

FEDERAL REGISTER: 56 FR 2139 (January 22, 1991)

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: In order to achieve uniformity of procedures and to provide for expedited administrative review of all permit-related decisions by the Office of Surface Mining Reclamation and Enforcement (OSMRE), the Office of Hearings and Appeals adopts amendments to the procedural rules for review of OSMRE decisions on applications for new permits, permit revisions, permit renewals, the transfer, assignment, or sale of rights granted under permit, and coal exploration permits. In addition, the period for filing a request for review is changed to begin with the day a permittee or applicant receives a written decision from OSMRE by certified mail rather than the date of publication in a local newspaper.

EFFECTIVE DATE: February 21, 1991.

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 October 22, 1987, the Office of Hearings and Appeals (OHA) adopted rules providing procedures for administrative review of decisions of the Office of Surface Mining Reclamation and Enforcement (OSMRE) under the permanent regulatory program established by the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201-1328* (1982) (the Act), including decisions on (1) Applications for new permits (43 CFR 4.1360-4.1369), (2) applications for permit revisions, permit renewals, the transfer, assignment, or sale of rights granted under permit, and permit revisions ordered by OSMRE (43 CFR 4.1370-4.1379), and (3) applications for coal exploration permits (43 CFR 4.1380-4.1388). *52 FR 39521-39531* (Oct. 22, 1987).

On March 8, 1989, in order to achieve uniformity of procedures and to provide for expedited administrative review of all permit-related decisions, OHA proposed amendments to remove the rules in 43 CFR 4.1370-4.1379 and 4.1380-4.1388 adopted in October 1987 and to revise the rules in 43 CFR 4.1360-4.1369 so they would cover administrative review of decisions provided for by the rules that were to be removed. *54 FR 9852-55* (Mar. 8, 1989); *54 FR 10784-10794* (Mar. 15, 1989). In addition, it was proposed to amend Section 4.1351 (adopted in October 1987) by adding a sentence providing that notice of OSMRE's preliminary finding required under that section shall be provided by certified mail or by overnight delivery service, if the applicant or operator has agreed to bear the expense for this service, and to amend Section 4.1391(b) (also adopted in October 1987) by providing for notice of OSMRE's written determination by certified mail or by overnight delivery service, if the applicant or permittee has agreed to bear the cost for this service, rather than by publication in a local newspaper.

Comments were received by the close of the comment period, April 7, 1989, from Peabody Coal Company, the Joint National Coal Association/American Mining Congress Committee on Surface Mining Regulations, and jointly from the National Wildlife Federation and the Kentucky Resources Council, Inc. By notice published July 24, 1989, the comment period was reopened until August 23, 1989, at the request of the National Wildlife Federation and the Environmental Policy Institute, who expressed interest in commenting on the unpublished decision in *Peabody Coal Co. v. United States of America*, CIV 86-502 PCT CLH (D. Ariz., Mar. 11, 1988), and on the settlement agreement in *Peabody Coal Co. v. Lujan*, Civil No. 87-3462 (RCL) (D.D.C., filed Dec. 21, 1987), which stated that the Department would initiate rulemaking proceedings to amend 43 CFR 4.1360-4.1388 and that the proposed rules published on March 8, 1989, addressed some of the plaintiffs' concerns in that case. *54 FR 30766* (July 24, 1989). Additional comments were filed by the Hopi Indian Tribe and, collectively, by the National Wildlife Federation, the Environmental Policy Institute, the Kentucky Resources Council, Inc., and the Western Organization of Resource Councils in response to this notice.

The proposed changes and the comments concerning them are discussed below.

(1) 43 CFR 4.1105

In light of the removal of 43 CFR 4.1370-4.1379 and 4.1380-4.1388, it was suggested that the references to these regulations in 43 CFR 4.1105(a)(2) concerning parties be deleted. The suggestion is accepted.

(2) 43 CFR 4.1109

It was suggested that the regulation concerning service of documents on the Office of the Solicitor be amended to provide the current jurisdictions and addresses of the field offices. The suggestion is accepted and 43 CFR 4.1109(a) is amended accordingly.

