



U · S · DEPARTMENT OF THE INTERIOR
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
DIRECTIVES SYSTEM

Subject Number:
INF-5

Transmittal Number:
797

Date: OCT 19 1993

Subject: Subpoenas to Compel the Attendance of Witnesses, the Production of Written or Printed Material, or Both

Approval: *[Signature]* **Title:** Acting Director

1. Purpose. This directive establishes the policy for, and procedures implementing, the issuance by the Director or his or her Designees of administrative subpoenas to compel the attendance of witnesses at a hearing or deposition, the production of written or printed materials, or both.

2. Summary. New directive

3. Definitions.

a. Subpoena. A subpoena is a written command, issued by the Director of the Office of Surface Mining Reclamation and Enforcement (OSM), or his or her Designee, pursuant to § 201(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. § 1211(c), compelling the attendance of witnesses at a hearing or deposition, the production of written or printed materials, or both. As used in this directive, the term subpoena may refer to the singular or plural.

b. Designee. Any employee of OSM to whom the authority to issue subpoenas on behalf of OSM has been delegated by paragraph 4.c.(1) of this directive.

c. Requester. The OSM employee who asks the Director or Designee to issue a subpoena.

4. Policy/Procedures.

a. Background. Section 201(c)(1) of SMCRA empowers the Secretary, acting through OSM, to "issue subpoenas, and compel the attendance of witnesses and production of written or printed material as provided for in this Act." The reasonable exercise of this power is needed in order to facilitate OSM's performance of its duties and responsibilities as required by SMCRA and its implementing regulations.

Such duties and responsibilities include agency determinations concerning, among other things, exemptions from regulation under SMCRA §§ 528 and 701(28), liability for abandoned mine reclamation fees under SMCRA § 402(a), ownership or control under

SMCRA § 510(c), requests for inspection under SMCRA § 517(h), bond release under SMCRA § 519(h), appropriateness of cessation orders under SMCRA § 521(a)(5), failure of a State to enforce an approved State program under SMCRA § 521(b), liability for mine site reclamation under SMCRA § 521(c), and designation of lands unsuitable for mining under SMCRA § 522(c).

Sufficient information from public sources may not always exist to enable OSM to make the necessary determinations. Private parties may refuse to voluntarily provide needed documentation upon request. Others selectively provide only that portion of the requested documentation that supports their own positions. Finally, third parties, including lending institutions and other neutral parties, are understandably reluctant to provide documentation needed by OSM, unless it is subpoenaed.

The judicious exercise of the subpoena power accorded by Congress to OSM will resolve these and other problems, and greatly assist OSM in performing its duties under SMCRA and its implementing regulations.

b. Policy. It is the policy of OSM to issue administrative subpoenas whenever such action would assist OSM in the discharge of responsibilities under SMCRA and its implementing regulations.

c. Procedures.

(1) A subpoena may be issued by the Director, Deputy Director, Assistant Director for Field Operations, or Assistant Director for Finance and Accounting; Chief, Division of Compliance Management; Chief, Applicant/Violator System Office; or any Field Office Director. The authority to issue subpoenas may not be further redelegated.

(2) Requests for the issuance of subpoenas shall be made in writing to the Director or Designee.

(3) Where testimony from a business entity is needed, the subpoena may name the officer, director, agent, or employee of the entity having knowledge of the information desired. Alternatively, the subpoena may name the business entity itself, describe with reasonable particularity the information desired, and inform the entity that it must designate one or more persons who will testify on its behalf as to matters known or reasonably available to the entity. See Rule 30(b)(6), Federal Rules of Civil Procedure. Where documents or other records from a business entity are needed, the subpoena should name the entity itself.

(4) The request shall include a memorandum from the Requester, approved by his or her supervisor, explaining the need for the subpoena. The subpoena shall follow the model in Appendix A. The request shall be accompanied by an original and one (1) copy of the proposed subpoena, completely filled out except for the date of issuance. The name, address and telephone number of the Requester shall be set out in the lower left hand corner of the subpoena.

