

**FEDERAL REGISTER: 59 FR 54356 (October 28, 1994)**

DEPARTMENT OF ENERGY (DOE)

AGENCY: Office of Hearings and Appeals (OHA)

43 CFR Part 4

Department Hearings and Appeals Procedures;

Special Rules Applicable to Surface Coal Mining Hearings and Appeals; Part III

ACTION: Final rule.

**SUMMARY:** The final rulemaking amends regulations of the Office of Hearings and Appeals (OHA) applicable to surface coal mining hearings and appeals by adding procedural rules for administrative review of a decision by the Office of Surface Mining Reclamation and Enforcement (OSM) to suspend or rescind permits that should not have been issued, and a decision by OSM in response to (a) a challenge, by an applicant or other person shown in the Applicant Violator System, to a finding that he or she is in an ownership or control link to any person or (b) a challenge, by an applicant or other person shown in the Applicant Violator System in an ownership or control link to any person cited in a federal violation notice, to the status of the violation in the notice. The final rulemaking provides for a hearing before an administrative law judge and for discretionary review of the administrative law judge's initial decision by the Interior Board of Land Appeals (IBLA). In addition, existing 43 CFR 4.1105(a)(2) is amended to include a reference to the rules added by this rulemaking.

EFFECTIVE DATE: These final regulations are effective on November 28, 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:**

OHA's proposed rulemaking was published in the Federal Register on September 6, 1991 (*56 FR 45806-11*). Proposed 43 CFR 4.1370-4.1377 set forth new OHA procedures for reviewing OSM decisions to suspend or rescind permits OSM finds were improvidently issued under 30 CFR 773.20. Proposed 43 CFR 4.1380-4.1387 set forth new OHA procedures for reviewing OSM decisions finding that a person is in an ownership or control link to a person currently in violation of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) or other applicable law. In addition, OHA proposed to amend the existing rule that establishes OSM's burden of proof in individual civil penalty proceedings, 43 CFR 3.1307(a).

Proposed 43 CFR 4.1370-4.1377 and 4.1380-4.1387 are based on section 510(c) of SMCRA, *30 U.S.C. 1260(c)* (1988). This section requires an applicant for a surface coal mining and reclamation permit to file with the permit application a schedule listing all notices of violations of SMCRA and any law, rule, or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation during the three-year period prior to the date of application. Where the schedule or other information indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of the Act or other air or water environmental protection laws, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation.

In order to implement section 510(c), OSM has promulgated a rule defining the words "owned or controlled" in that section, as well as "owns or controls." 30 CFR 773.5. It has adopted a rule requiring that an application for a permit include information about each person who owns or controls the applicant, within the meaning of Section 773.5, and about any surface coal mining operation owned or controlled by either the applicant or any person who owns or controls the applicant. 30 CFR 778.13(c), (d). It has adopted a regulation concerning review of applications for permits that provides: "[b]ased on available information \* \* \*, the regulatory authority shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the

applicant is currently in violation of the Act or any other law, rule or regulation referred to in this paragraph." 30 CFR 773.15(b)(1). This is the so-called "permit block," referring to the language in section 510(c) that states "the permit shall not be issued until the applicant submits proof" that a violation of a surface coal mining operation owned or controlled by the applicant has been corrected or is in the process of being corrected. OSM has also established the Applicant/Violator System (AVS), a computerized system to store data regarding violations and ownership and control links to those violations. See *Save Our Cumberland Mountains v. Lujan*, 963 F.2d 1541, 1545-46 (D.C. Cir. 1992).

OHA's proposed rules were published on the same day as OSM proposed related rules defining the AVS, requiring its use in reviewing permit applications to determine whether there are any ownership or control links between applicants and persons in violation, and proposing procedures and standards for an applicant or other person shown in the AVS to challenge ownership and control links shown in the AVS and the status of the violation. 56 FR 45780-45804 (Sept. 6, 1991). OSM also proposed to amend its existing rules governing suspension and rescission of improvidently issued permits. OSM's proposed rules provided a right to review of its decisions to suspend or rescind a permit under the procedures set forth in OHA's proposed rulemaking of sections 4.1370 through 4.1377. See proposed Section 773.20(c)(2), 56 FR 45799 (Sept. 6, 1991). OSM's proposed rules also provided a right to review of its written decisions on challenges to ownership and control links and the status of violations shown in the AVS under the procedures set forth in OHA's proposed rulemaking of sections 4.1380 through 4.1387. See proposed 30 CFR 773.24(d)(2)(ii), 56 FR 45800 (Sept. 6, 1991).

OHA received comments on its proposed rules from Texas Utilities Services, Inc. (TU Services), the Joint National Coal Association/American Mining Congress Committee on Surface Mining Regulations (NCA/AMC), and the National Wildlife Federation (NWF). The NCA/AMC comments dealt with both OHA's and OSM's proposed rules.

