

history to cloud a statutory text that is clear); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (legislative history is irrelevant to the interpretation of an unambiguous statute); *Immigration and Naturalization Service v. Cardoza-Fonsecca*, 480 U.S. 421, 432 (1987) (when the plain language appears to settle the question, the strong presumption is that Congress expresses its intent through the language it chooses).

Second, the legislative history that the agency relied upon appears in only the Senate committee's report on the bill. It is nowhere to be found in either the House or the conference report. If this were a proper interpretation, it would have been agreed to by both the House and Senate conferees and included in their report. In any event, the single passage in the Senate report is most likely based upon the same ambiguity the Supreme Court notes in *Greenwich Collieries* that has led to the misapprehension that the APA burden of proof meant only the burden of production. 512 U.S. at 276. Immediately preceding the SMCRA legislative history discussion on the burden of proof is the clear statement that hearings of record under SMCRA are "subject to the Administrative Procedure Act." S. Rep. No. 128 at 93. In short, this single isolated passage in the Senate report cannot carry the day in the face of the statutory language of SMCRA and the APA.³

More recently, OSM has acknowledged the changes in burden of proof requirements that resulted from *Greenwich Collieries*. The agency stated:

* * * the Court held that, under that APA provision [§ 7(c)], the proponent of an order has the burden of persuasion, not just the burden of production (or the burden of going forward with the evidence). [512 U.S. 267].

60 FR 16740 (March 31, 1995).

Not only did OSM acknowledge that the agency bears the ultimate burden of persuasion in cases governed by § 7(c) of the APA, but the agency also bears the burden of going forward with the evidence (the burden of production).

2. Other Agencies

While OHA attempts to place the ultimate burden of persuasion on parties other than OSM, other agencies have followed a more logical approach. For example, the Federal Mine Safety and Health Review Commission (FMSHRC) also has promulgated regulations that place the burden of proof on the proponent of an order. 29 CFR 2700.63(b) (1994). In cases before the Commission's ALJs, it is clear that when an operator avails itself of statutory rights to a formal hearing to contest a citation, the government shoulders the ultimate burden of persuasion as to both the fact and the seriousness of the violation. *National Independent Coal*

Operators' Association et al. v. Kleppe, Secretary of the Interior, 423 U.S. 388, 397 (1976) (holding that under the predecessor Coal Mine Safety and Health Act, when a hearing is requested, the burden of proof remains with the Secretary); *Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152 (November 21, 1989) (holding that the Mine Act imposes on the Secretary the burden of proving the violation the Secretary alleges by a preponderance of the evidence); *Secretary of Labor (MSHA) v. Consolidation Coal Company*, 11 FMSHRC 966, 973 (June 27, 1989) (holding that the Mine Act imposes on the Secretary the burden of proving a violation alleged by a preponderance of the evidence in a civil penalty proceeding).

Numerous decisions from the Courts of Appeals have made it clear that in proceedings governed by the APA's § 7(c), the government must bear the burden of proof when it is the proponent of a rule or order. *Kirby v. Shaw*, 358 F.2d 446, 449 (9th Cir. 1966) (holding that in a formal hearing under the APA, the burden rested on the Post Office Department as the proponent of the order denying the use of the mails); *Twigger v. Schultz*, 484 F.2d 856, 862 (3rd Cir. 1973) (holding that in license suspension proceeding, the Secretary of the Treasury, as proponent of suspension order, had burden of proof under 5 U.S.C. 556(d)); *Rice v. National Transportation Safety Board*, 745 F.2d 1037, 1039 (6th Cir. 1984) (holding that the burden of proof in a proceeding to suspend pilot's license is upon the agency, rather than upon the pilot).

As these cases demonstrate, when agencies are the proponents of orders in proceedings on the record, they are expected to carry their burden by a preponderance of the evidence. The Supreme Court has now made this proposition clear in the recent *Greenwich Collieries* decision.

C. The Rules OHA Must Revise To Place the Ultimate Burden of Persuasion on the Agency Where the Agency is the Proponent of a Rule or Order Governed by § 556(d) of the APA

1. § 4.1155 Burdens of Proof in Civil Penalty Proceedings

This regulation divides the burden of proof between OSM and the petitioner regarding the fact of the violation. 43 CFR 4.1155 (1994). Under the existing rule, OSM is charged with the burden of going forward to establish a prima facie case, and the person who petitioned for review is improperly assigned the ultimate burden of persuasion. Civil penalty proceedings are governed by § 518 of the Act, which provides that:

A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing * * * Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code. (emphasis added)

30 U.S.C. 1268(b).

Section 554 of the APA provides in relevant part:

The agency shall give all interested parties opportunity for—

(1) * * *

(2) * * * hearing and decision on notice and in accordance with sections 556 and 557 of this title.

5 U.S.C. 554(c).

Since § 554 of the APA requires the agency to comply with § 556 of the APA, the proponent of the rule or order must bear the burden of proof unless otherwise provided by statute. 5 U.S.C. 556(d). In cases of civil penalties, the agency is the proponent of the rule or order. See *Merrit v. U.S.*, 960 F.2d 15 (2d Cir. 1992) (stating that the Shipping Act of 1984 allocates burden of proof according to APA § 556(d) and that the Federal Maritime Commission was proponent of order assessing fines for violation of that Act); and *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 367 (D.C. Cir. 1989) (holding that EPA administrator bears burden of proof in APA § 554 hearing to review agency compliance order), *cert. denied*, 498 U.S. 849 (1989). In a case involving civil penalty proceedings conducted in accordance with 43 C.F.R. § 4.1155, there can be no doubt that OSM, in seeking to charge a violation of SMCRA, is the proponent of the order, and therefore must carry both the burden of production and the burden of persuasion.

Moreover, the statute does not "provide otherwise" for a different party to bear the burden of proof, other than the agency. To the contrary, it expressly references the APA and further requires the Secretary to "make findings of fact, and * * * issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted * * * (emphasis added) 30 U.S.C. § 1268(b). Nowhere in that section did Congress manifest an intent to either (1) place the ultimate burden of persuasion on the petitioner as to his innocence, or (2) provide differing burdens for the fact of the violation and the amount of the penalty. It is clear that Congress intended that the Secretary bear the burden of proof, and that the fact of the violation and the amount of the penalty be proven by the same party. Therefore, in light of the decision in *Greenwich Collieries*, 43 CFR 4.1155 must be amended to place the ultimate burden of persuasion on the agency for both the fact of the violation and the amount of the penalty.

2. Review of Section 521 Notices or Orders—§ 4.1171

This regulation also divides the burden of proof between the petitioner and the agency. The applicant for review is improperly charged with the burden of persuasion in reviewing § 521 notices of violation or orders of cessation. This regulation was issued pursuant to SMCRA § 525, 30 U.S.C. 1275, titled "Review by the Secretary." Section 525(a)(1) provides a permittee with an opportunity to request review of the notice or order by the Secretary, and requires the Secretary to cause "such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing * * *" Section 525(a)(2) further dictates that "Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code."

Read together, subsections (a)(1) and (a)(2) of § 525 clearly require the Secretary, as the

³ As the Third Circuit noted in *Maier Terminals*, only as express statutory provision may override the standards of the APA; and legislative history, longstanding use of a rule, judicial acceptance of the rule, or Congressional inaction do not constitute an express statutory provision having the authority to supercede the APA. 992 F.2d 1277, 1281 n.3 (3rd Cir. 1993), *aff'd*, 512 U.S. 267.