(5) The Director or Designee will return the subpoena, if issued, to the Requester at the address shown on the lower left hand corner. The Requester will then arrange to have it served.

(6) Any employee of the Executive Branch who is eighteen (18) years of age or older is authorized to serve a subpoena issued by the Director or Designee. Normally, service should be made by an employee of OSM.

(7) A witness may be required to attend a deposition or hearing at a place not more than one hundred (100) miles from the place of service. Subpoenaed witnesses shall be paid the same fees and mileage as are paid for like service in the District Courts of the United States. Cf. 43 C.F.R. § 4.26(a), (c)(1).

(8) If an individual is named in the subpoena, it shall be served on that individual. If an entity is named in the subpoena, it shall be served on an officer, a managing or general agent, or any other agent authorized to receive service on behalf of the entity.

(9) The subpoena must normally be served at least seven (7) calendar days before the date on which the witness is to appear. However, a longer time may be required if the subpoena requests a large volume of documents. A shorter time may be appropriate where exigent circumstances exist and are documented by the Requester and approved by the Director or Designee.

(10) The preferred method of service shall be by personal service. However, certified United States mail, return receipt requested, is an alternative method. If the addressee refuses to accept the certified mail, OSM may treat such refusal as good service. Cf. 30 C.F.R. § 843.14(a)(2).

(11) The Return of Service, also known as Proof of Service, shall be filed with the Requester within three (3) business days of the date that service is completed. The Return of Service consists of a certification signed by the person serving the subpoena, setting forth his or her age and the method

by which service was accomplished. The Return shall contain certified mail receipts where appropriate, and it shall be filed with, and become a part of, the official administrative record of the proceeding for which the subpoena was issued.

(12) The Director or Designee will return the subpoena to the Requester with the notation "Refused" if it is not issued. The Director or Designee may, in his or her discretion, write an explanation for the refusal.

(13) In the event that the witness subpoenaed fails to appear or refuses to produce the subpoenaed documents, the matter may be referred to the Field Solicitor's Office for initiation of a court action to enforce the subpoena. The Requester must obtain the approval of his or her supervisor in writing before commencing a referral for enforcement. The referral package shall contain a copy of the subpoena, a copy of the Return of Service, and a description of the circumstances concerning the failure to appear or to produce the documents.

5. Reporting Requirements. None

6. Effect on Other Documents. OPM-5, Delegation of Authority will be updated to reflect changes resulting from this new directive.

7. References. Section 201(c)(1) of SMCRA; Rule 30(b)(6), Federal Rules of Civil Procedure; 43 C.F.R. § 4.26; 30 C.F.R. § 843.14.

8. Effective Date. Upon issuance.

9. Contact. Chief, Applicant/Violator System Office at 202-208-4421

10. Keywords. Subpoena

11. List of Appendices. Appendix A: SAMPLE SUBPOENA FORM

[Appendix A]
SAMPLE SUBPOENA FORM

IN RE: Investigation of _____

TO: _____

SUBPOENA

Pursuant to the authority of Section 201(c)(1) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1211(c)(1), YOU ARE COMMANDED to appear at _____

_____, on the _____ day of _____, 199____, at _____ o'clock ____M., and to bring with you the following documents:

In lieu of personal appearance, you may arrange with the Requester of this subpoena at his or her discretion to produce the requested documents for inspection and copying.

NOTE: Your failure to respond fully and truthfully to this subpoena, or to justify adequately such failure to respond, may result in the issuance of a court order to enforce the subpoena and imposition of penalties against you by a Judge of a United States District Court.

Please be further advised that provision of false, fictitious, or fraudulent statements or representations may subject you to criminal penalties of up to five years imprisonment or a fine of up to \$10,000 or both under 18 U.S.C. § 1001.

This subpoena is issued this _____ day of _____, 199____.

Requester: [name] _____

[address] _____

[telephone number] _____

Director or Designee