#### **PROPOSED AMENDMENT OF 43 CFR 4.1307(a)(3) WITHDRAWN**

As part of its September 6, 1991, proposed rulemaking, OHA proposed an amendment to 43 CFR 4.1307(a)(3) at 56 FR 45808 which set forth an element of OSM's prima facie case in proceedings to review the assessment of individual civil penalties. Proposed 43 CFR 4.1307(a)(3) complemented proposed rules by OSM at 56 FR 48924, 48929-30 (Sept. 26, 1991) addressing individual civil penalties. Both TU Services' and NCA/AMC's comments expressed reservations about the proposed amendment of 43 CFR 4.1307(a)(3). By a notice published in the Federal Register on October 16, 1992, OSM withdrew its September 26, 1991, proposed rulemaking. 57 FR 47431 (Oct. 16, 1992). Therefore, OHA hereby withdraws the corresponding proposed amendment to 43 CFR 4.1307(a)(3). Because this proposed rule concerning an element of OSM's prima facie case in individual civil penalty proceedings is withdrawn, no response to the comments concerning it is necessary.

As noted above, the NCA/AMC comments address both the proposed OSM rules and the proposed OHA rules "[b]ecause [their] comments on the proposal by [OHA] are interrelated with [their] concerns about the OSM proposal." NCA/AMC's comments that relate to the procedures for administrative review are addressed here.

#### **PROCEDURAL DUE PROCESS**

NCA/AMC state that although the proposed rules "purport to establish a comprehensive scheme for administrative review of ownership and control determinations emanating from the AVS, they fall far short of providing the meaningful guarantees that the due process clause requires." They fall short, NCA/AMC state, because the procedures do not allow one to challenge the existence of the violation that forms the basis for a permit block under section 510(c). Further, the proposed rules do not provide "any opportunity for challenging either the status of the violation or the validity of the AVS link prior to the deprivation of the operator's property interest through permit denial, suspension, or revocation, unless the applicant is able to meet the stringent requirements for seeking temporary relief" contained in proposed 43 CFR 4.1386 (emphasis in original). NCA/AMC state that the "right to notice and a hearing prior to a governmental deprivation of private property is a cornerstone of American jurisprudence, and is a well-established principle in cases involving the constitutionality of SMCRA provisions" that the proposed rules fail to recognize. NCA/AMC state that an appeal or challenge to AVS information "must, of necessity, include the right to a full and fair determination on the merits of the violation in advance of any decision to prohibit mining through the sanctions contained within section 510(c)." Under the balancing test announced in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the proposed rules do not afford due process, NCA/AMC argue.

A fundamental requirement of the Fifth Amendment to the Constitution of the United States that "[n]o person shall \* \* \* be deprived of life, liberty, or property, without due process of law" is the opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In *Mathews v. Eldridge*, *supra*, the U.S. Supreme Court discussed "the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter." 424 U.S. at 333. The Court quoted *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), that "due process is flexible and calls for such procedural protections as the particular situation demands," and then stated:

"[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., *Goldberg v. Kelly*. [397 U.S.] at 263-271."

*Mathews v. Eldridge*, *supra* at 334-35. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court decided procedural due process requires that a state grant an evidentiary hearing before suspending or terminating welfare payments to an individual who meets the statutory qualifications for receiving them. "[T]he crucial factor in this context," the Court observed, "is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." *Id.* at 264 (emphasis in original). "[C]ountervailing governmental interests in conserving fiscal and administrative resources \* \* \* are not overriding in the welfare context," the Court stated. *Id.* at 265-66. "[H]owever, \* \* \* the pre-termination hearing need not take the form of a judicial or quasi-judicial trial," the Court commented. *Id.* at 266. A complete record and a comprehensive opinion are not necessary; an opportunity for the welfare recipient to confront and cross-examine witnesses relied on by the government, and to retain an attorney, however, are necessary. *Id.* at 267-270. Also necessary is an impartial decisionmaker, who must "state the reasons for his determination and indicate the evidence he relied on." *Id.* at 271.

OHA believes that, when analyzed under *Mathews v. Eldridge*, the procedures proposed for OSM decisions and for OHA administrative review of those decisions provide adequate due process protection of the interests involved.

The proposed rules recognize a distinction between a person who holds a permit that might be suspended or rescinded because OSM determines it was improvidently issued (43 CFR 4.1370-4.1377) and a person who has applied for a permit or might apply for one in the future (43 CFR 4.1380-4.1387). A person who holds a permit is entitled to more protection than the person who has applied for one or plans to do so. In recognition of this distinction, OSM's final rule 30 CFR 773.20(b)(2) will provide, for a person who has a permit, that OSM will determine whether a violation, penalty or fee existed when it was cited and whether an ownership or control link between a permittee and the person responsible for the violation existed, still exists, or has been severed, before issuing a notice to suspend or rescind a permit. An applicant for a permit, however, may challenge the existence of a violation in a review proceeding under 43 CFR 4.1360-4.1369 after the application has been denied, not before. An applicant (or any other person shown in the AVS) may challenge an ownership or control link or the status of a violation before a permit application is denied, or even filed, under proposed 30 CFR 773.24, as discussed further below. (The "status of a violation" concerns whether the violation remains outstanding, has been or is in the process of being corrected, or is the subject of an administrative or judicial appeal. The status of a violation is distinct from "the existence of a violation," i.e., whether the violation existed at the time it was cited.)

