

**DEPARTMENT OF THE INTERIOR****Office of Hearings and Appeals****43 CFR Part 4**

RIN 1090-AA74

**Special Rules Applicable to Surface Coal Mining Hearings and Appeals; Petitions for Award of Costs and Expenses Under Section 525(e) of the SMCRA****AGENCY:** Office of Hearings and Appeals, Interior.**ACTION:** Proposed rulemaking.

**SUMMARY:** The Office of Hearings and Appeals (OHA) proposes to amend its rule governing who may receive an award of costs and expenses, including attorney fees, under section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) to provide that an applicant for a permit may only receive an award from the Office of Surface Mining Reclamation and Enforcement (OSM) if OSM denies an application in bad faith and for the purpose of harassing or embarrassing the applicant.

**DATES:** Comments must be received on or before September 26, 2000.

**ADDRESSES:** Written comments about this proposed rule may be mailed or hand-delivered to Robert L. Baum, Director, Office of Hearings and Appeals, U.S. Department of the Interior, Room 1111, 4015 Wilson Boulevard, Arlington, Virginia 22203. See **SUPPLEMENTARY INFORMATION** for additional information on the handling of comments.

**FOR FURTHER INFORMATION CONTACT:** Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. Phone: 703-235-3750.

**SUPPLEMENTARY INFORMATION:** Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, and we will honor such requests to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from

organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

OSM has requested that OHA propose amending 43 CFR 4.1294(b) and (c) to provide that an applicant for a permit from OSM is entitled to an award of costs and expenses from OSM only when circumstances demonstrate that OSM denied an application in bad faith and for the purpose of harassing or embarrassing the applicant. The term "applicant" is defined at 30 CFR 701.5.

In *Skyline Coal Co. v. OSM*, 150 IBLA 51 (1999), the Interior Board of Land Appeals (IBLA) affirmed Administrative Law Judge David Torbett's award of more than \$200,000 in costs and expenses, including attorney fees, to Skyline Coal Company (Skyline). OSM had denied an application from Skyline for a permit and Skyline had filed a request for administrative review by OHA of the denial. During the course of the hearing before Judge Torbett, OSM agreed that Skyline's permit application could be approved. Judge Torbett therefore sustained Skyline's request for review.

Subsequently, Skyline filed a petition for an award of costs and expenses with Judge Torbett under section 525(e) of SMCRA, 30 U.S.C. 1275(e) (1994), and the implementing regulations in 43 CFR 4.1291. OSM opposed Skyline's petition, arguing that Skyline was a permittee under 43 CFR § 4.1294(c) and could only receive an award if it could demonstrate OSM had denied its application for a permit in bad faith. Skyline argued it was an applicant for a permit, not a permittee, and thus was entitled to an award under § 4.1294(b) as a "person" who had initiated a review proceeding and had prevailed in whole or in part, achieving at least some degree on the merits. IBLA affirmed Judge Torbett's fee award, stating:

In his August 1, 1994, order, Judge Torbett rejected OSM's argument, noting that an applicant for a permit is not, and does not become, a "permittee" until the applicant is issued a permit. He further found that, as a mining company, Skyline was a "person" under 30 U.S.C. § 1291(19) (1994) and was therefore eligible to petition for and receive an award of costs and fees under 43 CFR § 4.1294(b). Judge Torbett noted that 43 CFR § 4.1294(c) specifically covers enforcement actions taken against permittees, that is, cases involving cessation orders (CO's), NOV's, or orders to show cause why a permit should not be suspended or revoked. That regulation, the Judge observed, makes no mention of denials of permit applications. He ruled that the governing regulation was 43 CFR § 4.1294(b) and that Skyline met the criteria therein. (August 1, 1994, Order at 3-5, 7.)

*Id.* at 53.

In his concurring opinion, Administrative Judge Burski suggested that if OSM were dissatisfied with the result of the case it could seek an amendment of the regulations that would accord with its interpretation of SMCRA. *Id.* at 63.

OSM has requested OHA, which is responsible for these regulations, to propose an amendment that would limit an award to an applicant for a permit to the circumstances in § 4.1294(c). OSM suggests that the legislative history of SMCRA supports its request, quoting from the Senate's report on S.7, which was the Senate's version of SMCRA:

In many, if not most, cases in both the administrative and judicial forum, the citizen who sues to enforce the law, or participates in administrative proceedings to enforce the law, will have little or no money with which to hire a lawyer. If private citizens are to be able to assert the rights granted them by this bill, and if those who violate this bill's requirements are not to proceed with impunity, then citizens must have the opportunity to recover the attorneys' fees necessary to vindicate their rights. Attorneys' fees may be awarded to the permittee or government when the suit or participation is brought in bad faith.