(3) 43 CFR 4.1360

It was proposed to amend 43 CFR 4.1360 to include within the scope of Sections 4.1360-4.1369 administrative review of the decisions that would otherwise be reviewed under the rules proposed for removal in 43 CFR 4.1370-4.1379 (i.e., decisions on permit revisions, permit renewals, and the transfer, assignment or sale of rights granted under permit) and in Sections 4.1380-4.1388 (i.e., decisions on coal exploration permits). Two commenters suggested revising the introductory language of this rule by adding the italicized words: "These rules set forth the exclusive procedures for administrative review of decisions by OSMRE concerning -- * * *." The suggestion is based on a case in which a notice of appeal was filed with the Interior Board of Land Appeals (IBLA) under 43 CFR 4.1271 from an order of an Administrative Law Judge granting a motion to dismiss an appeal from the approval of certain surface mining permits, rather than a petition for discretionary review under Section 4.1369. The Appellant suggested 4.1271 was the appropriate regulation because the Administrative Law Judge's action did not have the effect of "granting or denying a permit" and was not a "decision" (in the language of Section 4.1369, see *52 FR 29528*, Oct. 22, 1987), whereas Section 4.1271(a) provides that an aggrieved party may file a notice of appeal from an order or decision of an Administrative Law Judge disposing of a proceeding under 43 CFR subpart L. See *The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement*, 107 IBLA 329 (1989). The Board's decision stated:

"[T]he intent of the regulations in 43 CFR 4.1360-69 is to guide the administrative review process for permit approval or disapproval. Therefore, we believe the proper interpretation is that any order or decision of an administrative law judge disposing of a permit review proceeding is subject to review only in accordance with 43 CFR 4.1369."

107 IBLA at 330. This was the intent of the October 1987 regulations. The commenters' suggestion is therefore accepted.

(4) 43 CFR 4.1361

It was proposed to amend 43 CFR 4.1361 so its language includes a "permittee" as well as an applicant and applies to request for review of any decision within the revised scope of Section 4.1360. There were no comments on this proposed change, so it is adopted.

(5) 43 CFR 4.1362

It was proposed to amend 43 CFR 4.1362 to provide that the period for filing a request for review of an OSMRE decision begins on the day an applicant or permittee receives the written decision by certified mail or by overnight delivery service, if the applicant or permittee has agreed to bear the expense for this service, rather than on the date of publication in a local newspaper. Similarly, it was proposed to amend 43 CFR 4.1351 by adding a sentence providing that notice of OSMRE's preliminary finding shall be provided by certified mail or by overnight delivery service, if the applicant or operator has agreed to bear the expense for this service.

Several commenters objected to the proposal to replace notice to an applicant or permittee of OSMRE's written decisions "by publication in a local newspaper" under 43 CFR 4.1362 (see *53 FR 39527* (Oct. 22, 1987)) with notice "by certified mail or by overnight delivery service if the applicant or permittee has agreed to bear the expense for this service." One commenter argues that the proposed amendment violates section 514(c) of the Act, *30 U.S.C. 1264(c)* (1982). That section provides in part:

Within thirty days after the applicant is notified of the final decision of the regulatory authority on the permit application, the applicant or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final determination. The regulatory authority shall hold a hearing within thirty days of such request and provide notification to all interested parties at the time the applicant is so notified.

The commenter argues that the requirement in the second sentence for notification to all interested parties at the same time as the applicant is notified is not limited to notice of the hearing provided for in that sentence but includes notification of the decision on the permit application referred to in the previous sentence. The commenter states:

Failure to require "same time" notice to all interested parties of the decision would violate the congressional intent to encourage citizen participation in the appellate process. The clear congressional intent was a "level playing field;" that all interested parties receive the same opportunity for notice, with no opportunities for intentional or unintentional discrimination against interested parties or in favor of the applicant or permittee.

The commenter argues that notice of an OSMRE decision to persons who file comments or participate in an informal conference under section 513(b) of the Act, *30 U.S.C. 1263(b)* (1982) -- (see section 514(a), *30 U.S.C. 1264* (1982), and 30 CFR 773.19(b)(1)) -- is insufficient because it does not include persons who did not file or participate, e.g., those who recently moved into the area, and because section 514(c) allows "any person who is or may be adversely affected" to request a hearing.

