

FEDERAL REGISTER: 56 FR 10060 (March 8, 1991)

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 723 and 845

Surface Coal Mining and Reclamation Operations; Initial Regulatory Program and Permanent Regulatory Program; Civil Penalty Assessment Conference Procedures

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior (DOI) is revising its Initial and Permanent Regulatory Program regulations governing the assessment of civil penalties under section 518 of the Surface Mining Control and Reclamation Act of 1977 (the Act). The revision will extend by approximately 30 days the amount of time within which OSM may complete the necessary administrative actions to hold an assessment conference and by 15 days the amount of time within which a person charged with a violation may appeal an assessment conference officer's decision to the Office of Hearings and Appeals.

EFFECTIVE DATES: April 8, 1991.

FOR FURTHER INFORMATION CONTACT: John A. Trelease, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202-208-2550 (Commercial) or 268-2550 (FTS).

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion
- III. Procedural Matters

I. BACKGROUND

Section 518 of the Surface Mining Control and Reclamation Act of 1977 (the Act), *30 U.S.C. 1201 et seq.*, authorizes the Secretary of the Interior to assess civil penalties for violations of the Act. 30 CFR 723.18 of the Initial Program regulations, first promulgated on December 13, 1977 (*42 FR 62702*), and subsequently revised on September 4, 1980 (*45 FR 58780*), and February 8, 1988 (*53 FR 3664*), and 30 CFR 845.18 of the Permanent Program regulations first promulgated on March 13, 1979 (*44 FR 15461*), and subsequently revised on August 16, 1982 (*47 FR 35640*), and February 8, 1988 (*53 FR 3664*), govern the procedures for an assessment conference. When a violation of the Act occurs and a person is served with a notice of a proposed civil penalty assessment for the violation, the person may request an assessment conference during which OSM shall review the proposed assessment or reassessment and consider all relevant information on the violation and the amount of the penalty. At the conclusion of an assessment conference the proposed penalty assessment shall be affirmed, raised, lowered, or vacated by the assessment conference officer. Following the determination by the assessment conference officer, the person may pay the penalty in full or petition the DOI Office of Hearings and Appeals (OHA) for review of a civil penalty in accordance with 30 CFR 723.19 or 845.19. The amount equal to the reassessed or affirmed penalty must then be submitted to OHA (to be held in escrow) along with the petition for review. The proposed rule to revise 30 CFR 723.18(b) and 845.18(b) was published on April 4, 1990 (*55 FR 12624*). The comment period closed on May 21, 1990. One commenter responded. No request was received for a public hearing and none was held. OSM has adopted the revisions as proposed.

II. DISCUSSION

A. SECTIONS 723.18 AND 845.18 -- PROCEDURES FOR ASSESSMENT CONFERENCE

1. DESCRIPTION OF RULES

The 1988 revisions to the Initial and Permanent Program regulations at 30 CFR 723.18(a) and 845.18(a) extended by approximately 18 days the time by which a person assessed a civil penalty may request an assessment conference.

Specifically, the time was extended from "15 days from the date the proposed assessment or reassessment is mailed" to "30 days from the date the proposed assessment or reassessment is received." However, the regulations at 30 CFR 723.18(b) and 845.18(b), which required OSM to hold an assessment conference "within 60 days from the date of issuance of the proposed assessment or the end of the abatement period, whichever is later", were not altered. A consequential effect of the revisions to Sections 723.18(a) and 845.18(a) was that the amount of time available for OSM to acknowledge the request for a conference, conduct research in preparation for the conference, schedule the conference, and then hold the conference was reduced from approximately 45 days to less than 30 days. This reduction further compounded the difficulty already experienced by OSM of completing within its regulatory deadline all the steps necessary for holding assessment conferences. The preparatory steps outlined above were discussed in detail in the proposed rule at *55 FR 12625*.

Final Sections 723.18(b) and 845.18(b) should provide adequate time to complete these steps by extending the amount of time allowed to hold an assessment conference by approximately 30 days. The rules specify that the 60 day period within which the conference must be held will run "from the date the assessment conference request is received or the end of the abatement period, whichever is later" rather than from the date the assessment is issued.

Since the person requesting the assessment conference is not required to prepay any proposed civil penalty assessment when the conference is requested, the extension of time will not result in any economic hardship for the person requesting the conference and will allow him or her more time to prepare for the conference.

2. PUBLIC COMMENTS RECEIVED

The one commenter to the current rulemaking voiced three concerns about the proposed and existing assessment conference rules at 30 CFR 723.18(b) and 845.18(b). The commenter's first concern was that the rules illegally expand the time frames of section 518(c) of the Act within which an operator charged with a violation of the Act must either pay the proposed amount in full or, if formally contesting the amount of the penalty or the fact of the violation, prepay the proposed amount into an escrow account with the Secretary. The commenter quoted that portion of section 518(c) which provides:

"Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account * * *." (Emphasis added by commenter.)