The "private interest that will be affected," i.e., a permit, is limited. A permit is issued for a five-year term (with a right of renewal unless its terms or other requirements are not being met), 30 U.S.C. 1256(b), (d) (1988), and is conditioned on compliance with several performance standards, 30 U.S.C. 1265(a) (1988). It may be terminated, revised, reviewed, suspended, or revoked. 30 U.S.C. 1256(c), 1261(c), 1265(c), 1271(a)(4) (1988). Thus, while valuable, a permit to conduct surface coal mining is not a private interest comparable to the welfare benefits in *Goldberg v. Kelly*, *supra*, that entitles the holder to an evidentiary hearing prior to suspension or rescission. In *Mathews v. Eldridge*, *supra* at 343, the Supreme Court held that termination of disability payments may be effected without a pretermination evidentiary hearing. Similarly, suspension or rescission of a surface coal mining permit does not require a prior hearing in addition to the other procedural safeguards provided in the OSM and OHA rules.

Those rules significantly reduce "the risk of an erroneous deprivation" of a permit. If OSM finds a permit was improvidently issued because at the time it was issued one or more of the circumstances set forth in the review criteria in 30 CFR 773.20(b)(1) existed, it does so in accordance with the standards for challenging ownership or control links and the status of violations in proposed 30 CFR 773.26, *56 FR 45801-45803* (Sept. 6, 1991). See proposed 30 CFR 773.20(b)(2), *56 FR 45799* (Sept. 6, 1991). As mentioned above, these standards will apply, under OSM's final rule 30 CFR 773.20(b)(2), to a determination whether a violation, penalty, or fee existed at the time it was cited, remains unabated or delinquent, has been or is in the process of being corrected, or is the subject of an appeal, and whether an ownership or control link between the permittee and the person responsible for the violation, penalty, or fee existed, still exists, or has been severed. OSM has a choice of four remedial measures if it finds a permit was improvidently issued, including suspension or rescission of the permit. 30 CFR 773.20(c); see proposed Section 773.20(c)(1), *56 FR 45799* (Sept. 6, 1991). If it decides to suspend, it will give the permittee 30 days written notice and inform the permittee of its right to review under 43 CFR 4.1370 et seq. See proposed 30 CFR 773.20(c)(2), *56 FR 45799* (Sept. 6, 1991). If it decides to rescind, it will issue the permittee a notice of proposed suspension and rescission under 30 CFR 773.21 that includes the reasons for finding the permit was improvidently issued and will inform the permittee of its right to review under 43 CFR 4.1370 et seq. See proposed 30 CFR 773.20(c)(2), *56 FR 45799* (Sept. 6, 1991).

Under OHA's proposed rules 43 CFR 4.1370-4.1377, the permittee may file a request for review with OHA that includes OSM's notice; documentary proof or offers of proof concerning the Section 773.20(b) review criteria (or their analogues in Section 773.21(a)(1)-(4)); other relevant information; a request for specific relief; and a request for an evidentiary hearing. Section 4.1372. The permittee may amend its request for review once as a matter of right before OSM files a response and may also do so afterwards with leave of the administrative law judge. The administrative law judge is to convene the hearing within 90 days of receiving responses to the request (unless the parties waive this deadline); this gives the parties an opportunity to conduct discovery under 43 CFR 4.1130-4.1141. Section 4.1373. The administrative law judge must issue an initial decision within 30 days of the date the hearing record is closed. Section 4.1375. OSM has the burden of going forward to present a prima facie case in support of its notice while the person requesting review has the ultimate burden of persuasion that the notice is in error. Section 4.1374. Any party may file a petition for discretionary review of the administrative law judge's initial decision with IBLA. The petition shall attach a copy of this decision and specify the alleged errors. Other parties have 30 days to file responses, after which IBLA shall issue a decision within 60 days denying the petition or granting it and deciding the merits. Section 4.1377.

OSM's proposed rule provides that its decision to suspend or rescind will remain in effect during the time a request for review is pending in OHA unless temporary relief is granted in accordance with 43 CFR 4.1376. 30 CFR 773.20(c)(2), *56 FR 45799* (Sept. 6, 1991). Proposed 43 CFR 4.1376 provides that with a request for review-or at any time before the administrative law judge issues the initial decision-any party may petition for temporary relief from OSM's notice of suspension or notice of proposed suspension and rescission. Under Section 4.1376, the petition must show that the petitioner has a substantial likelihood of prevailing on the merits and that the relief it seeks will not adversely affect public health or safety or cause significant, imminent environmental harm. Other parties have 5 days to file responses. The administrative law judge must hold a hearing within 10 days of the filing of the responses if a hearing has been requested and must issue a decision granting or denying temporary relief within 5 days of the date of the hearing, or the filing of the responses if no hearing is held. If all parties have been notified of the petition and given an opportunity to respond (and a hearing has been held if requested), the administrative law judge may grant temporary relief if the petitioner has demonstrated a substantial likelihood of prevailing on the merits and the relief will not adversely affect public health or safety or cause significant, imminent environmental harm. These standards are based on those contained in *30 U.S.C. 1275(c)* (1988). As noted in the preamble to the proposed regulations, *56 FR at 45807* (Sept. 6, 1991), the focus of the adverse effect inquiry would be on the permitted operation rather than operation allegedly in violation. Any party may appeal the administrative law judge's decision granting or denying temporary relief to IBIA, which shall decide the appeal expeditiously, or may seek judicial review.

