

**FEDERAL REGISTER: 45 FR 2626 (January 11, 1980)**

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 722 and 843

Service of Notices of Violation, Cessation Orders and Show Cause Orders and Informal Public Hearings

ACTION: Final Rule.

**SUMMARY:** The Office of Surface Mining adopts final rules which would clarify procedures for service of notices of violation, cessation orders and orders to show cause under its interim regulations and would explain the effect of refusal to accept tender of service. They would also clarify procedures for informal public hearings under the interim and permanent regulations of the Office, which govern surface coal mining operations under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

EFFECTIVE DATE: February 11, 1980.

FOR FURTHER INFORMATION CONTACT: Richard Robinson, Enforcement Specialist; Office of Surface Mining, Department of the Interior, Washington, DC 20240, 202-343-8061.

**SUPPLEMENTARY INFORMATION:**

In this document, the Office adopts final rules to modify provisions regarding the service of notices of violation, cessation orders and orders to show cause, and to clarify procedures for informal public hearings under the interim and permanent regulatory programs of SMCRA. The Director, Office of Surface Mining, has determined that these final rules are not significant rules, and do not require the preparation of a regulatory analysis.

**INTRODUCTION TO FINAL RULES**

The revised Section 722.14, which conforms to similar language in the permanent regulations, Section 843.14, explains in greater detail the manner for service of notices of violation, cessation orders, and show cause orders. It also states expressly OSM's interpretation of its existing regulations regarding service, namely, that service is complete upon tender and shall not be deemed incomplete because of refusal to accept. Thus, for instance, a person who refuses to accept certified mail is deemed to have been served with that mail. This includes failure to pick up such mail at the post office. Service will be made at the minesite, where possible, but failure to do so will not invalidate proper service by mail.

Three changes are made to Section 843.15 of the permanent regulations, regarding informal public hearings:

1. First, subsection (b) has been rewritten to clarify how an informal public hearing may be waived or the time for holding it extended.
2. Second, the second sentence of subsection (g) has been deleted. This sentence provided that no statements made or evidence introduced at an informal public hearing could be introduced in a subsequent hearing to impeach a witness. This deletion is being made because the Office has reconsidered this sentence and believes that it would result in the exclusion of a great deal of valid evidence.
3. Third, subsection (h) has been added to indicate that the decision as to whether a minesite should be viewed during the hearing is that of the person conducting the hearing.

Regarding Section 722.15, The Office has modified this regulation to conform it to Section 843.15. Section 722.15 incorporates the following changes:

1. The term "informal public hearing", which is the term used in Section 843.15, has been adopted in place of the term "minesite review".
2. Subsection (a) clarifies the situations in which an informal public hearing will be made available. Under the present language, informal public hearings are provided only for cessation orders. This is both too narrow and too broad. Under

Section 521(a)(5) of the Act, a public hearing must be provided for any “notice or order” issued pursuant to Section 521 which “requires cessation of mining”. Thus, the present Section 722.15 is too narrow because it does not provide for hearings with respect to notices of violation which result in “cessation of mining”. The Office recognizes that even though it may not expressly order a cessation of mining by means of a notice of violation, a notice of violation may be necessary implication cause a cessation of mining, in which case an informal public hearing should be made available.

3. Similarly, a cessation order may not require “cessation of mining”. It is possible for a cessation order not to result in “cessation of mining”, as for example, where a cessation order directing the operator to cease placing spoil on the downslope may not prevent the operator from extracting coal and transporting it within or from the minesite. In such a case, no informal public hearing is required under Section 521(a)(5).

4. Subsection (b), which based on the next-to-last sentence of the present Section 722.15(a), has been rewritten to refer to notices of violation as well as to orders. It has also been rewritten to clarify how an informal public hearing may be waived or the time for holding it extended.

5. Subsections (c), (d) and (e), which are based on the present Sections 722.15(c) and (d), have been rewritten for clarification.

6. Subsection (f), which is based on the present Section 722.15(e), has been modified to shorten the time period for issuance of a decision after an informal public hearing, and for clarity. The time period has been shortened because the Office believes that the informal public hearing procedures is intended to give the operator an expedited review of any notice or order that causes a cessation of mining.