The commenter argues that any rule must satisfy "two basic, statutorily mandated principles: (1) Timely notice of the decision, at the time the applicant is so notified, to any person with an interest which is or may be adversely affected; and (2) clear notice to all such persons of the deadline for filing a request for review." The commenter suggests providing notice either by publication in a local newspaper and the Federal Register or by simultaneous certified mail and publication in a local newspaper and the Federal Register. "Simultaneous publication can be assured by delaying certified mail notice by a few days to track a weekly newspaper or Federal Register publication schedule," the commenter states.

In addition, several commenters suggest that beginning the period for filing a request for review with the day an applicant or permittee receives the written decision by certified mail denies equal protection of the law, by discriminating between applicants or permittees and citizens without a rational basis, and deprives interested persons of due process by denying them reasonable notice of their right to seek review.

The change in the proposed amendment of the rule from notice of the decision by newspaper publication to notice by certified mail or overnight delivery was made in response to the argument that both section 514(c) and 30 CFR 775.11 clearly provide 30 days to request a hearing "after the applicant is notified," and that newspaper publication frequently occurred considerably later than an applicant had actually received his permit. At least one court has held the Department may not extend this time by redefining when the applicant is notified to be when a notice is published in a newspaper. *Peabody Coal Co. v. United States of America*, CIV 86-502 PCT CLH (D. Ariz., Mar. 11, 1988).

"There is no basis for a claim that OSM can unilaterally add a requirement for newspaper publication or that OMS [sic] can hold that the permit applicant has not been notified when it has received the actual permit. Moreover, once [the applicant] received the permit, OSM had no authority to alter the finality of that decision after the fact by sending the letter lengthening [sic] the time for appeals." [Emphasis in original.]

Id. at 8-9. See *The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement*, 109 IBLA 374 (1989).

Section 514(c) of the Act requires neither notice of an OSMRE decision, at the same time as the applicant is notified, to any person with an interest which is or may be adversely affected, nor notice of the deadline for filing a request for review of a decision to all such persons. Section 514(c) provides that any person with an interest that is or may be adversely affected may request a hearing "[w]ithin thirty days after the applicant is notified of the final decision of the regulatory authority" (Emphasis added). The "notification to all interested parties at the time that the applicant is so notified" language from the second sentence of section 514(c) quoted above applies only to the notice of hearing. The "notified" in the previous sentence refers to notice of the final decision to the applicant.

Section 513(a), *30 U.S.C. 1263(a)* (1982), requires an applicant for a surface mining permit or a revision of a permit to place an advertisement of the ownership, precise location, and boundaries of the land to be affected, in a local newspaper of general circulation in the locality of the proposed mine at least once a week for four consecutive weeks. This requirement is elaborated at 30 CFR 773.13(a). Any person having an interest which is or may be adversely affected may file written objections to the application, and may request an informal conference. *30 U.S.C. 1263(b)* (1982); 30 CFR 773.13(b)(c). If an informal conference is requested, the regulatory authority must advertise its date and location (which must be in the locality of the proposed mining) in a newspaper of general circulation at least two weeks before the date. *30 U.S.C. 1263(b)*; 30 CFR 773.13(c)(2)(ii). If an informal conference is held, the regulatory authority must furnish the applicant and the persons who are parties to that administrative proceeding the written finding granting or denying the permit. *30 U.S.C. 1264(a)* (1982). If no informal conference has been held, the regulatory authority is to notify the applicant. *30 U.S.C. 1264(b)* (1982). 30 CFR 773.19(b)(1) requires the regulatory authority to also notify each person who filed comments or objections to the application, even if no conference was held. Thus, the statute and the regulations provide that the regulatory authority must provide a copy of its written decision to the applicant for a permit and to any person who participated in an informal conference or who commented on or objected to the application, but not to anyone who may be adversely affected by the decision but has not participated.

