

FEDERAL REGISTER: 51 FR 16319 (May 2, 1986)

DEPARTMENT OF THE INTERIOR
AGENCY: Office of Hearings and Appeals

43 CFR Part 4
Special Rules Applicable to Surface Coal Mining Hearings and Appeals

ACTION: Final rule.

SUMMARY: These amendments to existing rules confirm that dismissal of the applicable petition or application is the mandatory sanction for failure to comply with time limits for: (1) Filing petitions for review of proposed civil penalties, (2) filing applications for review of notices of violation or cessation orders, and (3) making full payment of proposed civil penalties under section 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1268(c) (1982).

EFFECTIVE DATE: June 2, 1986.

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 Blvd., Arlington, Virginia 22203; phone (703) 235-3750.

SUPPLEMENTARY INFORMATION:

On November 15, 1985, the Office of Hearings and Appeals (OHA) published proposed amendments providing sanctions for failure to comply with the time limit for filing a petition for review of a proposed civil penalty set forth in 43 CFR 4.1151; for failure to comply with the time limit for payment of a proposed assessment set forth in 43 CFR 4.1152; and for failure to comply with the time limit for filing an application for review of a notice of violation or cessation order set forth in 43 CFR 4.1162. *See* 50 FR 47237-38 (Nov. 15, 1985). In each case the sanction proposed was dismissal of the applicable petition or application for review.

Comments on the proposed rules were received from the Mining and Reclamation Council of America, the Pennsylvania Coal Mining Association, and Arch Mineral Corporation. The comments and OHA's responses are set forth below:

Comment 1: It is questionable whether the time limits for filing for administrative review under sections 518(c) and 525(a) of the Act, 30 U.S.C. 1268(c) and 1275(a) (1982), are jurisdictional, as the amendments to the rules assume, or rather are statutes of limitations with which failure to comply must be raised by the Office of Surface Mining (OSM) as an affirmative defense or in a motion to dismiss. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-98 (1982). Congress was only concerned that payment of a proposed civil penalty precede a hearing, not that payment occur within 30 days. Section 518(c) states only that failure to forward payment within 30 days results in a "waiver" of the right to contest the amount of the penalty or the fact of the violation; it does not expressly bar jurisdiction to conduct administrative review. OHA should take the opportunity of the proposed rulemaking to rescind its decisions holding that untimely filings of petitions for review or applications for review and untimely submission of the amount of a proposed civil penalty deprive it of jurisdiction to consider an appeal.

Response: Section 525(a)(1), 30 U.S.C. 1275(a)(1) (1982), provides that a permittee issued a notice of violation or cessation order or any person having an interest which is or may be adversely affected by such a notice or order "may apply to the Secretary for review of the notice or order within 30 days of receipt thereof or within 30 days of its modification, vacation, or termination." Congress included this provision "[i]n order to assure expeditious review and the process for persons seeking administrative relief from enforcement decisions of Federal inspectors." H.R. Rep. No. 218, 95th Cong., 1st Sess. 130 (1977). Section 525 "establishes clear, definitive administrative review procedures." *Id.* at 131.

The reason for such procedures was stated:

"H.R. 2 contains comprehensive provisions for inspections, enforcement notices and orders, administrative and judicial review, and penalties. These requirements are of equal importance to the provisions of the bill regarding mining and reclamation performance standards since experience with State surface mining reclamation laws has amply

demonstrated that the most effective reclamation occurs when sound performance standards go hand in hand with strong, equitable enforcement mechanisms.”

Id. at 128.

Section 518(c), 30 U.S.C. 1268(c), provides that a person charged with a proposed civil penalty shall have 30 days after being informed of its amount to either pay the penalty or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. The Congress stated that the permittee "must forward the amount of the proposed penalty to the Secretary within 30 days of receipt of the notice of proposed penalty." S. Rep. No. 128, 95th Cong., 1st Sess. 1, 86 (1977). A civil penalty would become final after a hearing was held "or waived by act or by operation of law." *Id.* The explanation for this approach was:

“This section also requires the operator (or permittee) to pay the proposed penalty within thirty days after he has been assessed a penalty for violation of the Act or permit. If the permittee wishes to contest either the fact of violation or the amount of the penalty, he shall so notify the Secretary when making the remittance. Upon receipt of a payment from a permittee the Secretary shall place it in an escrow account and should the permittee's challenge be sustained, the payment is to be returned to the permittee with interest. The Committee is of the belief that this procedure will avoid the problem of non-collection of fines.”

