

assessments (§ 4.1307); and proceedings to review permit revisions ordered by OSM (§ 4.1366(b)).

Both the APA and SMCRA provide for petitions for rulemaking. 5 U.S.C. 553(e); 30 U.S.C. 1211(g). The Department has implemented these provisions in 43 CFR part 14 and 30 CFR 700.12. 43 CFR 4.1 provides that OHA is the authorized representative of the Secretary for the purpose of hearing, considering, and determining matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary. 30 CFR 700.4(e) provides that the Director of OHA is responsible for the administration of administrative hearings and appeals required or authorized by SMCRA pursuant to the regulations in 43 CFR part 4.

Accordingly, OHA requests comments on the following petition.

Dated: March 6, 2003.

Robert S. More,

Director, Office of Hearings and Appeals.

**Before the Office of Hearings and Appeals
United States Department of Interior;
Petition for Rulemaking Under the Surface
Mining Control and Reclamation Act of
1977; Submitted by: The National Mining
Association**

I. Introduction

Pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA, or "the Act"), 30 U.S.C. § 1211(g), its implementing regulations, 30 CFR 700.12, and the Administrative Procedure Act, 5 U.S.C. 553(e), the National Mining Association (NMA) petitions the Director of the Office of Hearings and Appeals (OHA) for certain amendments and modifications to 43 CFR 4.1155, 4.1171, 4.1194,¹ 4.1307, and 4.1366(b). Pursuant to 43 CFR 4.1 the Office of Hearings and Appeals is the authorized representative of the Secretary for the consideration and determination of matters within the jurisdiction of the Department involving hearings and appeals and other review functions, including the rules establishing the procedure governing such hearings and appeals. This petition involves the rules governing procedures for the hearing of appeals related to matters arising under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.* (1988).

II. Petitioner

The National Mining Association (NMA) is a trade association whose members include producers of most of the nation's coal, metals and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment and supplies; state mining associations; and engineering and consulting firms and financial institutions that serve the mining

industry. The coal-producing members of NMA conduct surface coal mining operations pursuant to permits under SMCRA in almost every coal-producing state throughout the country, and are therefore directly impacted by these proposed amendments and modifications to OSM's regulations.

III. Proposed Amendments and Modifications

Petitioner requests amendments and modifications to the burden of proof requirements for proceedings governed by § 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d) (1988).

The APA establishes the framework for those proceedings required by statute to be determined on the record after an opportunity for a hearing. 5 U.S.C. 554. This procedural framework indicates that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d). A controlling Supreme Court decision clarifies that the burden of proof means not merely the burden of production, but also the burden of persuasion. *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 276, 279 (1994).

There are various proceedings under SMCRA which the statute requires to be administered on the record after an opportunity for a hearing. In many of these proceedings, the existing OHA rules improperly relieve the proponent, OSM, of the burden of persuasion under the APA, even though such procedure is not "otherwise provided by [SMCRA]." Accordingly, in view of the Supreme Court's recent pronouncement in *Greenwich Collieries* on the meaning of the "burden of proof" in § 556(d) of the APA, the Department must initiate a rulemaking to revise OHA's regulations as presented below.

A. Amend § 4.1155 to Read as Follows:

§ 4.1155 Burden of Proof in civil penalty proceedings.

In civil penalty proceedings, OSM shall have both the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of the violation and the amount of the civil penalty.

B. Amend § 4.1171 to Read as Follows:

§ 4.1171 Burden of proof in review of section 521 notices or orders.

In review of section 521 notices of violation or orders of cessation or the modification, vacation, or termination thereof, including expedited review under § 4.1180, OSM shall have both the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the validity of the notice, order, or modification, vacation, or termination thereof.

Any person other than the permittee-applicant who contests the modification, vacation, or termination of notices of violation or orders of cessation shall have both the burden of going forward to establish a prima facie case and the ultimate burden of persuasion.

C. Amend § 4.1194 to Read as Follows:

§ 4.1194 Burden of proof in suspension or revocation proceedings.

In proceedings to suspend or revoke a permit, OSM shall have both the burden of going forward to establish a prima facie case and the ultimate burden of persuasion for suspension or revocation of the permit.

D. Amend § 4.1307 to Read as Follows:

§ 4.1307 Elements; burden of proof.

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

(1) A corporate permittee either violated a condition of a permit or failed or refused to comply with an order issued under § 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 § 4.1150 through § 4.1158, § 4.1160 through § 4.1171, or § 4.1180 through § 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.

Delete existing paragraph "(b)," redesignate paragraph "(c)" as paragraph "(b)," and revise as follows:

(b) OSM shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the amount of the penalty.

E. Amend § 4.1366(b) to Read as Follows:

§ 4.1366 Burdens of proof.

* * * * *

(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 and the ultimate burden of persuasion that the permit should be revised.

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IV. Statement of Facts and Law Supporting the Amendment and Modification of Existing Federal Enforcement Regulations

A. Background

Since the passage of the Administrative Procedure Act (APA) in 1946, 5 U.S.C. 551, *et seq.*, various views emerged about the meaning of "burden of proof" as used in § 7(c) of the APA. Section 7(c) of the APA states that:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

¹ Formerly 43 CFR 4.1193 (See 67 FR 61510 (October 1, 2002)).