The commenter cited to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984), and other authorities for the proposition that the plain meaning of section 518(c) precludes the assessment conference time frames specified at 30 CFR 723.18(b) and 845.18(b).

OSM disagrees with the commenter. The informal assessment procedures of 30 CFR 723.18 and 845.18, which have been in existence since 1977 and 1979, respectively, and the changes adopted today are supported by section 518(c) and the Secretary's general rulemaking authority set forth in section 201(c)(2) of the Act, *30 U.S.C. 1211(c)(2)*.

Two 30-day periods are specified in section 518(c) of the Act. The first, the 30-day period between the issuance of a notice of violation or cessation order and the Secretary's notification of the person issued the notice or order of the proposed penalty amount, is directory and waivable by the person requesting the assessment conference, who is part of the class that the provision is aimed at protecting. This view is consistent with court holdings that the first time frame is not jurisdictional. These holdings were based on the fact that the first sentence of section 518(c) does not expressly specify a consequence for failure to comply with its terms. See *United States v. Log Mountain Mining Co.*, 550 F. Supp. 811 (E.D. Tenn. 1982), *aff'd.* without opinion sub nom. *United States v. Moore*, 734 F.2d 17 (6th Cir. 1984), cert. denied, 469 U.S. 881 (1984), and *United States v. Bolton*, 781 F.2d 528 (6th Cir. 1985). n1

n 1 On the other hand, the statute does provide a consequence for failure to pay or contest the amount of the penalty in a timely manner and, therefore, this requirement is jurisdictional. The changes to 30 CFR Sections 723.19 and 845.19, described later in this preamble, are a recognition of the jurisdictional nature of this latter requirement.

When a person requests an assessment conference under the Secretary's rules, the provision in section 518(c) that the Secretary inform the operator of the amount of the proposed penalty is satisfied upon the assessment conference officer notifying the person assessed of his or her decision to affirm, raise, lower or vacate a penalty. This action provides the person who has been issued a notice of violation or cessation order with final notice of the proposed penalty. By requesting an assessment conference, the person has consented to notification of the proposed penalty amount subsequent to the assessment conference. In effect, such action constitutes a waiver of notification of the proposed penalty within 30 days of the issuance of a notice of violation or cessation order.

The theory that the service of notice of proposed assessment may constitute initial, but not necessarily final, notice is not new. It is already embodied, in part, in the provisions of 30 CFR 723.17(c), 723.19(a), 845.17(c), and 845.19(a) which recognize that, in certain circumstances, reassessment of the initial proposed penalty may occur, and that the period for seeking formal administrative review runs from such reassessment.

Since their adoption, the assessment conference procedures have added an increased element of fairness to the enforcement process by allowing the person who has been issued a notice of violation or cessation order to contest the amount of the proposed penalty prior to paying it in full or prepaying it into escrow and pursuing formal administrative review. The amendments adopted today further contribute to that fairness, without prejudice to any other person, including the commenter.

The assessment conference procedures have also contributed to upholding the constitutionality of the 518(c) prepayment provision in the face of challenges that it was violative of due process. *Graham v. Office of Surface Min. Reclam. & Enforc.*, 722 F.2d 1106 (3rd Cir. 1983), *Blackhawk Mining Co. v. Andrus*, 711 F.2d 753 (6th Cir. 1983), *B & M Coal Corp. v. Office of Surface Min. Reclam. & Enforc.*, 699 F.2d 381 (7th Cir. 1983). In upholding the prepayment provision, the courts took into account the statutory and administrative review procedures available to operators prior to prepayment of the proposed penalty.

The Graham Court noted that the basic foundation of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Graham*, 722 F.2d at 1111, citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965). Under the Armstrong standard, adequate time should be afforded both the operator and the conference officer to reasonably comply with each step of the assessment conference procedures outlined at 30 CFR 723.18 and 845.18. The preambles to the present and prior assessment conference rules provide extensive practical justification for the time frames allotted for each of these steps. The commenter's second concern was that the extensive practical justification provided by OSM over the years in support of the assessment conference time frames was "illusory". As its sole basis for this characterization, the commenter pointed to one of the several factors included in the preamble to the proposed rule for further extending the time within which a conference must be held. The commenter objected to that portion of the preamble which explained that:

"Many times the operator is not prepared to present his evidence on short notice. Operators frequently request 2 weeks advance notice of the conference date since they may have attorneys or consultants who will attend."

(55 FR 12624, April 4, 1990.)