Id. at 58-59.

The last comment was a reference to difficulties experienced with the civil penalty provisions of the Federal Coal Mine Health and Safety Act of 1969. The Committee stated that variations from the provisions of that law in the surface mining bill were made, in part, "to improve enforcement." *Id.* at 58.

It is OHA's belief that the plain language of Sections 525(a) and 518(c) and the legislative history of these administrative review provisions require that failure to file application for review of notices of violation or cessation orders "within thirty days" of receiving them, as required by Section 525(a), be regarded as failure to meet the jurisdictional prerequisite for administrative review established by the Congress. Interpreting the 30-day period as a matter that OSM must raise as an affirmative defense if it were not complied with would neither "assure expeditious review" nor constitute a "clear, definitive administrative review procedure." Similarly, the language of 518(c) provides that in every case the amount of a proposed civil penalty must be sent to the Department within 30 days of being informed of the amount; only if the person "wishes to contest the amount or the fact of the violation" would the amount be placed in escrow pending the outcome of administrative or judicial review. The consequence of failure to forward the amount of the proposed assessment to the Secretary within 30 days is clearly set forth in the statute: Such a failure "shall result in a waiver of *all* legal rights to contest the violation or the amount of the penalty." (Emphasis added.) The statute does not say such a failure may be deemed a waiver, and the Committee report states that a hearing could be waived "by operation of law." The report also states that the permittee "must" forward the amount within 30 days and that the section "requires" this. Nor would allowing the failure to pay within 30 days to be raised as an affirmative defense "improve enforcement" of the civil penalty provisions or "avoid the problem of non-collection of fines."

Zipes v. Trans World Airlines, Inc., supra, does not indicate the time limits of the surface mining act should be interpreted as statutes of limitations rather than jurisdictional prerequisites. That was a case under Title VII of the Civil Rights Act of 1964 in which the Court held that filing charges of discrimination with the Equal Employment Opportunity Commission (EEOC) within the time prescribed by statute was not a jurisdictional prerequisite to bringing a Title VII suit in Federal court. The Court found the Act's provisions did not limit Federal court jurisdiction to cases in which there had been a timely filing with the EEOC under a separate provision that did not refer to court jurisdiction. The Court supported its decision by referring to 1972 Congressional action in amending the Act, and to the principle that a literal reading of filing provisions would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." 455 U.S. at 397. It also noted the "remedial purpose of the legislation as a whole." *Id.* at 398. In the surface mining act the Congress sought to provide a statutory scheme of "strong, equitable enforcement mechanisms" with "clear, definitive administrative review procedures" and a remedial purpose of improving enforcement of civil penalties by requiring that they be paid within 30 days whether or not the person was contesting them. It is apparent that this scheme and purpose are markedly different from the provisions of the Civil Rights Act considered by the Court in *Zipes*.

OHA therefore adheres to its position that compliance with these time limits in the surface mining act is a jurisdictional prerequisite to administrative review and that dismissal is mandatory for failure to comply. The suggestion in the comment is accordingly rejected.

Comment 2: If the Department will not allow a hearing when a person filing a petition for review of a proposed civil penalty pays the amount after 30 days, the preamble to the rule should clarify that such an amount will be returned with the dismissed petition.

Response: The only circumstance under which the amount of a proposed civil penalty or any part of it can be returned is if a person pays it within 30 days of being informed of the amount, contests either the amount of the penalty or the fact of the violation, and successfully demonstrates that no violation occurred or that the amount of the penalty should be reduced. 30 U.S.C. 1268(c); 30 CFR 723.20(c). If the amount is paid after 30 days it will be regarded as payment of the penalty that is due, since there is no jurisdiction to conduct administrative review. 30 U.S.C. 1268(c); 30 CFR 723.20(a). There is no legal authority to support the suggestion in the comment and it is therefore rejected.

Comment 3: There should be a clarification that failure to file a petition for review of a proposed civil penalty or to pay the amount assessed within 30 days does not preclude filing an application for review of a notice of violation or cessation order or operate as an admission of the fact of violation in such proceeding.

