

proponent of the original notice or order, to conduct a hearing pursuant to APA § 554 upon the request of the permittee. Moreover, § 525 of the Act does not “provide otherwise” for the burden of proof. In fact, it expressly adopts, by cross-reference, the APA standard. Therefore, since the proponent must have the ultimate burden of persuasion, OHA must modify 43 CFR 4.1171 to be consistent with federal law and the *Greenwich Collieries* case.

### 3. Permit Suspension or Revocation Proceedings—§ 4.1194

This regulation improperly places the ultimate burden of persuasion on the permittee in proceedings to suspend or revoke a permit that has previously been approved. OSM merely bears the burden of going forward with a prima facie case for suspension or revocation of the permit. 43 CFR 4.1194. The allocation of the burden of proof for this regulation must be amended to place both the burden of going forward with a prima facie case and the ultimate burden of persuasion on the agency. *See, e.g. Roach v. National Transportation Safety Board*, 804 F.2d 1147, 1159 (10th Cir. 1986) (holding that in a proceeding to suspend commercial pilot's license, the burden of proof always remained with the Administrator), *cert. denied*, 486 U.S. 1006.

Section 525(d) of SMCRA governs hearings held following the issuance of an order under § 521(a)(4) to show cause why a permit should not be suspended or revoked. Section 525(d) specifically requires the Secretary to “hold a public hearing \* \* \* [and that] any hearing shall be of record and shall be subject to § 554 of title 5 of the United States Code.” 30 U.S.C. 1275(d). Section 525(d) does not provide a burden of proof distinct from that in the APA, but expressly incorporates the APA as the governing procedure. Since OSM is the proponent of the order to show cause, it must bear the burden of presenting a prima facie case and proving it by a preponderance of the evidence.<sup>4</sup>

### 4. Petitions for Review of Proposed Individual Penalty Assessments Under § 518(f) of the Act—§ 4.1307

This regulation inappropriately requires “the individual” to carry the burden of proof on the issues of (1) whether the individual at the time of the violation, failure, or refusal was a director or officer of the corporation; and (2) whether the individual 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. 43 CFR 1307(b) (1994). This regulation was issued pursuant to § 518(f) of the Act.

Section 518(b) of the Act expressly provides that any hearings arising under § 518 are to be governed by § 554 of the APA. The assignment of the burden of proof by the agency to the individual by this regulation is improper and inconsistent with SMCRA and the APA. A defendant's status as a corporate officer or director and the fact of the violation are both necessary elements to impose the civil penalties called for in § 518(f) of the Act. Therefore, the agency must amend 43 CFR § 4.1307 so that the proponent of the notice or order, the agency, has the ultimate burden of persuasion on all of these critical elements.

### 5. Request for Review of Approval or Disapproval of Permit Revisions—§ 4.1366(b)

Section 4.1366(b) improperly requires the permittee to carry the ultimate burden of persuasion that a revision of their permit ordered by OSM is not justified. While a new permit applicant may bear the burden of persuasion that he has complied with all of the permitting requirements, 30 U.S.C. 1260(a); 43 CFR 4.1366(a)(1) (1994); *see also Greenwich Collieries* at 280, (holding that applicants for statutory benefits bear ultimate burden of proof on entitlement thereto); *United States Steel Corp. v. Train*, 556 F.2d 822, 834, (7th Cir. 1977) (holding that where law prohibits conduct for which applicant seeks a permit, unless applicant receives permit, applicant is proponent); the agency becomes the proponent once the applicant becomes a permittee and the agency is trying to change the status quo. *Roach v. National Transportation Safety Board*, 804 F.2d 1147, 1159 (10th Cir. 1986) (holding that in a proceeding to suspend a commercial pilot's license, the burden of proof always remained with the Administrator), *cert. denied*, 486 U.S. 1006 (1988).

Pursuant to § 511(c), 30 U.S.C. 1261(c), the regulatory authority may require reasonable revisions provided that such revision or modification shall be based upon a written finding and subject to notice and hearing requirements. Section 511(c) of SMCRA does not provide for a burden of proof different than that established under § 7(c) of the APA. Moreover, as a general matter, OSM's rules provide that administrative hearings under Federal programs for such permit revisions “shall be of record and subject to 5 U.S.C. 554 \* \* \*” 30 CFR 775.11(c) (1994). Accordingly, when the regulatory authority orders the permittee to revise its permit, the regulatory authority is the proponent of the order, and thus bears the burden of proof.

Since the burden of proof carried by the proponent of a rule or order has now been settled to mean the burden of persuasion, OHA must amend 43 CFR 4.1366(b) to place the ultimate burden of persuasion on the

agency when the agency seeks to revise a permit.

### V. Conclusion

The requested amendments and modifications to OHA's burden of proof requirements in situations where the agency is the proponent of the rule or order (and the Act does not provide for a different burden of proof) will conform the agency's regulatory review procedures to the plain language of the Act, Congressional intent, and the controlling Supreme Court decision in *Greenwich Collieries*. Moreover, these changes will correct several flaws in OSM's current approach to adjudicatory proceedings and will provide for a more consistent and equitable system of jurisprudence. Under OHA's current regulations, OSM may essentially assess penalties, revise or revoke valid permits, and/or have their notices of violation or cessation orders affirmed without proving their case by a preponderance of the evidence. As the D.C. Circuit noted:

\* \* \* in American law a preponderance of the evidence is rock bottom at the fact-finding level of civil litigation. Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating “something less than the weight of the evidence.” \* \* \* the bare minimum for a finding of misconduct is the greater convincing power of the evidence. That the proceeding is administrative rather than judicial does not diminish this wholesome demand \* \* \*

*Charlton v. F.T.C.*, 543 F.2d 903, 907–8 (D.C. Cir. 1976).

Amending the OHA regulations outlined above will afford mine operators this minimum level of protection that is required by SMCRA and the APA.

Accordingly, for the reasons stated herein, the National Mining Association requests that the Director immediately grant the petition pursuant to § 201(g) of the Surface Mining Act, 30 U.S.C. 1211(g), and 30 CFR 700.12, and promptly thereafter commence an appropriate proceeding to promulgate the requested amendments and modifications in accordance with § 501 of the Surface Mining Act, 30 U.S.C. 1251, and 5 U.S.C. 553.

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<sup>4</sup> In addition to properly allocating the burden of proof to OSM in review of suspension or revocation proceedings, this modification to 43 CFR § 4.1194 would correct an inconsistency with 43 CFR § 4.1355. In § 4.1355, OHA correctly allocated to OSM both the burden of going forward with a prima facie case and the ultimate burden of persuasion as to the existence of a demonstrated pattern of willful violations.