

FEDERAL REGISTER: 59 FR 1486 (January 11, 1994)

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Hearings and Appeals (OHA)

43 CFR Part 4

Special Rules Applicable to Surface Coal Mining Hearings and Appeals

ACTION: Final rule.

SUMMARY: The Office of Hearings and Appeals (OHA) amends several existing rules that govern procedures for hearings and appeals under the Surface Mining Control and Reclamation Act of 1977 in order to bring the rules up to date. Because of events that have occurred since they were adopted, the existing rules omit references or contain incorrect references, are inconsistent with other rules, or fail to provide necessary information or procedures. The amendments correct these defects. In this document OHA also updates telephone numbers of offices of field solicitors and field offices of the Office of Surface Mining Reclamation and Enforcement (OSM), listed in the existing rules, to reflect changes which have been effected heretofore.

EFFECTIVE DATE: February 10, 1994.

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

SUPPLEMENTARY INFORMATION:

On November 19, 1991, OHA proposed amendments to existing procedural rules governing hearings and appeals under the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201 et seq.* (1988), because rules subsequently adopted or cases decided have rendered the existing rules out of date or shown them to be incomplete or inaccurate. See *56 FR 58330-58332* (Nov. 19, 1991). No comments were received on the published proposed amendments. The amendments effected by this final rulemaking are explained below under the heading for each rule involved.

AMENDMENT OF 43 CFR 4.1100

As a result of previous amendments of 43 CFR 4.1109(a) to provide current addresses and jurisdictions of field solicitors who are to be served documents (see *56 FR 2139, 2142-43 (Jan. 22, 1991)*, *56 FR 5061* (Feb. 7, 1991)), the definition of "field solicitor" in 43 CFR 4.1100(d) is superfluous. It was proposed to remove that definition and redesignate the following definitions in alphabetical order. No comments were received on this proposal. That definition is therefore removed and the following definitions (e) and (f) are redesignated (d) and (e).

AMENDMENT OF 43 CFR 4.1105(a)

30 CFR 842.15(d) provides a right of appeal to the Interior Board of Land Appeals (IBLA or the Board) under 43 CFR 4.1280 et seq. of the written determination, after informal review by the Director of the OSM or his or her designee, concerning the decision of an authorized representative of the Secretary not to inspect or take enforcement action concerning an alleged violation that is the subject of a request for a federal inspection under 30 CFR 842.12.

Similarly, 30 CFR 843.12(i) provides that any determination by an authorized representative of the Secretary granting or denying an abatement period exceeding 90 days under 30 CFR 842.12(h) shall contain a right of appeal to IBLA under 1280 et seq.

As the Board has had occasion to observe, however, 43 CFR 4.1105 does not name the permittee of the operation that is the subject of a determination of the Director or an authorized representative, or any person whose interests might be adversely affected by the outcome on appeal and who participated before OSM, as a party who must be served with a copy of the notice of appeal and statement of reasons under 43 CFR 4.1283(a) and who may participate under Sections

4.1284 and 4.1286. See *Save Our Cumberland Mountains, Inc.*, 108 IBLA 70, 83 n.7, 96 I.D. 139, 146 n.7 (1989). OHA therefore proposed to amend 43 CFR 4.1105(a) by adding subsection (5) naming such permittees and persons as parties.

After this addition to 43 CFR 4.1105(a) was proposed, however, the Board decided *Robert L. Clewell*, 123 IBLA 253 (1992). In that case, citizens who had requested their identity be kept confidential, in accordance with 30 CFR 842.12(b), later revealed their identity to the coal company whose operation they had requested be inspected by sending a copy of their statement of reasons of appealing the denial of their request for inspection to the company. Had they not done so, under the terms of Section 842.12(b), their "identity may not be revealed, even to other parties to a case, unless and until a competent official acting in response to a formal request filed under 5 U.S.C. 552 (1988) or other Federal law has determined that [their] identity must be made public because it does not fall within the scope of 5 U.S.C. 552(b)(7) (1988) or any other exemption from disclosure provided by law. See 42 FR 62665-66 (Dec. 13, 1977)." Robert L. Clewell, *supra* at 257 n.1.