If a person wishes to assure that he or she will be notified of a Director's decision on the permit, the filing of any comment, however brief, will create that assurance. Upon receipt of the decision, such a person may easily inquire as to when the request for review period expires.

It is true, as the commenter notes, that if a person does not file comments or participate in an informal conference under section 513(b), he or she will not receive written notification of OSMRE's decision on the application. Nothing in section 514(c) requires that notice of OSMRE's decision be given in a local newspaper or in the Federal Register, or both, in addition to notifying the applicant, as the commenter suggests, and we believe the commenter's suggestion that this be done is both administratively cumbersome and legally inadvisable. Failure to receive such notification in no way vitiates the right of any person who is or may be adversely affected by an OSMRE decision to file a request for a hearing under section 514(c); it simply means he or she must take the initiative to monitor the regulatory authority's decisionmaking and to learn when the applicant received the decision by certified mail or overnight delivery service. The regulatory authority will promptly respond to an informal oral or written request for this information. Placing this responsibility on those who do not file comments or participate neither discriminates irrationally against such persons nor deprives them of due process of law.

(6) 43 CFR 4.1363

No amendments to 43 CFR 4.1363 were proposed. However, a commenter urged that if the proposed amendments of 43 CFR 4.1362 and 4.1391(b) were not revised to:

“ensure that interested parties have a full thirty days notice of the deadline [for filing a request for review], it is essential that the information provisions of (43 CFR 4.1363) be modified. This could be done without prolonging the proceedings unduly by clarifying that in such circumstances, only a bare-bones notice identifying the decision for review be filed by the deadline. Then, the full detailed package could be specifically required to be submitted by thirty days from the date the party received notice of the decision. * * * If a person discovers through word of mouth or a belated newspaper publication that adverse action has been taken and the deadline is only days away, it likely will not be possible to determine the effect of such action, gather all the required information, decide to act, and submit the information in a timely fashion. * * * In addition, it is likely that interested parties who do not receive a full thirty days notice may be forced to file requests for review within the deadline to preserve their rights while they analyze the decision more fully to make a final determination on whether to proceed.”

Although OHA recognizes that the 30-day limitation in section 514(c) for filing a request for review, as well as the statutory requirement that “[t]he regulatory authority shall hold a hearing within thirty days of [a] request” for a hearing, place substantial burdens on all parties involved in the administrative review process, timely submission of all the information called for under 43 CFR 4.1363(a) is required in order to give all parties a fair opportunity to prepare adequately for the hearing. As the commenter notes, 43 CFR 4.1363(c) provides that a request for review may be amended as a matter of right before an answer or motion is filed in response to it under 4.1363(b). This is as much room for supplementing the request as the statutory mandate allows unless all parties agree under 43 CFR 4.1364 to an extension of the required time for holding a hearing. The commenter's suggestion therefore cannot be accepted.

(7) 43 CFR 4.1364

It was proposed to amend 43 CFR 4.1364 to provide that unless all parties agree to an extension or waiver, the Administrative Law Judge shall commence a hearing within 30 days of the filing of a request for review of an OSMRE decision and notify the applicant or permittee and all interested parties of the time and place of the hearing. There were no comments on this proposed change, so it is adopted.

(8) 43 CFR 4.1365

It was proposed to amend 43 CFR 4.1365 to provide that the filing of a request for review would not stay the effectiveness of the OSMRE decision pending completion of administrative review. There were no comments on this proposed change, so it is adopted.

(9) 43 CFR 4.1366

It was proposed to amend 43 CFR 4.1366 by adding the provisions for burdens of proof from 4.1376 and 4.1386. There were no comments on this proposed change, so it is adopted.

(10) 43 CFR 4.1367

It was proposed to amend 43 CFR 4.1367 by revising the heading to apply to temporary relief from any OSMRE decision. There were no comments on this proposed change, so it is adopted.

(11) 43 CFR 4.1368

It was proposed to amend 43 CFR 4.1368 to provide that unless all parties agree to an extension or waiver, the Administrative Law Judge shall issue a written decision within 30 days of the date the hearing record is closed. There were no comments on this proposed change, so it is adopted.

