

FEDERAL REGISTER: 43 FR 15441 (April 13, 1978)

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Hearings and Appeals

43 CFR Part 4

Special Rules Applicable to Surface Coal Mining Hearings and Appeals

ACTION: Proposed rules.

SUMMARY: The regulations in this subpart set out the rules of procedure to govern adjudicatory proceedings before Administrative Law Judges and the Board of Surface Mining and Reclamation Appeals pursuant to the Surface Mining Control and Reclamation Act of 1977.

DATES: Comments must be received by May 23, 1978. Public hearings will be held starting at 9:30 a.m. in Washington, D.C., on May 10, 1978, and at 9:30 a.m. in Denver, Colo., on May 12, 1978.

ADDRESSES: Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, Va. 22203. The public hearings will be held at the Department of the Interior Auditorium, 18th and C Streets NW., Washington, D.C., and Conference Room 708, Colorado State Bank Building, 1600 Broadway, Denver, Colo.

FOR FURTHER INFORMATION CONTACT: David B. Graham, Director, Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, Va. 22203, 703-557-1500.

SUPPLEMENTARY INFORMATION:

The Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C.1201-1328, required the Secretary of the Interior to publish initial environmental protection regulations that would be applicable to all coal mining operations regulated by the States until a State has an approved regulatory program or a Federal regulatory program has been implemented in the State. The Secretary published such regulations on December 13, 1977. The initial environmental protection regulations make numerous references to proceedings which shall be conducted in the Office of Hearings and Appeals pursuant to procedures set forth in 43 CFR Part 4. These proposed regulations have been developed to provide procedures for various proceedings required by the Act and the initial regulations. Following publication of the permanent substantive regulations on August 3, 1978, as required by Section 501(b) of the Act, additional procedural regulations will be proposed to supplement these procedural rules.

The public is requested to comment on these proposed regulations. Full public participation will improve the quality of these regulations.

A brief discussion of the major parts in the proposed regulations follows:

Sections 4.1100-16 set forth the jurisdiction of the Board of Surface Mining and Reclamation Appeals (the Board) and contain certain general regulations governing practice before the Administrative Law Judges and the Board. Sections 4.1120-29 outline the powers of the Administrative Law Judges and set forth generally the actions that may be taken by the Administrative Law Judges.

Sections 4.1130-42 contain rules to regulate discovery in proceedings under the Act before Administrative Law Judges.

Sections 4.1150-58 set out the procedure for obtaining review of a proposed assessment of a civil penalty.

Sections 4.1160-71 provide the method for obtaining review of Section 521(a)(3) notices of violation or Section 521(a)(2) or Section 521(a)(3) orders of cessation or the modification, vacation, or termination of such notices or orders. These procedures apply to orders of cessation which are not subject to expedited review under Section 4.1180 et seq. of these proposed regulations.

Sections 4.1180-86 contain regulations to provide for expedited review of certain Section 521(a)(2) or Section 521(a)(3) orders of cessation. Such expedited review is required by Section 525(b) of the Act. [Page 15442]

Sections 4.1190-96 encompass the procedures for review of an order to show cause why a permit for surface coal mining operations should not be suspended or revoked.

Sections 4.1200-05 set forth the rules governing formal review of alleged acts of discrimination. These rules are proposed to implement Section 703 of the Act and 30 CFR Part 830.

Sections 4.1210-39 have been reserved for permit procedures which will be developed following completion of permanent substantive regulations governing the application process for permits for surface coal mining operations.

Sections 4.1240-59 have been reserved for procedures relating to performance bond release. Such procedures will be proposed following publication of permanent substantive regulations concerning performance bond release.

Sections 4.1260-66 set forth the procedures for applying for temporary relief in Section 525 review proceedings under the Act. The procedure for seeking temporary relief from alleged discriminatory acts is covered in Section 4.1203 of these proposed rules.

Sections 4.1270-76 establish procedures governing Board review of decisions or orders of Administrative Law Judges.

Sections 4.1280-86 provide procedures for appealing directly to the Board from a decision of the Director, Office of Surface Mining (OSM), granting or denying a small operator exemption pursuant to 30 CFR 710.12, or from any other written decision of an official of OSM which specifically grants the right of appeal to the Board.

Sections 4.1290-95 set forth regulations to govern the awarding of costs and expenses, including attorneys' fees, in administrative proceedings pursuant to Section 525(e) of the Act.

GENERAL PROVISIONS

Subject to the provisions of 43 CFR 4.21(c) and 4.5, the Board exercises the final decisionmaking authority of the Secretary with respect to the various proceedings under the Act outlined in Section 4.1101. Except in the limited situation of appeals to the Board from decisions of OSM under Section 4.1280, the Board acts only to review orders or decisions of Administrative Law Judges.

Section 4.1107 establishes the procedures for initiating a proceeding before an Administrative Law Judge. The Office of Hearings and Appeals has established hearings division field offices for the purposes of this Act. Nevertheless, these regulations require that documents that initiate any such proceedings, other than those involving expedited review proceedings under Section 4.1180 and temporary relief proceedings under Section 4.1260, must be filed with the main office of the Office of Hearings and Appeals in Arlington, Va. The Office felt that by allowing the Chief Administrative Law Judge to make case assignments, he would be able to oversee proceedings under the Act and be able to keep a particular field office from being inundated with cases. Because of the expeditious nature of proceedings under Section 4.1180, the Office decided to have such proceedings initiated in the field office nearest the mine site. Section 4.1260 applications for temporary relief will be filed with the Administrative Law Judge to whom the case is assigned or with the field office of the Office of Hearings and Appeals nearest the mine site.