S. Rep. No. 95-128, 95th Cong. 1st Sess. 59 (1977). When § 4.1294 was first proposed, some commenters suggested substituting the statutory language of section 525(e). OHA rejected the suggestion "because it did not answer any of the questions raised by the statutory language." 43 FR 34395 (Aug. 3, 1978).

The proposed amendment of §§ 4.1294(b) and (c) is designed to answer the question of when an applicant for a permit may be eligible for an award of costs and expenses, including attorney fees, and to limit an award to an applicant to the circumstances in § 4.1294(c).

**Procedural Matters***Executive Order 12866—Regulatory Planning and Review*

This document is not a significant rule under Executive Order 12866.

a. This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. The proposed revision would have the effect of limiting the circumstances authorizing the award of costs and expenses, including attorney fees, to applicants whose applications have

been denied. The rule would not impose any new costs on the coal industry. While the number of requests for attorney fees that would be processed under the proposed revisions is not known, it is expected that only a very few applicants would potentially qualify for an award as a result of prevailing over OSM in a proceeding to review OSM's denial of a permit application.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

No other agency has a rule implementing section 525(e) of SMCRA.

c. This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

No entitlements, grants, user fees, or loan programs are authorized by section 525(e) of SMCRA or its implementing regulations.

d. This rule does not raise novel legal or policy issues.

The legal issue involved—the standard for making an award of costs and expenses to an applicant for a surface coal mining permit who prevails on administrative review of the denial of an application by OSM—has been discussed by IBLA in the *Skyline Coal Co.* case, 150 IBLA 51 (1999). The proposed amendment is in response to that discussion.

#### *Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This determination is based on the findings that the proposed revisions will not significantly change costs to industry and will not affect state or local governments. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets for the reasons stated above.

Only a few applicants for surface coal mining permits would be expected to apply for a permit, have their applications denied by OSM, prevail on administrative review of the denial, and be able to demonstrate that OSM's denial was based on bad faith and for the purpose of harassing or embarrassing the applicant, and an even smaller number of these applicants would be small entities.

#### *Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of \$100 million or more for the reasons stated above.

The potential reduction in the award of costs and expenses as a result of amending this rule would be, at most, in the hundreds of thousands of dollars per year, given the number of applicants for permits and the even smaller number whose applications would be denied by OSM for reasons they could demonstrate amounted to bad faith and for the purpose of harassing or embarrassing the applicant.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions because the rule does not impose major new requirements on the coal mining industry or consumers.

No cost increases of any kind appear foreseeable as a result of limiting the award of costs and expenses to applicants for surface mining permits to instances in which their applications are denied by OSM for reasons of bad faith and for the purpose of harassing or embarrassing the applicant.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises for the reasons stated above.

Any eventual effects of the nature listed above from limiting the circumstances when an applicant for the award of costs and expenses could receive an award as a result of prevailing on administrative review of the denial of a permit application because OSM's denial was based on bad faith and for the purpose of harassing or embarrassing the applicant would be minimal.

#### *Unfunded Mandates*

This rule does not impose an unfunded mandate on state, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on state, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531, *et seq.*) is not required.

A small government is not likely to apply for a surface coal mining permit.

Therefore, it is improbable that there would be an effect of any kind on small governments.

#### *Executive Order 12630—Takings*

In accordance with Executive Order 12630, the rule does not have takings implications. This determination is based on the fact that the rule will not have an impact on the use or value of private property and so, does not result in significant costs to the government.

No realistic claims of a constitutional taking appear possible from defining the standard for an award of costs and expenses to an applicant for a surface mining permit whose application is denied to be OSM's bad faith and for the purpose of harassing or embarrassing the applicant in denying the application.

#### *Executive Order 13132—Federalism*

This proposed rule does not have Federalism implications. It would not have "substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."

The only potential impact on the states from this proposed amendment is that they would wish to change their state program rules to correspond to the changed federal rule. This does not appear to qualify as a significant effect.

#### *Executive Order 12988—Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

The proposed amendment of the rule clearly limits the basis for an award of costs and expenses to an applicant for a surface coal mining permit whose application is denied to a demonstration of bad faith and for the purpose of harassing or embarrassing the applicant on the part of OSM in denying the application. The proposed rule has no pre-emptive or retroactive effect.

#### *Paperwork Reduction Act*

The proposed rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. § 3501 *et seq.*

The proposed amendment of the rule would not change the information a petitioner for an award of costs and expenses would provide with the petition; it would only change the standard for when an applicant for a

permit could receive an award. Therefore, no information collection is involved.

#### National Environmental Policy Act

OHA has reviewed this proposed rule and determined that it is categorically excluded from the National Environmental Policy Act process in accordance with the Departmental Manual 516 DM 2, Appendix 1.10.

