the official record for filing in the Hearings Division, Office of Hearings and Appeals, Arlington, Va.

DISCOVERY

§ 4.1130 Discovery methods.

Parties may obtain discovery by one or more of the following methods—

(a) Depositions upon oral examination or upon written interrogatories;

(b) Written interrogatories;

§ 4.1131

(c) Production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and

(d) Requests for admission.

§ 4.1131 Time for discovery.

Following the initiation of a proceeding, the parties may initiate discovery at any time as long as it does not interfere with the conduct of the hearing.

§ 4.1132 Scope of discovery.

(a) Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

(b) It is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

(d) Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to protect a

43 CFR Subtitle A (10-1-11 Edition)

party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following—

(1) The discovery not be had;

(2) The discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) The discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) Certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters;

(5) Discovery be conducted with no one present except persons designated by the administrative law judge; or

(6) A trade secret or other confidential research, development or commercial information may not be disclosed or be disclosed only in a designated way.

§ 4.1133 Sequence and timing of discovery.

Unless the administrative law judge upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

§ 4.1134 Supplementation of responses.

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows—

(a) A party is under a duty to supplement timely his response with respect to any question directly addressed to—

(1) The identity and location of persons having knowledge of discoverable matters; and

(2) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify and the substance of his testimony.

(b) A party is under a duty to amend timely a prior response if he later obtains information upon the basis of which—

Office of the Secretary, Interior

§4.1137

(1) He knows the response was incorrect when made; or

(2) He knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the administrative law judge or agreement of the parties.

§4.1135 Motion to compel discovery.

(a) If a deponent fails to answer a question propounded, or a party upon whom a request is made pursuant to §4.1140, or a party upon whom answers to interrogatories are served fails to adequately respond or objects to the request, or any part thereof, or fails to permit inspection as requested, the discovering party may move the administrative law judge for an order compelling a response or inspection in accordance with the request.

(b) The motion shall set forth—

(1) The nature of the questions or request;

(2) The response or objection of the party upon whom the request was served; and

(3) Arguments in support of the motion.

(c) For purposes of this section, an evasive answer or incomplete answer or response shall be treated as a failure to answer or respond.

(d) In ruling on a motion made pursuant to this section, the administrative law judge may make such a protective order as he is authorized to make on a motion made pursuant to §4.1132(d).

§4.1136 Failure to comply with orders compelling discovery.

If a party or an officer, director, or other agent of a party fails to obey an order to provide or permit discovery, the administrative law judge before whom the action is pending may make such orders in regard to the failure as are just, including but not limited to the following—

(a) An order that the matters sought to be discovered or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence; or

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

§4.1137 Depositions upon oral examination or upon written questions.

(a) Any party desiring to take the testimony of any other party or other person by deposition upon oral examination or written questions shall, without leave of the administrative law judge, give reasonable notice in writing to every other party, to the person to be examined and to the administrative law judge of—

(1) The proposed time and place of taking the deposition;

(2) The name and address of each person to be examined, if known, or if the name is not known, a general description sufficient to identify him or the particular group or class to which he belongs;

(3) The matter upon which each person will be examined; and

(4) The name or descriptive title and address of the officer before whom the deposition is to be taken.

(b) A deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(c) The actual taking of the deposition shall proceed as follows—

(1) The deposition shall be on the record;

(2) The officer before whom the deposition is to be taken shall put the witness on oath or affirmation;

(3) Examination and cross-examination shall proceed as at a hearing;

(4) All objections made at the time of the examination shall be noted by the officer upon the deposition;

(5) The officer shall not rule on objections to the evidence, but evidence objected to shall be taken subject to the objections.

§ 4.1138

(d) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature, unless examination and signature is waived by the deponent. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign.

(e) Where the deposition is to be taken upon written questions, the party taking the deposition shall serve a copy of the questions, showing each question separately and consecutively numbered, on every other party with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be taken. Within 30 days after service, any other party may serve cross-questions. The questions, cross-questions, and answers shall be recorded and signed, and the deposition certified, as in the case of a deposition on oral examination.

(f) A deposition will not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts.

(g) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party at whose instance the deposition is taken.

(h) The deponent may be accompanied, represented, and advised by legal counsel.

§ 4.1138 Use of depositions.

At the hearing, any part or all of a deposition, so far as admissible, may be used against any party who was present or represented at the taking of the deposition, or who had reasonable notice thereof, in accordance with any of the following provisions—

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness;

(b) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or a person designated

43 CFR Subtitle A (10–1–11 Edition)

to testify on behalf of a public or private corporation, partnership, or association or governmental agency which is a party may be used by an adverse party for any purpose; or

(c) The deposition of a witness, whether or not a party, may be used by a party for any purpose if the administrative law judge finds that—

(1) The witness is dead;

(2) The witness is at a distance greater than 100 miles from the place of hearing, or is outside the United States, unless it appears that the absence of the witness was procured by the party offering the deposition;

(3) The witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(4) The party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(5) Such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the hearing, to allow the deposition to be used.

§ 4.1139 Written interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be served on the administrative law judge and upon all parties to the proceeding.

(b) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answer and objections shall be signed by the person making them. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties to the proceeding within 30 days after service of the interrogatories, or within such shorter or longer period as the administrative law judge may allow.

Office of the Secretary, Interior

§4.1141

(c) Interrogatories may relate to any matters which can be inquired into under §4.1132. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

§4.1140 Production of documents and things and entry upon land for inspection and other purposes.

(a) Any party may serve on any other party a request to—

(1) Produce and permit the party making the request, or a person acting on his behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things within the scope of §4.1132 and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property (including the air, water, and soil) or any designated object or operation thereon, within the scope of §4.1132.

(b) The request may be served on any party without leave of the administrative law judge.

(c) The request shall—

(1) Set forth the items to be inspected either by individual item or by category;

(2) Describe each item or category with reasonable particularity; and

(3) Specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) The party upon whom the request is served shall serve on the party submitting the request a written response within 30 days after service of the request.

(e) The response shall state, with respect to each item or category—

(1) That inspection and related activities will be permitted as requested; or

(2) That objection is made in whole or in part, in which case the reasons for objection shall be stated.

§4.1141 Admissions.

(a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact.

(b) Each matter of which an admission is requested is admitted unless, within 30 days after service of the request or such shorter or longer time as the administrative law judge may allow, the party to whom the request is directed serves on the requesting party—

(1) A sworn statement denying specifically the relevant matters of which an admission is requested;

(2) A sworn statement setting forth in detail the reasons why he can neither truthfully admit nor deny them; or

(3) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(c) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.

(d) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the administrative law judge determines that an objection is justified, he shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, he may order either that the matter is admitted or that an amended answer be served. The administrative law judge may, in lieu of these orders, determine that final disposition of the request be made at a

§ 4.1150

prehearing conference or at a designated time prior to hearing.

(e) Any matter admitted under this section is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission.

(f) Any admission made by a party under this section is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

PETITIONS FOR REVIEW OF PROPOSED ASSESSMENTS OF CIVIL PENALTIES

§ 4.1150 Who may file.

Any person charged with a civil penalty may file a petition for review of a proposed assessment of that penalty with the Hearings Division, OHA, 801 North Quincy Street, Arlington, Va. 22203.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1151 Time for filing.

(a) A petition for review of a proposed assessment of a civil penalty must be filed within 30 days of receipt of the proposed assessment; or

(b) If a timely request for a conference has been made pursuant to 30 CFR 723.18 or 845.18, a petition for review must be filed within 30 days from service of notice by the conference officer that the conference is deemed completed.

(c) No extension of time will be granted for filing a petition for review of a proposed assessment of a civil penalty as required by paragraph (a) or (b) of this section. If a petition for review is not filed within the time period provided in paragraph (a) or (b) of this section, the appropriateness of the amount of the penalty, and the fact of the violation if there is no proceeding pending under section 525 of the Act to review the notice of violation or cessation order involved, shall be deemed admitted, the petition shall be dismissed, and the civil penalty assessed shall become a final order of the Secretary.

[43 FR 34386, Aug. 3, 1978, as amended at 51 FR 16321, May 2, 1986; 59 FR 1488, Jan. 11, 1994]

43 CFR Subtitle A (10–1–11 Edition)

§ 4.1152 Contents of petition; payment required.

(a) The petition shall include—

(1) A short and plain statement indicating the reasons why either the amount of the penalty or the fact of the violation is being contested;

(2) If the amount of penalty is being contested based upon a misapplication of the civil penalty formula, a statement indicating how the civil penalty formula contained in 30 CFR part 723 or 845 was misapplied, along with a proposed civil penalty utilizing the civil penalty formula;

(3) Identification by number of all violations being contested;

(4) The identifying number of the cashier's check, certified check, bank draft, personal check, or bank money order accompanying the petition; and

(5) A request for a hearing site.

(b) The petition shall be accompanied by—

(1) Full payment of the proposed assessment in the form of a cashier's check, certified check, bank draft, personal check or bank money order made payable to—Assessment Office, OSM—to be placed in an escrow account pending final determination of the assessment; and

(2) On the face of the payment an identification by number of the violations for which payment is being tendered.

(c) As required by section 518(c) of the act, failure to make timely payment of the proposed assessment in full shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(d) No extension of time will be granted for full payment of the proposed assessment. If payment is not made within the time period provided in § 4.1151 (a) or (b), the appropriateness of the amount of the penalty, and the fact of the violation if there is no proceeding pending under section 525 of the Act to review the notice of violation or cessation order involved, shall be deemed admitted, the petition shall be dismissed, and the civil penalty assessed shall become a final order of the Secretary.

[43 FR 34386, Aug. 3, 1978, as amended at 51 FR 16321, May 2, 1986; 59 FR 1488, Jan. 11, 1994]

Office of the Secretary, Interior

§ 4.1157

§ 4.1153 Answer.

OSM shall have 30 days from receipt of a copy of the petition within which to file an answer to the petition with the Hearings Division, OHA.

§ 4.1154 Review of waiver determination.

(a) Within 10 days of the filing of a petition under this part, petitioner may move the administrative law judge to review the granting or denial of a waiver of the civil penalty formula pursuant to 30 CFR 723.16 or 845.16.

(b) The motion shall contain a statement indicating all alleged facts relevant to the granting or denial of the waiver;

(c) Review shall be limited to the written determination of the Director of OSM granting or denying the waiver, the motion and responses to the motion. The standard of review shall be abuse of discretion.

(d) If the administrative law judge finds that the Director of OSM abused his discretion in granting or denying the waiver, the administrative law judge shall hold the hearing on the petition for review of the proposed assessment required by section 518(b) of the act and make a determination pursuant to § 4.1157.

[43 FR 34386, Aug. 3, 1978, as amended at 59 FR 1488, Jan. 11, 1994]

§ 4.1155 Burdens of proof in civil penalty proceedings.

In civil penalty proceedings, OSM shall have the burden of going forward to establish a prima facie case as to the fact of the violation and the amount of the civil penalty and the ultimate burden of persuasion as to the amount of the civil penalty. The person who petitioned for review shall have the ultimate burden of persuasion as to the fact of the violation.

[53 FR 47694, Nov. 25, 1988]

§ 4.1156 Summary disposition.