(12) 43 CFR 4.1369

It was proposed to amend 43 CFR 4.1369 to provide that any party aggrieved by a decision of an Administrative Law Judge may file a petition for discretionary review with the Board within 30 days of receipt, or, alternatively, seek judicial review. If a petition for discretionary review is filed, the Board must issue a decision denying it or granting it and deciding the merits within 60 days of the date for filing responses to it. There were no comments on these proposed changes, so they are adopted.

(13) 43 CFR 4.1391

It was proposed to amend 43 CFR 4.1391(b) to provide for filing of a request for review within 30 days after the applicant or permittee is notified by OSMRE of the written determination, either by certified mail or by overnight delivery service, rather than by publication in a local newspaper.

It was suggested that, because of the importance of OSMRE determinations under 30 CFR part 761 and the heightened public interest in those determinations, the time for filing a request for review of a determination under part 761, when made separately from an application for a permit, should begin 30 days after receipt of the determination for those who receive it by certified mail or overnight delivery service and 30 days after publication of notice in the Federal Register that the decision has been issued for those who do not.

A determination on an application for valid existing rights or other determination under part 761 may be made either in conjunction with the filing of an application for a permit to mine the coal that is the subject of the part 761 application, or separately. See 52 *FR* 39525 (Oct. 22, 1987). When OSMRE makes a separate determination on a part 761 application that is filed independently of a permit application, the requirement of section 514(c) that a request for a hearing on a decision on a permit application must be filed within 30 days "after the applicant is notified" does not apply. Therefore, the suggestion that the period of appeal be 30 days from receipt by the applicant or publication of notice in the

Federal Register, whichever is applicable, is accepted. The period for appealing a determination on a part 761 application that was made in conjunction with a decision on a permit application would be governed by 43 CFR 4.1362.

Executive Order 12291 and Regulatory Flexibility Act

Because these rules only set forth the details of procedures for conducting hearings and appeals of decisions of OSMRE under the Surface Mining Control and Reclamation Act of 1977, the Department has determined that they are not major, as defined by Executive Order No. 12291, and 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 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

The author of these regulations is 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, Public lands, Surface mining.

For the reasons set forth in the preamble, subpart L of part 4 of title 43 of Code of Federal Regulations is amended as set forth below.

Dated: November 13, 1990.

Manuel Lujan, Jr., Secretary of the Interior.

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, 1264, 1268, 1271, 1272, 1275, 1293; 5 U.S.C. 301.*

2. 43 CFR 4.1105 is amended by revising paragraph (a)(2) to read as follows:

SECTION 4.1105 - PARTIES.

(a) * * *

(2) In review proceeding under Sections 4.1160 et seq., 4.1180 et seq., 4.1300 et seq., 4.1350 et seq., 4.1360 et seq., or 4.1390 et seq. of this part, OSMRE, as represented by the Office of the Solicitor, Department of the Interior, and

--

(i) If an applicant, operator, or permittee files an application or request for review, the applicant, operator, or permittee; and

(ii) If any other person having an interest which is or may be adversely affected files an application or request for review, the applicant, operator, or permittee and the person filing such application or request;

* * * * *

3. Section 4.1109(a) is revised to read as follows:

SECTION 4.1109 - SERVICE.

(a) Any part initiating a proceeding in OHA under the Act shall, on date of filing, simultaneously serve copies of the initiating documents on the field solicitor of the U.S. Department of the Interior, Office of the Solicitor, Division of Surface Mining, representing OSMRE in the state in which the mining operation of issue is located, and on any other statutory parties specified under Section 4.1105 of this part. The jurisdictions, addresses and telephone numbers of the applicable filed solicitors are:

East of the Mississippi River --

For mining operations located in Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee and Virginia:

Office of the Field Solicitor, U.S. Department of the Interior

Regular U.S. Mail: P.O. Box 15006, Knoxville, Tennessee 37901

Other Delivery Services: 530 S. Gay Street, Room 320, Knoxville, Tennessee 37902

Telephone: (615) 673-4233, FAX: (615) 673-4545.