The street addresses for the field offices of the Office of Hearings and Appeals have not yet been determined. They will be published in the final rules. The cities in which the field offices will be located are: Charleston, W.Va.; Knoxville, Tenn.; Louisville, Ky.; and Pittsburgh, Pa. There are presently two field offices of the Office of Hearings and Appeals which will be handling cases arising in the western United States. They are located at: 6432 Federal Building, Salt Lake City, Utah 84138, and Suite 170, 2020 Hurley Way, Sacramento, Calif. 95825.

Section 4.1109 indicates that any party initiating a proceeding in the Office of Hearings and Appeals must serve the initiating documents on the Field Solicitor, Department of the Interior, for the region where the mine site is located.

The Office of the Solicitor, Division of Surface Mining, Department of the Interior, has established field offices in various cities to handle the legal work for the Office of Surface Mining. The street addresses of all the field offices will be published in the final rules.

Section 4.1110 governing intervention contains criteria to provide guidance for the Administrative Law Judge in determining whether intervention is appropriate in a particular case. These criteria are based upon the Act's requirement that adequate procedures be established for public participation in the enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under the Act. The Office contemplates that intervention will be liberally granted based upon these criteria.

Section 4.1116 is proposed to make clear the mandate of Congress as expressed in Section 525(a)(1) of the Act that the filing of an application for review shall not operate as a stay of any such order or notice.

DISCOVERY

The discovery sections have been proposed to allow the full range of discovery available under the *Federal Rules of Civil Procedure*. Consideration was given to merely adopting the *Federal Rules* on discovery with certain exceptions. However, a careful examination of the *Federal Rules* made it apparent that wholesale adoption of those rules would in many instances be inappropriate and confusing when applied to the administrative setting with its specialized procedures and terminology. For that reason, the approach taken was to develop specific discovery procedures for administrative proceedings under the Act and to pattern such rules after the discovery sections of the *Federal Rules*, where appropriate. The Office also relied upon the discovery provisions of other agencies including the Nuclear Regulatory Commission, 10 CFR 2.740-44.

Section 4.1142 provides that the special rules of discovery in Sections 4.1130-41 are to be supplemented by certain *Federal Rules* on discovery, to the extent the *Federal Rules* are not inconsistent with the special rules. The rationale for Section 4.1142 is that it will allow the body of case law which has evolved under the *Federal Rules* on discovery to be applicable to discovery problems arising under this Act.

CIVIL PENALTY PROCEEDINGS

The proposed regulations provide that any person charged with a civil penalty may file a petition with the main office of the Office of Hearings and Appeals for review of the proposed assessment of the penalty. The petition must be accompanied by full payment of the proposed assessment. Section 518(c) of the Act provides that failure to make timely payment of the proposed assessment "shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."

Section 4.1154 contains the procedure to obtain review of a decision of the Director, OSM, granting or denying a waiver of the civil penalty formula. This procedure was developed to implement 30 CFR 723.15.

Section 4.1156 establishes a summary procedure for dispensing with civil penalty cases where the person against whom the proposed civil penalty is assessed fails to comply timely with a prehearing order of an Administrative Law Judge or where such person fails to appear at a hearing.

Section 4.1157 provides that in establishing the amount of the civil penalty, the Administrative Law Judge must adhere to the point system and conversion table contained in 30 CFR Part 723. The section also provides, however, that the Administrative Law Judge may waive the use of the point system if he determines that waiver of the point system would further abatement of violations of the Act. The purpose of such a provision is to grant to the trier of fact the same authority to waive the civil penalty formula and point system as is available to the Director, OSM, acting in his enforcement capacity. This provision is premised upon the concept that an Administrative Law Judge should be able to waive the civil penalty formula in appropriate cases. [Page 15443]

REVIEW OF SECTION 521 NOTICES OF VIOLATION AND ORDERS OF CESSATION

The proposed regulations attempt to provide reasonable procedures for review of notices of violation and orders of cessation. Notices of violation are reviewable under Sections 4.1160-71. Orders of cessation are reviewable under Sections 4.1160-71 or under Sections 4.1180-86, depending upon the status of the order.

Section 525(b) of the Act provides that the Secretary shall issue a written decision within 30 days of receipt of an application for review of an order of cessation issued pursuant to Section 521(a)(2) or 521(a)(3). As set forth in Section

4.1180, expedited review of an order of cessation is available if temporary relief has not been granted under Section 525(c) or 526(c) of the Act and if the order is unabated. If temporary relief has been granted or if the order has been abated, review will take place under Sections 4.1160-71.

Because of the severe time restraint imposed by Congress in Section 525(b) of the Act, the Office was forced to adopt stringent procedures to comply with the mandate of Congress.

Since all parties will be under tremendous pressure in an expedited review situation, the proposed regulations require that a person qualifying for expedited review under Section 4.1180 and intending to file an expedited application under Section 4.1184 must notify the Field Solicitor, Department of the Interior, for the region in which the mine site is located, of such intention. Such notice will allow the Field Solicitor to take preliminary steps to prepare for the expedited proceeding.