(a) In a civil penalty proceeding where the person against whom the proposed civil penalty is assessed fails to comply on time with any prehearing order of an administrative law judge, the administrative law judge shall issue an order to show cause why—

(1) That person should not be deemed to have waived his right to a hearing; and

(2) The proceedings should not be dismissed and referred to the assessment officer.

(b) If the order to show cause is not satisfied as required, the administrative law judge shall order the proceedings summarily dismissed and shall refer the case to the assessment officer who shall enter the assessment as the final order of the Department.

(c) Where the person against whom the proposed civil penalty is assessed fails to appear at a hearing, that person will be deemed to have waived his right to a hearing and the administrative law judge may assume for purposes of the assessment—

(1) That each violation listed in the notice of violation or order occurred; and

(2) The truth of any facts alleged in such notice or order.

(d) In order to issue an initial decision assessing the appropriate penalty when the person against whom the proposed civil penalty is assessed fails to appear at the hearing, an administrative law judge shall either conduct an ex parte hearing or require OSM to furnish proposed findings of fact and conclusions of law.

(e) Nothing in this section shall be construed to deprive the person against whom the penalty is assessed of his opportunity to have OSM prove the violations charged in open hearing with confrontation and cross-examination of witnesses, except where that person fails to comply with a prehearing order or fails to appear at the scheduled hearing.

§ 4.1157 Determination by administrative law judge.

(a) The administrative law judge shall incorporate in his decision concerning the civil penalty, findings of fact on each of the four criteria set forth in 30 CFR 723.13 or 845.13, and conclusions of law.

(b) If the administrative law judge finds that—

(1) A violation occurred or that the fact of violation is uncontested, he shall establish the amount of the penalty, but in so doing, he shall adhere to

§ 4.1158

the point system and conversion table contained in 30 CFR 723.13 and 723.14 or 845.13 and 845.14, except that the administrative law judge may waive the use of such point system where he determines that a waiver would further abatement of violations of the Act. However, the administrative law judge shall not waive the use of the point system and reduce the proposed assessment on the basis of an argument that a reduction in the proposed assessment could be used to abate other violations of the Act; or

(2) No violation occurred, he shall issue an order that the proposed assessment be returned to the petitioner.

(c) If the administrative law judge makes a finding that no violation occurred or if the administrative law judge reduces the amount of the civil penalty below that of the proposed assessment and a timely petition for review of his decision is not filed with the Board or the Board refuses to grant such a petition, the Department of the Interior shall have 30 days from the expiration of the date for filing a petition with the Board if no petition is filed, or 30 days from the date the Board refuses to grant such a petition, within which to remit the appropriate amount to the person who made the payment, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater.

(d) If the administrative law judge increases the amount of the civil penalty above that of the proposed assessment, the administrative law judge shall order payment of the appropriate amount within 30 days of receipt of the decision.

[43 FR 34386, Aug. 3, 1978, as amended at 59 FR 1488, Jan. 11, 1994]

§ 4.1158 Appeals.

Any party may petition the Board to review the decision of an administrative law judge concerning an assessment according to the procedures set forth in § 4.1270.

REVIEW OF SECTION 521 NOTICES OF VIOLATION AND ORDERS OF CESSATION

§ 4.1160 Scope.

These regulations govern applications for review of—

43 CFR Subtitle A (10–1–11 Edition)

(a) Notices of violation or the modification, vacation, or termination of a notice of violation under section 521(a)(3) of the Act; and

(b) Orders of cessation which are not subject to expedited review under § 4.1180 or the modification, vacation, or termination of such an order of cessation under section 521(a)(2) or section 521(a)(3).

§ 4.1161 Who may file.

A permittee issued a notice or order by the Secretary pursuant to the provisions of section 521(a)(2) or section 521(a)(3) of the Act or any person having an interest which is or may be adversely affected by a notice or order subject to review under § 4.1160 may file an application for review with the Hearings Division, OHA, 801 North Quincy Street, Arlington, Va. 22203.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1162 Time for filing.

(a) Any person filing an application for review under § 4.1160 *et seq.* shall file that application within 30 days of the receipt of a notice or order or within 30 days of receipt of notice of modification, vacation, or termination of such a notice or order. Any person not served with a copy of the document shall file the application for review within 40 days of the date of issuance of the document.

(b) No extension of time will be granted for filing an application for review as provided by paragraph (a) of this section. If an application for review is not filed within the time period provided in paragraph (a) of this section, the application shall be dismissed.

[51 FR 16321, May 2, 1986]

§ 4.1163 Effect of failure to file.

Failure to file an application for review of a notice of violation or order of cessation shall not preclude challenging the fact of violation during a civil penalty proceeding.

§ 4.1164 Contents of application.

Any person filing an application for review shall incorporate in that application regarding each claim for relief—

Office of the Secretary, Interior

§ 4.1180

- (a) A statement of facts entitling that person to administrative relief;
- (b) A request for specific relief;
- (c) A copy of any notice or order sought to be reviewed;
- (d) A statement as to whether the person requests or waives the opportunity for an evidentiary hearing; and
- (e) Any other relevant information.

§ 4.1165 Answer.

(a) Where an application for review is filed by a permittee, OSM as well as any other person granted leave to intervene pursuant to § 4.1110 shall file an answer within 20 days of service of a copy of such application.

(b) Where an application for review is filed by a person other than a permittee, the following shall file an answer within 20 days of service of a copy of such application—

- (1) OSM;
- (2) The permittee; or
- (3) Any other person granted leave to intervene pursuant to § 4.1110.

§ 4.1166 Contents of answer.

An answer to an application for review shall incorporate—

- (a) A statement specifically admitting or denying the alleged facts stated by the applicant;
- (b) A statement of any other relevant facts;
- (c) A statement whether an evidentiary hearing is requested or waived; and
- (d) Any other relevant information.

§ 4.1167 Notice of hearing.

Pursuant to section 525(a)(2) of the act, the applicant and other interested persons shall be given written notice of the time and place of the hearing at least 5 working days prior thereto.

§ 4.1168 Amendments to pleadings.

(a) An application for review may be amended once as a matter of right prior to the filing of an answer and thereafter by leave of the administrative law judge upon proper motion.

(b) Upon receipt of an initial or amended application for review or subsequent to granting leave to amend, the administrative law judge shall issue an order setting a time for filing an amended answer if the judge deter-

mines that such an answer is appropriate.

§ 4.1169 Failure to state a claim.

Upon proper motion or after the issuance of an order to show cause by the administrative law judge, an administrative law judge may dismiss at any time an application for review which fails to state a claim upon which administrative relief may be granted.

§ 4.1170 Related notices or orders.

(a) An applicant for review shall file a copy of any subsequent notice or order which modifies, vacates, or terminates the notice or order sought to be reviewed within 10 days of receipt.

(b) An applicant for review of a notice shall file a copy of an order of cessation for failure timely to abate the violation which is the subject of the notice under review within 10 days of receipt of such order.

(c) If an applicant for review desires to challenge any subsequent notice or order, the applicant must file a separate application for review.

(d) Applications for review of related notices or orders are subject to consolidation.

§ 4.1171 Burden of proof in review of section 521 notices or orders.

(a) In review of section 521 notices of violation or orders of cessation or the modification, vacation, or termination thereof, including expedited review under § 4.1180, OSM shall have the burden of going forward to establish a prima facie case as to the validity of the notice, order, or modification, vacation, or termination thereof.

(b) The ultimate burden of persuasion shall rest with the applicant for review.

EXPEDITED REVIEW OF SECTION 521(a)(2) OR 521(a)(3) ORDERS OF CESSATION

§ 4.1180 Purpose.

The purpose of §§ 4.1180-4.1187 is to govern applications filed under section 525(b) of the act for expedited review of orders of cessation for which temporary relief has not been granted under section 525(c) or section 526(c) of

§ 4.1181

the act. If a person is qualified to receive a 30-day decision under these regulations, he may waive that right and file an application under § 4.1164, and the procedures in § 4.1160 *et seq.* shall apply. If there is a waiver as set forth in § 4.1186, the final administrative decision shall be issued within 120 days of the filing of the application.

§ 4.1181 Who may file.

(a) An application for review of an order of cessation may be filed under this section, whenever temporary relief has not been granted under section 525(c) or section 526(c) of the act, by—

(1) A permittee who has been issued an order of cessation under section 521(a)(2) or section 521(a)(3) of the act; or

(2) Any person having an interest which is or may be adversely affected by the issuance of an order of cessation under section 521(a)(2) or section 521(a)(3) of the act.

(b) A permittee or any person having an interest which is or may be adversely affected by a section 521(a)(2) or section 521(a)(3) order of cessation waives his right to expedited review upon being granted temporary relief pursuant to section 525(c) or section 526(c) of the act.

§ 4.1182 Where to file.

The application shall be filed in the Hearings Division, 801 North Quincy Street, OHA, Arlington, Va. 22203.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1183 Time for filing.

(a) Any person intending to file an application for expedited review under section 525(b) of the act shall notify the field solicitor, Department of the Interior, for the region in which the mine site is located, within 15 days of receipt of the order. Any person not served with a copy of the order shall file notice of intention to file an application for review within 20 days of the date of issuance of the order.

(b) Any person filing an application for review under § 4.1184 shall file the application within 30 days of receipt of the order. Any person not served with a copy of the order shall file an applica-

43 CFR Subtitle A (10–1–11 Edition)

tion for review within 40 days of the date of issuance of the order.

§ 4.1184 Contents of application.

(a) Any person filing an application for expedited review under section 525(b) of the act shall incorporate in that application regarding each claim for relief—

(1) A statement of facts entitling that person to administrative relief;

(2) A request for specific relief;

(3) A specific statement which delineates each issue to be addressed by the applicant during the expedited proceeding;

(4) A copy of the order sought to be reviewed;

(5) A list identifying each of applicant's witnesses by name, address, and place of employment, including expert witnesses and the area of expertise to which they will address themselves at the hearing, and a detailed summary of their testimony;

(6) Copies of all exhibits and other documentary evidence that the applicant intends to introduce as evidence at the hearing and descriptions of all physical exhibits and evidence which is not capable of being copied or attached; and

(7) Any other relevant information.

(b) If any applicant fails to comply with all the requirements of § 4.1184(a), the administrative law judge may find that the applicant has waived the 30-day decision requirement or the administrative law judge shall order that the application be perfected and the application shall not be considered filed for purposes of the 30-day decision until perfected. Failure to timely comply with the administrative law judge's order shall constitute a waiver of the 30-day decision.

§ 4.1185 Computation of time for decision.

In computing the 30-day time period for administrative decision, intermediate Saturdays, Sundays, Federal legal holidays, and other nonbusiness days shall be excluded in the computation.

§4.1186 Waiver of the 30-day decision requirement.

(a) Any person qualified to receive a 30-day decision may waive that right—

(1) By filing an application pursuant to §4.1160–71;

(2) By failing to comply with all the requirements of §4.1184(a); or

(3) In accordance with §4.1187(j).

(b) Any person qualified to receive a 30-day decision shall waive that right—

(1) By obtaining temporary relief pursuant to section 525(c) or section 526(c) of the act;

(2) By failing to perfect an application pursuant to §4.1184(b); or

(3) In accordance with §4.1187(i).