The commenter asserted that this justification for further extending the time within which a conference must be held ignores the fact that the operator is on notice of the charge against him and that any "short notice" to the operator is solely the result of his own delay in waiting until the last minute to request a conference.

Again, OSM disagrees with the commenter. Once the request has been made and a tentative conference date been set by the conference officer, an operator needs time to prepare to present his evidence -- preeminently by ensuring the attendance of his attorney or consultant. The preamble passage objected to by the commenter is consistent with scheduling difficulties that are typically encountered in firming up an assessment conference date. In addition to considerations of the operator's own availability, the schedules of attorneys and consultants who often represent other clients need to be considered. The amount of advance notice needed to ensure the attendance of all parties concerned is but one of the several factors which must legitimately be considered in prescribing reasonable assessment conference time frames. Under the final rule, extending the time within which a conference must be held to 60 days from the date the request is received allows proper case preparation and reasonable scheduling while continuing to assure the conferences will be held in an expeditious manner.

The commenter's third concern is that the assessment conference time frames at 30 CFR 723.18(b) and 845.18(b) allow an operator to delay the payments prescribed under section 518(c) and thereby lessen OSM's prospects for collection. In support of this proposition, the commenter stated that a 1984 House Report "found that delays throughout the process (from issuance of the notice of violation through formal administrative review) * * * had led to a low collection rate." H.R. Rep. No. 98-1146, 98th Cong., 1st Sess. 5-19 (1984).

The Committee was concerned about "inordinate delays" resulting primarily from the process extending for much longer periods than allowed by the assessment rules. The regulatory time frames do not cause such inordinate delays.

Although the government is concerned about the prompt payment and collection of penalties, a limited extension of the deadline for holding an assessment conference is unlikely to have any effect on the collectability of penalties. The Government must assure the adequacy of the procedural protection available to individuals prior to the deprivation of property. It must weigh its interest in prompt payment and collection of penalties against the private interest involved and the risk of erroneous deprivation. *Graham, 722 F.2d at 1111*, citing *Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 843 (1976)*. The Graham court considered each of these criteria in upholding the prepayment provisions of section 518(c) on the basis of the due process protection provided to the operator prior to prepayment. The time frames for informal review provided under the assessment conference procedures at 30 CFR 723.18(b) and 845.18(b) may therefore be seen as furthering, rather than thwarting, the purposes of section 518(c), as suggested by the commenter.

B. SECTIONS 723.19(a) and 845.19(a) -- REQUEST FOR HEARING.

In response to the comment discussed earlier in this preamble concerning the consistency of the proposed amendments with the time frames of section 518(c) of the Act, OSM re-examined the assessment conference procedures in the context of the section 518(c) requirements. As a result of that comment and OSM's subsequent examination of the statute, OSM is amending 30 CFR 723.19(a) and 845.19(a) to extend the time for submitting a petition for a hearing and prepaying the proposed penalty into escrow from 15 days to 30 days.

As discussed earlier, in situations where an assessment conference is requested and held, the Secretary's final notification to the operator of the amount of the proposed penalty does not occur until service of the conference officer's decision either affirming or reassessing the penalty. Under section 518(c) of the Act, the person wishing to contest either the amount of the penalty or the fact of the violation has 30 days following notice of the proposed penalty amount to forward that amount to the Secretary for placement into escrow. Prior to today's amendments, however, Sections 723.19(a) and 845.19(a) provided that the person charged with the violation has only 15 days from the date of service of the conference officer's action to pay in full or seek formal administrative review.

Accordingly, the Secretary is revising Sections 723.19(a) and 845.19(a) to provide the full 30 days allowed by the statute. This change stems directly from the commenter's concern about the consistency of the Secretary's rules with the time frames set forth in the Act and OSM's subsequent recognition of the need to provide the full 30 days the statute allows to pay the penalty in full or to prepay the penalty amount into escrow and to contest the penalty or violation.

Conforming changes to the OHA rules at 43 CFR 4.1151(b) will also be required to increase from 15 to 30 days the time frame within which a petition for review must be filed following service of notice by an assessment conference officer that the conference is deemed completed.

EFFECT OF THE RULE IN FEDERAL PROGRAM STATES AND ON INDIAN LANDS

This rule will apply, through cross-referencing, to the following States with Federal programs: California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The rule will also apply through cross-referencing to Indian lands under the Federal program for Indian lands as provided in 30 CFR part 750. No comments were received concerning unique conditions in any of these States or on Indian lands which would require changes to the national rules or as specific amendments to any or all of the Federal programs.