The requirements of the Section 4.1184 application, while detailed, are deemed necessary if an Administrative Law Judge is to meet the time requirements of the Act for rendering his decision. If the 30-day decision requirement is invoked and a hearing is not waived, the proposed regulations require that the Administrative Law Judge issue his decision within 30 days of receipt of the application. If the Administrative Law Judge's decision is not appealed to the Board, it becomes final for the Department. If a party seeks review of the Administrative Law Judge's decision, the Board must issue its decision within 30 days of receipt of the appeal.

Consideration was given to requiring the Administrative Law Judge's decision within 15 days of the date the application was received by the Office of Hearings and Appeals, and any Board decision within 30 days of such date. In fact, such an approach was adopted in Section 4.1187(h), when all parties waive the opportunity for a hearing and the Administrative Law Judge determines that a hearing is not necessary.

In the ordinary situation in which a hearing will be held, the Office feels that 30 days for the Administrative Law Judge's decision and 30 days for the Board decision is consistent with the statutory language and is the most reasonable solution to a very difficult problem.

The Office is also considering requiring that evidence at the expedited hearing be developed, to the maximum extent feasible, through written submissions, including written direct testimony and written cross-examination. Such a system has been adopted by the Food and Drug Administration for formal evidentiary hearings, 21 CFR 2.154, 41 FR 51706 (1976), and was recommended by the Senate Government Affairs Committee, "Study on Federal Regulations," S. Doc. No. 95-72, July 1977. Senate Bill 2490, the Regulatory Procedures Reform Act, which proposes amendments to the Administrative Procedures Act (APA), would amend section 556(c) of the APA to provide for the introduction of evidence in written form, unless the oral presentation of testimony or oral cross-examination is necessary for a full and true disclosure of relevant evidentiary facts and the denial of such an opportunity would materially prejudice a party.

Section 4.1186 of the proposed regulations provides that a person qualifying to file an expedited application under Section 4.1184 may waive his right to such review. If such a waiver is made, the person may file a Section 4.1164 application and the procedures in Section 4.1160 et seq. will apply, except that the final administrative decision will be issued within 120 days of the filing of the application. The Office believes that such a section is necessary in that some qualified applicants may not need the 30-day decision or may not want to undertake the filing of a Section 4.1184 application. In such a situation the person may waive the requirement, yet may receive the final administrative decision on the application within a reasonable amount of time, i.e., 120 days.

A qualified applicant who files a Section 4.1184 application and who requests a 30-day decision shall be entitled to such review unless his actions constitute a waiver under Section 4.1187(i). This subsection is proposed as a means to encourage complete cooperation in the expedited proceeding by the applicant who initiates the proceeding. Even if there is a waiver under Section 4.1187(i), the final administrative decision must be issued within 120 days of the filing of the application.

The Office is still considering the above alternatives and solicits comments regarding the system which should be adopted.

SUSPENSION OR REVOCATION PROCEEDINGS

The proposed regulations for suspension or revocation proceedings require that a permittee's answer to a show cause order issued by the Director, OSM, must be filed with the Office of Hearings and Appeals. At a hearing held by an

Administrative Law Judge pursuant to such an order, OSM will have the burden of going forward to establish a prima facie case that a pattern of violations, as described in 30 CFR 722.16, exists or has existed and that such violations were caused by the unwarranted failure of the permittee or were willfully caused by the permittee. If the permittee fails to overcome the prima facie case and the Administrative Law Judge determines that a pattern of violations exists, the Administrative Law Judge must order the permit suspended or revoked.

OSM is also required to present evidence to establish a prima facie case for the terms of the revocation or the length and terms of the suspension.

REVIEW OF ALLEGED DISCRIMINATORY ACTS UNDER SECTION 703 OF THE ACT

The procedures for filing an application for review of discriminatory acts are set forth with specificity in 30 CFR 830.12. An informal conference is provided for in 30 CFR 830.12 in order to attempt to resolve problems on an informal basis, wherever possible, before resorting to formal adjudicatory proceedings in the Office of Hearings and Appeals.

While OSM is required to file the application with the Office of Hearings and Appeals within 7 days of its receipt, the Office of Hearings and Appeals does not become involved in the proceedings until one of the requests listed in Section 4.1200(b) is made.

APPLICATIONS FOR TEMPORARY RELIEF

The Act specifically provides in Section 525(c) that an applicant seeking review of a notice of violation or order of cessation issued under section 521 may request that the Secretary grant temporary relief from such notice or order. The proposed regulations outline the procedure for filing such a request and the specific contents of the request.

Where an application is filed requesting temporary relief from an order issued pursuant to Section 521(a)(2) or Section 521(a)(3) of the Act, Congress has stated in Section 525(c) of the Act that the order or decision on the request must be issued within 5 days of receipt of the application. [Page 15444]

Section 4.1266 of the proposed regulations attempts to set forth procedures which will insure that an applicant desiring such expeditious relief is able to receive a decision on his request within the 5-day period. The proposed procedures are stringent and will necessitate strict adherence to the rules and cooperation of the parties to achieve the statutory time requirement.

Comments which will help the Office refine these procedures to satisfy the Congressional mandate are solicited.