For mining operations located in Connecticut, Delaware, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, West Virginia and Wisconsin:

Office of the Field Solicitor, U.S. Department of the Interior, Ten Parkway Center, room 385, Pittsburgh, Pennsylvania 15220, Telephone: (412) 937-4000, FAX: (412) 937-2177.

West of the Mississippi River --

For mining operations located in Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming:

Office of the Field Solicitor, U.S. Department of the Interior

Regular U.S. Mail: P.O. Box 25007 (D-105), Denver, Colorado 80225-0007

Other Delivery Services: 730 Simms Street, suite 472, Golden, Colorado 80401

Telephone: (303) 236-3546, FAX: (303) 236-8644.

Any party or other person who subsequently files any other document with OHA in the proceeding shall simultaneously serve copies of that document on all other parties and persons participating in the proceeding.

* * * * *

4. Section 4.1351 is revised to read as follows:

SECTION 4.1351 - PRELIMINARY FINDING BY OSMRE.

If OSMRE determines during review of the permit application that the applicant or operator specified in the application controls or has controlled mining operations with a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply, OSMRE shall issue the applicant or operator a notice of such preliminary finding. Notice by OSMRE shall be provided by certified mail, or by overnight delivery service if the applicant or operator has agreed to bear the expense for this service. The notice shall state with specificity the violations upon which the preliminary finding is based.

5. Sections 4.1360-4.1369 and the heading and table of contents for those sections are revised to read as follows:

REQUEST FOR REVIEW OF APPROVAL OR DISAPPROVAL OF APPLICATIONS FOR NEW PERMITS, PERMIT REVISIONS, PERMIT RENEWALS, THE TRANSFER, ASSIGNMENT OR SALE OF RIGHTS GRANTED UNDER PERMIT (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS) AND FOR COAL EXPLORATION PERMITS (FEDERAL PROGRAM)

4.1360	Scope.
4.1361	Who may file.
4.1362	Where to file; when to file.
4.1363	Contents of request; amendment of request; responses.
4.1364	Time for hearing; notice of hearing; extension of time for hearing.
4.1365	Status of decision pending administrative review.
4.1366	Burden of proof.
4.1367	Request for temporary relief.
4.1368	Determination by the Administrative Law Judge.
4.1369	Petitions for discretionary review; judicial review.

Request for Review of Approval or Disapproval of Applications for New Permits, Permit Revisions, Permit Renewals, the Transfer, Assignment or Sale of Rights Granted Under Permit (Federal Program; Federal Lands Program; Federal Program for Indian Lands) and for Coal Exploration Permits (Federal Program)

SECTION 4.1360 - SCOPE.

These rules set forth the exclusive procedures for administrative review of decisions by OSMRE concerning --

- (a) Applications for new permits, including applications under 30 CFR part 785, and the terms and conditions imposed or not imposed in permits by those decisions. They do not apply to decisions or applications to mine on Federal lands in states where the terms of a cooperative agreement provide for the applicability of alternative administrative procedures (see 30 CFR 775.11(c)), but they do apply to OSMRE decisions on applications for Federal lands in states with cooperative agreements where OSMRE as well as the state issue Federal lands permits;
- (b) Applications for permit revisions, permit renewals, and the transfer, assignment, or sale of right granted under permit;
- (c) Permit revisions ordered by OSMRE; and
- (d) Applications for coal exploration permits.

SECTION 4.1361 - WHO MAY FILE.

The applicant, permittee, or any person having an interest which is or may be adversely affected by a decision of OSMRE set forth in Section 4.1360 may file a request for review of that decision.

SECTION 4.1362 - WHERE TO FILE; WHEN TO FILE.

(a) The request for review shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (phone 703-235-3800), within 30 days after the applicant or permittee is notified by OSMRE of the written decision by certified mail or by overnight delivery service if the applicant or permittee has agreed to bear the expense for this service.

(b) Failure to file a request for review within the time specified in paragraph (a) of this section shall constitute a waiver of a hearing and the request shall be dismissed.

SECTION 4.1363 - CONTENTS OF REQUEST; AMENDMENT OF REQUEST; RESPONSES.