The five-day period for issuing a decision after an informal hearing is intended to benefit the operator. The Office recognizes that in some cases, the Office may not have all the information necessary to make the decision in five days. For example, the operator may claim that he had approval from the State to take certain action, but may be unable to produce written proof. If he asks the State to supply him with written proof, it may take more than five days for the Office to receive it from the State. In such case, the Office would issue a decision based on the facts established as of the fifth day, and reconsider and modify this decision, if appropriate, after receipt of additional information. If no additional information is received, the original decision would remain as final.

## **BACKGROUND**

Proposed modifications to 30 CFR Parts 722 and 843 were published in the Federal Register on August 20, 1979 (44 FR 48270), and a notice of public hearing relating to these proposed modifications were published in the Federal Register on September 28, 1979 (44 FR 55909). A public hearing was held on October 9, 1979, in Washington, D.C. At the close of the comment period on October 15, 1979, ten commenters had submitted written comments. The transcript of the public hearing and all written comments have been fully and completely considered in the development of these final regulations.

## **SECTION 722.14**

1. Almost every commenter objected to the second sentence of Section 722.14(a)(1), which permits service on “any individual at the site who appears to be an employee or agent of the person to whom the notice or order is issued”, where the designated agent of individual who appears to be in charge cannot be located at the site. The commenters felt that service on such persons of tern results in the notice or order being lost or never being delivered to a responsible individual who will take proper action. Therefore, the Office has changed this subsection. Tender of service will be made on the operator’s designated agent if he or she is reasonably available at the site. If the designated agent is not reasonably available at the site, tender of service will be made on any person at the site who appears to be in charge. Inquiry will be made at the office on the site, if there is one, for such person. If there is no office or no one is there, however, service may then be made on any individual at the site who appears to be an employee or agent of the person to whom the notice or order is issued. The designation of an agent for such service should be made on the mine identification sign or on the mine bulletin board located near the office on the minesite, and should be conspicuous and easy to read. Such designation may sl also include the name and address of one person t whom a courtesy copy of the notice of violation, cessation order or show cause order may be mailed (see comment below). If no designation has been made or the designation is not located as described above, service will be made on the person who appears to be in charge. If such person cannot be located, service will be made on any individual at the site who appears to be an employee or agent of the person t whom the notice or order is issued.

2. One commenter suggested that Section 722.14(d) be modified to provide that a notice of violation or cessation order must be mailed to the person to whom it is issued, when it has been served in accordance with Section 722.14(a). As stated in the preamble to the permanent regulations (44 FR 15304, March 13, 1979), the Office does not agree with this suggestion. The permittee/operator should be able to rely on its own employees/agents to forward copies of notices and orders. The Office will, however, mail a courtesy copy of the notice of violation or cessation order to a person as designated above. Such mailing or the failure to do so shall have no effect on the validity of the notice or order.

3. One commenter suggested that Section 722.14(d) provide that copies of notices and orders be furnished by the Office only to persons requesting them, and that the Office keep a record of all such requests, which record would be available to the permittee. The Office has decided not to accept this comment for two reasons. First, both the Freedom of Information Act and the Surface Mining Control and Reclamation Act provide that copies of these documents will be available to operators. Second, the Office feels that such a recordkeeping procedure would place too great an administrative burden on the Office in relation to the benefit received from such a procedure.

### **SECTIONS 722.15 and 843.15**

1. Several commenters felt that the definition of “mining” in Section 722.15(a) and Section 843.15(a) was too restrictive and ought to be expanded. One commenter suggested that all cessation orders should automatically trigger an informal public hearing. The Office disagrees with this view because reviews of this type of notice or order are necessary only for potential substantial economic consequences to the operator caused by cessation of operations. The Act does not contemplate imposing upon the Office the administrative burden of holding informal hearings for every notice violation and cessation order issued. The operator is encouraged, however, to attempt to reach an informal resolution of the issue by contacting the inspector or his supervisor to discuss the operator’s concerns. If persuaded that the notice or order was issued in error, the inspector will modify or vacate the same (see Federal Register March 13, 1979, 44 FR 15304).

The Office has changed the definition of “mining”, however, to include those operations separated from a minesite which clean, concentrate, process, prepare or load coal. The Office believes that a notice or order for such an operation which requires a cessation of these activities may cause substantial economic consequences for this kind of operation.