#### Clarity of this Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "\$" and a numbered heading; for example, § 4.1294). (5) Is the description of the proposed rule in the "SUPPLEMENTARY INFORMATION" section of this preamble helpful in understanding the proposed rule? What else could we do to make the proposed rule easier to understand?

Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW, Washington, DC 20240. You may also e-mail the comments to this address: [exsec@ios.doi.gov](mailto:exsec@ios.doi.gov).

#### List of Subjects in 43 CFR Part 4

Administrative practice and procedure, Lawyers, Surface mining.

Dated: July 3, 2000.

**John Berry,**

*Assistant Secretary, Policy, Management and Budget.*

For the reasons set forth in the preamble, OHA proposes to amend 43 CFR Part 4 as follows:

#### PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES

1. The authority citation for part 4, Subpart L, continues to read as follows:

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

2. 43 CFR 4.1294(b) and (c) are revised to read as follows:

#### § 4.1294 Who may receive an award.

\* \* \* \* \*

(b) From OSM to any person, other than an applicant or permittee or his or her representative, who initiates or participates in any proceeding under the Act, 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 an applicant or permittee from OSM when the applicant or permittee demonstrates that OSM denied an application or 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 applicant or permittee; or

\* \* \* \* \*

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#### DEPARTMENT OF THE INTERIOR

#### Fish and Wildlife Service

#### 50 CFR Part 17

#### Endangered and Threatened Wildlife and Plants: 12-Month Finding on Petition To Reclassify the Cheetah (*Acinonyx jubatus*) in the Republic of Namibia From Endangered to Threatened

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** 12-month finding on petition.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the 12-month finding on a petition to reclassify the cheetah (*Acinonyx jubatus*) population of Namibia from endangered to threatened. We have determined that the petitioned action is not warranted because available information is inadequate to determine that the factors that caused the cheetah to become endangered have been reduced sufficiently. Specifically, the lack of reliable, long-term population estimates for cheetah in Namibia make it impossible to determine whether the population is of adequate size to withstand most natural catastrophes or whether the population is increasing, decreasing, or stable. Such population trend information is necessary to determine the extent to which the substantial regulatory mechanisms initiated by the Government of Namibia are reducing the killing of cheetahs by Namibian farmers. This killing has been

an important mortality factor for cheetahs in Namibia over the past three decades.

**DATES:** The 12-month finding was made on June 28, 2000.

**ADDRESSES:** If you have any questions about this decision, you may send correspondence or questions to the Chief, Office of Scientific Authority; Mail Stop: Room 750, Arlington Square; U.S. Fish and Wildlife Service; Washington, DC 20240 (Fax number: 703-358-2276; E-mail address: [r9osa@fws.gov](mailto:r9osa@fws.gov)). Express and messenger deliveries should be addressed to Chief, Office of Scientific Authority, Room 750; U.S. Fish and Wildlife Service; 4401 North Fairfax Drive; Arlington, Virginia 22203.

**FOR FURTHER INFORMATION CONTACT:** Dr. Susan Lieberman, Chief, Office of Scientific Authority (Telephone number: 703-358-1708; Fax number: 703-358-2276; E-mail address: [r9osa@fws.gov](mailto:r9osa@fws.gov)) or Dr. Kurt A. Johnson, Office of Scientific Authority (same telephone and fax numbers as above; E-mail address: [kurt\\_johnson@fws.gov](mailto:kurt_johnson@fws.gov)).

#### SUPPLEMENTARY INFORMATION:

#### Background

On August, 11, 1995, the Service received a petition from the government of the Republic of Namibia and Safari Club International requesting that the Namibian population of the cheetah (*Acinonyx jubatus*) be reclassified from endangered to threatened under the Endangered Species Act (Act) of 1973 as amended (16 U.S.C. 1531 *et seq.*). The petition gives three reasons for requesting the reclassification of the cheetah in Namibia: (1) The original listing of the Namibian cheetah population was in error; (2) the cheetah population in Namibia has recovered; and (3) the current endangered classification puts the species at greater risk because it impedes the conservation efforts of the Government of Namibia.

In the **Federal Register** of March 19, 1996 (61 FR 11181), we announced a 90-day finding that the petition presented substantial information indicating that the requested action (*i.e.*, reclassification from endangered to threatened) may be warranted. We initiated a status review of the cheetah in Namibia, with the original comment period ending on July 17, 1996. Before a decision was taken we received two new documents of importance to this issue. The first was the final report of a 1996 cheetah and lion (*Panthera leo*) workshop sponsored by the World Conservation Union/Species Survival Commission (IUCN/SSC) Conservation Breeding Specialist Group (CBSG) in