Response: The statute establishes separate proceedings to review notices of violation and cessation orders under Section 525 and to review proposed civil penalties under Section 518. Although hearings under Section 518 shall be consolidated with other proceedings resulting from Section 521 when appropriate (30 U.S.C. 1268(b)), a person may elect administrative review under either Section 518 or Section 525 or both and failure to elect one does not affect one's rights under the other. Specifically, dismissal of a petition for review of a proposed civil penalty because the petition or the proposed amount of the penalty was untimely would not be res judicata on the issue of the fact of the violation in an application for review proceeding arising from the same notice of violation or cessation order. The amendments to 43 CFR 4.1151 and 4.1152 have been revised to make this explicit.

Comment 4: The rules should allow the administrative law judge discretion to accept a petition for review or application for review outside of the 30 day time limit for good cause or exigent circumstances.

Response: As discussed in the response to Comment 1, compliance with the 30 day limits for filing is required for OHA jurisdiction. Therefore, neither an administrative law judge nor the Interior Board of Land Appeals may excuse failure to comply with these limits. The suggestion in the comment must be rejected.

Comment 5: Sanctions similar to those contained in the proposed amendments should be adopted for failure to comply with the time limits for filing under 43 CFR 4.1280 *et seq.* and 4.1290 *et seq.*

Response: Although the proceedings referred to are not covered in this rulemaking, the surface mining act does not provide time limits for initiating such proceedings as it does for those that are covered by this rulemaking.

Because these rules simply confirm the mandatory nature of existing filing requirements, the Department has determined that these rules are not major, as defined by E.O. 12291; 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.*); and will not significantly affect the quality of the human environment, and therefore no detailed statement is required under the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

The rules contain no information collection requirements requiring Office of Management and Budget approval under 44 U.S.C. 3507.

The author of these regulations is Will A. Irwin, Administrative Judge, Board of Land Appeals, Office of Hearings and Appeals.

LIST OF SUBJECTS IN 43 CFR PART 4

Administrative practice and procedure, Surface mining.

For the reasons stated in the preamble and under the authority of 30 U.S.C. 1201 *et seq.* (1982), 4.1151, 4.1152, and 4.1162 of Subpart L of Part 4 of Title 43 of the Code of Federal Regulations are amended as set forth below.

Dated: March 26, 1986.

Ann McLaughlin,
Under Secretary.

PART 4 -- [AMENDED]

43 CFR Part 4 is amended as follows:

1. The authority citation for Part 4, Subpart L, continues to read as follows:

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

2. In part 4, Section 4.1151 is amended by adding paragraph (c) as follows:

SECTION 4.1151 - TIME FOR FILING.

* * * * *

(c) No extension of time will be granted for filing a petition for review of a proposed assessment of a civil penalty as required by paragraph (a) or (b) of this section. If a petition for review is not filed within the time period provided in paragraph (a) or (b) of this section, the appropriateness of the amount of the penalty, and the fact of the violation if there is no proceeding pending under section 525 of the Act to review the notice of violation or cessation order involved, shall be deemed admitted, the petition shall be dismissed, and the civil penalty assessed shall become a final order of the Secretary.

3. In Part 4, Section 4.1152 is amended by adding paragraph (d), as follows:

SECTION 4.1152 - CONTENTS OF PETITION; PAYMENT REQUIRED.

* * * * *

(d) No extension of time will be granted for full payment of the proposed assessment. If payment is not made within the time period provided in Section 4.1151 (a) or (b), the appropriateness of the amount of the penalty, and the fact of the violation if there is no proceeding pending under section 525 of the Act of review the notice of violation or cessation order involved, shall be deemed admitted, the petition shall be dismissed, and the civil penalty assessed shall become a final order of the Secretary.

4. In Part 4, Section 4.1162 is revised.

SECTION 4.1162 - TIME FOR FILING.

(a) Any person filing an application for review under Section 4.1160 *et seq.* shall file that application within 30 days of the receipt of a notice or order or within 30 days of receipt of notice of modification, vacation, or termination of such a notice or order. Any person not served with a copy of the document shall file the application for review within 40 days of the date of issuance of the document.

(b) No extension of time will be granted for filing an application for review as provided by paragraph (a) of this section. If an application for review is not filed within the time period provided in paragraph (a) of this section, the application shall be dismissed.

[FR Doc. 86-9918 Filed 5-1-86; 8:45 am]

BILLING CODE 4310-10-M