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

The Office anticipates that the bulk of the civil penalty cases in which review is sought before the Board will be routine cases. Accordingly, Section 4.1270 of the proposed regulations provides for a petition system in which the person seeking review files a petition with the Board and the Board determines whether to grant or deny the petition. If the petition is denied, the Board will issue an order indicating that the Administrative Law Judge's decision shall constitute the final administrative decision on the matter sought to be reviewed. If, on the other hand, the petition raises in the opinion of the Board a significant question of law, the Board will grant the petition and issue a decision in the case.

All other decisions of Administrative Law Judges are appealable to the Board under the proposed procedures in Section 4.1271 et seq.

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

The regulations on informal adjudicatory proceedings before the Board are proposed primarily to accommodate appeals from decisions of the Director of OSM on applications for small operator exemptions, filed pursuant to 30 CFR 710.12(h). In addition, these provisions are designed to allow OSM an opportunity to grant a right to informal administrative review of its written decisions in those instances deemed by the Director to be appropriate.

AWARD OF COSTS AND EXPENSES

Section 525(e) of the Act provides for the awarding of costs and expenses, including reasonable attorneys' fees, in administrative proceedings under the Act in the discretion of the Secretary.

Under the proposed regulations, costs and expenses may be awarded in an administrative proceeding which results in a final order being issued by an Administrative Law Judge or by the Board.

The legislative history of the Act is clear that Section 525(e) of the Act is intended to encourage public participation in the administrative process. Such a provision is designed to encourage citizens to bring good faith actions to insure that the Act is being properly enforced. It is the intention of the Office that these proposed rules not be interpreted to discourage good faith actions on the part of interested citizens.

The Office has utilized the legislative history of the Act, Federal statutes, and various court cases concerning the awarding of attorneys' fees in arriving at these proposed rules.

The Surface Mining Act and its legislative history appear to authorize awards of costs and expenses on the basis of two theories. One theory might be characterized as fee shifting, in which the person adjudged to have violated the law might be required to pay the cost and expenses of the party affected by the wrong. For example, if a permittee violated the Act to the detriment of a citizen, costs and expenses might be awarded against the permittee and in favor of the citizen. The second theory might be referred to as a Government compensation theory and would allow for Government payment to citizens for their participation in administrative proceedings where there has been a substantial contribution to a determination of the issues. In this situation, a citizen might intervene in or initiate a proceeding and substantially contribute and be compensated, even if the citizen were not the winning party.

While the proposed regulations do not specifically address these two theories, comments are invited concerning any addition or different language which will assist the Office in implementing section 525(e) of the Act.

The Department of the Interior has determined that this document does not constitute a major federal action requiring preparation of an environmental impact statement under section 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. Section 4332 (1970).

A public hearing will be held at the Department of the Interior Auditorium, 18th and C Streets NW., Washington, D.C., on May 10, 1978, at 9:30 a.m., and in Conference Room 708, Colorado State Bank Building, Denver, Colo., on May 12, 1978, at 9:30 a.m. The purpose of the hearing is to allow full public participation in the rulemaking process. Individuals making oral statements or submitting written comments should limit their statements to these proposed rules. Individuals are encouraged to submit statements in writing.

DRAFTING INFORMATION

Principal authors of these regulations are Bruce R. Harris, Office of Hearings and Appeals, and Marcus P. McGraw, Office of the Solicitor.

The regulations proposed for issuance as Subpart L of 43 CFR Part 4 are set forth below.

Dated: April 10, 1978.

DAVID B. GRAHAM, *Director, Office of Hearings and Appeals.* Hearings and Appeals.

SUBPART 1 - SPECIAL RULES APPLICABLE TO SURFACE COAL MINING HEARINGS AND APPEALS

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

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AUTHORITY: Section 201, Pub.L. 96-57, 91 Stat. 445 (30 U.S.C. 1291 et seq)

SUBPART L - SPECIAL RULES APPLICABLE IS SURFACE COAL MINING HEARINGS AND APPEALS

GENERAL PROVISIONS

SECTION 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 Surface Mining and Reclamation Appeals in the Office of Hearings and Appeals.
- (d) "Field Solicitor" means an attorney with the Office of the Solicitor, Division of Surface Mining, Department of the Interior, who is located in a Division of Surface Mining field office.
- (e) "OHA" means the Office of Hearings and Appeals, Department of the Interior.
- (f) "OSM" means the Office of surface Mining Reclamation and Enforcement, Department of the Interior.

SECTION 4.1101 - JURISDICTION OF THE BOARD.

- (a) The jurisdiction of the Board, as set forth in 43 CFR 4.1(4), and subject to 43 CFR 4.21(c) and 43 CFR 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 raining operations pursuant to section 514 of the Act;
 - (2) Petitions for review of proposed [*] of civil penalties issued by OSM pursuant to section 513 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 [*] acts filed pursuant to Section 703 of the Act;
 - (6) Applications for temporary relief in appropriate cases;
 - (7) Petitions for award of costs and expenses under Section 525(e) of the Act;
 - (6) Appeals from orders or decisions of Administrative Law Judges; and
 - (9) All other appeals and review procedures under the Act which are permitted by these regulations.
- (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.

SECTION 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.

SECTION 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.

SECTION 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.