§4.1187 Procedure if 30-day decision requirement is not waived.

If the applicant does not waive the 30-day decision requirement of section 525(b) of the act, the following special rules shall apply—

(a) The applicant shall serve all known parties with a copy of the application simultaneously with the filing of the application with OHA. If service is accomplished by mail, the applicant shall inform all known parties by telephone at the time of mailing that an application is being filed and shall inform the administrative law judge by telephone that such notice has been given. However, no ex parte communication as to the merits of the proceeding may be conducted with the administrative law judge.

(b) Any party desiring to file a response to the application for review shall file a written response within 5 working days of service of the application.

(c) If the applicant has requested a hearing, the administrative law judge shall act immediately upon receipt of the application to notify the parties of the time and place of the hearing at least 5 working days prior to the hearing date.

(d) The administrative law judge may require the parties to submit proposed findings of fact and conclusions of law at the hearing which may be orally supplemented on the record at the hearing or, where proposed findings of fact and conclusions of law have not been submitted at the hearing, they

may be orally presented for the record at the hearing.

(e) The administrative law judge shall make an initial decision. He shall either rule from the bench on the application, orally stating the reasons for his decision or he shall issue a written decision. If the administrative law judge makes an oral ruling, his approval of the record of the hearing shall constitute his written decision. The decision of the administrative law judge must be issued within 15 days of the filing of the perfected application under §4.1184.

(f) If any party desires to appeal to the Board, such party shall—

(1) If the administrative law judge makes an oral ruling, make an oral statement, within a time period as directed by the administrative law judge, that the decision is being appealed and request that the administrative law judge certify the record to the Board; or

(2) If the administrative law judge issues a written decision after the close of the hearing, file a notice of appeal with the administrative law judge and with the Board within 2 working days of receipt of the administrative law judge's decision.

(g) If the decision of the administrative law judge is appealed, the Board shall act immediately to issue an expedited briefing schedule, and the Board shall act expeditiously to review the record and issue its decision. The decision of the Board must be issued within 30 days of the date the perfected application is filed with OHA pursuant to §4.1184.

(h) If all parties waive the opportunity for a hearing and the administrative law judge determines that a hearing is not necessary, but the applicant does not waive the 30-day decision requirement, the administrative law judge shall issue an initial decision on the application within 15 days of receipt of the application. The decision shall contain findings of fact and an order disposing of the application. The decision shall be served upon all the parties and the parties shall have 2 working days from receipt of such decision within which to appeal to the

§ 4.1190

Board. The Board shall issue its decision within 30 days of the date the perfected application is filed with OHA pursuant to § 4.1184.

(i) If at any time after the initiation of this expedited procedure, the applicant requests a delay or acts in a manner so as to frustrate the expeditious nature of this proceeding or fails to comply with any requirement of § 4.1187(a), such action shall constitute a waiver of the 30-day requirement of section 525(b) of the act.

(j) If the applicant seeks to offer witnesses, exhibits, or testimony at the hearing in addition to those identified, submitted, described, or summarized in the application for expedited review perfected in accordance with the requirements of § 4.1184, upon objection by an opposing party to such offer, the administrative law judge may allow such objecting party additional time in order to prepare for cross-examination of unidentified witnesses or to identify and prepare rebuttal evidence or otherwise uncover any additional prejudice which may result to such party. The administrative law judge may rule that the running of the 30-day time for decision is stayed for the period of any additional time allowed pursuant to this subsection or may determine that the applicant has waived his right to the 30-day decision.

PROCEEDINGS FOR SUSPENSION OR REVOCATION OF PERMITS UNDER SECTION 521(a)(4) OF THE ACT

§ 4.1190 Initiation of proceedings.

(a) A proceeding on a show cause order issued by the Director of OSM pursuant to section 521(a)(4) of the Act shall be initiated by the Director of OSM filing a copy of such an order with the Hearings Division, OHA, 801 N. Quincy Street, Suite 300, Arlington, VA 22203, promptly after the order is issued to the permittee.

(b) A show cause order filed with OHA shall set forth—

(1) A list of the unwarranted or willful violations which contribute to a pattern of violations;

(2) A copy of each order or notice which contains one or more of the violations listed as contributing to a pattern of violations;

43 CFR Subtitle A (10–1–11 Edition)

(3) The basis for determining the existence of a pattern or violations; and

(4) Recommendations whether the permit should be suspended or revoked, including the length and terms of a suspension.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61510, Oct. 1, 2002]

§ 4.1191 Answer.

The permittee shall have 30 days from receipt of the order within which to file an answer with the Hearings Division, OHA, Arlington, Va.

§ 4.1192 Contents of answer.

The permittee's answer to a show cause order shall contain a statement setting forth—

(a) The reasons in detail why a pattern of violations does not exist or has not existed, including all reasons for contesting—

(1) The fact of any of the violations alleged by OSM as constituting a pattern of violations;

(2) The willfulness of such violations; or

(3) Whether such violations were caused by the unwarranted failure of the permittee;

(b) All mitigating factors the permittee believes exist in determining the terms of the revocation or the length and terms of the suspension;

(c) Any other alleged relevant facts; and

(d) Whether a hearing on the show cause order is desired.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61510, Oct. 1, 2002]

§ 4.1193 Notice of hearing.

If a hearing on the show cause order is requested, or if no hearing is requested but the administrative law judge determines that a hearing is necessary, the administrative law judge shall give thirty days written notice of the date, time, and place of the hearing to the Director, the permittee, the State regulatory authority, if any, and any intervenor.

[67 FR 61510, Oct. 1, 2002]

Office of the Secretary, Interior

§ 4.1200

§ 4.1194 Burden of proof in suspension or revocation proceedings.

In proceedings to suspend or revoke a permit, OSM shall have the burden of going forward to establish a prima facie case for suspension or revocation of the permit. The ultimate burden of persuasion that the permit should not be suspended or revoked shall rest with the permittee.

[43 FR 34386, Aug. 3, 1978. Redesignated at 67 FR 61510, Oct. 1, 2002]

§ 4.1195 Determination by the administrative law judge.

(a) Upon a determination by the administrative law judge that a pattern of violations exists or has existed, the administrative law judge shall order the permit either suspended or revoked. In making such a determination, the administrative law judge need not find that all the violations listed in the show cause order occurred, but only that sufficient violations occurred to establish a pattern.

(b) If the permit is suspended, the minimum suspension period shall be 3 working days unless the administrative law judge finds that imposition of the minimum suspension period would result in manifest injustice and would not further the purposes of the act. Also, the administrative law judge may impose preconditions to be satisfied prior to the suspension being lifted.

(c) The decision of the administrative law judge shall be issued within 20 days following the date the hearing record is closed by the administrative law judge or within 20 days of receipt of the answer, if no hearing is requested by any party and the administrative law judge determines that no hearing is necessary.

(d) At any stage of a suspension or revocation proceeding being conducted by an administrative law judge, the parties may enter into a settlement, subject to the approval of the administrative law judge.

[43 FR 34386, Aug. 3, 1978. Redesignated and amended at 67 FR 61510, Oct. 1, 2002]

§ 4.1196 Summary disposition.

(a) In a proceeding under this section where the permittee fails to appear at a hearing, the permittee shall be

deemed to have waived his right to a hearing and the administrative law judge may assume for purposes of the proceeding that—

(1) Each violation listed in the order occurred;

(2) Such violations were caused by the permittee's unwarranted failure or were willfully caused; and

(3) A pattern of violations exists.

(b) In order to issue an initial decision concerning suspension or revocation of the permit when the permittee fails to appear at the hearing, the administrative law judge shall either conduct an ex parte hearing or require OSM to furnish proposed findings of fact and conclusions of law.

[43 FR 34386, Aug. 3, 1978. Redesignated at 67 FR 61510, Oct. 1, 2002]

§ 4.1197 Appeals.

Any party desiring to appeal the decision of the administrative law judge shall have 5 days from receipt of the administrative law judge's decision within which to file a notice of appeal with the Board. The Board shall act immediately to issue an expedited briefing schedule. The decision of the Board shall be issued within 60 days of the date the hearing record is closed by the administrative law judge or, if no hearing is held, within 60 days of the date the answer is filed.

[43 FR 34386, Aug. 3, 1978. Redesignated at 67 FR 61510, Oct. 1, 2002]

APPLICATIONS FOR REVIEW OF ALLEGED DISCRIMINATORY ACTS UNDER SECTION 703 OF THE ACT

§ 4.1200 Filing of the application for review with the Office of Hearings and Appeals.

(a) Pursuant to 30 CFR 865.13, within 7 days of receipt of an application for review of alleged discriminatory acts, OSM shall file a copy of the application in the Hearings Division, OHA, 801 N. Quincy Street, Suite 300, Arlington, VA 22203. OSM shall also file in the Hearings Division, OHA, Arlington, VA, a copy of any answer submitted in response to the application for review.

(b) The application for review, as filed in the Hearings Division, OHA, shall be held in suspense until one of the following takes place—

§ 4.1201

(1) A request for temporary relief is filed pursuant to § 4.1203;

(2) A request is made by OSM for the scheduling of a hearing pursuant to 30 CFR 865.14(a);

(3) A request is made by the applicant for the scheduling of a hearing pursuant to 30 CFR 865.14(a);

(4) A request is made by the applicant for the scheduling of a hearing pursuant to 30 CFR 865.14(b);

(5) A request is made by OSM that OHA close the case because OSM, the applicant, and the alleged discriminating person have entered into an agreement in resolution of the discriminatory acts and there has been compliance with such agreement.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61510, Oct. 1, 2002]

§ 4.1201 Request for scheduling of a hearing.

(a) If OSM determines that a violation of section 703(a) of the act has probably occurred and was not resolved at the informal conference, it shall file with the Hearings Division, OHA, a request on behalf of the applicant that a hearing be scheduled. The request shall be filed within 10 days of the completion of the informal conference, or where no conference is held, within 10 days following the scheduled conference. Where OSM makes such a request, it shall represent the applicant in the administrative proceedings, unless the applicant desires to be represented by private counsel.

(b) If OSM declines to request that a hearing be scheduled and to represent the applicant, it shall within 10 days of the completion of the informal conference, or where no conference is held, within 10 days following the scheduled conference, notify the applicant of his right to request the scheduling of a hearing on his own behalf. An applicant shall file a request for the scheduling of a hearing in the Hearings Division, OHA, within 30 days of service of such notice from OSM.

(c) If no request for the scheduling of a hearing has been made pursuant to paragraph (a) or (b) of this section and 60 days have elapsed from the filing of the application for review with OSM, the applicant may file on his own be-

43 CFR Subtitle A (10–1–11 Edition)

half a request for the scheduling of a hearing with the main office of OHA. Where such a request is made, the applicant shall proceed on his own behalf, but OSM may intervene pursuant to § 4.1110.

§ 4.1202 Response to request for the scheduling of a hearing.

(a) Any person served with a copy of the request for the scheduling of a hearing shall file a response with the Hearings Division, OHA, Arlington, Va., within 20 days of service of such request.

(b) If the alleged discriminating person has not filed an answer to the application, such person shall include with the response to the request for the scheduling of a hearing, a statement specifically admitting or denying the alleged facts set forth in the application.