OHA believes "the probable value, if any, of additional or substitute procedural safeguards"-in particular, an evidentiary hearing before a decision to suspend or rescind is effective-is minimal. As in *Mathews, supra at 343-345*, although the definition of ownership and control in 30 CFR 773.5 includes elements or judgment where witness credibility and veracity will sometimes play a role (e.g., Sections 773.5(a)(3), 773.5(b)(6)), the determination is usually made on the basis of documents, such as instruments of ownership or voting securities, or on the basis of readily and often publicly documentable circumstances such as a person's status as an officer or director of an entity, the permittee or operator of a surface coal mining operation, or a general partner in a partnership (e.g., Sections 773.5(a)(1)-(2), 773.5(b)(1)-(2), (4)-(5)). Further, a permittee receives sufficient notice of OSM's decision to suspend a permit (30 days

under proposed Section 773.20(c)(2)) or rescind a permit (up to 180 days under Section 773.21) to enable it to request review by an administrative law judge before the decision becomes effective. The provisions in Sections 4.1370-4.1377 imposing short time frames for each step of review significantly reduce delay due to "the torpidity of [the] administrative review process," Mathews, supra at 342, especially if temporary relief is sought.

The "Government's interest" is to effectively implement section 510(c), specifically, to ensure that no person in violation of SMCRA or the other specified environmental laws obtains or retains a permit to conduct surface mining operations until the violation is corrected or in the process of being corrected. The Department's goal of achieving compliance with these laws would be significantly burdened if it were required to provide an evidentiary hearing before OSM could decide to suspend or rescind a permit because the person should not have received the permit when it was issued. It was OSM's experience in 1992-93 that providing informal review by OSM of the proposed entry into the AVS of information concerning ownership or control links became very time-and-personnel-consuming. For 105 cases in 1993, for example, OSM spent more than 11,000 hours from after investigating an ownership or control link to issuing its final decision, a mean of 105 hours per case. It would be even more costly to require an evidentiary hearing before a permit was suspended or rescinded; meanwhile, mining would continue while alleged outstanding violations existed.

In sum, as the Supreme Court stated in Mathews, supra at 343, "there is less reason here than in Goldberg to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." OHA believes the procedures for OSM decisionmaking and OHA administrative review on the proposed rules provide all the due process that is due before an improvidently issued permit is suspended or rescinded.

As noted above, OSM's proposed rules also provide that an applicant for a permit or any other person that is shown in the AVS as having an ownership or control link to a person may challenge the link (unless the applicant or other person is bound by an earlier administrative or judicial decision concerning the link). See proposed 30 CFR 773.24(a)(1), *56 FR 45800* (Sept. 6, 1991). An applicant or any other person shown in the AVS may also challenge the status of the violation cited in a federal violation notice naming a person with whom the applicant or other person is linked (unless bound by a decision concerning the status of the violation). See proposed 30 CFR 773.24(a)(2), *56 FR 45800* (Sept. 6, 1991). The applicant or other person may submit a written explanation and supporting evidence to OSM concerning the existence of the link or the status of the violation. See proposed Section 773.24(b), *56 FR 45800* (Sept. 6, 1991). Applying the standards for challenging ownership and control links and the status of violations contained in proposed Section 773.26, *56 FR 45801-03* (Sept. 6, 1991), OSM will either correct the information in the AVS, if the applicant or other person shows the link is erroneous or the violation is no longer outstanding, or, if this is not shown, OSM will so notify the applicant or other person. See proposed Section 773.24(d), *56 FR 45800* (Sept. 6, 1991). In either event, OSM will issue a written decision and serve it by certified mail. See proposed Sections 773.24(d)(2)(i), *56 FR 45800-01* (Sept. 6, 1991). The applicant or other person has a right to request review within 30 days of service of OSM's decision under the procedures proposed by OHA in 43 CFR 4.1380-4.1387. OSM's decision remains in effect pending a decision on review unless temporary relief is granted under proposed Section 4.1386. See proposed Section 773.24(d)(2)(ii), *56 FR 45801* (Sept. 6, 1991).

OHA's procedures in proposed 43 CFR 4.1380-4.1387 closely parallel those in Sections 4.1370-4.1377. Any person who receives a written OSM decision concerning a challenge to the existence of a link or the status of a violation may request review. Section 4.1381. The required contents of the request are set forth in proposed Section 4.1382; the request may be amended once as a matter of right before a response is filed by OSM and with the leave of an administrative law judge thereafter. Section 4.1382(c). The administrative law judge is to convene a hearing within 90 days of receipt of the responses unless the parties waive that deadline, and give notice at least 10 days in advance of the hearing. Section 4.1383. OSM has the burden of going forward to present a prima facie case in support of its decision, while the person requesting review has the ultimate burden of persuasion that the decision is in error. Section 4.1384. An initial decision is required within 30 days after the record of the hearing is closed. Section 4.1385. At any time before the initial decision is issued, any party may file a petition for temporary relief from OSM's decision. Temporary relief may be granted if all parties to the proceeding have been notified of the petition, have had an opportunity to respond, and a hearing has been held if requested; and if the petitioner has demonstrated that it has a substantial likelihood of prevailing on the merits and that temporary relief will not adversely affect public health or safety or cause significant, imminent environmental harm. Section 4.1386. Expedited review by IBLA or judicial review of a decision granting or denying temporary relief may be requested within 30 days of receipt of the decision. Section 4.1386(h). If temporary relief is not requested, any party may file a petition for discretionary review of the administrative law judge's initial decision within 30

