

**FEDERAL REGISTER: 53 FR 8752 (March 17, 1988)**

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Hearings and Appeals (OHA)

43 CFR Part 4

Special Rules Applicable to Surface Coal Mining Hearings and Appeals

ACTION: Final rule.

**SUMMARY:** The Office of Hearings and Appeals promulgates final regulations to provide procedures for administrative review of the proposed assessment of individual civil penalties against a director, officer, or agent of a corporation under the Surface Mining Control and Reclamation Act of 1977. These rules are necessary to inform parties of who may petition for review of a proposed assessment, when and where the petition must be filed, what the contents of a petition must be, what must be proved at a hearing and who bears the burden of proof, and who may petition for a review of a decision by an administrative law judge. The intended effect of these regulations is to provide the mechanisms for administrative review of proposed individual civil penalties.

EFFECTIVE DATE: These rules are effective April 18, 1988.

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. Phone: (703) 235-3750.

**SUPPLEMENTARY INFORMATION:**

On December 24, 1986, the Office of Hearings and Appeals (OHA) published proposed regulations providing procedures for administrative review of the proposed assessment of individual civil penalties against a director, officer, or agent of a corporation under section 518(f) of the Surface Mining Control and Reclamation Act of 1977 (the Act), *30 U.S.C. 1268(f)* (1982). *51 FR 47846-46848* (Dec. 24, 1986). The Office of Surface Mining Reclamation and Enforcement (OSM) also published proposed regulations implementing section 518(f) on that day. See *51 FR 46838-46844* (Dec. 24, 1986) Comments on OHA's proposed regulations were received from five organizations. These comments are summarized and OHA's responses are provided in the following discussion.

Editorial changes have been made in the final rule to conform with the terminology used in the corresponding OSM rule on individual civil penalties. The document used to notify an individual concerning the assessment of a penalty is now called a "notice of proposed individual civil penalty assessment."

**1. SECTION 4.1302**

One comment argues that Section 4.1302(a) "lacks the necessary flexibility for the protection of an individual's right to due process" and should be revised to allow the filing of a petition for review of a proposed assessment after 30 days of its service under extenuating circumstances such as "faulty service of the assessment or ambiguous nature of the propose assessment." "OHA should change the mandatory language which precludes the exercise of discretion to consider a petition filed late for good cause," the comment suggests, as well as delete the second sentence of proposed Section 4.1302(b), which specifies the sanctions for untimely filing of a petition, because it has "no statutory support."

OHA distinguishes between deadlines for filing documents that initiate administrative review proceedings, which it regards as jurisdictional, and deadlines for filing subsequent briefs or other pleadings. Untimely filing of documents in the former category, such as petitions for review under Section 4.1302, mandates dismissal of the proceeding, while dismissal of the proceeding for untimely filing of documents in the later category is discretionary and depends in part on whether another party was prejudiced by the untimely filing. See, e.g., *James C. Mackey*, 96 IBLA 356, 359, 94 I.D. 132, 134 (1987). The distinction is well-recognized, see, e.g., *Pressentin, v. Seaton*, 284 F.2d 195, 199 (D.C. Cir. 1960), and may be established under the authority of *5 U.S.C. 301* (1982) as well as under the authority of the Surface Mining Act. See *51 FR 16319-20* (May 2, 1986). The suggestion is rejected.

## **2. SECTION 4.1303**

One comment objected to the requirement in proposed Section 4.1303(a)(3) that an individual filing a petition for review provide a copy of the permit, order or final decision that the corporate permittee is charged with violating. Such document might be difficult for an individual to find in time for filing within 30 days, especially if he has left the corporation, and it is more appropriate for OSM to produce them as part of its prima facie case, the comment argues. Finally, the comment notes, comparable regulations only require a petitioner to file items that have previously been served on him. See, e.g., 43 CFR 4.1164(c).

The proposed regulation has been revised to require the filing only of all documents that OSM has served on the individual in connection with the proposed civil penalty. See 30 CFR 724.17(a), 846.17(a).

## **3. SECTION 4.1304**

A comment observes that there is no sanction comparable to Section 4.1302(b), second sentence (discussed above), for failure to comply with the requirement of Section 4.1304 that OSM file an answer or motion, or a statement that it will not file an answer or motion, within 30 days of receipt of a copy of a petition. The commenter proposes that no extension be available for a filing under Section 4.1304, and that failure to timely file in accordance with it be deemed to be a statement that OSM will not file anything in response to a petition.