2. One commenter suggested that there should be no civil penalty if the notice or order expires due to the failure of the Office to conduct a timely informal public hearing. The Office believes that the commenter has confused the concept “expire” with the concept “vacate”. A notice or order which is vacated is totally expunged as if it had never been issued. A notice or order which expires (or which is terminated upon the operator’s compliance) is valid for the period during which it was in effect. A civil penalty must be assessed and collected for the period during which the notice of violation or cessation order was in effect if required under the penalty point system set out in 30 CFR Part 722. In addition, the Office will include the notice or order in its calculation of the points to be assigned for the operator’s history of previous violations” as described in Sections 723.12(b) and 845.13(b) of these regulations, regardless of whether or why a notice or order was allowed to expire. Furthermore, the informal public hearing is separated from an operator’s right to challenge a civil penalty assessment. If the notice of violation or cessation order expires, the operator may return to work although he may not continue the allegedly illegal activity. Also, the operator may challenge his civil penalty through the assessment conference provided in Section 723.17 and Section 845.18, and by means of the formal review process described in Sections 723.18 and 845.19.

3. Two commenters objected to the statement in Section 722.15(a) and Section 843.15(a) that the OSM office nearest to the minesite shall be deemed to be reasonably close to the minesite unless a closer location is requested and agreed to by the Office. The Office wishes to make it clear that this includes district and field as well as regional offices. Another commenter suggested that all informal public hearings be held in the county where the minesite is located, and that for water pollution violations the hearing be held at the nearest downstream location. The proposed rule has not been changed. However, where the minesite is a long distance from the nearest OSM office and a view of the minesite may be of aid in the hearing, a closer location to the minesite will be scheduled. Where the OSM office is relatively close to the minesite and there is no good reason to hold the hearing nearer the minesite, the hearing will be held at the OSM office nearest the minesite. Operators will generally be afforded a hearing site convenient to both parties, but it is necessary to vest the final decision as to where a hearing will be held with the Office.

4. One commenter suggested that at least part of the hearing be held after 7:00 p.m. for the benefit of the public. While OSM encourages public participation in all phases of its activities, the Office feels that the informal public hearing is basically for the benefit of the operator. The Office also feels that such a regular procedure would place too great an administrative burden on the Office because of the number of these hearings. OSM feels that public participation is adequately provided for in this instance.

5. Two commenters objected to the provision for waiver of the hearing in Section 722.15(b) and Section 843.15(b), and suggested that an operator should not have the burden of requesting an informal public hearing. The Office has not accepted this comment because of its experience that a great number of operators entitled to these hearings failed to appear for them, thus wasting the valuable time of OSM personnel. The Office feels that in view of the requirement in Sections 722.15(b)(1)(i) and 843.15(b)(1)(i) that OSM notify the operator of his right to a hearing, the minimal action of requesting a hearing is not too great a burden on those operators desiring one. Moreover, such a procedure would remove the burden of the Office holding such hearings where operators neither desire one nor intend to appear.

6. One commenter indicated that Sections 722.15 and 843.15 do not conform to the requirements of Section 525(c) of the Act regarding temporary relief. The informal public hearing provided in Section 521(a)(5) of the Act is entirely separate from the hearing on temporary relief in Section 525(c). The rules in Sections 722.15 and 843.15 would not apply to temporary relief requests.

7. One commenter indicated that the first sentence in subsection (b) of Sections 722.15 and 843.15 is confusing, and that "even though" should be substituted for the first "if" in that sentence. The Office agrees that this sentence is confusing, and has clarified when a notice or order does not expire and when no hearing will be required.

8. One commenter pointed out that Section 722.15(b)(92) and Section 843.15(b)(2) are not the same. The two subsections have been changed to be the same and to clarify that the written notice must be delivered or sent no later than five business days after the notice or order is served.

9. One commenter indicated that the time by which the Office shall send the decision to all interested parties is not specified in Section 722.15(f). The rule now states that the decision shall be sent within five business days after the close of the hearing. The Office will also make an effort to telephone the operator with the decision prior to mailing, where possible, if the decision modifies or vacates the notice or order.

10. Several commenters objected to the decision of the second sentence of Section 843.15(g), which would not allow statements of evidence produced at an informal public hearing to be introduced as evidence or to impeach a witness. The Office has retained this deletion both for the reasons mentioned above and because this sentence has caused confusion at administrative hearings.