§ 4.1203 Application for temporary relief from alleged discriminatory acts.

(a) On or after 10 days from the filing of an application for review under this part, any party may file an application for temporary relief from alleged discriminatory acts.

(b) The application shall be filed in the Hearings Division, OHA, Arlington, Va.

(c) The application shall include—

(1) A detailed written statement setting forth the reasons why relief should be granted;

(2) A showing that the complaint of discrimination was not frivolously brought;

(3) A description of any exigent circumstances justifying temporary relief; and

(4) A statement of the specific relief requested.

(d) All parties to the proceeding to which the application relates shall have 5 days from receipt of the application to file a written response.

(e) The administrative law judge may convene a hearing on any issue raised by the application if he deems it appropriate.

(f) The administrative law judge shall expeditiously issue an order or decision granting or denying such relief.

Office of the Secretary, Interior

§ 4.1265

(g) If all parties consent, before or after the commencement of any hearing on the application for temporary relief, the administrative law judge may order the hearing on the application for review of alleged discriminatory - acts to be advanced and consolidated with the hearing on the application for temporary relief.

§ 4.1204 Determination by administrative law judge.

Upon a finding of a violation of section 703 of the act or 30 CFR 865.11, the administrative law judge shall order the appropriate affirmative relief, including but not limited to—

(a) The rehiring or reinstatement of the applicant to his former position with full rights and privileges, full backpay, and any special damages sustained as a result of the discrimination; and

(b) All other relief which the administrative law judge deems appropriate to abate the violation or to prevent recurrence of discrimination.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61510, Oct. 1, 2002]

§ 4.1205 Appeals.

Any party aggrieved by a decision of an administrative law judge concerning an application for review of alleged discriminatory acts may appeal to the Board under procedures set forth in § 4.1271 *et seq.*

APPLICATIONS FOR TEMPORARY RELIEF

§ 4.1260 Scope.

These regulations contain the procedures for seeking temporary relief in section 525 review proceedings under the act. The special procedures for seeking temporary relief from an order of cessation are set forth in § 4.1266. Procedures for seeking temporary relief from alleged discriminatory acts are covered in § 4.1203.

§ 4.1261 When to file.

An application for temporary relief may be filed by any party to a proceeding at any time prior to decision by an administrative law judge.

§ 4.1262 Where to file.

The application shall be filed with the administrative law judge to whom the case has been assigned. If no assignment has been made, the application shall be filed in the Hearings Division, OHA, 801 North Quincy Street, Arlington, Va. 22203.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1263 Contents of application.

The application shall include—

(a) A detailed written statement setting forth the reasons why relief should be granted;

(b) A showing that there is a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant;

(c) A statement that the relief sought will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources;

(d) If the application relates to an order of cessation issued pursuant to section 521(a)(2) or section 521(a)(3) of the act, a statement of whether the requirement of section 525(c) of the act for decision on the application within 5 days is waived; and

(e) A statement of the specific relief requested.

§ 4.1264 Response to application.

(a) Except as provided in § 4.1266(b), all parties to the proceeding to which the application relates shall have 5 days from the date of receipt of the application to file a written response.

(b) Except as provided in § 4.1266(b), the administrative law judge may hold a hearing on any issue raised by the application if he deems it appropriate.

§ 4.1265 Determination on application concerning a notice of violation issued pursuant to section 521(a)(3) of the act.

Where an application has been filed requesting temporary relief from a notice of violation issued under section 521(a)(3) of the act, the administrative law judge shall expeditiously issue an

§ 4.1266

order or decision granting or denying such relief.

§ 4.1266 Determination on application concerning an order of cessation.

(a) If the 5-day requirement of section 525(c) of the act is waived, the administrative law judge shall expeditiously conduct a hearing and render a decision on the application.

(b) If there is no waiver of the 5-day requirement of section 525(c) of the act, the following special rules shall apply—

(1) The 5-day time for decision shall not begin to run until the application is filed pursuant to § 4.1262 or a copy of the application is received by the field solicitor for the region in which the mine site subject to the order is located, whichever occurs at a later date (see § 4.1109 for addresses);

(2) The application shall include an affidavit stating that telephone notice has been given to the field office of OSM serving the state in which the minesite subject to the order is located. The telephone notice shall identify the mine, the mine operator, the date and number of the order from which relief is requested, the name of the OSM inspector involved, and the name and telephone number of the applicant. OSM's field offices and their numbers follow:

Albuquerque Field Office (serving Arizona, California, and New Mexico) (505) 248-5070.
Big Stone Gap Field Office (serving Virginia) (276) 523-4303.

Birmingham Field Office (serving Alabama and Mississippi) (205) 290-7282 (ext. 16).

Casper Field Office (serving Idaho, Montana, North Dakota, South Dakota, and Wyoming) (307) 261-6550.

Charleston Field Office (serving West Virginia) (304) 347-7158.

Columbus Team Office (serving Maryland, Michigan, and Ohio) (412) 937-2153.

Harrisburg Field Office (serving Massachusetts, Pennsylvania, and Rhode Island) (717) 782-4036.

Knoxville Field Office (serving Georgia, Tennessee, and North Carolina) (865) 545-4103 (ext. 186).

Lexington Field Office (serving Kentucky) (859) 260-8402.

Mid-Continent Regional Coordinating Center (serving Iowa, Kansas, and Missouri) (618) 463-6460.

Olympia Office (serving Washington) (360) 753-9538.

43 CFR Subtitle A (10-1-11 Edition)

Tulsa Field Office (serving Arkansas, Louisiana, Oklahoma, and Texas) (918) 581-6431 (ext. 23).

Western Regional Coordinating Center (serving Alaska, Colorado, Oregon, and Utah) (303) 844-1400 (ext. 1424).

(3) Prior to or at the hearing, the applicant shall file with OHA an affidavit stating the date upon which the copy of the application was delivered to the office of the field solicitor or the applicant may make an oral statement at the hearing setting forth that information. For purposes of the affidavit or statement the applicant may rely upon telephone confirmation by the office of the field solicitor that the application was received.

(4) In addition to the service requirements of § 4.1266(b) (1) and (2), the applicant shall serve any other parties with a copy of the application simultaneously with the filing of the application. If service is accomplished by mail, the applicant shall inform such other parties by telephone at the time of mailing that an application is being filed, the contents of the application, and with whom the application was filed.

(5) The field solicitor and all other parties may indicate their objection to the application by communicating such objection to the administrative law judge and the applicant by telephone. However, no ex parte communication as to the merits of the proceeding may be conducted with the administrative law judge. The field solicitor and all other parties shall simultaneously reduce their objections to writing. The written objections must be immediately filed with the administrative law judge and immediately served upon the applicant.

(6) Upon receipt of communication that there is an objection to the request, the administrative law judge shall immediately order a location, time, and date for the hearing by communicating such information to the field solicitor, all other parties, and the applicant by telephone. The administrative law judge shall reduce such communications to writing in the form of a memorandum to the file.

(7) If a hearing is held—

(i) The administrative law judge may require the parties to submit proposed

Office of the Secretary, Interior

§ 4.1271

findings of fact and conclusions of law at the hearing which may be orally supplemented on the record at the hearing or where written proposed findings of fact and conclusions of law have not been submitted at the hearing, they may be orally presented for the record at the hearing.

(ii) The administrative law judge shall either rule from the bench on the application, orally stating the reasons for his decision or he shall within 24 hours of completion of the hearing issue a written decision. If the administrative law judge makes an oral ruling, his approval of the record of the hearing shall constitute his written decision.

(8) The order or decision of the administrative law judge shall be issued within 5 working days of the receipt of the application for temporary relief.

(9) If at any time after the initiation of this expedited procedure, the applicant requests a delay or acts in a manner so as to frustrate the expeditious nature of this proceeding or fails to supply the information required by § 4.1263 such action shall constitute a waiver of the 5-day requirement of section 525(c) of the act.

[43 FR 34386, Aug. 3, 1978, as amended at 49 FR 7565, Mar. 1, 1984; 59 FR 1489, Jan. 11, 1994; 67 FR 61510, Oct. 1, 2002]

§ 4.1267 Appeals.

(a) Any party desiring to appeal a decision of an administrative law judge granting temporary relief may appeal to the Board.

(b) Any party desiring to appeal a decision of an administrative law judge denying temporary relief may appeal to the Board or, in the alternative, may seek judicial review pursuant to section 526(a) of the act.

(c) The Board shall issue an expedited briefing schedule and shall issue a decision on the appeal expeditiously.

[43 FR 34386, Aug. 3, 1978, as amended at 45 FR 50753, July 31, 1980]

APPEALS TO THE BOARD FROM DECISIONS OR ORDERS OF ADMINISTRATIVE LAW JUDGES

§ 4.1270 Petition for discretionary review of a proposed civil penalty.

(a) Any party may petition the Board to review an order or decision by an administrative law judge disposing of a civil penalty proceeding under § 4.1150.

(b) A petition under this section shall be filed on or before 30 days from the date of receipt of the order or decision sought to be reviewed and the time for filing may not be extended.

(c) A petitioner under this section shall list the alleged errors of the administrative law judge and shall attach a copy of the order or decision sought to be reviewed.

(d) Any party may file with the Board a response to the petition for review within 10 days of receipt of a copy of such petition.

(e) Not later than 30 days from the filing of a petition under this section, the Board shall grant or deny the petition in whole or in part.

(f) If the petition is granted, the rules in §§ 4.1273 through 4.1275 are applicable, and the Board must use the point system and conversion table contained in 30 CFR part 723 or 845 in recalculating assessments. However, the Board has the same authority to waive the civil penalty formula as that granted to administrative law judges in § 4.1157(b)(1). If the petition is denied, the decision of the administrative law judge is final for the Department, subject to § 4.5.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61511, Oct. 1, 2002; 75 FR 64669, Oct. 20, 2010]

§ 4.1271 Notice of appeal.

(a) Any aggrieved party may file a notice of appeal from an order or decision of an administrative law judge disposing of a proceeding under §§ 4.1160 through 4.1171, 4.1200 through 4.1205, 4.1260 through 4.1267, 4.1290 through 4.1296, and 4.1350 through 4.1356.

(b) Except in an expedited review proceeding under § 4.1180, or in a suspension or revocation proceeding under § 4.1190, a notice of appeal shall be filed with the Board on or before 30 days from the date of receipt of the order or

§ 4.1272

decision sought to be reviewed and the time for filing may not be extended.

[43 FR 34386, Aug. 3, 1978, as amended at 59 FR 1489, Jan. 11, 1994]

§ 4.1272 Interlocutory appeals.

(a) If a party has sought certification under § 4.1124, that party may petition the Board for permission to appeal from an interlocutory ruling by an administrative law judge.

(b) A petition under this section shall be in writing and not exceed 10 pages in length.

(c) If the correctness of the ruling sought to be reviewed involves a controlling issue of law the resolution of which will materially advance final disposition of the case, the Board may grant the petition.

(d) Upon granting a petition under this section, the Board may dispense with briefing or issue a briefing schedule.

(e) Unless the Board or the administrative law judge orders otherwise, an interlocutory appeal shall not operate as a stay of further proceedings before the judge.