OHA has held, as the commenter apparently recognizes, that OSM's failure to file an answer should not result in vacating a notice of violation or cessation order, absent extreme circumstances. *William Francis Rice, 3 IBSMA 17*, 88 I.D. 269 (1981). Although failure to comply with Section 4.1304 would presumably be regarded similarly, the regulation is intended to require OSM to file either an answer or a motion or a statement that it does not intend to file a substantive answer or motion so that the administrative law judge will have a clear indication when the case is ready to be set for hearing. Although treating OSM's silence as a statement that it would not file anything would have the same effect as the proposed regulation, OHA prefers the definiteness that will result from requiring that it file one of the documents specified. The suggestion is not accepted.

## **4. SECTION 4.1307(a)**

One comment objects that proposed Section 4.1307(a)(1) goes beyond the authority of section 518(f) in authorizing imposition of an individual civil penalty for violation "of any requirement of the Act or implementing regulations," and states the quoted language must be stricken.

Section 518(f) authorizes a civil penalty for a director, officer, or agent of a corporation "[w]henver a corporate permittee violates a condition of a permit \* \* \* or fails or refuses to comply with any order issued under section 521 of this Act \* \* \*." Section 4.1307(a)(1) has been revised to correspond to this language.

Under Section 4.1307(a)(1), OSM can meet its burden by establishing a prima facie case of either a violation, or of a failure or refusal. In cases where an individual civil penalty is based on a failure or refusal, OSM need not prove the fact of a violation; it need only show that it cited a violation in an order issued to a corporate permittee. Section 518(f) of the Act subjects a director, officer or agent of a corporation to an individual civil penalty for the corporation's failure or refusal to comply with an applicable order, even where the director, officer or agent had no role in committing the underlying violation itself.

## **5. SECTION 4.1307(b)**

Two comments object to the provision of proposed Section 4.1307(b) that the "existence of a corporate permittee's violation \* \* \* is conclusively established if the violation or order has been upheld in a final decision" in an administrative review proceeding before OHA. The commenters presume that the rule is based on principles of res judicata or collateral estoppel, but object that a corporate director, officer, or agent would not necessarily be either a party to administrative litigation involving the corporation's violation or in privity with the corporation. No precedent exists for "the concept of a per se application of collateral estoppel without a specific showing of the requisite privity," it is argued.

The question is when a director, officer, or agent of a corporation may be precluded from relitigating the issue whether that corporation violated a permit condition or failed or refused to comply with an order issued under section 521 or by the Secretary. The answer is that

“when an administrative body has acted in a judicial capacity and has issued a valid and final decision on disputed issues of fact properly before it, collateral estoppel will apply to preclude relitigation of fact issues only if: (1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision.”

*Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241, 1245 (11th Cir. 1985). See *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Nasemv. Brown*, 595 F.2d 801, 806-07 (D.C. Cir. 1979). Under these circumstances an individual may be collaterally estopped from contesting the existence of a corporate permittee's violation or failure or refusal to comply with an order.

The provision authorizing the preclusion of this issue has been added to Section 4.1307(a)(1), proposed Section 4.1307(b) has been deleted, and proposed Section 4.1307(c) has been redesignated as Section 4.1307(b).

#### **6. SECTION 4.1307(c)**

Three comments observe that, unlike 43 CFR 4.1155 in civil penalty proceedings involving permittees under section 518(a) of the Act, proposed Section 4.1307(c) imposes the ultimate burden of persuasion on the individual to show by a preponderance of the evidence that the elements for imposing the proposed penalty have not been established. Unless a basis exists for distinguishing why the ultimate burden of persuasion should be allocated differently between the two proceedings, the comments suggest that Section 4.1307(c) (now Section 4.1307(b)) be revised to allocate this burden of persuasion to OSM as it is in Section 4.1155.