days of receiving it. Section 4.1387. The Board is to issue a decision denying the petition or granting it and ruling on the merits within 60 days of the deadline for filing responses to the petition section 4.1387(d).

The nature of a person's interest in an application for a permit cannot be regarded as a "legitimate claim of entitlement" to a permit and therefore requires less due process protection than the interest of a person who holds a permit that is subject to suspension or rescission because it was improvidently issued. See *Board of Regents v. Roth*, 408 U.S. 564, 569-71, 577 (1972). For a person who has applied for a permit or may apply for one, due process does not require a hearing on the existence of an ownership or control link or on the existence of a violation when it was cited before OSM issues a decision under proposed 30 CFR 773.24. If the proposed procedures in Sections 4.1370-4.1377 for administrative review of notices of permit suspension or rescission under proposed 30 CFR 773.20(c)(2) provide adequate due process protection, as OHA believes, then the parallel procedures in proposed Sections 4.1380-4.1387 certainly satisfy due process requirements for OSM's decisions regarding ownership and control links or the status of a violation under proposed 30 CFR 773.24. In particular, an applicant's opportunity to obtain temporary relief under 43 CFR 4.1386 from an OSM decision provides sufficient due process at this stage. Further administrative review is available to an applicant for a permit in an appeal of the denial of the application under existing procedures in 43 CFR 4.1360 through 4.1369, when the existence of the violation may be challenged. Providing an evidentiary hearing before OSM decisions under proposed 30 CFR 773.24 would severely impede the Department's effective implementation of section 510(c).

## **STATE PRIMACY**

NCA/AMC argue that the proposed OSM and OHA regulations "undermine state primacy [under section 503 of SMCRA, 30 U.S.C. (1988)] entirely, by preempting state permitting authority where the ownership and control presumption is based on information contained within the AVS. \* \* \* Additionally, OSM and OHA propose to require that any appeals from decisions on the ownership and control presumptions be made before the OHA in accordance with the proposed OHA regulations at 43 CFR 4.1380. \* \* \* Moreover, OSM would create a completely federalized process for administrative review of the AVS linkage."

The regulatory authority in a state that has been delegated primacy under section 503 will retain its authority to issue permits. Information in the AVS is "other information available to the regulatory authority," within the meaning of section 510(c), that a state regulatory authority must use in deciding whether or not issuance of a permit should be blocked. The state regulatory authority's decision is its own-subject, of course, to OSM oversight. See *30 U.S.C. 1202(g), 1211(c), 1253, 1254, 1255, and 1271*.

An applicant or other person shown in the AVS in an ownership or control link to any person cited in a state violation notice may challenge the status of the violation in that notice under the state program equivalents to proposed 30 CFR 773.24(b)-(d) and 773.26. See proposed 30 CFR 773.24(a)(3), *56 FR 45800* (Sept. 6, 1991). Similarly, decisions by a state regulatory authority to suspend or rescind a permit are reviewed by the State program equivalent of proposed 43 CFR 4.1370-4.1377. See proposed 30 CFR 773.20(c)(2), *56 FR 45799* (Sept. 6, 1991). The fact that challenges to ownerships and control links and to the status of violations are made to OSM by applicants or other persons shown in the AVS under proposed 30 CFR 773.24(a)(1) and (a)(2), and that OSM's decisions are reviewed under proposed 43 CFR 4.1380-4.1387, is a function of OSM's maintenance of the data in AVS and its responsibility to keep that data accurate and up-to-date. But OSM's role in deciding on the accuracy of the data and OHA's role in reviewing those decisions do not subvert the authority of the state regulatory authority in a primacy state to make decisions on applications for permits.

## **BURDEN OF PROOF**

NCA/AMC object to OHA's proposed 43 CFR 4.1374(b) and 4.1384(b), which place the ultimate burden of persuasion on a permittee that seeks review of a notice of proposed suspension or rescission and on an applicant or other persons that seeks review of an OSM decision on a challenge to an ownership and control link or status of a violation shown in the AVS. In proposed Sections 4.1374(a) and 4.1384(a), OSM has the burden of going forward to present a prima facie case of the validity of the notice or decision. NCA/AMC state that when OSM seeks to overturn a permit as improvidently issued, it should bear the ultimate burden of proving its case. "All permits, once issued, should be accorded some presumption that they were issued in accordance and compliance with applicable law. \* \* \* [I]t is the party seeking

to set aside the permitting decision who should bear both the burden of going forward to establish a prima facie case and the ultimate burden of persuasion, "NCA/AMC state.