(f) In deciding an interlocutory appeal, the Board shall confine itself to the issue presented on appeal.

(g) The Board shall promptly decide appeals under this section.

(h) Upon affirmance, reversal or modification of the administrative law judge's interlocutory ruling or order, the jurisdiction of the Board shall terminate, and the case shall be remanded promptly to the administrative law judge for further proceedings.

§ 4.1273 Briefs.

(a) Unless the Board orders otherwise, an appellant's brief is due on or before 30 days from the date of receipt of notice by the appellant that the Board has agreed to exercise discretionary review authority pursuant to § 4.1270 or a notice of appeal is filed.

(b) If any appellant fails to file a timely brief, an appeal under this part may be subject to summary dismissal.

(c) An appellant shall state specifically the rulings to which there is an objection, the reasons for such objections, and the relief requested. The failure to specify a ruling as objection-

43 CFR Subtitle A (10-1-11 Edition)

able may be deemed by the Board as a waiver of objection.

(d) Unless the Board orders otherwise, within 20 days after service of appellant's brief, any other party to the proceeding may file a brief.

(e) If any argument is based upon the evidence of record and there is a failure to include specific record citations, when available, the Board need not consider the arguments.

(f) Further briefing may take place by permission of the Board.

(g) Unless the Board provides otherwise, appellant's brief shall not exceed 50 typed pages and an appellee's brief shall not exceed 25 typed pages.

§ 4.1274 Remand.

The Board may remand cases if further proceedings are required.

§ 4.1275 Final decisions.

The Board may adopt, affirm, modify, set aside, or reverse any finding of fact, conclusion of law, or order of the administrative law judge.

APPEALS TO THE BOARD FROM DECISIONS OF THE OFFICE OF SURFACE MINING

§ 4.1280 Scope.

This section is applicable to appeals from decisions of the Director of OSM concerning small operator exemptions under 30 CFR 710.12(h) and to other appeals which are not required by the Act to be determined by formal adjudication under the procedures set forth in 5 U.S.C. 554.

§ 4.1281 Who may appeal.

Any person who is or may be adversely affected by a written decision of the Director of OSM or his delegate may appeal to the Board where the decision specifically grants such right of appeal.

§ 4.1282 Appeals; how taken.

(a) A person appealing under this section shall file a written notice of appeal with the office of the OSM official whose decision is being appealed and at the same time shall send a copy of the notice to the Board of Land Appeals, 801 North Quincy Street, Arlington, Va. 22203.

Office of the Secretary, Interior

§ 4.1286

(b) The notice of appeal shall be filed within 20 days from the date of receipt of the decision. If the person appealing has not been served with a copy of the decision, such appeal must be filed within 30 days of the date of the decision.

(c) The notice of appeal shall indicate that an appeal is intended and must identify the decision being appealed. The notice should include the serial number or other identification of the case and the date of the decision. The notice of appeal may include a statement of reasons for the appeal and any arguments the appellant desires to make.

(d) If the notice of appeal did not include a statement of reasons for the appeal, such a statement shall be filed with the Board within 20 days after the notice of appeal was filed. In any case, the appellant shall be permitted to file with the Board additional statements of reasons and written arguments or briefs within the 20-day period after filing the notice of appeal.

[43 FR 34386, Aug. 3, 1978, as amended at 49 FR 7565, Mar. 1, 1984; 67 FR 4368, Jan. 30, 2002]

§ 4.1283 Service.

(a) The appellant shall serve personally or by certified mail, return receipt requested, a copy of the notice of appeal and a copy of any statement of reasons, written arguments, or other documents on each party within 15 days after filing the document. Proof of service shall be filed with the Board within 15 days after service.

(b) Failure to serve may subject the appeal to summary dismissal pursuant to § 4.1285.

§ 4.1284 Answer.

(a) Any party served with a notice of appeal who wishes to participate in the proceedings on appeal shall file an answer with the Board within 20 days after service of the notice of appeal or statement of reasons where such statement was not included in the notice of appeal.

(b) If additional reasons, written arguments or other documents are filed by the appellant, a party shall have 20 days after service thereof within which to answer. The answer shall state the

reasons the party opposes or supports the appeal.

§ 4.1285 Summary dismissal.

An appeal shall be subject to summary dismissal, in the discretion of the Board, for failure to file or serve, upon all persons required to be served, a notice of appeal or a statement of reasons for appeal.

§ 4.1286 Motion for a hearing on an appeal involving issues of fact.

(a) Any party may file a motion that the Board refer a case to an administrative law judge for a hearing. The motion must state:

(1) What specific issues of material fact require a hearing;

(2) What evidence concerning these issues must be presented by oral testimony, or be subject to cross-examination;

(3) What witnesses need to be examined; and

(4) What documentary evidence requires explanation, if any.

(b) In response to a motion under paragraph (a) of this section or on its own initiative, the Board may order a hearing if there are:

(1) Any issues of material fact which, if proved, would alter the disposition of the appeal; or

(2) Significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them.

(c) If the Board orders a hearing, it must:

(1) Specify the issues of fact upon which the hearing is to be held; and

(2) Request the administrative law judge to issue:

(i) Proposed findings of fact on the issues presented at the hearing;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(d) If the Board orders a hearing, it may do one or more of the following:

(1) Suspend the effectiveness of the decision under review pending a final Departmental decision on the appeal if it finds good cause to do so;

§ 4.1287

(2) Authorize the administrative law judge to specify additional issues; or

(3) Authorize the parties to agree to additional issues that are material, with the approval of the administrative law judge.

(e) The hearing will be conducted under §§ 4.1100, 4.1102 through 4.1115, 4.1121 through 4.1127, and 4.1130 through 4.1141. Unless the Board orders otherwise, the administrative law judge may consider other relevant issues and evidence identified after referral of the case for a hearing.

[75 FR 64669, Oct. 20, 2010]

§ 4.1287 Action by administrative law judge.

(a) Upon completion of the hearing and the incorporation of the transcript in the record, the administrative law judge will issue and serve on the parties, as specified by the Board under § 4.415(c)(2):

(1) Proposed findings of fact on the issues presented at the hearing;

(2) A recommended decision that includes findings of fact and conclusions of law and that advises the parties of their right to file exceptions under paragraph (c) of this section; or

(3) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(b) The administrative law judge will promptly send to the Board the record and:

(1) The proposed findings;

(2) The recommended decision; or

(3) The final decision if a timely notice of appeal is filed.

(c) The parties will have 30 days from service of the recommended decision to file exceptions with the Board.

[75 FR 64669, Oct. 20, 2010]

PETITIONS FOR AWARD OF COSTS AND EXPENSES UNDER SECTION 525(e) OF THE ACT

§ 4.1290 Who may file.

(a) Any person may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in—

(1) A final order being issued by an administrative law judge; or

43 CFR Subtitle A (10–1–11 Edition)

(2) A final order being issued by the Board.

(b) [Reserved]

§ 4.1291 Where to file; time for filing.

The petition for an award of costs and expenses including attorneys' fees must be filed with the administrative law judge who issued the final order, or if the final order was issued by the Board, with the Board, within 45 days of receipt of such order. Failure to make a timely filing of the petition may constitute a waiver of the right to such an award.

§ 4.1292 Contents of petition.

(a) A petition filed under this section 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 attorneys' 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 attorneys' 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.

(b) [Reserved]

§ 4.1293 Answer.

Any person served with a copy of the petition shall have 30 days from service of the petition within which to file an answer to such petition.

§ 4.1294 Who may receive an award.

Appropriate costs and expenses including attorneys' fees may be awarded—

(a) To any person from the permittee, if—

(1) The person initiates or participates in any administrative proceeding reviewing enforcement actions upon a finding that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed, and the administrative law judge or Board

Office of the Secretary, Interior

§ 4.1302

determines that the person made a substantial contribution to the full and fair determination of the issues, except that 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; or

(2) The person initiates an application for review of alleged discriminatory acts, pursuant to 30 CFR part 830, upon a finding of discriminatory discharge or other acts of discrimination.

(b) From OSM to any person, other than a permittee or his representative, who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues.

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

(d) To a permittee from any person where the permittee demonstrates that the person initiated a proceeding under section 525 of the Act or participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee.

(e) To OSM where it demonstrates that any person applied for review pursuant to section 525 of the Act or that any party participated in such a proceeding in bad faith and for the purpose of harassing or embarrassing the Government.

[43 FR 34386, Aug. 3, 1978, as amended at 50 FR 47224, Nov. 15, 1985]

§ 4.1295 Awards.

An award under these sections may include—

(a) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred as a result of initiation and/or participation in a proceeding under the Act; and

(b) All costs and expenses, including attorneys' fees and expert witness fees,

reasonably incurred in seeking the award in OHA.

§ 4.1296 Appeals.

Any person aggrieved by a decision concerning the award of costs and expenses in an administrative proceeding under this Act may appeal such award to the Board under procedures set forth in § 4.1271 *et seq.*, unless the Board has made the initial decision concerning such an award.

PETITIONS FOR REVIEW OF PROPOSED INDIVIDUAL CIVIL PENALTY ASSESSMENTS UNDER SECTION 518(f) OF THE ACT

SOURCE: 53 FR 8754, Mar. 17, 1988, unless otherwise noted.

§ 4.1300 Scope.

These regulations govern administrative review of proposed individual civil penalty assessments under section 518(f) of the Act against a director, officer, or agent of a corporation.

§ 4.1301 Who may file.

Any individual served a notice of proposed individual civil penalty assessment may file a petition for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, VA 22203. Phone: 703-235-3800.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1302 Time for filing.

(a) A petition for review of a notice of proposed individual civil penalty assessment must be filed within 30 days of its service on the individual.

(b) No extension of time will be granted for filing a petition for review of a notice of proposed individual civil penalty assessment. Failure to file a petition for review within the time period provided in paragraph (a) shall be deemed an admission of liability by the individual, whereupon the notice of proposed assessment shall become a final order of the Secretary and any tardy petition shall be dismissed.

§ 4.1303

§ 4.1303 Contents and service of petition.

(a) An individual filing a petition for review of a notice of proposed individual civil penalty assessment shall provide—

(1) A concise statement of the facts entitling the individual to relief;

(2) A copy of the notice of proposed assessment;

(3) A copy of the notice(s) of violation, order(s) or final decision(s) the corporate permittee is charged with failing or refusing to comply with that have been served on the individual by OSM; and

(4) A statement whether the individual requests or waives the opportunity for an evidentiary hearing.

(b) Copies of the petition shall be served in accordance with § 4.1109 (a) and (b) of this part.

[53 FR 8754, Mar. 17, 1988; 53 FR 10036, Mar. 28, 1988]

§ 4.1304 Answer, motion, or statement of OSM.

Within 30 days from receipt of a copy of a petition, OSM shall file with the Hearings Division an answer or motion, or a statement that it will not file an answer or motion, in response to the petition.

§ 4.1305 Amendment of petition.

(a) An individual filing a petition may amend it once as a matter of right before receipt by the individual of an answer, motion, or statement of OSM made in accordance with § 4.1304 of this part. Thereafter, a motion for leave to amend the petition shall be filed with the administrative law judge.