EFFECT OF THE RULE IN STATES WITH PRIMACY

Section 518(i) of the Act and 30 CFR 840.13(c) of the regulations require approved State programs to contain civil penalty assessment procedures which are the same as or similar to the provisions of section 518 of the Act and consistent with those of 30 CFR part 845. The time allowed for holding an assessment conference is not prescribed in the Act; thus, the applicable standard governing the adequacy of State program provisions under 30 CFR 840.13(c) is whether the approved State programs contain procedural requirements relating to civil penalties which are consistent with (i.e., no less effective than) 30 CFR 845.18, as amended. Because OSM allows the States reasonable latitude in establishing certain procedural time frames, and because this rule merely extends one of such time frames, States do not have to adopt this change.

III. PROCEDURAL MATTERS.

Executive Order 12291 and the Regulatory Flexibility Act

The Department of the Interior has determined this document is not a major rule under E.O. 12291 and certifies this document will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (*5 U.S.C. 601 et seq.*).

Federal Paperwork Reduction Act

This rule does not contain collections of information which require approval by the Office of Management and Budget under *44 U.S.C. 3501 et seq.*

National Environmental Policy Act

OSM has prepared an environmental assessment, and has made a finding that the proposed rule would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332(2)(C)*. The environmental assessment is on file in the OSM Administrative Record at the address previously specified (see "ADDRESSES").

Author

The principal author of this rule is John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-208-2550 (Commercial) or 268-2550 (FTS).

LIST OF SUBJECTS

30 CFR Part 723

Administrative practice and procedure, Penalties, Surface mining, Underground mining.

30 CFR Part 845

Administrative practice and procedure, Law enforcement, Penalties, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, 30 CFR parts 723 and 845 are amended as follows:

Dated: January 22, 1991.

Dave O'Neal, Assistant Secretary -- Land and Minerals Management.

SUBCHAPTER B -- INITIAL PROGRAM REGULATIONS

PART 723 -- CIVIL PENALTIES

1. The authority citation for part 723 continues to read as follows:

Authority: Surface Mining Control and Reclamation Act of 1977, Sections 201, 501, 518 (*30 U.S.C. 1211, 1251, 1268*), unless otherwise noted; and Pub. L. 100-34.

2. Section 723.18(b)(1) is revised to read as follows:

SECTION 723.18 - PROCEDURES FOR ASSESSMENT CONFERENCES.

* * * * *

(b)(1) The Office shall assign a conference officer to hold the assessment conference. The assessment conference shall not be governed by section 554 of title 5 of the United States Code, regarding requirements for formal adjudicatory hearings. The assessment conference shall be held within 60 days from the date the conference request is received or the end of the abatement period, whichever is later.

* * * * *

3. Section 723.19(a) is revised to read as follows:

SECTION 723.19 - REQUEST FOR HEARING.

(a) The person charged with the violation may contest the proposed penalty or the fact of the violation by submitting a petition and an amount equal to the proposed penalty or, if a conference has been held, the reassessed or affirmed penalty to the Office of Hearings and Appeals (to be held in escrow as provided in paragraph (b) of this section) within 30 days from receipt of the proposed assessment or reassessment or 30 days from the date of service of the conference officer's action, whichever is later. The fact of the violation may not be contested, if it has been decided in a review proceeding commenced under section 525 of the Act and 43 CFR part 4.

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SUBCHAPTER L -- PERMANENT PROGRAM INSPECTION AND ENFORCEMENT PROCEDURES

PART 845 -- CIVIL PENALTIES

1. The authority citation for part 845 continues to read as follows:

Authority: Pub. L. 95-87, 91 Stat. 445 (*30 U.S.C. 1201 et seq.*); and Pub L. 100-34.

2. Section 845.18(b)(1) is revised to read as follows:

SECTION 845.18 - PROCEDURES FOR ASSESSMENT CONFERENCES.

* * * * *

(b)(1) The Office shall assign a conference officer to hold the assessment conference. The assessment conference shall not be governed by section 554 of title 5 of the United States Code, regarding requirements for formal adjudicatory hearings. The assessment conference shall be held within 60 days from the date the conference request is received or the end of the abatement period, whichever is later: Provided, That a failure by the Office to hold such conference within 60 days shall not be grounds for dismissal of all or part of an assessment unless the person against whom the proposed penalty has been assessed proves actual prejudice as a result of the delay.

* * * * *

3. Section 845.19(a) is revised to read as follows:

SECTION 845.19 - REQUEST FOR HEARING.

(a) The person charged with the violation may contest the proposed penalty or the fact of the violation by submitting a petition and an amount equal to the proposed penalty or, if a conference has been held, the reassessed or affirmed penalty to the Office of Hearings and Appeals (to be held in escrow as provided in paragraph (b) of this section) within 30 days from receipt of the proposed assessment or reassessment or 30 days from the date of service of the conference officer's action, whichever is later. The fact of the violation may not be contested if it has been decided in a review proceeding commenced under 30 CFR 843.16.

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