43 CFR 4.1155 provides that OSM shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of violation and as to the amount of the penalty. As to the fact of violation, the allocation of the ultimate burden of persuasion to OSM in Section 4.1155 is inconsistent with Section 4.1171, which allocates the ultimate burden to the applicant for review because "the legislative history clearly states that an applicant for review has the ultimate burden of proof in proceedings to review notices and orders. S.R. No. 128, 95th Cong., 1st Sess. 93 (1977)." 43 FR 34381 (Aug. 3, 1978). Because the allocation of the ultimate burden in Section 4.1155 as to the fact of violation is inconsistent with this congressional intent, and because there are now contradictory ultimate burdens of persuasion as to the fact of violation in consolidated application for review/petition for review of civil penalty proceedings involving the same notice of violation or cessation order (see section 518(b) of the Act and 43 CFR 4.1113), OHA has proposed an amendment to Section 4.1155 that will allocate to OSM the ultimate burden of persuasion as to the amount of the civil penalty and allocate to the petitioner for review the ultimate burden of persuasion as to the fact of violation. 52 FR 38246 (Oct. 15, 1987). For these reasons, the allocation of the ultimate burden of persuasion in Section 4.1307(b) as to Section 4.1307(a)(1) will remain on the individual, as it will on the issue of whether he was an officer or director, since he will have readier access to facts on this issue. A new 4.1307(c) is added, however, providing that OSM bears the ultimate burden of persuasion as to whether the individual was an agent of the corporation, as to Section 4.1307(a)(3), and as to the correctness of the amount of the civil penalty proposed, because these are issues it is appropriate for the government to demonstrate.

#### **7. SECTION 4.1308**

Section 4.1308(b) has been revised to conform when payment is due with 30 CFR 724.18 or 846.18.

#### **8. SECTION 4.1309**

One comment suggests OHA clarify whether a petition for discretionary review is required to exhaust administrative remedies before seeking judicial review under section 526 of the Act and, if so, specify that the time for seeking judicial review begins with the issuance of the Board's decision.

Filing of a petition for discretionary review is required for the exhaustion of administrative remedies. A statement is added to Section 4.1309(f) that if a petition is denied by order, the decision of the administrative law judge shall be final for the Department, subject to 43 CFR 4.5. The date of such an order, or of a decision by the Board on the petition if it is granted, would be the date of the order or decision for purposes of section 526(a)(2).

Section 4.1309(g) has been added to provide that payment of a penalty is due in accordance with 30 CFR 724.18 or 846.18.

#### Determination of Effects

Because this rulemaking only provides administrative review procedures, the Department has determined that it is not major, as defined by Exec. Order No. 12291, and certifies that it 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.

#### National Environmental Policy Act

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

#### Paperwork Reduction Act

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

#### Drafting

These rules were drafted by Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, Office of Hearings and Appeals.

### **LIST OF SUBJECTS IN 43 CFR PART 4**

Administrative practice and procedure, Mines, Penalties, Surface mining

For the reasons stated in the preamble, Subpart L of Part 4 of Title 43 of the Code of Federal Regulations is amended by adding Sections 4.1300-4.1309 as set forth below.

Dated: February 2, 1988.

Earl E. Gjelde, Under Secretary.

### **PART 4 -- [AMENDED]**

1. The authority citation for 43 CFR Part 4, Subpart L continues to read:

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

2. 43 CFR Part 4, Subpart L, is amended by adding a new heading and Sections 4.1300-4.1309 to read:

### **PETITIONS FOR REVIEW OF PROPOSED INDIVIDUAL CIVIL PENALTY ASSESSMENTS UNDER SECTION 518(F) OF THE ACT**

Section	
4.1300	Scope.
4.1301	Who may file.
4.1302	Time for filing.
4.1303	Contents and service of petition.
4.1304	Answer, motion, or statement of OSM.
4.1305	Amendment of petition.
4.1306	Notice of hearing.

- 4.1307 Elements; burdens of proof.
- 4.1308 Decision by administrative law judge.
- 4.1309 Petition for discretionary review.

Petitions for Review of Proposed Individual Civil Penalty Assessments Under Section 581(f) of the Act

**SECTION 4.1300 - SCOPE.**

These regulations govern administrative review of proposed individual civil penalty assessments under section 518(f) of the Act against a director, officer, or agent of a corporation.

**SECTION 4.1301 - WHO MAY FILE.**

Any individual served a notice of proposed individual civil penalty assessment may file a petition for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. Phone: 703-235-3800.

**SECTION 4.1302 - TIME FOR FILING.**

(a) A petition for review of a notice of proposed individual civil penalty assessment must be filed within 30 days of its service on the individual.

(b) No extension of time will be granted for filing a petition for review of a notice of proposed individual civil penalty assessment. Failure to file a petition for review within the time period provided in paragraph (a) shall be deemed an admission of liability by the individual, whereupon the notice of proposed assessment shall become a final order of the Secretary and any tardy petition shall be dismissed.