(b) OSM shall have 30 days from receipt of a petition amended as a matter of right to file an answer, motion, or statement in accordance with § 4.1304 of this part. If the administrative law judge grants a motion to amend a petition, the time for OSM to file an answer, motion, or statement shall be set forth in the order granting the motion to amend.

§ 4.1306 Notice of hearing.

The administrative law judge shall give notice of the time and place of the hearing to all interested parties. The

43 CFR Subtitle A (10–1–11 Edition)

hearing shall be of record and governed by 5 U.S.C. 554.

§ 4.1307 Elements; burdens of proof.

(a) OSM shall have the burden of going forward with evidence to establish a prima facie case that:

(1) A corporate permittee either violated a condition of a permit or failed or refused to comply with an order issued under section 521 of the Act or an order incorporated in a final decision by the Secretary under the Act (except an order incorporated in a decision issued under sections 518(b) or 703 of the Act or implementing regulations), unless the fact of violation or failure or refusal to comply with an order has been upheld in a final decision in a proceeding under § 4.1150 through 4.1158, § 4.1160 through 4.1171, or § 4.1180 through 4.1187, and § 4.1270 or § 4.1271 of this part, and the individual is one against whom the doctrine of collateral estoppel may be applied to preclude relitigation of fact issues;

(2) The individual, at the time of the violation, failure or refusal, was a director, officer, or agent of the corporation; and

(3) The individual willfully and knowingly authorized, ordered, or carried out the corporate permittee's violation or failure or refusal to comply.

(b) The individual shall have the ultimate burden of persuasion by a preponderance of the evidence as to the elements set forth in paragraph (a)(1) of this section.

(c) OSM shall have the ultimate burden of persuasion by a preponderance of the evidence as to the elements set forth in paragraphs (a)(2) and (a)(3) of this section and as to the amount of the individual civil penalty.

[53 FR 8754, Mar. 17, 1988, as amended at 68 FR 66728, Nov. 28, 2003]

§ 4.1308 Decision by administrative law judge.

(a) The administrative law judge shall issue a written decision containing findings of fact and conclusions of law on each of the elements set forth in § 4.1307 of this part.

(b) If the administrative law judge concludes that the individual is liable for an individual civil penalty, he shall order that it be paid in accordance

Office of the Secretary, Interior

§ 4.1353

with 30 CFR 724.18 or 846.18, absent the filing of a petition for discretionary review in accordance with § 4.1309 of this part.

§ 4.1309 Petition for discretionary review.

(a) Any party may petition the Board to review an order or decision by an administrative law judge disposing of an individual civil penalty proceeding under § 4.1308 of this part.

(b) A petition under this section shall be filed on or before 30 days from the date of receipt of the order or decision sought to be reviewed, and the time for filing shall not be extended.

(c) A petitioner under this section shall list the alleged errors of the administrative law judge and shall attach a copy of the order or decision sought to be reviewed.

(d) Any party may file with the Board a response to the petition for review within 10 days of receipt of a copy of such petition.

(e) Not later than 30 days from the filing of a petition for review under this section, the Board shall grant or deny the petition in whole or in part.

(f) If the petition for review is granted the rules in §§ 4.1273–4.1276 of this part are applicable. If the petition is denied, the decision of the administrative law judge is final for the Department, subject to § 4.5 of this part.

(g) Payment of a penalty is due in accordance with 30 CFR 724.18 or 846.18.

REQUEST FOR HEARING ON A PRELIMINARY FINDING CONCERNING A DEMONSTRATED PATTERN OF WILLFUL VIOLATIONS UNDER SECTION 510(c) OF THE ACT, 30 U.S.C. 1260(c) (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS)

SOURCE: 52 FR 39526, Oct. 22, 1987, unless otherwise noted.

§ 4.1350 Scope.

These rules set forth the procedures for obtaining review of a preliminary finding by OSM under section 510(c) of the Act and 30 CFR 774.11(c) of an applicant's or operator's permanent permit ineligibility.

[67 FR 61511, Oct. 1, 2002]

§ 4.1351 Preliminary finding by OSM.

(a) If OSM determines that an applicant or operator controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations and the violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the Act, its implementing regulations, the regulatory program, or the permit, OSM must serve a preliminary finding of permanent permit ineligibility on the applicant or operator.

(b) OSM must serve the preliminary finding by certified mail, or by overnight delivery service if the applicant or operator has agreed to bear the expense for this service. The preliminary finding must specifically state the violations upon which it is based.

[67 FR 61511, Oct. 1, 2002]

§ 4.1352 Who may file; where to file; when to file.

(a) The applicant or operator may file a request for hearing on OSM's preliminary finding of permanent permit ineligibility.

(b) The request for hearing must be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203 (telephone 703-235-3800), within 30 days of receipt of the preliminary finding by the applicant or operator.

(c) Failure to file a timely request constitutes a waiver of the opportunity for a hearing before OSM makes its final finding concerning permanent permit ineligibility. Any untimely request will be denied.

[67 FR 61511, Oct. 1, 2002]

§ 4.1353 Contents of request.

The request for hearing shall include—

(a) A clear statement of the facts entitling the one requesting the hearing to administrative relief;

(b) An explanation of the alleged errors in OSM's preliminary finding; and

(c) Any other relevant information.

§ 4.1354

§ 4.1354 Determination by the administrative law judge.

The administrative law judge shall promptly set a time and place for and give notice of the hearing to the applicant or operator and shall issue a decision within 60 days of the filing of a request for hearing. The hearing shall be of record and governed by 5 U.S.C. 554.

§ 4.1355 Burden of proof.

OSM shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the existence of a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the Act, its implementing regulations, the regulatory program, or the permit.

[67 FR 61511, Oct. 1, 2002]

§ 4.1356 Appeals.

(a) Any party aggrieved by the decision of the administrative law judge may appeal to the Board under procedures set forth in § 4.1271 et seq. of this subpart, except that the notice of appeal must be filed within 20 days of receipt of the administrative law judge's decision.

(b) The Board shall order an expedited briefing schedule and shall issue a decision within 45 days of the filing of the appeal.

REQUEST FOR REVIEW OF APPROVAL OR DISAPPROVAL OF APPLICATIONS FOR NEW PERMITS, PERMIT REVISIONS, PERMIT RENEWALS, THE TRANSFER, ASSIGNMENT OR SALE OF RIGHTS GRANTED UNDER PERMIT (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS) AND FOR COAL EXPLORATION PERMITS (FEDERAL PROGRAM)

SOURCE: 56 FR 2143, Jan. 22, 1991, unless otherwise noted.

§ 4.1360 Scope.

These rules set forth the exclusive procedures for administrative review of decisions by OSMRE concerning—

(a) Applications for new permits, including applications under 30 CFR part

43 CFR Subtitle A (10–1–11 Edition)

785, and the terms and conditions imposed or not imposed in permits by those decisions. They do not apply to decisions on applications to mine on Federal lands in states where the terms of a cooperative agreement provide for the applicability of alternative administrative procedures (see 30 CFR 775.11(c)), but they do apply to OSMRE decisions on applications for Federal lands in states with cooperative agreements where OSMRE as well as the state issue Federal lands permits;

(b) Applications for permit revisions, permit renewals, and the transfer, assignment, or sale of rights granted under permit;

(c) Permit revisions ordered by OSMRE;

(d) Applications for coal exploration permits; and

(e) Ineligibility for a permit under section 510(c) of the Act and 30 CFR 773.12.

[56 FR 2143, Jan. 22, 1991; 56 FR 5061, Feb. 7, 1991, as amended at 67 FR 61511, Oct. 1, 2002]

§ 4.1361 Who may file.

The applicant, permittee, or any person having an interest which is or may be adversely affected by a decision of OSMRE set forth in § 4.1360 may file a request for review of that decision.

§ 4.1362 Where to file; when to file.

(a) The request for review shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203 (phone 703-235-3800), within 30 days after the applicant or permittee is notified by OSMRE of the written decision by certified mail or by overnight delivery service if the applicant or permittee has agreed to bear the expense for this service.

(b) Failure to file a request for review within the time specified in paragraph (a) of this section shall constitute a waiver of a hearing and the request shall be dismissed.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

Office of the Secretary, Interior

§ 4.1366

§ 4.1363 Contents of request; amendment of request; responses.

(a) The request for review shall include—

(1) A clear statement of the facts entitling the one requesting review to administrative relief;

(2) An explanation of each specific alleged error in OSMRE's decision, including reference to the statutory and regulatory provisions allegedly violated;

(3) A request for specific relief;

(4) A statement whether the person requests or waives the opportunity for an evidentiary hearing; and

(5) Any other relevant information.

(b) All interested parties shall file an answer or motion in response to a request for review, or a statement that no answer or motion will be filed, within 15 days of receipt of the request specifically admitting or denying facts or alleged errors stated in the request and setting forth any other matters to be considered on review.

(c) A request for review may be amended once as a matter of right prior to filing of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter, a motion for leave to amend the request shall be filed with the Administrative Law Judge. An Administrative Law Judge may not grant a motion for leave to amend unless all parties agree to an extension of the date of commencement of the hearing under § 4.1364. A request for review may not be amended after a hearing commences.

(d) An interested party shall have 10 days from filing of a request for review that is amended as a matter of right or the time remaining for response to the original request, whichever is longer, to file an answer, motion, or statement in accordance with paragraph (b) of this section. If the Administrative Law Judge grants a motion to amend a request for review, the time for an interested party to file an answer, motion, or statement shall be set forth in the order granting it.

(e) Failure of any party to comply with the requirements of paragraph (a) or (b) of this section may be regarded by an Administrative Law Judge as a waiver by that party of the right to

commencement of a hearing within 30 days of the filing of a request for review if the Administrative Law Judge concludes that the failure was substantial and that another party was prejudiced as a result.

[56 FR 2143, Jan. 22, 1991; 56 FR 5061, Feb. 7, 1991]

§ 4.1364 Time for hearing; notice of hearing; extension of time for hearing.

Unless all parties agree in writing to an extension or waiver, the Administrative Law Judge shall commence a hearing within 30 days of the date of the filing of the request for review or amended request for review and shall simultaneously notify the applicant or permittee and all interested parties of the time and place of such hearing before the hearing commences. The hearing shall be of record and governed by 5 U.S.C. 554. An agreement to waive the time limit for commencement of a hearing may specify the length of the extension agreed to.

§ 4.1365 Status of decision pending administrative review.

The filing of a request for review shall not stay the effectiveness of the OSMRE decision pending completion of administrative review.

§ 4.1366 Burdens of proof.

(a) In a proceeding to review a decision on an application for a new permit—

(1) If the permit applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations or as to the appropriateness of the permit terms and conditions, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the permit or as to the inappropriateness of the permit terms and conditions.

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the permit application fails in some manner to comply with the applicable requirements of the Act or the regulations, or that OSMRE

§ 4.1367

should have imposed certain terms and conditions that were not imposed.

(b) In a proceeding to review a permit revision ordered by OSMRE, OSMRE shall have the burden of going forward to establish a prima facie case that the permit should be revised and the permittee shall have the ultimate burden of persuasion.

(c) In a proceeding to review the approval or disapproval of an application for a permit renewal, those parties opposing renewal shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the renewal application should be disapproved.