SECTION 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 Section 4.1150 of this Part, OSM, as represented by the Solicitor, any person against whom a proposed assessment is made and who files a petition, and any other person having an interest which is or may be adversely affected; [Page 15446]
 - (2) In a review proceeding under Section 4.1160 or Section 4.1180 of this Part, OSM, as represented by the Solicitor, and:
 - (i) if a permittee files an application for review, the permittee; and
 - (ii) if any other person having an interest which is or may be adversely affected files an application for review, the permittee and the person filing such application;
 - (3) In a proceeding to suspend or revoke a permit under Section 4.1190 of this Part, OSM, as represented by the Solicitor, and the permittee who is ordered to show cause; and
 - (4) In a discriminatory discharge proceeding under Section 4.1200 of this Part, OSM, as represented by the Solicitor, any employee or any authorized representative of employees who files an application for review, and the alleged discriminating party, except where an employee files an application under Section 4.1201(c) of this Part, only such applicant and the alleged discriminating party.
- (b) Any other person claiming a right of participation as a party may seek leave to intervene in a proceeding by filing a petition to do so pursuant to Section 4.1110 of this Part.
- (c) If any person has a right to participate as a party in a proceeding under the Act and fails to exercise that 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.

SECTION 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 of their representatives and witnesses.

SECTION 4.1107 - FILING OF DOCUMENTS.

- (a) Except in expedited review proceedings under Section 4.1180 of this Part and temporary relief proceedings under Section 4.1260 of this Part, any initial pleadings or documents in a proceeding to be conducted or being conducted by an administrative Law Judge under these rules must be filed, by hand or by mail, with the Hearings Division, Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, 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 below.

(c) Administrative Law Judges will be assigned to field offices of OHA at the following addresses: (to be published in the final rules).

(d) Any notice of appeal or documents in a proceeding to be conducted or being conducted by the Board shall be filed with the Board of Surface Mining and Reclamation Appeals, 4015 Wilson Boulevard, Arlington, Va. 22203.

(e) Any person filing initial pleadings or documents with OHA shall furnish an original and one copy. Any person filing other documents with OHA shall furnish only an original.

(f) Any person who has initiated a proceeding under these rules shall file proof of service with OHA in the form of a return receipt where service is by registered or certified mail, or an acknowledgment by the party served or verified return where service is made personally. A certificate of service shall accompany all other documents filed by a party in any proceeding.

(g) The effective filing date for documents initiating proceedings other than expedited review proceedings under Section 4.1180 of this Part and temporary relief proceedings under Section 4.1260 of this Part shall be the date the document is received in the main office of OHA, Arlington, Va.

(h) The effective filing date for all other documents, including documents initiating an expedited proceeding under Section 4.1180 of this Part and temporary relief proceedings under Section 4.1260 of this Part, shall be the date the document is received by the Administrative Law Judge or in a proceeding before the Board the date the document is received by the Board.

SECTION 4.1108 - FROM 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 of OSM identification number.

(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.

SECTION 4.1109 - SERVICE.

(a) Any party initiating a proceeding in OHA under the Act shall serve copies of the initiating documents on the Field Solicitor, Department of the Interior, for the region where the mine site is located and on any other statutory parties under Section 4.1105 of this Part. The addresses of the Field Solicitors are as follows: (to be published in final regulations). Any party or other person shall serve any other documents being filed subsequently with OHA on all other parties and all other persons participating in the proceeding.

(b) Copies of documents by which any proceeding is initiated shall be served on OSM and all other 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 documents initiating a proceeding is complete at the time of personal service or, if service is made by mail, upon receipt. Service of all subsequent documents is complete at the time of personal service or, if service is by mail, upon mailing.

(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.

SECTION 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 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 a direct economic or personal stake in the outcome of the proceeding.

(d) If neither (c)(1) nor (c)(2) 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 [Page 15447]
- (4) The effect of intervention on the agency's implementation of its statutory mandate.

SECTION 4.1111 - VOLUNTARY DISMISSAL.

Any party who initiated a proceeding before OHA may withdraw by moving to dismiss at any stage of a proceeding and the Administrative Law Judge or the Board may grant such a motion.

SECTION 4.1112 - MOTIONS.

(a) Except in oral hearings 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 with appropriate supporting affidavits.

(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.

SECTION 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.

SECTION 4.1114 - ADVANCEMENT OF PROCEEDINGS.

(a) Except in expedited review proceedings under Section 4.1180 of this Part, and in temporary relief proceedings under Section 4.1266 et seq. of this Part, 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 registered or certified mail, return-receipt requested. 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 5 days from the date of service of the motion 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) Following the timely receipt by the Board of statements in response to the motion, 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.

SECTION 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.

SECTION 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.

EVIDENTIARY HEARINGS

SECTION 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).

SECTION 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 authorized by law;
- (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.

SECTION 4.1122 - CONDUCT OF ADMINISTRATIVE LAW JUDGES.

Administrative Law Judges shall adhere to the Code of Judicial Conduct.

SECTION 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.

SECTION 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 only if the ruling presents a controlling question of law and an immediate appeal would materially advance ultimate disposition by the judge. [Page 15448]

SECTION 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.

(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 Administrative 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.

SECTION 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.

SECTION 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 reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and
- (b) An order granting or denying relief.

SECTION 4.1128 - EFFECT OF INITIAL ORDER OR DECISION.

An initial order or decision under Section 4.1127 of this Part shall become final if that order or decision is not timely appealed to the Board under Section 4.1270 or Section 4.1271 of this Part.

SECTION 4.1129 - CERTIFICATION OF RECORD.