Allocation of the burdens of proof in proposed 43 CFR 4.1374 and 4.1384 is consistent with other OHA regulations governing review of OSM decisions. See 43 CFR 4.1171, 4.1193, 4.1366. OSM's burden of going forward to support a prima facie case of the validity of its notice or decision means it must present "sufficient evidence \* \* \* to establish the essential facts \* \* \* which evidence will remain sufficient if not contradicted. It is evidence that will justify but not compel a finding in favor of the one presenting it." *James Moore, 1 IBSMA 216, 223 n.7, 86 I.D. 369, 373 n.7 (1979)*. It is the permittee, applicant, or other person shown in the AVS who will have access to information that would overcome OSM's prima facie case. *Harry Smith Construction Co. v. OSM, 78 IBLA 27, 31 (1983)*. Under the Administrative Procedure Act, 5 U.S.C. 556(d) (1988), OSM properly bears only the burden of going forward with proof, not the ultimate burden of persuasion. *Environmental Defense Fund, Inc. v. Environmental Protection Agency, 548 F.2d 998, 1012-13 (D.C. Cir. 1976)*.

### **RIGHT OF APPEALS FROM OSM DECISIONS FOR ADVERSELY AFFECTED PERSONS; NOTICE OF APPEALS TO ADVERSELY AFFECTED PERSONS**

The NWF comments criticized proposed 43 CFR 4.1371 for its failure to incorporate the rights of citizens to challenge decisions by OSM regarding improvidently issued permits under 30 CFR 773.20. As explained above, 30 CFR 773.20 provides that a permit has been improvidently issued if, under the violations review criteria at the time the permit was issued, the regulatory authority should not have issued the permit. Proposed 43 CFR 4.1371 grants a right of review to a "permittee that is served with a notice of suspension under 30 CFR 773.20(c)(2) or a notice of proposed suspension and rescission under 30 CFR 773.21." The rights of citizens to appeal similar decisions have been completely overlooked, NWF states.

Similarly, NWF objects to proposed 43 CFR 4.1381, which authorizes "[a]ny person who receives a written decision from OSM" pursuant to proposed 30 CFR 773.24(d)(2) or 773.25(c)(2) to file a request for review of OSM's finding that such person is in an ownership or control link to any person cited in a violation notice within the scope of 30 CFR 773.5 and 773.15(b). No provision for citizen-initiated appeals of these decisions exists under the proposed rules, NWF states. "Decisions by OSM not to act on the information provided by citizens, or decisions to issue permits in the face of information that indicates an ownership or control link to a violation, should be subject to review by the Office of Hearings and Appeals," NWF comments.

NWF also criticizes lack of notice to affected citizens. Although proposed 43 CFR 4.1372(b) provides to "OSM and all interested parties" the right to file an answer to a request for review of a decision to suspend or rescind a permit as improvidently issued and to request an evidentiary hearing even if the person requesting review does not, it is silent as to how interested parties other than OSM are to know that a request for review has been filed, NWF states. Only counsel for OSM would be served with a copy of a request for review under 43 CFR 4.1109, NWF observes. Similarly, the rules proposed in 43 CFR 4.1380-4.1387 for review of OSM decisions concerning ownership and control links provide "no notice to citizens who may be substantially and adversely affected by a reversal of a determination of ownership and control linkage," NWF comments. Specific provisions for notice to all affected persons of appeals of both kinds of OSM decisions should be adopted, NWF urges.

OHA agrees that provisions for notice to citizens of appeals of OSM decisions concerning permit suspension and rescission and concerning ownership and control links and for rights of appeal of such OSM decisions were not included in the proposed rules. Adding such provisions to the final rules on the basis of NWF's comments, however, without providing an opportunity for notice and comment, might be regarded as inconsistent with the requirements of the Administrative Procedure Act. See *American Federation of Labor v. Donovan, 757 F.2d 330, 338-40 (D.C. Cir. 1985)*. After consultation with OSM, OHA may propose rules concerning these issues in the future. Meanwhile, no right of appeal by citizens from OSM decisions not to find an ownership or control link is available under these rules. Citizens may of course avail themselves of existing procedures, e.g., 30 CFR 773.13, 842.11, 842.12, 842.15, and 843.21, and petition for leave to intervene in proceedings under Sections 4.1370-4.1377 and 4.1380-4.1387 in accordance with 43 CFR 4.1110.