(d) In a proceeding to review the approval or disapproval of an application for a permit revision or an application for the transfer, assignment, or sale of rights granted under a permit—

(1) If the applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with applicable requirements of the Act or the regulations, and the applicant requesting review shall have the ultimate burden of persuasion as to entitlement to approval of the application; and

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act and the regulations.

(e) In a proceeding to review a decision on an application for a coal exploration permit—

(1) If the coal exploration permit applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the approval.

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act or the regulations.

43 CFR Subtitle A (10–1–11 Edition)

§ 4.1367 Request for temporary relief.

(a) Where review is requested pursuant to § 4.1362, any party may file a request for temporary relief at any time prior to a decision by an Administrative Law Judge, so long as the relief sought is not the issuance of a permit where a permit application has been disapproved in whole or in part.

(b) The request shall be filed with the Administrative Law Judge to whom the case has been assigned. If no assignment has been made, the application shall be filed in the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203 (phone 703-235-3800).

(c) The application shall include—

(1) A detailed written statement setting forth the reasons why relief should be granted;

(2) A statement of the specific relief requested;

(3) A showing that there is a substantial likelihood that the person seeking relief will prevail on the merits of the final determination of the proceeding; and

(4) A showing that the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(d) The Administrative Law Judge may hold a hearing on any issue raised by the application.

(e) The Administrative Law Judge shall issue expeditiously an order or decision granting or denying such temporary relief. Temporary relief may be granted only if—

(1) All parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(2) The person requesting such relief shows a substantial likelihood of prevailing on the merits of the final determination of the proceeding; and

(3) Such relief will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(f) Appeals of temporary relief decisions.

(1) Any party desiring to appeal the decision of the Administrative Law

Office of the Secretary, Interior

§4.1372

Judge granting or denying temporary relief may appeal to the Board, or, in the alternative, may seek judicial review pursuant to section 526(a), 30 U.S.C. 1276(a), of the Act.

(2) The Board shall issue an expedited briefing schedule and shall issue a decision on the appeal expeditiously.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§4.1368 Determination by the Administrative Law Judge.

Unless all parties agree in writing to an extension or waiver, the Administrative Law Judge shall issue a written decision in accordance with §4.1127 within 30 days of the date the hearing record is closed by the Administrative Law Judge. An agreement to waive the time limit for issuing a decision may specify the length of the extension agreed to.

§4.1369 Petition for discretionary review; judicial review.

(a) Any party aggrieved by a decision of an Administrative Law Judge may file a petition for discretionary review with the Board within 30 days of receipt of the decision or, in the alternative, may seek judicial review in accordance with 30 U.S.C. 1276(a)(2) (1982). A copy of the petition shall be served simultaneously on the Administrative Law Judge who issued the decision, who shall forthwith forward the record to the Board, and on all other parties to the proceeding.

(b) The petition shall set forth specifically the alleged errors in the decision, with supporting argument, and shall attach a copy of the decision.

(c) Any party may file a response to a petition for discretionary review within 20 days of receipt of the petition.

(d) The Board shall issue a decision denying the petition or granting the petition and deciding the merits within 60 days of the deadline for filing responses.

REVIEW OF OSM DECISIONS PROPOSING TO SUSPEND OR RESCIND OR SUSPENDING OR RESCINDING IMPROVIDENTLY ISSUED PERMITS

SOURCE: 59 FR 54326, Oct. 28, 1994, unless otherwise noted.

§4.1370 Scope.

Sections 4.1370 through 4.1377 govern the procedures for review of a written notice of proposed suspension or rescission of an improvidently issued permit issued by OSM under 30 CFR 773.22 and of a written notice of suspension or rescission of an improvidently issued permit issued by OSM under 30 CFR 773.23.

[67 FR 61511, Oct. 1, 2002]

§4.1371 Who may file, where to file, when to file.

(a) A permittee that is served with a notice of proposed suspension or rescission under 30 CFR 773.22 or a notice of suspension or rescission under 30 CFR 773.23 may file a request for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203 (telephone 703-235-3800) within 30 days of service of the notice.

(b) Failure to file a request for review within 30 days of service of the notice shall constitute a waiver of review of the notice. An untimely request for review shall be dismissed.

(c) Where appropriate under the Administrative Dispute Resolution Act, 5 U.S.C. §§571-583, the Hearings Division may use a dispute resolution proceeding, if the parties agree to such proceeding, before the procedures set forth in §§4.1373 through 4.1377.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61511, Oct. 1, 2002]

§4.1372 Contents of request for review, response to request, amendment of request.

(a) The request for review shall include:

(1) A copy of the notice of proposed suspension or rescission or the notice of suspension or rescission;

(2) Documentary proof, or, where appropriate, offers of proof, concerning the matters in 30 CFR 773.21(a) and (b)

§ 4.1373

or 30 CFR 773.14(c) for a notice of proposed suspension or rescission, or 30 CFR 773.23(a)(1) through (a)(6) for a notice of suspension or rescission, showing that the person requesting review is entitled to administrative relief;

(3) A statement whether the person requesting review wishes an evidentiary hearing or waives the opportunity for such a hearing;

(4) A request for specific relief; and

(5) Any other relevant information.

(b) Within 20 days of service of the request for review by the permittee in accordance with 43 CFR 4.1109, OSM and all interested parties shall file an answer to the request for review or a motion in response to the request or a statement that no answer or motion will be filed. OSM or any interested party may request an evidentiary hearing even if the person requesting review has waived the opportunity for such a hearing.

(c) The permittee may amend the request for review once as a matter of right before a response in accordance with paragraph (b) of this section is required to be filed. After the period for filing such a response, the permittee may file a motion for leave to amend the request for review with the administrative law judge. If the administrative law judge grants a motion for leave to amend, he shall provide OSM and any other party that filed a response in accordance with paragraph (b) not less than 10 days to file an amended response.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 61511, Oct. 1, 2002]

§ 4.1373 Hearing.

(a) If a hearing is requested, the administrative law judge shall convene the hearing within 90 days of receipt of the responses under § 4.1372(b). The 90-day deadline for convening the hearing may be waived for a definite time by the written agreement of all parties, filed with the administrative law judge, or may be extended by the administrative law judge, in response to a motion setting forth good cause to do so, if no other party is prejudiced by the extension.

(b) The administrative law judge shall give notice of the hearing at least

43 CFR Subtitle A (10–1–11 Edition)

10 days in advance of the date of the hearing.

[59 FR 54362, Oct. 28, 1994; 59 FR 56573, Nov. 14, 1994]

§ 4.1374 Burdens of proof.

(a) OSM shall have the burden of going forward to present a prima facie case of the validity of the notice of proposed suspension or rescission or the notice of suspension or rescission.

(b) The permittee shall have the ultimate burden of persuasion by a preponderance of the evidence that the notice is invalid.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 61512, Oct. 1, 2002]

§ 4.1375 Time for initial decision.

The administrative law judge shall issue an initial decision within 30 days of the date the record of the hearing is closed, or, if no hearing is held, within 30 days of the deadline for filing responses under § 4.1372(b).

§ 4.1376 Petition for temporary relief from notice of proposed suspension or rescission or notice of suspension or rescission; appeals from decisions granting or denying temporary relief.

(a) Any party may file a petition for temporary relief from the notice of proposed suspension or rescission or the notice of suspension or rescission in conjunction with the filing of the request for review or at any time before an initial decision is issued by the administrative law judge.

(b) The petition for temporary relief shall be filed with the administrative law judge to whom the request for review has been assigned. If none has been assigned, the petition shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203 (Telephone 703-235-3800).

(c) The petition for temporary relief shall include:

(1) A statement of the specific relief requested;

(2) A detailed statement of why temporary relief should be granted, including—

Office of the Secretary, Interior

§4.1381

(i) A showing that there is a substantial likelihood that petitioner will prevail on the merits, and

(ii) A showing that the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air or water resources;

(3) A statement whether the petitioner requests an evidentiary hearing.

(d) Any party may file a response to the petition no later than 5 days after it was served and may request a hearing even if the petitioner has not done so.

(e) The administrative law judge may hold a hearing on any issue raised by the petition within 10 days of the filing of responses to the petition, and shall do so if a hearing is requested by any party.

(f) The administrative law judge shall issue an order or decision granting or denying the petition for temporary relief within 5 days of the date of a hearing on the petition or, if no hearing is held, of service of the responses to the petition on all parties.

(g) The administrative law judge may only grant temporary relief if:

(1) All parties to the proceeding have been notified of the petition and have had an opportunity to respond and a hearing has been held if requested;

(2) The petitioner has demonstrated a substantial likelihood of prevailing on the merits; and

(3) Temporary relief will not adversely affect public health or safety or cause significant, imminent harm to land, air or water resources.

(h) Any party may file an appeal of an order or decision granting or denying temporary relief with the Board within 30 days of receipt of the order or decision or, in the alternative, may seek judicial review within 30 days in accordance with section 526(a) of the Act, 30 U.S.C. 1276(a). If an appeal is filed with the Board, the Board shall issue an expedited briefing schedule and shall decide the appeal expeditiously.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61512, Oct. 1, 2002]

§4.1377 Petition for discretionary review of initial decision.

(a) Any party may file a petition for discretionary review of an initial decision of an administrative law judge issued under §4.1375 with the Board within 30 days of receipt of the decision. An untimely petition shall be dismissed.

(b) The petition for discretionary review shall set forth specifically the alleged errors in the initial decision, with supporting argument, and shall attach a copy of the decision.

(c) Any party may file a response to the petition for discretionary review within 30 days of its service.

(d) The Board shall issue a decision denying the petition or granting the petition and deciding the merits within 60 days of the deadline for filing responses.

REVIEW OF OFFICE OF SURFACE MINING WRITTEN DECISIONS CONCERNING OWNERSHIP OR CONTROL CHALLENGES

SOURCE: 59 FR 54363, Oct. 28, 1994, unless otherwise noted.

§4.1380 Scope.

Sections 4.1380 through 4.1387 govern the procedures for review of a written decision issued by OSM under 30 CFR 773.28 on a challenge to a listing or finding of ownership or control.

[67 FR 61512, Oct. 1, 2002]

§4.1381 Who may file; when to file; where to file.

(a) Any person who receives a written decision issued by OSM under 30 CFR 773.28 on a challenge to an ownership or control listing or finding may file a request for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203 (telephone 703-235-3800) within 30 days of service of the decision.

(b) Failure to file a request for review within 30 days of service of the decision constitutes a waiver of review of the decision. An untimely request for review shall be dismissed.

(c) Where appropriate under the Administrative Dispute Resolution Act, 5 U.S.C. §§571-583, the Hearings Division

§ 4.1382

may use a dispute resolution proceeding, if the parties agree to such proceeding, before the procedures set forth in §§ 4.1383 through 4.1387.

[59 FR 54363, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1382 Contents of request for review; response to request; amendment of request.

(a) The request for review shall include:

- (1) A copy of the decision of OSM;
- (2) A statement of the alleged errors in the decision and the facts that entitle the person requesting review to administrative relief;
- (3) A statement whether the person requesting review wishes an evidentiary hearing or waives the opportunity for such a hearing;
- (4) A request for specific relief; and
- (5) Any other relevant information.