11. Two commenters objected that the proposed rule gave the person conducting the informal hearing sole discretion in deciding whether to view the minesite. The final rule has been changed to make sure that the criterion on which the person conducting the hearing will make such a decision is whether a viewing of the minesite will assist in his/her determination of the appropriateness of the enforcement action or remedial action required. However, a failure to view the minesite by the Office would not invalidate any notice or order.

## REGULATION DRAFTERS

The modifications to the interim and permanent program regulations have been drafted principally by Harriet B. Marple, Chief, Division of Enforcement; Richard Robinson, Enforcement Specialist; John Williams, Staff Attorney and Marc McGraw, Assistant Solicitor for Enforcement.

Dated: December 28, 1979.

Joan M. Davenport, Assistant Secretary Energy and Minerals.

## PART 722 – ENFORCEMENT PROCEDURES

Section 722.14 is revised to read as follows:

### **SECTION 722.14 - SERVICE OF NOTICES OF VIOLATION, CESSATION ORDERS, AND ORDERS TO SHOW CAUSE**

(a) A notice of violation or cessation order shall be served on the person to whom it is directed or his designated agent promptly after issuance, as follows:

(1) By tendering a copy at the surface coal mining and reclamation operation to the designated agent or to the person to whom it is directed. If no such agent is reasonably available, a copy may be tendered to the individual who, based

upon reasonable inquiry by the authorized representative, appears to be in charge of the surface coal mining and reclamation operation referred to in the notice or order. If no such individual can be located at the site, a copy may be tendered to any individual at the site who appears to be an employee or agent of the person to whom the notice or order is issued. Service shall be complete upon tender of the notice or order and shall not be deemed incomplete because of refusal to accept.

(2) As an alternative to paragraph (a)(1) of this section, service may be made by sending a copy of the notice or order by certified mail or by hand to the person to whom it is issued or his designated agent. Service shall be complete upon tender of the notice or order or of the mail and shall not be deemed incomplete because of refusal to accept.

(b) A show cause order, or a vacation, modification or termination of a notice or order, may be served on the person to whom it is issued in either manner provided in paragraph (a) of this section.

(c) Designation by any person of an agent for service of notices and orders shall be made in a conspicuous, easy-to-read manner on the mine identification sign, or on the mine bulletin board posted by the minesite office.

(d) The Office shall furnish copies of notices and orders to the State regulatory authority, if any, after their issuance. The Office may furnish copies to any person having an interest in the surface coal mining and reclamation operation or the permit area, such as the owner of the fee, a corporate officer of the permittee, or the bonding company.

Section 722.15 is revised to read as follows:

#### **SECTION 722.15 - INFORMAL PUBLIC HEARING**

(a) Except as provided in paragraphs (b) and (c) of this section, a notice of violation or cessation order which requires cessation of mining, expressly or by necessary implication, shall expire within 30 days after it is served unless an informal public hearing has been held within that time. The hearing shall be held at or reasonably close to the minesite so that it may be viewed during the hearing or at any other location acceptable to the Office and the person to whom the notice or order was issued. The Office of Surface Mining office nearest to the minesite shall be deemed to be reasonably close to the minesite unless a closer location is requested and agreed to by the Office. Expiration of a notice or order shall not affect the Office's right to assess civil penalties with respect to the period during which the notice or order was in effect. No hearing will be required where the condition, practice or violation in question has been abated, or the hearing has been waived. For purposes of this section only, mining means (1) extracting coal from the earth or from coal waste piles and transporting it within or from the permit area, and (2) the processing, cleaning, concentrating, preparing or loading of coal where such operations occur at a place other than at a minesite.

(b) A notice of violation or cessation order shall not expire as provided in paragraph (a) of this section if the informal public hearing has been waived or if, with the consent of the person to whom the notice or order was issued, the informal public hearing is held later than 30 days after the notice or order was served. For purposes of this subsection:

(1) The informal public hearing will be deemed waived if the person to whom the notice or order is issued:

(i) Is informed, by written notice served in the manner provided in paragraph (b)(2) of this section, that he will be deemed to have waived an informal public hearing unless he requests one within 30 days after service of the notice or order, and

(ii) Fails to request an informal public hearing within that time.

(2) The written notice referred to in paragraph (b)(1)(i) of this section shall be delivered to such person by an authorized representative or sent by certified mail to such person no later than five days after the notice or order is served on such person.