(a) The request for review shall include --

- (1) A clear statement of the facts entitling the one requesting review to administrative relief;
- (2) An explanation of each specific alleged error in OSMRE's decision, including reference to the statutory and regulatory provisions allegedly violated;
- (3) A request for specific relief;
- (4) A statement whether the person requests or waives the opportunity for an evidentiary hearing; and
- (5) Any other relevant information.

(b) All interested parties shall file an answer or motion in response to a request for review, or a statement that no answer or motion will be filed, within 15 days of receipt of the request specifically admitting or denying facts or alleged errors stated in the request and setting forth any other matters to be considered on review.

(c) A request for review may be amended once as a matter of right prior to filing of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter, a motion for leave to amend the request shall be filed with the Administrative Law Judge. An Administrative Law Judge may not grant a motion for leave to amend unless all parties agree to an extension of the date of commencement of the hearing under Section 4.1364. A request for review may not be amended after a hearing commences.

(d) An interested party shall have 10 days from filing of a request for review that is amended as a matter of right or the time remaining for response to the original request, whichever is longer, to file an answer, motion, or statement in accordance with paragraph (b) of this section. If the Administrative Law Judge grants a motion to amend a request for review, the time for an interested party to file an answer, motion, or statement shall be set forth in the order granting it.

(e) Failure of any party to comply with the requirements of paragraph (a) or (b) of this section may be regarded by an Administrative Law Judge as a waiver by that party of the right to commencement of a hearing within 30 days of the filing of a request for review if the Administrative Law Judge concludes that the failure was substantial and that another party was prejudiced as a result.

SECTION 4.1364 - TIME FOR HEARING; NOTICE OF HEARING; EXTENSION OF TIME FOR HEARING.

Unless all parties agree in writing to an extension or waiver, the Administrative Law Judge shall commence a hearing within 30 days of the date of the filing of the request for review or amended request for review and shall simultaneously notify the applicant or permittee and all interested parties of the time and place of such hearing before the hearing commences. The hearing shall be of record and governed by 5 U.S.C. 554. An agreement to waive the time limit for commencement of a hearing may specify the length of the extension agreed to.

SECTION 4.1365 - STATUS OF DECISION PENDING ADMINISTRATIVE REVIEW.

The filing of a request for review shall not stay the effectiveness of the OSMRE decision pending completion of administrative review.

SECTION 4.1366 - BURDENS OF PROOF.

(a) In a proceeding to review a decision on an application for a new permit --

(1) If the permit applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations or as to the appropriateness of the permit terms and conditions, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the permit or as to the inappropriateness of the permit terms and conditions.

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the permit application fails in some manner to comply with the applicable requirements of the Act or the regulations, or that OSMRE should have imposed certain terms and conditions that were not imposed.

(b) In a proceeding to review a permit revision ordered by OSMRE, OSMRE shall have the burden of going forward to establish a prima facie case that the permit should be revised and the permittee shall have the ultimate burden of persuasion.

(c) In a proceeding to review the approval or disapproval of an application for a permit renewal, those parties opposing renewal shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the renewal application should be disapproved.

(d) In a proceeding to review the approval or disapproval of an application for a permit revision or an application for the transfer, assignment, or sale of rights granted under a permit --

(1) If the applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with applicable requirements of the Act or the regulations, and the applicant requesting review shall have the ultimate burden of persuasion as to entitlement to approval of the application; and

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act and the regulations.

(e) In a proceeding to review a decision on an application for a coal exploration permit --

(1) If the coal exploration permit applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the approval.

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act or the regulations.

SECTION 4.1367 - REQUEST FOR TEMPORARY RELIEF.

(a) Where review is requested pursuant to Section 4.1362, any party may file a request for temporary relief at any time prior to a decision by an Administrative Law Judge, so long as the relief sought is not the issuance of a permit where a permit application has been disapproved in whole or in part.

(b) The request shall be filed with the Administrative Law Judge to whom the case has been assigned. If no assignment has been made, the application shall be filed in the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (phone 703-235-3800).