(b) Within 20 days of service of the request for review in accordance with 43 CFR 4.1109, OSM and all interested parties shall file an answer to the request for review or a motion in response to the request or a statement that no answer or motion will be filed. OSM or any interested party may request an evidentiary hearing even if the person requesting review has waived the opportunity for a hearing.

(c) The person filing the request for review may amend it once as a matter of right before the response in accordance with paragraph (b) of this section is required to be filed. After the period for filing such a response, the person may file a motion for leave to amend the request with the administrative law judge. If the administrative law judge grants a motion for leave to amend, he shall provide OSM and any other party that filed a response in accordance with paragraph (b) not less than 10 days to file an amended response.

§ 4.1383 Hearing.

(a) If a hearing is requested, the administrative law judge shall convene the hearing within 90 days of receipt of responses under § 4.1382(b). The 90-day deadline for convening the hearing may be waived for a definite time by the written agreement of all parties, filed with the administrative law judge, or

43 CFR Subtitle A (10–1–11 Edition)

may be extended by the administrative law judge, in response to a motion setting forth good cause to do so, if no other party is prejudiced by the extension.

(b) The administrative law judge shall give notice of the hearing at least 10 days in advance of the date of the hearing.

§ 4.1384 Burdens of proof.

(a) OSM shall have the burden of going forward to present a prima facie case of the validity of the decision.

(b) The person filing the request for review shall have the ultimate burden of persuasion by a preponderance of the evidence that the decision is in error.

§ 4.1385 Time for initial decision.

The administrative law judge shall issue an initial decision within 30 days of the date the record of the hearing is closed, or, if no hearing is held, within 30 days of the deadline for filing responses under § 4.1382(b).

§ 4.1386 Petition for temporary relief from decision; appeals from decisions granting or denying temporary relief.

(a) Any party may file a petition for temporary relief from the decision of OSM in conjunction with the filing of the request for review or at any time before an initial decision is issued by the administrative law judge.

(b) The petition for temporary relief shall be filed with the administrative law judge to whom the request for review has been assigned. If none has been assigned, the petition shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203 (Telephone 703–235–3800).

(c) The petition for temporary relief shall include:

- (1) A statement of the specific relief requested;
- (2) A detailed statement of why temporary relief should be granted, including:

- (i) A showing that there is a substantial likelihood that petitioner will prevail on the merits, and

- (ii) A showing that granting the relief requested will not adversely affect

Office of the Secretary, Interior

§4.1391

the public health or safety or cause significant, imminent environmental harm to land, air or water resources;

(3) A statement whether the petitioner requests an evidentiary hearing.

(d) Any party may file a response to the petition no later than 5 days after it was served and may request a hearing even if the petitioner has not done so.

(e) The administrative law judge may hold a hearing on any issue raised by the petition within 10 days of the filing of responses to the petition, and shall do so if a hearing is requested by any party.

(f) The administrative law judge shall issue an order or decision granting or denying the petition for temporary relief within 5 days of the date of a hearing on the petition or, if no hearing is held, of service of the responses to the petition on all parties.

(g) The administrative law judge may only grant temporary relief if:

(1) All parties to the proceeding have been notified of the petition and have had an opportunity to respond and a hearing has been held if requested;

(2) The petitioner has demonstrated a substantial likelihood of prevailing on the merits; and

(3) Temporary relief will not adversely affect public health or safety or cause significant, imminent environmental harm to land, air or water resources.

(h) Any party may file an appeal of an order or decision granting or denying temporary relief with the Board within 30 days of receipt of the order or decision or, in the alternative, may seek judicial review within 30 days in accordance with section 526(a) of the Act, 30 U.S.C. 1276(a). If an appeal is filed with the Board, the Board shall issue an expedited briefing schedule and shall decide the appeal expeditiously.

[59 FR 54363, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002]

§4.1387 Petition for discretionary review of initial decisions.

(a) Any party may file a petition for discretionary review of an initial decision of an administrative law judge issued under §4.1385 with the Board within 30 days of receipt of the deci-

sion. An untimely petition shall be dismissed.

(b) The petition for discretionary review shall set forth specifically the alleged errors in the initial decision, with supporting argument, and shall attach a copy of the decision.

(c) Any party may file a response to the petition for discretionary review within 30 days of its service.

(d) The Board shall issue a decision denying the petition or granting the petition and deciding the merits within 60 days of the deadline for filing responses.

REQUEST FOR REVIEW OF OSM DETERMINATIONS OF ISSUES UNDER 30 CFR PART 761 (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS)

SOURCE: 52 FR 39530, Oct. 22, 1987, unless otherwise noted.

§4.1390 Scope.

Sections 4.1391 through 4.1394 set forth the procedures for obtaining review of an OSM determination under 30 CFR 761.16 that a person does or does not have valid existing rights.

[67 FR 61512, Oct. 1, 2002]

§4.1391 Who may file; where to file; when to file; filing of administrative record.

(a) The person who requested a determination under 30 CFR 761.16 or any person with an interest that is or may be adversely affected by a determination that a person does or does not have valid existing rights may file a request for review of the determination with the office of the OSM official whose determination is being reviewed and at the same time shall send a copy of the request to the Interior Board of Land Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, VA 22203 (telephone 703-235-3750). OSM shall file the complete administrative record of the determination under review with the Board as soon as practicable.

(b) OSM must provide notice of the valid existing rights determination to the person who requested that determination by certified mail, or by overnight delivery service if the person has

§ 4.1392

agreed to bear the expense of this service.

(1) When the determination is made independently of a decision on an application for a permit or for a permit boundary revision, a request for review shall be filed within 30 days of receipt of the determination by a person who has received a copy of it by certified mail or overnight delivery service. The request for review shall be filed within 30 days of the date of publication of the determination in a newspaper of general circulation or in the FEDERAL REGISTER, whichever is later, by any person who has not received a copy of it by certified mail or overnight delivery service.

(2) When the determination is made in conjunction with a decision on an application for a permit or for a permit boundary revision, the request for review must be filed in accordance with § 4.1362.

(c) Failure to file a request for review within the time specified in paragraph (b) of this section shall constitute a waiver of the right to review and the request shall be dismissed.

[56 FR 2145, Jan. 22, 1991, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61512, Oct. 1, 2002]

§ 4.1392 Contents of request; amendment of request; responses.

(a) The request for review:

(1) Must include:

(i) A clear statement of the reasons for appeal;

(ii) A request for specific relief;

(iii) A copy of the decision appealed from; and

(iv) Any other relevant information; and

(2) May not exceed 30 pages, excluding exhibits, declarations, and other attachments, unless the Board orders otherwise upon motion for good cause shown.

(b) All interested parties shall file an answer or motion in response to a request for review or a statement that no answer or motion will be filed within 15 days of receipt specifically admitting or denying facts or alleged errors stated in the request and setting forth any other matters to be considered on review.

43 CFR Subtitle A (10–1–11 Edition)

(c) A request for review may be amended once as a matter of right prior to receipt of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter, a motion for leave to amend the request shall be filed with the Board.

(d) An interested party may file an answer, motion, or statement as described in paragraph (b) of this section in response to an amended request for review as follows:

(1) If the request for review is amended as a matter of right, the answer, motion, or statement must be filed within the longer of the following periods:

(i) The time remaining for response to the original request for review; or

(ii) Ten days after receipt of the amended request for review; and

(2) If the Board grants a motion to amend a request for review, the answer, motion, or statement must be filed within the time set by the Board in its order granting the motion.

(e) The filing of a reply is discouraged. However, a person who filed a request for review may file a reply that:

(1) Is limited to the issues raised in an answer or motion;

(2) Does not exceed 20 pages, excluding exhibits, declarations, and other attachments, unless the Board orders otherwise upon motion for good cause shown; and

(3) Is filed within:

(i) Fifteen days after service of the answer or motion under paragraph (b) or (d)(1) of this section; or

(ii) The time set by the Board in its order under paragraph (d)(2) of this section.

[52 FR 39530, Oct. 22, 1987, as amended at 75 FR 64670, Oct. 20, 2010]

§ 4.1393 Status of decision pending administrative review.

43 CFR 4.21(a) applies to determinations of the Office of Surface Mining under 30 U.S.C. 1272(e).

§ 4.1394 Burden of proof.

(a) If the person who requested the determination is seeking review, OSM shall have the burden of going forward to establish a prima facie case and the

Office of the Secretary, Interior

§ 4.1606

person who requested the determination shall have the ultimate burden of persuasion.

(b) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the person who requested the determination does or does not have valid existing rights.

[67 FR 61512, Oct. 1, 2002]

Subpart M—Special Procedural Rules Applicable to Appeals of Decisions Made Under OMB Circular A-76

AUTHORITY: 5 U.S.C. 301.

SOURCE: 45 FR 75213, Nov. 14, 1980, unless otherwise noted. Redesignated at 52 FR 39525, Oct. 22, 1987.

§ 4.1600 Purpose and nature of the appeal process.

(a) This appeals procedure embodies an informal administrative review of agency decisions made under OMB Circular A-76, and is intended to assure that such decisions are fair, equitable, and in compliance with the provisions of the Circular. This procedure provides affected parties an opportunity to request that such decisions be objectively reviewed by a party independent of the A-76 decision process.

(b) This appeals procedure is administrative rather than judicial in nature, and does not provide for a judicial review or for further levels of appeal. The decisions of the appeals official are final.

(c) This procedure is intended to protect the rights of all affected parties and, therefore, neither the procedure nor agency determinations may be subject to negotiation, arbitration, or agreements with any one of the parties.

§ 4.1601 Basis for appeal.

(a) An appeal may be based only on a specific alleged material deviation (or deviations) by the agency from the provisions of OMB Circular A-76 or Supplement No. 1 thereto, the "Cost Comparison Handbook." Appeals may not be based on other factors, such as the economic impact of the agency's deci-

sion on a community, or other socioeconomic issues.

(b) This appeals procedure shall be used only to resolve questions of the determination between contract and in-house performance of a commercial or industrial type requirement, and shall not apply to questions concerning award to one contractor in preference to another.

§ 4.1602 Who may appeal under this procedure.

An appeal may be filed by any affected party, viz, employees of the Federal activity under review, authorized employee representative organizations, contractors, and potential contractors.

§ 4.1603 Appeal period.

An appeal may be submitted at any time within 45 calendar days after announcement of an agency decision regarding the method of performance of a commercial or industrial type requirement.

§ 4.1604 Method of filing an appeal.

An appeal must be in writing, and must be submitted to: Director, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203.

[45 FR 75213, Nov. 14, 1980. Redesignated at 52 FR 39525, Oct. 22, 1987. And amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1605 Action by the Office of Hearings and Appeals.

(a) Upon receipt of an appeal, the Director, Office of Hearings and Appeals shall designate an appeals official, who shall process the appeal.

(b) The appeals official shall promptly docket the appeal and send copies of the docketing notice to the appellant, the director or other appropriate official of the bureau or office involved, and the Solicitor of the Department.

§ 4.1606 Department representation.

(a) Upon receipt of the docketing notice, the Solicitor shall appoint counsel to represent the Department in the appeal action, and so notify the appellant and the appeals official.

(b) Within seven calendar days of his designation the Department Counsel