## CHANGES IN THE FINAL RULES FROM THE PROPOSED RULES

OHA believes no revisions to proposed 43 CFR 4.1370-4.1377 and 4.1380-4.1387 are required in response to the comments. However, OHA has made the following changes to the proposed rules to improve their clarity and to remove references to section numbers of the rules proposed by OSM:

1. 43 CFR 4.1373(a): The phrase "If a hearing is requested" has been added at the beginning of the first sentence, and the remainder of the sentence revised, to account for the possibility that a hearing might not be requested.
2. 43 CFR 4.1373(b): "of the date of the hearing" has been added at the end of the sentence to make clear that notice shall be given at least 10 days in advance of the hearing.
3. 43 CFR 4.1375: An alternative deadline is provided for issuance of an initial decision when no hearing is held.
4. 43 CFR 4.1380: The language concerning the kind of OSM decisions from which a request for review may be filed has been revised to replace references to 30 CFR 773.5 and 773.15(b) with a more general description, i.e., decisions on challenges by an applicant or other person shown in the AVS to an ownership or control link or the status of a violation.
5. 43 CFR 4.1381(a): The specific references to proposed 30 CFR 773.24(d)(2) and 773.25(c)(2) and to 30 CFR 773.5 and 773.15(b) have been replaced with language describing the kind of OSM decision from which a request for review may be filed, i.e., a written decision by OSM, in response to a challenge from an applicant or other person shown in the AVS, on whether or not the ownership or control link has been shown to be erroneous or has been rebutted and/or whether the violation covered by the notice remains outstanding, has been corrected, or is the subject of a good faith appeal.
6. 43 CFR 4.1383(a): The phrase "If a hearing is requested" has been added at the beginning of the first sentence, and the remainder of the sentence revised, to account for the possibility that a hearing might not be requested.
7. 43 CFR 4.1383(b): "of the date of the hearing" has been added at the end of the sentence to make clear that notice shall be given at least 10 days in advance of the hearing.
8. 43 CFR 4.1385: An alternative deadline is provided for issuance of an initial decision when no hearing is held.

In addition, in order to implement the Administrative Dispute Resolution Act, OHA has added rules (Sections 4.1371(c), 4.1381(c)) providing the parties an opportunity to employ alternatives means of dispute resolution, as defined in 5 *U.S.C.* 571(3) (1988), before the hearing and appeals procedures set forth in the following rules. Any party could decline this opportunity, in its discretion, at any time. Because no new obligations are imposed and this voluntary procedure does not affect substantive rights, its adoption does not require separate notice under the Administrative Procedure Act.

### 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.

### Executive Order 12866

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 requirement 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: August 18, 1994.

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.*

2. Section 4.1105 is amended by revising paragraph (a)(2) introductory text to read:

#### SECTION 4.1105 -- PARTIES.

(a) \* \* \*

(2) In a review proceeding under Sections 4.1160 through 4.1171, 4.1180 through 4.1187, 4.1300 through 4.1309, 4.1350 through 4.1356, 4.1360 through 4.1369, 4.1370 through 4.1377, 4.1380 through 4.1387 or 4.1390 through 4.1394 of this part, OSM, as represented by the Office of the Solicitor, Department of the Interior, and-

\* \* \* \* \*

3. New Sections 4.1370 through 4.1377 and a new undesignated heading preceding them are added to read:

#### REVIEW OF DECISIONS OF THE OFFICE OF SURFACE MINING SUSPENDING OR RESCINDING IMPROVIDENTLY ISSUED PERMITS

##### Section

4.1370	Scope.
4.1371	Who may file, where to file, when to file.
4.1372	Contents of request for review, response to request, amendment of request.
4.1373	Hearing.
4.1374	Burdens of proof.
4.1375	Time for initial decision.
4.1376	Petition for temporary relief from notice of suspension or notice of proposed suspension and rescission; appeals from decisions granting or denying temporary relief.
4.1377	Petition for discretionary review of initial decisions.

## **REVIEW OF DECISIONS OF THE OFFICE OF SURFACE MINING SUSPENDING OR RESCINDING IMPROVIDENTLY ISSUED PERMITS**

### **SECTION 4.1370 -- SCOPE.**

Sections 4.1370 through 4.1377 govern the procedures for review of notices from OSM of suspension of improvidently issued permits issued under 30 CFR 773.20(c) or of notices of proposed suspension and rescission of improvidently issued permits issued under 30 CFR 773.21.

### **SECTION 4.1371 -- WHO MAY FILE, WHERE TO FILE, WHEN TO FILE.**

(a) A permittee that is served with a notice of suspension under 30 CFR 773.20(c)(2) or a notice of proposed suspension and rescission under 30 CFR 773.21 may file a request for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (Telephone 703-235-3800) within 30 days of service of the notice.

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

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

### **SECTION 4.1372 -- CONTENTS OF REQUESTS FOR REVIEW, RESPONSE TO REQUEST, AMENDMENT OF REQUEST.**

(a) The request for review shall include:

- (1) A copy of the notice of suspension or the notice of proposed suspension and rescission;
- (2) Documentary proof, or, where appropriate, offers of proof, concerning the matters set forth in 30 CFR 773.20(b) or 773.21(a)(1) through (4) showing that the person requesting review is entitled to administrative relief;
- (3) A statement whether the person requesting review wishes an evidentiary hearing or waives the opportunity for such a hearing;
- (4) A request for specific relief; and
- (5) Any other relevant information.

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

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

### **SECTION 4.1373 -- HEARING.**

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

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

**SECTION 4.1374 -- BURDENS OF PROOF.**

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

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

**SECTION 4.1375 -- TIME FOR INITIAL DECISION.**

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

**SECTION 4.1376 -- PETITION FOR TEMPORARY RELIEF FROM NOTICE OF SUSPENSION OR NOTICE OF PROPOSED SUSPENSION AND RESCISSION: APPEALS FROM DECISIONS GRANTING OR DENYING TEMPORARY RELIEF.**

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

(b) The petition for temporary relief shall be filed with the administrative law judge to whom the request for review has been assigned. If none has been assigned, the petition shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (Telephone 703-235-3800).