As a result of this decision, OHA has added a statement to the new Section 4.1105(a)(5) that a person who wishes his or her identity kept confidential under 30 CFR 842.12(b) is responsible for maintaining that confidentiality when serving documents in accordance with Section 4.1109.

AMENDMENT OF 43 CFR 4.1109(a)

43 CFR 4.1109(a) is amended to update field solicitor office telephone number to reflect changes which have been effected heretofore.

AMENDMENT OF 43 CFR 4.1151(b)

OSM amended 30 CFR 723.19(a) and 845.19(a) to provide 30 days rather than 15 days in which a person may file a petition for review of a proposed civil penalty with the Hearings Division of OHA after the date of service of notice of an assessment conference officer's action. See 56 FR 10060, 10063 (Mar. 8, 1991). OHA therefore proposed to amend the corresponding procedural rule, 43 CFR 4.1151(b), to provide the same time and to add a reference to 30 CFR 845.18. No comments were received on the proposed change, so it is adopted.

AMENDMENTS OF 43 CFR 4.1152, 4.1154, and 4.1157

The references to 30 CFR part 723 in 43 CFR 4.1152(a)(2); to 30 CFR 723.15 in 43 CFR 4.1154(a); and to 30 CFR 723.12 and 723.13 in 43 CFR 4.1157 (a) and (b) need to be updated by correcting the references in 43 CFR 4.1154(a) and in 43 CFR 4.1157 (a) and (b) and by adding references to the corresponding sections in 30 CFR part 845. OHA proposed to amend 43 CFR 4.1152, 4.1154, and 4.1157 for this purpose. No comments on these proposed changes were received, so they are adopted.

AMENDMENT OF 43 CFR 4.1266(b)(2)

43 CFR 4.1266(b)(2) is amended to update OSM field office telephone numbers to reflect changes which have been effected heretofore.

AMENDMENT OF 43 CFR 4.1271(a)

When 43 CFR part 4, subpart L was originally promulgated in 1978, 43 CFR 4.1271(a) provided that an aggrieved party could 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." This is still the language of the rule. Since 1978, however, other rules have been added to subpart L that provide for a "petition for discretionary review," rather than a notice of appeal, as the document to file with IBLA when seeking review of the initial decision of an administrative law judge. See 43 CFR 4.1309, 4.1369 (56 FR 2139, 2144, Jan. 22, 1991; 56 FR 5061, Feb. 7, 1991). OHA has also proposed rules that provide for petitions for discretionary review. See 43 CFR 4.1377, 4.1387 (56 FR 45806, Sept. 6, 1991). Further, special procedures for seeking IBLA review exist for other proceedings in subpart L. See 43 CFR 4.1187, 4.1196, 4.1391.

Although it is possible for IBLA to clarify by decision which avenue of appeal is appropriate for each proceeding, see *The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement*, 107 IBLA 329 (1989), it is preferable for the procedural rules themselves to contain this information. OHA therefore proposed to amend 43 CFR 4.1271(a) so that the rule will specify for which proceedings a notice of appeal is appropriate. No comments on the proposed change were received, so it is adopted. Proceedings not covered by the procedural rules set forth in the revised Section 4.1271(a) contain special provisions for seeking review of initial decisions.

DETERMINATION OF EFFECTS

The Department has determined that these rules will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (*5 U.S.C. 601 et seq.*). These rules were not subject to OMB review under Executive Order 12866.

National Environmental Policy Act

The Department has determined that these rules will not significantly affect the quality of the human environment on the basis of the categorical exclusion of regulations of a procedural nature set forth in 516 DM 2, Appendix 1, section 1.10.