Except in expedited review proceedings under Section 4.1180 of this Part, 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 Office of Hearings and Appeals.

DISCOVERY

SECTION 4.1139 - 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;
- (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.

SECTION 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.

SECTION 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 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 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.

SECTION 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.

SECTION 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 obtains information upon the basis of which -
 - (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.

SECTION 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 Section 4.1140 of this Part, 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. [Page 15449]

(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) Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to Section 4.1132(d) of this Part.

(e) 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 Section 4.1132(d) of this Part.

(f) This section does not preclude an independent request for issuance of a subpoena directed to a person not a party for production of documents and things.

SECTION 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.

SECTION 4.1137 - DEPOSITIONS UPON ORAL EXAMINATION OR UPON WRITTEN INTERROGATORIES.

(a) Any party desiring to take the testimony of any other party or other person by deposition upon oral examination or written interrogatories 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.

(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 on written interrogatories, the party taking the deposition shall serve a copy of the interrogatories, showing each interrogatory 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 seven (7) days after service, any other party may serve cross-interrogatories. The interrogatories, cross-interrogatories, 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. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition.

(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.

SECTION 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 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; 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.

SECTION 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 proceedings.

(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. [Page 15450]

(c) Interrogatories may relate to any matters which can be inquired into under Section 4.1132 of this Part. 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.

SECTION 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 Section 4.1132 of this Part 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 Section 4.1132 of this Part.

(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.

SECTION 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 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.

SECTION 4.1142 - THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DISCOVERY.

The above-listed special rules of discovery are to be supplemented by the Federal Rules of Civil Procedure relating to discovery contained in 28 U.S.C., Rules 26, 28, 29, 30, 31, 32, 33, 34, 36, and 37 (a)(1), (a)(2), (a)(3), (b)(2)(A), (b)(2)(B), (b)(2)(C), and (d) except that portion dealing with expenses, to the extent such Federal Rules are not inconsistent with the special rules.

PETITIONS FOR REVIEW OF PROPOSED ASSESSMENTS OF CIVIL PENALTIES

SECTION 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.

SECTION 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 723.17, a petition for review must be filed within 15 days from service of notice by the conference officer that the conference is deemed completed.

SECTION 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 723.13 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 - Office of the Secretary - Department of the Interior - 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) 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.

SECTION 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 OHA.

SECTION 4.1154 - REVIEW OF WAIVER DETERMINATION.

(a) Within 10 days following 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 723.15. [Page 15451]

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

(c) Review of the granting or denial of the waiver shall be limited to the written determination of the Director of OSM, 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 and make a determination pursuant to Section 4.1157 of this Part.

SECTION 4.1155 - BURDEN 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 violation and as to the amount of the penalty. The ultimate burden of persuasion in establishing the fact of violation and in establishing that the proposed assessment is appropriate shall rest with OSM.

SECTION 4.1156 - SUMMARY DISPOSITION.

(a) In a civil penalty proceeding where the person against whom the proposed civil penalty is assessed fails timely to comply 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 referred 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.

SECTION 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 723.12, 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 the point system and conversion table contained in 30 CFR Part 723, except 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 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 is not filed with the Board or the Board refuses to grant such a petition, OHA 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.

SECTION 4.1158 - APPEALS.

Any party may petition the Board to review the decision of an Administrative Law Judge concerning a proposed assessment according to the procedures set forth in Section 4.1270 of this Part.

REVIEW OF SECTION 521 NOTICES OF VIOLATION AND ORDERS OF CESSATION

SECTION 4.1160 - SCOPE.

These regulations govern applications for review of -

(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 Section 4.1180 of this Part or the modification, vacation, or termination of an order of cessation under Sections 521(a)(2) or 521(a)(3).

SECTION 4.1161 - WHO MAY FILE.

A permittee issued a notice or order by the Secretary pursuant to the provisions of Sections 521(a)(2) or 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 Section 4.1160 of this Part may file an application for review.

SECTION 4.1162 - TIME FOR FILING.

Any person filing an application for review under Section 4.1160 of this Part 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 a notice or an 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.

SECTION 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.

SECTION 4.1164 - CONTENTS OF APPLICATION.

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

- (a) A statement of facts entitling that person to administrative relief;
- (b) A specific request for 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.

SECTION 4.1165 - ANSWER.

(a) Where an application for review is filed by a permittee, OSM and any other person granted leave to intervene, pursuant to Section 4.1110 of this Part, shall file an answer within 20 days of service of a copy of such application. [Page 15452]

(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 Section 4.1110 of this Part.

SECTION 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 waived; and
- (d) Any other relevant information.

SECTION 4.1167 - NOTICE OF HEARING.

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

SECTION 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 determines that such an answer is appropriate.

SECTION 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.

SECTION 4.1170 - RELATED NOTICES OR ORDERS.

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

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

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

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

SECTION 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 Section 4.1180 of this Part, 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

SECTION 4.1180 - PURPOSE.

The purpose of these regulations is to govern applications for review of unabated orders of cessation for which temporary relief has not been granted under Section 525(c) or Section 526(c) of 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 Section 4.1164, and the procedures in Section 4.1160 et seq. of this Part shall apply. If there is a waiver, the final administrative decision shall be issued within 120 days of the filing of the application.

SECTION 4.1181 - WHO MAY FILE.