(3) The person to whom the notice or order is issued shall be deemed to have consented to an extension of the time for holding the informal public hearing if his request is received on or after the 21<sup>st</sup> day after the service of the notice of order. The extension of time shall be equal to the number of days elapsed after the 21<sup>st</sup> day.

(c) The Office shall give as much advance notice as is practicable of the time, place, and subject matter of the informal public hearing to:

(1) The person to whom the notice or order was issued;

(2) Any person who filed a report which led to the notice or order; and

(3) The State regulatory authority, if any.

(d) The Office shall also post notice of the hearing at the regional district or field office closest to the minesite, and publish it, where practicable, in a newspaper of general circulation in the area of the mine.

(e) Section 554 of Title 5 of the United States Code, regarding requirements for formal adjudicatory hearings, shall not govern the conduct of these informal public hearings. An informal public hearing shall be conducted by a representative of the Office, who may accept oral or written arguments and any other relevant information from any person attending.

(f) Within five business days after the date of the informal public hearing, the Office shall affirm, modify or vacate the notice or order in writing and send its decision to:

- (1) The person to whom the notice or order was issued;
- (2) Any person who filed a report which led to the notice or order; and
- (3) The State regulatory authority, if any.

(g) The granting or waiver of an informal public hearing shall not affect the right of any person to formal review under Sections 518(b), 521(a)(4), or 525 of the Act.

(h) The person conducting the hearing for the Office shall determine whether or not the minesite should be viewed during the hearing. In making this determination the only consideration shall be whether a view of the minesite will assist the person conducting the hearing in reviewing the appropriateness of the enforcement action or the required remedial action.

### **PART 843 – FEDERAL ENFORCEMENT**

Sections 843.15(a), (b), (g) are revised and (h) is added to read as follows:

(a) Except as provided in paragraphs (b) and (c) of this section, a notice of violation or cessation order which requires cessation of mining, expressly or by necessary implication, shall expire within 30 days after it is served unless an informal public hearing has been held within that time. The hearing shall be held at or reasonably close to the minesite so that it may be viewed during the hearing or at any other location acceptable to the Office and the person to whom the notice or order was issued. The Office of Surface Mining Office nearest to the minesite shall be deemed to be reasonably close to the minesite unless a closer location is requested and agreed to by the Office. Expiration of a notice or order shall not affect the Office's right to assess civil penalties with respect to the period during which the notice or order was in effect. No hearing will be required where the condition, practice or violation in question has been abated or the hearing has been waived. For purposes of this section only, mining means (1) extracting coal from the earth or from coal waste piles and transporting it within or from the permit area, and (2) the processing, cleaning, concentrating, preparing or loading of coal where such operations occur at a place other than at a minesite.

(b) A notice of violation or cessation order shall not expire as provided in paragraph (a) of this section if the informal public hearing has been waived or if, with the consent of the person to whom the notice or order was issued, the informal public hearing is held later than 30 days after the notice or order was served. For purposes of this subsection:

(1) The informal public hearing will be deemed waived if the person to whom the notice or order is issued:

(i) Is informed, by written notice served in the manner provided in paragraph (b)(2) of this section, that he will be deemed to have waived an informal public hearing unless he requests one within 30 days after service of the notice or order, and

(ii) Fails to request an informal public hearing within that time.

(2) The written notice referred to in paragraph (b)(1)(i) of this section shall be delivered to such person by an authorized representative or sent by certified mail to such person no later than five days after the notice or order is served on such person.

(3) The person to whom the notice or order is issued shall be deemed to have consented to an extension of the time for holding the informal public hearing if his request is received on or after the 21<sup>st</sup> day after the service of the notice of order. The extension of time shall be equal to the number of days elapsed after the 21<sup>st</sup> day.

\* \* \* \* \*

(g) The granting or waiver of an informal public hearing shall not affect the right of any person to formal review under Sections 518(b), 521(a)(4), or 525 of the Act.

(h) The person conducting the hearing for the Office shall determine whether or not the minesite should be viewed during the hearing. In making this determination the only consideration shall be whether a view of the minesite will assist the person conducting the hearing in reviewing the appropriateness of the enforcement action or the required remedial action.

(Surface Mining Control and Reclamation Act of 1977, Sections 201, 501, 521(a)(5); 30 U.S.C. 1211, 1251, 1271(a)(5))

[FR Doc. 80-1072. Filed 1-10-80, 8:45 am]

BILLING CODE 4310-05-M