

significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 "Protection of Children From Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: March 12, 2003.

Alexis Strauss,

Acting Regional Administrator, Region IX.

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DEPARTMENT OF THE INTERIOR

Office of the Secretary of the Interior

43 CFR Part 4

Special Rules Applicable to Surface Coal Mining Hearings and Appeals

AGENCY: Office of the Secretary.

ACTION: Petition for rulemaking.

SUMMARY: The Office of Hearings and Appeals is publishing for comment a petition for rulemaking received from the National Mining Association. The petition requests amendment of several existing rules relating to the burden of proof in proceedings under the Surface Mining Control and Reclamation Act of 1977.

DATES: You should submit your comments by May 19, 2003.

ADDRESSES: Send comments to: Director, Office of Hearings and Appeals, Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203. Phone: (703) 235-3750. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877-8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION: In January 2003, the National Mining Association (NMA) re-submitted a petition for rulemaking to the Director, Office of Hearings and Appeals, that it had originally submitted in January 1996.

NMA summarized its January 1996 petition in an accompanying letter:

The NMA requests amendments and revisions to the allocation of the burden of proof for proceedings under SMCRA [the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*] governed by § 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d), in view of the decision of the United States Supreme Court in *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 114 S.Ct. 2251 (1994). In that decision, the Supreme Court clarified that under § 7(c) of the APA, the burden of proof placed upon the proponent of a rule or order means not merely the burden of production, but also the burden of persuasion. Accordingly, when the Office of Surface Mining is the proponent of an order, *e.g.*, notice of violation, cessation order, order to show cause, the burden of proof remains with the agency.

At the time the NMA originally filed its petition, it was the plaintiff in a challenge to several Departmental rules, including those allocating the burden of proof in 43 CFR 4.1374 and 4.1384. Although NMA did not include those rules in its petition, the then-Director of OHA replied that "it would be prudent to await the outcome of that litigation before considering whether to proceed with your suggested rulemaking."

That litigation was concluded in June 2001 with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *National Mining Association v. United States Department of the Interior*, 251 F.3d 1007 (D.C. Cir. 2001). In that decision the Court concluded that OHA "did not improperly shift the burden of proof" in §§ 4.1374 and 4.1384. *Id.* at 1013-14.

In its January 2003 re-submission, NMA states:

Unlike that case, the regulations at issue in NMA's petition for rulemaking are governed by different sections of SMCRA that do not expressly allocate the burden of proof to the operator, and in some cases expressly allocate it to whomever is challenging the permit.

NMA's petition argues OHA must amend its regulations to allocate the ultimate burden of persuasion to the Office of Surface Mining in proceedings to review assessment of civil penalties (§ 4.1155); proceedings to review notices of violation or orders of cessation (§ 4.1171); proceedings for suspension or revocation of permits (§ 4.1194; formerly § 4.1193, *see* 67 FR 61506, 61507, 61510, Oct. 1, 2002); proceedings to review individual civil penalty