(a) An application for review of an unabated 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 (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 (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 (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.

SECTION 4.1182 - WHERE TO FILE.

The application shall be filed in the OHA field office nearest the mine site with a copy sent to the main OHA office in Arlington, Virginia.

SECTION 4.1183 - TIME FOR FILING.

(a) Any person intending to file an application for review under this section 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 Section 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 application for review within 40 days of the date of issuance of the order.

SECTION 4.1184 - CONTENTS OF APPLICATION.

(a) Any person filing an application for review under this section shall incorporate in that application regarding each claim for relief -

- (1) A statement of facts, verified by affidavit, entitling that person to administrative relief;
- (2) A specific request for relief;
- (3) A supporting memorandum of law delineating each issue to be asserted by the applicant during the expedited proceeding;
- (4) A copy of the order sought to be reviewed;
- (5) A statement whether the person requests or waives the opportunity for an evidentiary hearing;
- (6) The direct testimony of all applicant's witnesses in affidavit form;
- (7) Copies of all exhibits and other documentary evidence that the applicant intends to introduce as evidence at the hearing;
- (8) A statement whether the applicant desires to exercise his right to a written decision on the application within 30 days of receipt of the application pursuant to Section 525(b) of the Act; and
- (9) Any other relevant information.

(b) Failure to include a statement in the application invoking the 30-day decision requirement shall constitute a waiver of such requirement.

SECTION 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.

SECTION 4.1186 - PROCEDURE IF 30-DAY DECISION REQUIREMENT IS WAIVED.

If the person qualified to receive a 30-day decision waives that right, he may file a Section 4.1164 application and the procedures in Section 4.1160 et seq. of this Part shall apply. If there is a waiver, the final administrative decision shall be issued within 120 days of the filing of the application.

SECTION 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. [Page 15453]

(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 written 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 30 days of the filing of the application.

(f) If any party desires to appeal to the Board, such party may -

(1) If the Administrative Law Judge makes an oral ruling, make an oral statement 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 receipt of the appeal.

(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 3 working days from receipt of such decision within which to appeal to the Board. The Board shall issue its decision within 30 days of the date the application is filed with OHA.

(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 Section 4.1184 or Section 4.1187 of this Part, such action shall constitute a waiver of the 30-day requirement of Section 525(b) of the Act.

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

SECTION 4.1190 - INITIATION OF PROCEEDINGS.

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 main office of OHA at the same time the order is issued to the permittee.

SECTION 4.1191 - ANSWER.

The permittee shall have 30 days from receipt of the order within which to file his answer with the main office of OHA.

SECTION 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, as described in 30 CFR 722.16, 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 he 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.

SECTION 4.1193 - 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 shall rest with the permittee.

SECTION 4.1194 - DETERMINATION BY THE ADMINISTRATIVE LAW JUDGE.

- (a) Upon a determination by the Administrative Law Judge that a pattern of violations exists, pursuant to 30 CFR 722.16(c)(2) or 30 CFR 722.16(c)(3), the Administrative Law Judge shall order the permit either suspended or revoked.
- (b) 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.

SECTION 4.1195 - 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.

SECTION 4.1196 - 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.

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

SECTION 4.1200 - FILING OF THE APPLICATION FOR REVIEW WITH THE OFFICE OF HEARINGS AND APPEALS.

(a) Pursuant to 30 CFR 830.13, within 7 days of receipt of an application for review of alleged discriminatory acts. OSM shall file a copy of the application in the main office of OHA. OSM shall also file in the main office of OHA a copy of any answer submitted in response to the application for review. [Page 15454]

(b) The application for review, as filed in the main office of OHA, shall be held in suspense until one of the following takes place -

- (1) A request for temporary relief is filed pursuant to Section 4.1203 of this Part;
- (2) A request is made by OSM for the scheduling of a hearing pursuant to 30 CFR 830.14(a);
- (3) A request is made by the applicant for the scheduling of a hearing pursuant to 30 CFR 830.14(a);
- (4) A request is made by the applicant for the scheduling of a hearing pursuant to 30 CFR 830.14(b); or
- (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.

SECTION 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 main office of 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 main office of 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 behalf 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 Section 4.1110 of this Part.

SECTION 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 main office of OHA within 20 days of service of such request.

(b) If the alleged discriminating person has not filed an answer to the application, such person must 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.

SECTION 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 main office of OHA.

(c) The application shall include -

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

(2) A showing supported by affidavits of facts, that there is a substantial likelihood that findings and decision of the Administrative Law Judge in the matters to which the application relates will be favorable to the applicant;

(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.

(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.

SECTION 4.1204 - DETERMINATION BY ADMINISTRATIVE LAW JUDGE.

Upon a finding of a violation of Section 703 of the Act or 30 CFR 830.11, the Administrative Law Judge shall order the appropriate affirmative relief including, but not limited to, the rehiring or reinstatement of the applicant to his former position with appropriate compensation.

SECTION 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 Section 4.1271 et seq. of this Part.

APPLICATIONS FOR TEMPORARY RELIEF

SECTION 4.1260 - SCOPE.

These regulations contain the procedures for seeking temporary relief in Section 525 review proceedings under the Act. Procedures for seeking temporary relief from alleged discriminatory acts are covered in Section 4.1203 of this Part.

SECTION 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.

SECTION 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 OHA field office nearest the mine site.