(c) The petition for temporary relief shall include:

- (1) A statement of the specific relief requested;
- (2) A detailed statement of why temporary relief should be granted, including-
  - (i) A showing that there is a substantial likelihood that petitioner will prevail on the merits, and
  - (ii) A showing that the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air or water resources;
- (3) A statement whether the petitioner requests an evidentiary hearing.

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

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

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

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

- (1) All parties to the proceeding have been notified of the petition and have had an opportunity to respond and a hearing has been held if requested;
- (2) The petitioner has demonstrated a substantial likelihood of prevailing on the merits; and
- (3) Temporary relief will not adversely affect public health or safety or cause significant, imminent harm to land, air or water resources.

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

**SECTION 4.1377 -- PETITION FOR DISCRETIONARY REVIEW OF INITIAL DECISION.**

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

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

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

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

4. New Sections 4.1380 through 4.1387 and a new undesignated heading preceding them are added to read:

**REVIEW OF OFFICE OF SURFACE MINING WRITTEN DECISIONS CONCERNING OWNERSHIP AND CONTROL**

Section

4.1380	Scope.
4.1381	Who may file; when to file; where to file.
4.1382	Contents of request for review; response to request; amendment of request.
4.1383	Hearing.
4.1384	Burdens of proof.
4.1385	Time for initial decision.
4.1386	Petition for temporary relief from decision; appeals from decisions granting or denying relief.
4.1387	Petition for discretionary review of initial decisions.

**REVIEW OF OFFICE OF SURFACE MINING WRITTEN DECISIONS CONCERNING OWNERSHIP AND CONTROL**

**SECTION 4.1380 -- SCOPE.**

Sections 4.1380 through 4.1387 govern the procedures for review of written decisions of OSM on challenges by an applicant or other person shown in the Applicant Violator System to an ownership or control link or the status of a violation.

**SECTION 4.1381 -- WHO MAY FILE; WHEN TO FILE; WHERE TO FILE.**

(a) An applicant or any other person shown in the Applicant Violator System who receives a written decision by OSM, in response to a challenge to an ownership or control link or the status of a violation, on whether or not the ownership or control link has been shown to be erroneous or has been rebutted and/or whether the violation covered by a federal violation notice remains outstanding, has been corrected, or is the subject of a good faith appeal may file a request for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (Telephone 703-235-3800) within 30 days of service of the decision.

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

(c) Where appropriate under the Administrative Dispute Resolution Act, *5 U.S.C. Sections 571-583*, the Hearings Division may use a dispute resolution proceeding, if the parties agree to such proceeding, before the procedures set forth in Sections 4.1383 through 4.1387.

#### **SECTION 4.1382 -- CONTENTS OF REQUEST FOR REVIEW; RESPONSE TO REQUEST; AMENDMENT OF REQUEST.**

(a) The request for review shall include:

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

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

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

#### **SECTION 4.1383 -- HEARING.**

(a) If a hearing is requested, the administrative law judge shall convene the hearing within 90 days of receipt of responses under Section 4.1382(b). The 90-day deadline for convening the hearing may be waived for a definite time by the written agreement of all parties, filed with the administrative law judge, or may be extended by the administrative law judge, in response to a motion setting forth good cause to do so, if no other party is prejudiced by the extension.

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

#### **SECTION 4.1384 -- BURDENS OF PROOF.**

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

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

#### **SECTION 4.1385 -- TIME FOR INITIAL DECISION.**

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

**SECTION 4.1386 -- PETITION FOR TEMPORARY RELIEF FROM DECISION; APPEALS FROM DECISIONS GRANTING OR DENYING TEMPORARY RELIEF.**

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

(b) The petition for temporary relief shall be filed with the administrative law judge to whom the request for review has been assigned. If none has been assigned, the petition shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (Telephone 703-235-3800).

(c) The petition for temporary relief shall include:

- (1) A statement of the specific relief requested;
- (2) A detailed statement of why temporary relief should be granted, including:
  - (i) A showing that there is a substantial likelihood that petitioner will prevail on the merits, and
  - (ii) A showing that granting the relief requested will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air or water resources;
- (3) A statement whether the petitioner requests an evidentiary hearing.

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

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

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

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

- (1) All parties to the proceeding have been notified of the petition and have had an opportunity to respond and a hearing has been held if requested;
- (2) The petitioner has demonstrated a substantial likelihood of prevailing on the merits; and
- (3) Temporary relief will not adversely affect public health or safety or cause significant, imminent environmental harm to land, air or water resources.

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

**SECTION 4.1387 -- PETITION FOR DISCRETIONARY REVIEW OF INITIAL DECISIONS.**

(a) Any party may file a petition for discretionary review of an initial decision of an administrative law judge issued under Section 4.1385 with the Board within 30 days of receipt of the decision. An untimely petition shall be dismissed.

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

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

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