

Workers' Compensation Programs, Department of Labor v. Greenwich Collieries, 512 U.S. 267, 114 S. Ct. 2251 (1994), the petition urged that OHA reallocate the burden of proof in several existing rules that govern hearings under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201–1328 (2000) (the Act or SMCRA).

The Administrative Procedure Act (APA), 5 U.S.C. 554 (2000), applies to cases of adjudication that are required by statute to be determined on the record after an opportunity for an agency hearing. Section 554(c)(2) of the APA requires an agency to give all interested parties an opportunity for a hearing in accordance with sections 556 and 557. Section 556(d) provides that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”

In *Greenwich Collieries*, the Supreme Court considered whether a rule employed by the Department of Labor in adjudicating claims for benefits under the Black Lung Benefits Act was consistent with section 556(d) of the APA. The Court explained that the effect of the rule was to “shift the burden of persuasion to the party opposing the benefits claim—when the evidence is evenly balanced, the benefits claimant wins,” 512 U.S. at 269, 114 S. Ct. at 2253. The Court construed the term “burden of proof” in section 556(d) to mean “burden of persuasion,” not merely “burden of production (i.e., the burden of going forward with evidence),” 512 U.S. at 272, 114 S. Ct. at 2255; and it concluded that the Department of Labor rule was inconsistent with section 556(d), pursuant to which “when the evidence is evenly balanced, the benefits claimant must lose.” 512 U.S. at 281, 114 S. Ct. at 2259.

The NMA petition argued that, “[i]n those proceedings where SMCRA does not expressly provide a burden of proof distinct from that set forth in the APA, OHA has improperly relieved OSM [the Office of Surface Mining Reclamation and Enforcement] of the burden of persuasion when OSM is the proponent of a rule or order * * *. Since the ultimate burden of persuasion under section [556(d)] of the APA requires the agency as a proponent of a rule or order to prove its case by a preponderance of the evidence * * *, OHA must revise its regulations concerning the burden of proof to require OSM, as the proponent of a rule or order, to prove its case by a preponderance of the evidence.” Petition at 11.

The petition addressed existing OHA rules applicable to the burden of proof in five different kinds of proceedings:

(1) Proceedings to review notices of violation or cessation orders issued under section 521 of the Act (the applicable existing rule is 43 CFR 4.1171); (2) civil penalty proceedings (§ 4.1155); (3) individual civil penalty proceedings (§ 4.1307); (4) permit suspension or revocation proceedings (§ 4.1194); and (5) proceedings to review permit revisions ordered by OSM (§ 4.1366(b)).

OHA received 19 comments in support of the petition from mining companies, mining trade associations, and law firms; and it received one comment from an agency in a primary state recommending that the burden of proof remain with the permittee.

As a preliminary matter OHA observes that, although the Supreme Court did not discuss how often “the evidence is evenly balanced,” in OHA’s experience under SMCRA it is quite rare. *See, e.g., OSM v. C-Ann Coal Co.*, 94 IBLA 14, 19 (1986); *Harry Smith Construction Co. v. OSM*, 78 IBLA 27, 29, 32 (1983).

In any event, with one exception, OHA does not agree with the premise of the NMA petition, i.e., that SMCRA does not provide for a burden of proof distinct from that set forth in section 556(d) of the APA for the proceedings NMA addresses. Whether or not OSM is “the proponent of a rule or order” within the meaning of section 556(d), it does not bear the burden of persuasion in most of the proceedings discussed in NMA’s petition because SMCRA “otherwise provide[s].” Each of the proceedings is analyzed below.

A. Proceedings To Review Notices of Violation or Cessation Orders Issued Under Section 521 of the Act

Section 525(a)(1) of the Act, 30 U.S.C. 1275(a)(1), provides as follows:

A permittee issued a notice or order by the Secretary pursuant to the provisions of subparagraphs (a)(2) and (3) of section 521 of this title [30 U.S.C. 1271], or pursuant to a Federal program or the Federal lands program, or any person having an interest which is or may be adversely affected by such notice or order or by any modification, vacation, or termination of such notice or order, may apply to the Secretary for review of the notice or order within thirty days of receipt thereof or within thirty days of its modification, vacation, or termination. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. *Such investigation shall provide an opportunity for a public hearing*, at the request of the applicant or the person having an interest which is or may be adversely affected, *to enable the applicant or such person to present information relating to the issuance and continuance of such notice or order or the modification, vacation, or termination thereof*. The filing of an

application for review under this subsection shall not operate as a stay of any order or notice.

Section 525(a)(1) (emphasis added). Under section 525(a)(2), “[a]ny such hearing shall be of record and shall be subject to section 554 of title 5 of the United State Code.”

The existing regulation, 43 CFR 4.1171, provides that OSM has the “burden of going forward to establish a prima facie case as to the validity” of the notice or order or its modification, vacation or termination; the “ultimate burden of persuasion” rests with the applicant for review. OHA believes the regulation correctly allocates the burdens of proof.

In *Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975), the court construed nearly identical language from the Federal Coal Mine Health and Safety Act of 1969. Section 105(a)(1) of that statute, 30 U.S.C. 815(a)(1) (1976), provided as follows:

An operator issued an order pursuant to the provisions of section 814 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. * * * Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. *Such investigation shall provide an opportunity for a public hearing*, at the request of the operator or the representative of miners in such mine, *to enable the operator and the representative of miners in such mine to present information relating to the issuance or continuance of such order or the modification or termination thereof or to the time fixed in such notice*. The filing of an application for review under this subsection shall not operate as a stay of any order or notice.

(Emphasis added.) Section 105(a)(2) provided that any such hearing “shall be of record and shall be subject to section 554 of title 5.”

The operator in that case argued that a Department of the Interior regulation allocating the burden of proof under section 105(a) to “the applicant, petitioner, or other party initiating the proceedings” violated section 556(d) of the APA because there was no provision in the Coal Mine Health and Safety Act that “require[d] the mine operator to carry the burden of proof in a review of summary agency action.” 523 F.2d at 35. In defending the regulation, the Secretary argued that section 105(a) fit within the “[e]xcept as otherwise provided by statute” language in section 556(d) “because it specifically places on the operator who requests a public