

“otherwise provide[]” an allocation of the burden of proof on that issue, OHA agrees with NMA that the burden must be imposed on OSM as the proponent of the order (individual civil penalty) under 5 U.S.C. 556(d). OHA is therefore amending 43 CFR 4.1307 in this final rule to state that OSM has the ultimate burden of persuasion as to whether the individual was a director, officer, or agent of the corporation.

D. Permit Suspension or Revocation Proceedings

Section 521(a)(4) of the Act, 30 U.S.C. 1271(a)(4), provides as follows:

When, on the basis of a Federal inspection * * *, the Secretary or his authorized representative determines that a pattern of violations of any requirements of this Act or any permit conditions required by this Act exists or has existed, and if the Secretary or his authorized representative also finds that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this Act or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith *issue an order to the permittee to show cause as to why the permit should not be suspended or revoked* and shall provide opportunity for a public hearing. If a hearing is requested, the Secretary shall inform all interested parties of the time and place of the hearing. *Upon the permittee's failure to show cause as to why the permit should not be suspended or revoked*, the Secretary or his authorized representative shall forthwith suspend or revoke the permit.

(Emphasis added.) Section 525(d) of the Act, 30 U.S.C. 1275(d), provides that the hearing shall be of record and subject to section 554 of the APA.

OHA's regulations at 43 CFR 4.1194 provide that, in such proceedings, OSM has the burden of going forward to establish a prima facie case for suspension or revocation of the permit, but the ultimate burden of persuasion that the permit should not be suspended or revoked rests with the permittee.

The language of section 521(a)(4) clearly assigns the burden of persuasion in permit suspension or revocation proceedings to the permittee. The legislative history confirms Congress' intent:

This section [section 525] also provides for the Secretary to hold a public hearing following the issuance of an order to show cause why a permit should not be revoked or suspended pursuant to [section 521]. *At the hearing the permittee shall have the burden of proof to show why his permit should not be suspended or revoked.*

S. Rep. No. 95–128, 95th Cong., 1st Sess., 96 (1977) (emphasis added).

As with the fact-of-the-violation issue in proceedings under sections 525(a)(1),

518(b), and 518(f), therefore, SMCRA provides its own allocation of the burden of proof in permit suspension or revocation proceedings, and the language of 5 U.S.C. 556(d) assigning the burden to the proponent of the order does not apply.

E. Proceedings To Review Permit Revisions Ordered by OSM

Section 511 of the Act, 30 U.S.C. 1261, applies to revision of permits. Section 511(a) provides that, during the term of the permit, a permittee may apply for a revision to a permit. Section 511(c) provides that the regulatory authority must, within time limits prescribed in regulations, review outstanding permits and may require reasonable revision or modification of permit provisions during the term of the permit. The revision or modification is to be “based upon a written finding and subject to notice and hearing requirements established by the State or Federal program.” *Id.*

OSM's implementing regulations at 30 CFR 774.10(a) provide that the regulatory authority must review each permit issued under an approved program not later than the middle of each permit term. The regulatory authority “may, by order, require reasonable revision of a permit * * * to ensure compliance with the Act and the regulatory program.” § 774.10(b). Any order requiring revision of a permit “shall be based upon written findings and shall be subject to the provisions for administrative and judicial review in [30 CFR] part 775.” § 774.10(c). Under § 775.11(c), all hearings “under a Federal program for a State or a Federal lands program * * * on an application for approval of * * * permit revision shall be of record and governed by 5 U.S.C. 554 and 43 CFR part 4.”

OHA's regulations at 43 CFR 4.1366(b) provide that, in a proceeding to review a permit revision ordered by OSM, OSM has the burden of going forward to establish a prima facie case that the permit should be revised, and the permittee has the ultimate burden of persuasion. This allocation of the burden of proof was explained in the preamble to the proposed rule:

A comment suggested due process requires that 43 CFR [4.1365] should provide that the filing of a request for review would stay an OSM order requiring revision of a permit because it is an “ex parte action by OSM” * * *. [B]ecause the purpose of such an order is to ensure compliance with the Act (see 30 CFR 774.11(b)), no stay is appropriate, just as it is not under 30 U.S.C. 1275(a)(1) when an application for review is filed for a notice of violation or cessation order (unless temporary relief is granted). *Cf.* 43 CFR 4.1116. *Because of the enforcement*

nature of such an order, the ultimate burden of persuasion is properly on the permittee in 43 CFR [4.1366(b)]. Cf. 43 CFR 4.1171(b).

51 FR 35250 (Oct. 2, 1986) (emphasis added).

Under section 510(a) of the Act, 30 U.S.C. 1260(a), “[t]he applicant for a permit, or revision of a permit, shall have the burden of establishing that his application is in compliance with all the requirements of the applicable State or Federal program.” If at any point the permitted operation is no longer in compliance with the Act, “the regulatory authority * * * may require reasonable revision or modification of the permit provisions * * *.” Section 511(c). It follows that, when challenging OSM's decision to require a permit revision to ensure compliance with the Act, the permit holder properly bears the burden of persuasion.

Construing section 511(c) in light of the statutory scheme as a whole, including sections 510(a), 521(a), and 525(a), and in light of the legislative history and case precedent interpreting those provisions, OHA believes it has correctly allocated the burden of proof in 43 CFR 4.1366(b).

F. Conclusion

For the foregoing reasons, NMA's petition for rulemaking is granted in part with respect to 43 CFR 4.1307 and is otherwise denied.

II. Review Under Procedural Statutes and Executive Orders

A. Planning and Review (E.O. 12866). accordance with the criteria in Executive Order 12866, the Department of the Interior finds that this document is not a significant rule. The Office of Management and Budget has not reviewed this rule under Executive Order 12866.

1. This rule will not have an annual economic effect of \$100 million or adversely affect an economic sector, productivity, competition, jobs, the environment, public health or safety, or other units of government. A cost-benefit and economic analysis is not required. The amended rule will have virtually no effect on the economy because it will only change the allocation of the burden of proof—from the individual to OSM—on one issue in one kind of proceeding under SMCRA. Moreover, the practical effect of the rule will be limited to the rare situation in which the evidence on that one issue is evenly balanced.

2. This rule will not create inconsistencies with or interfere with other agencies' actions. The rule amends an existing OHA regulation to change