SECTION 4.1263 - CONTENTS OF APPLICATION.

The application shall include -

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

(b) A showing, supported by affidavits of fact, 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, supported by affidavit, 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.

SECTION 4.1264 - RESPONSE TO APPLICATION.

(a) Except as provided in Section 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 Section 4.1266(b), the Administrative Law Judge may hold a hearing on any issue raised by the application if he deems it appropriate.

SECTION 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 order or decision granting or denying such relief. [Page 15455]

SECTION 4.1266 - DETERMINATION ON APPLICATION CONCERNING AN ORDER OF CESSATION ISSUED PURSUANT TO SECTION 521(A)(2) OR SECTION 521(A)(3) OF THE ACT.

(a) If the 5-day requirement of section 525(c) of the Act is waived, the Administrative Law Judge shall expeditiously conduct a hearing, unless all parties waive such right, 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 applicant shall serve the Field Solicitor, Department of the Interior, in the region where the mine site is located and all other 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 the Field Solicitor and all other parties by telephone at the time of mailing that an application is being filed and what the contents of the application are.

(2) 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.

(3) 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.

(4) If a hearing is held -

(i) The Administrative Law Judge may require the parties to submit written proposed findings of fact and conclusions of law at the hearing which may be orally supplemented on 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.

(5) 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.

(6) 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 Section 4.1263 of this Part, such action shall constitute a waiver of the 5-day requirement of Section 525(c) of the Act.

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

SECTION 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 Section 4.1150 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 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 Sections 4.1273-77 of this Part are applicable and the Board shall use the point system and conversion table contained in 30 CFR Part 723 in recalculating assessments. If the petition is denied, the decision of the Administrative Law Judge shall be final for the Department.

SECTION 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 this subpart, except a civil penalty proceeding under Section 4.1150 of this Part.
- (b) Except in an expedited review proceeding under Section 4.1180 of this Part, or in a suspension or revocation proceeding under Section 4.1190 of this Part, a notice of appeal shall be filed with the Board 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.

SECTION 4.1272 - INTERLOCUTORY APPEALS.

- (a) If a party has sought certification under Section 4.1124 of this Part, 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.

SECTION 4.1273 - BRIEFS.

(a) Unless the Board orders otherwise, an appellant's brief is due on or before 30 days after the date the Board agrees to exercise discretionary review authority pursuant to Section 4.1270 of this Part or a notice of appeal is filed.

(b) If any appellant fails to file a timely brief, an appeal under this Part shall 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 objectionable 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 pages and an appellee's brief shall not exceed 25 pages. [Page 15456]

SECTION 4.1274 - REMAND.

The Board may remand cases if further proceedings are required.

SECTION 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.

SECTION 4.1276 - RECONSIDERATION.

(a) A party may move for reconsideration under Section 4.21(c) of this Part.

(b) The filing of a petition for reconsideration shall not stay the effect of any decision or order and shall not affect the finality of any decision or order for purposes of judicial review.

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

SECTION 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 do not require formal adjudication under the procedures set forth in 5 U.S.C. Section 554.

SECTION 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.

SECTION 4.1282 - APPEALS; HOW TAKEN.

(a) A person appealing under this section shall file a written notice of appeal with the Board of Surface Mining and Reclamation Appeals, 4015 Wilson Boulevard, Arlington, Va. 22203.

(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.

SECTION 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 Section 4.1285 of this Part.

SECTION 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.

SECTION 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.

SECTION 4.1286 - REQUEST FOR HEARING.

(a) Any party may request the Board to order a hearing before an Administrative Law Judge in order to present evidence on an issue of fact. Such a request shall be made in writing and filed with the Board within 20 days after the answer is due. Copies of the request shall be served in accordance with Section 4.1283.

(b) The allowance of a request for a hearing is within the discretion of the Board, and the Board may, on its own motion, refer any case to an Administrative Law Judge for a hearing on an issue of fact. If a hearing is ordered, the Board shall specify the issues upon which the hearing is to be held.

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

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

SECTION 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 shall constitute a waiver of the right to such an award.

SECTION 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, and the experience, reputation and ability of the individual or individuals performing the services.

SECTION 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.

SECTION 4.1294 - WHO MAY RECEIVE AN AWARD.

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

(a) To any person -

- (1) Who supplies the Secretary with information pursuant to 30 CFR 721.13, and who participates as a party in any administrative proceedings reviewing enforcement actions resulting therefrom, upon a finding that a violation of the Act, regulations or permit has occurred, or that an imminent hazard existed;
- (2) Who files an application for review of alleged discriminatory acts, pursuant to 30 CFR 830, upon a finding of discriminatory discharge or other acts of discrimination;
- (3) Who participates in an administrative proceeding upon a finding that that person made a substantial contribution to the full and fair determination of the issues.

(b) To a permittee -

- (1) Who demonstrates that OSM issued an order of cessation pursuant to 30 CFR 722.11 or 30 CFR 722.13, a notice of violation pursuant to 30 CFR 722.12, or an order to show cause pursuant to 30 CFR 722.17, in bad faith and for the purpose of harassing or embarrassing the permittee; or
- (2) Who 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 permittee. [Page 15457]

(c) To the Government when 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.

SECTION 4.1295 - 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 Section 4.1271 et seq. of this Part, unless the Board has made the initial decision concerning such an award.

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