**SECTION 4.1303 - CONTENTS AND SERVICE OF PETITION.**

(a) An individual filing a petition for review of a notice of proposed individual civil penalty assessment shall provide --

- (1) A concise statement of the facts entitling the individual to relief;
- (2) A copy of the notice of proposal assessment;
- (3) A copy of the notice(s) of violation, order(s) or final decision(s) the corporate permittee is charged with failing or refusing to comply with that have been served on the individual by OSM; and
- (4) A statement whether the individual requests or waives the opportunity for an evidentiary hearing.

(b) Copies of the petition shall be served in accordance with Section 4.1109 (a) and (b) of this part.

**SECTION 4.1304 - ANSWER, MOTION, OR STATEMENT OF OSM.**

Within 30 days from receipt of a copy of a petition, OSM shall file with the Hearings Division an answer or motion, or a statement that it will not file an answer or motion, in response to the petition.

**SECTION 4.1305 - AMENDMENT OF PETITION.**

(a) An individual filing a petition may amend it once as a matter of right before receipt by the individual of an answer, motion, or statement of OSM made in accordance with Section 4.1304 of this part. Thereafter, a motion for leave to amend the petition shall be filed with the administrative law judge.

(b) OSM shall have 30 days from receipt of a petition amended as a matter of right to file an answer, motion, or statement in accordance with Section 4.1304 of this part. If the administrative law judge grants a motion to amend a petition, the time for OSM to file an answer, motion, or statement shall be set forth in the order granting the motion to amend.

#### **SECTION 4.1306 - NOTICE OF HEARING.**

The administrative law judge shall give notice of the time and place of the hearing to all interested parties. The hearing shall be of record and governed by *5 U.S.C. 554*.

#### **SECTION 4.1307 - ELEMENTS; BURDENS OF PROOF.**

(a) OSM shall have the burden of going forward with evidence to establish a prima facie case that:

(1) A corporate permittee either violated a condition of a permit or failed or refused to comply with an order issued under section 521 of the Act or an order incorporated in a final decision by the Secretary under the Act (except an order incorporated in a decision issued under sections 518(b) or 703 of the Act or implementing regulations), unless the fact of violation or failure or refusal to comply with an order has been upheld in a final decision in a proceeding under Sections 4.1150-4.1158, 4.1160-4.1171, or 4.1180-4.1187, and 4.1270 or 4.1271 of this part, and the individual is one against whom the doctrine of collateral estoppel may be applied to preclude relitigation of fact issues;

(2) The individual, at the time of the violation, failure or refusal, was a director, officer, or agent of the corporation; and

(3) The individual willfully and knowingly authorized, ordered, or carried out the corporate permittee's violation or failure or refusal to comply.

(b) The individual shall have the ultimate burden of persuasion by a preponderance of the evidence as to the elements set forth in Section 4.1307(a)(1) of this part and as to whether he was a director or officer of the corporation at the time of the violation or refusal.

(c) OSM shall have the ultimate burden of persuasion by a preponderance of the evidence as to whether the individual was an agent of the corporation, as to 4.1307(a)(3) of this part, and as to the amount of the individual civil penalty.

#### **SECTION 4.1308 - DECISION BY ADMINISTRATIVE LAW JUDGE.**

(a) The administrative law judge shall issue a written decision containing findings of fact and conclusions of law on each of the elements set forth in Section 4.1307 of this part.

(b) If the administrative law judge concludes that the individual is liable for an individual civil penalty, he shall order that it be paid in accordance with 30 CFR 724.18 or 846.18, absent the filing of a petition for discretionary review in accordance with Section 4.1309 of this part.

#### **SECTION 4.1309 - PETITION FOR DISCRETIONARY REVIEW.**

(a) Any party may petition the Board to review an order or decision by an administrative law judge disposing of an individual civil penalty proceeding under Section 4.1308 of this part.

(b) A petition under this section shall be filed on or before 30 days from the date of receipt of the order or decision sought to be reviewed, and the time for filing shall not be extended.

(c) A petitioner under this section shall list the alleged errors of the administrative law judge and shall attach a copy of the order or decision sought to be reviewed.

(d) Any party may file with the Board a response to the petition for review within 10 days of receipt of a copy of such petition.

(e) Not later than 30 days from the filing of a petition for review under this section, the Board shall grant or deny the petition in whole or in part.

(f) If the petition for review is granted the rules in Sections 4.1273-4.1276 of this part are applicable. If the petition is denied, the decision of the administrative law judge is final for the Department, subject to Section 4.5 of this part.

(g) Payment of a penalty is due in accordance with 30 CFR 724.18 or 846.18.

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