Paperwork Reduction Act

These rules contain no information collection requirements requiring Office of Management and Budget approval under *44 U.S.C. 3501 et seq.*

Takings Implication Assessment

These rules do not pose any takings implications requiring preparation of a Takings Implication Assessment under Executive Order No. 12630 of March 18, 1988.

Drafting Information

The primary author of these regulations is Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, Office of Hearings and Appeals, U.S. Department of the Interior.

LIST OF SUBJECTS IN 43 CFR PART 4

Administrative practice and procedure, Mines, Public lands, Surface mining.

For the reasons set forth in the preamble, subpart L of part 4 of title 43 of the Code of Federal Regulations is amended as set forth below.

Dated: December 12, 1993.

Bonnie R. Cohen, Assistant Secretary-Policy, Management and Budget.

43 CFR part 4 is amended as follows:

PART 4-[AMENDED]

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

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

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

SECTION 4.1100 -- [Amended]

2. Section 4.1100 is amended by removing paragraph (d) and redesignating paragraphs (e) and (f) as paragraphs (d) and (e) respectively.

3. Section 4.1105 is amended by adding paragraph (a)(5) to read as follows:

SECTION 4.1105 -- PARTIES.

(a) * * *

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

* * * * *

4. Section 4.1109 is amended by revising the phone numbers in paragraph (a) to read as follows:

SECTION 4.1109 -- SERVICE.

(a) * * *

East of the Mississippi River-

* * * * *

Telephone: (615) 545-4292, FAX (615) 545-4314.

* * * * *

Telephone: (412) 937-4000, FAX (412) 937-4003.

West of the Mississippi River-

* * * * *

Telephone: (303) 231-5350, FAX, (303) 231-5360.

* * * * *

5. Section 4.1151 is amended by revising paragraph (b) to read as follows:

SECTION 4.1151 -- TIME FOR FILING.

(a) * * *

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

* * * * *

6. Section 4.1152 is amended by revising paragraph (a)(2) to read as follows:

SECTION 4.1152 -- CONTENTS OF PETITION; PAYMENT REQUIRED.

(a) * * *

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

* * * * *

7. Section 4.1154 is amended by revising paragraph (a)(2) to read as follows:

SECTION 4.1154 -- REVIEW OF WAIVER DETERMINATION.

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

* * * * *

8. Section 4.1157 is amended by revising paragraphs (a) and (b)(1) to read as follows:

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 723.13 or 845.13, and conclusions of law.

(b) If the administrative law judge finds that-

(1) A violation occurred or that the fact of violation is uncontested, he shall establish the amount of the penalty, but in so doing, he shall adhere to the point system and conversion table contained in 30 CFR 723.13 and 723.14 or 845.13 and 845.14, except that the administrative law judge may waive the use of such point system where he determines that a waiver would further abatement of violations of the Act. However, the administrative law judge shall not waive the use of the point system and reduce the proposed assessment on the basis of an argument that a reduction in the proposed assessment could be used to abate other violations of the Act; or

* * * * *

9. Section 4.1266 is amended by revising the following phone numbers in paragraph (b)(2):

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.

* * * * *

(b) * * *

(2) * * *

Alabama Field Office (also serving Georgia): 205-290-7282

Illinois Field Office: 217-492-4495

Indiana Field Office: 317-226-6700

Kentucky Field Office: 606-233-2494

Missouri Field Office (also serving Iowa, Kansas and Nebraska): 816-374-6405

* * * * *

Oklahoma Field Office (also serving Arkansas, Louisiana and Texas): 918-581-6430

* * * * *

Tennessee Field Office: 615-545-4103

* * * * *

Wyoming Field Office (also serving Alaska, Idaho, Montana, North Dakota, Oregon, South Dakota and Washington): 307-261-5776

* * * * *

10. Section 4.1271 is amended by revising paragraph (a) to read as follows:

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 Sections 4.1160 through 4.1171, 4.1200 through 4.1205, 4.1260 through 4.1267, 4.1290 through 4.1296, and 4.1350 through 4.1356.

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