(c) The application shall include --

(1) A detailed written statement setting forth the reasons why relief should be granted;

(2) A statement of the specific relief requested;

(3) A showing that there is a substantial likelihood that the person seeking relief will prevail on the merits of the final determination of the proceeding; and

(4) 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.

(d) The Administrative Law Judge may hold a hearing on any issue raised by the application.

(e) The Administrative Law Judge shall issue expeditiously an order or decision granting or denying such temporary relief. Temporary relief may be granted only if --

(1) All parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(2) The person requesting such relief shows a substantial likelihood of prevailing on the merits of the final determination of the proceeding; and

(3) Such relief will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(f) Appeals of temporary relief decisions.

(1) Any party desiring to appeal the decision of the Administrative Law Judge granting or denying temporary relief may appeal to the Board, or, in the alternative, may seek judicial review pursuant to section 526(a), *30 U.S.C. 1276(a)*, of the Act.

(2) The Board shall issue an expedited briefing schedule and shall issue a decision on the appeal expeditiously.

SECTION 4.1368 – DETERMINATION BY THE ADMINISTRATIVE LAW JUDGE.

Unless all parties agree in writing to an extension or waiver, the Administrative Law Judge shall issue a written decision in accordance with Section 4.1127 within 30 days of the date the hearing record is closed by the Administrative Law Judge. An agreement to waive the time limit for issuing a decision may specify the length of the extension agreed to.

SECTION 4.1369 - PETITION FOR DISCRETIONARY REVIEW; JUDICIAL REVIEW.

(a) Any party aggrieved by a decision of an Administrative Law Judge may file a petition for discretionary review with the Board within 30 days of receipt of the decision or, in the alternative, may seek judicial review in accordance with *30 U.S.C. 1276(a)(2)* (1982). A copy of the petition shall be served simultaneously on the Administrative Law Judge who issued the decision, who shall forthwith forward the record to the Board, and on all other parties to the proceeding.

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

(c) Any party may file a response to a petition for discretionary review within 20 days of receipt of the petition.

(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.

SECTIONS 4.1370-4.1739 [Amended]

SECTIONS 4.1380-4.1388 [Removed]

6. 43 CFR 4.1370-4.1379 and 43 CFR 4.1380-4.1388 and their corresponding center headings are removed.

7. Section 4.1391 is revised to read as follows:

SECTION 4.1391 - WHO MAY FILE; WHERE TO FILE; WHEN TO FILE; FILING OF ADMINISTRATIVE RECORD.

(a) The applicant or any person with an interest which is or may be adversely affected by a determination of OSMRE that a person holds or does not hold a valid existing right, or that surface coal mining operations did or did not exist on the date of enactment of the Act, or that surface coal mining operations may be permitted within the boundaries of a national forest, may file a request for review of that determination with the office of the OSMRE official whose determination is being appealed and at the same time shall send a copy of the request to the 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). The OSMRE official shall file with the Board the complete administrative record of the decision under review as soon as practicable.

(b)(1) Notice by OSMRE to the applicant or permittee of a determination under section (a) shall be provided by certified mail or by overnight delivery service if the applicant or permittee has agreed to bear the expense of this service. The request for review of a determination under section (a), when that determination is made independently of a decision on an application for a permit; permit revision; permit renewal; transfer, assignment, or sale of rights granted under permit; or coal exploration permit, shall be filed within 30 days after receipt of the determination by any person who has received a copy of the determination by certified mail or overnight delivery service. The request for review shall be filed within 30 days of the date of publication of notice in the Federal Register that a determination has been made for any person who has not received a copy by certified mail or overnight delivery service.

(2) The request for review of a determination under section (a), when that determination is made in conjunction with a decision on an application for a permit; permit revision; permit renewal, transfer, assignment, or sale of rights granted under permit; or coal exploration permit, shall be filed in accordance with 43 CFR 4.1362.

(c) Failure to file a request for review within the time specified in paragraph (b) of this section shall constitute a waiver of the right to review and the request shall be dismissed.

[FR Doc. 91-1336 Filed 1-18-91; 8:45 am]
BILLING CODE 4310-79-M