

FEDERAL REGISTER: 52 FR 39521 (October 22, 1987)

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Hearings and Appeals (OHA)

43 CFR Part 4

Special Rules Applicable to Surface Coal Mining Hearings and Appeals

ACTION: Final rule.

SUMMARY: The Office of Hearings and Appeals publishes final regulations promulgating procedures for adjudicatory proceedings to review decisions of the Office of Surface Mining Reclamation and Enforcement made under the permanent regulatory program established by the Surface Mining Control and Reclamation Act of 1977. These rules are necessary to inform parties who may request a hearing or appeal, where and when to file legal pleadings, what the contents of the pleadings should be, what party bears the burden of proof, and similar matters. These rules implement the provisions in the Act and in other regulations that authorize administrative review.

EFFECTIVE DATE: These rules are effective November 23, 1987.

FOR FURTHER INFORMATION CONTACT: Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. Phone 703-235-3750.

SUPPLEMENTARY INFORMATION:

On October 2, 1986, the Office of Hearings and Appeals (OHA) re-proposed rules providing procedures for administrative review of decisions of the Office of Surface Mining Reclamation and Enforcement (OSM) under the permanent regulatory program established by the Surface Mining Control and Reclamation Act of 1977 (the Act), *30 U.S.C. 1201 et seq.* (1982). *51 FR 35248-35256* (Oct. 2, 1986). The rules were originally proposed on April 9, 1986, *51 FR 12168-12175* (Apr. 9, 1986), and January 14, 1981, *46 FR 3242* (Jan. 14, 1981). Comments on the re-proposed rules were received from the Joint National Coal Association/American Mining Congress Committee on Surface Mining Regulations, the Mining and Reclamation Council of America, Peabody Coal Company, Arch Mineral Corporation, and the Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior. These comments are summarized and OHA's responses are provided in the following discussion. The discussion is organized according to the kind of decision made by OSM and the corresponding procedural regulations (43 CFR 4.1350 et seq., 4.1360 et seq. etc.), in numerical sequence.

REVIEW OF A PRELIMINARY FINDING CONCERNING A DEMONSTRATED PATTERN OF WILLFUL VIOLATIONS, 43 CFR 4.1350 et seq.

1. A comment suggested that it be specifically stated in 43 CFR 4.1351 that the pendency of an OHA proceeding to review a preliminary finding by OSM of a demonstrated pattern of willful violations of the Act or the applicable state or Federal program may not serve as the basis for suspension, postponement, or other delay by OSM in reviewing the application for a permit in other respects. "OHA has an obligation to formally clarify that the OHA proceedings do not form the basis for OSM delay of review," the commenter argues. The suggestion is not accepted. OHA cannot instruct OSM whether or not the pendency of such proceedings is a proper basis for OSM to suspend its consideration of a permit application. It is possible that OSM would be sufficiently convinced of the soundness of its preliminary determination that it would regard it as a waste of resources to continue during administrative review to consider an application for a permit that by law may not be issued if there is a "finding, after opportunity for hearing, that the applicant or the operator specified in the application controls or has controlled mining operations with a demonstrated pattern of willful violations." *30 U.S.C. 1260(c)*.

2. A comment suggested that the time limit for filing a request for hearing under 43 CFR 4.1352(b) and the sanction for failure to do so under Section 4.1352(c) be removed because they unnecessarily restrict the ability of an applicant or operator to enter into discussion with OSM to resolve whether there is a demonstrated pattern "without formal involvement of OHA." An applicant should have the option of requesting an OHA hearing or eliminating the alleged

pattern if discussions with OSM do not resolve the question, it is argued. This suggestion is rejected. Such discussions could take place with OSM either as it was preparing to issue a preliminary notice or in the course of trying to settle the issue after a request for a hearing had been filed. In addition to the need for a clear date after which OHA's jurisdiction cannot be invoked, the filing deadline (together with the requirement of Section 4.1354 that an administrative law judge issue a decision within 60 days of the filing) serves the policy of achieving a prompt decision on whether a permit must be denied under section 510(c), a policy that conserves the resources of both OSM and the applicant.

3. Another comment argues that the imposition on an applicant or operator in 43 CFR 4.1355 of the ultimate burden of persuasion on the basis that this is "the standard allocation of burdens of proof" (see *51 FR 35249*) "fails to recognize the unique character of the section 510 provision [that] requires a finding after an opportunity for a hearing * * * The burden should be on [the regulatory] authority to support [its] findings and not shifted to the applicant to persuade OHA that the allegations of OSM are not correct," the commenter argues. This argument is accepted. Under these rules OSM makes a preliminary finding of a demonstrated pattern and OHA determines, after hearing, whether there is a finding under section 510(c). In this context the comment is correct that the burden must be on OSM both to present a prima facie case and to prove the existence of a pattern by a preponderance of the evidence. The regulation has been revised to allocate these burdens to OSM in this kind of proceeding.

4. A comment related to the previous one suggests that "OHA should modify the proposed Section 4.1350 regulations to conform to the hearings rules established at 43 CFR 4.1190-4.1196." "Inasmuch as the finding required of a regulatory authority in the context of a permit application is virtually identical to this procedure, there is no reason why a substantially identical procedure should not be adopted which requires OSM to initiate and sustain its preliminary finding," the commenter argues. While there are some similarities between the determinations called for in sections 510(c) and 521(a)(4), *30 U.S.C. 1260(c)* and *1271(a)(4)*, the differences between these provisions indicate that a "substantially identical" procedure to that provided for permit revocation proceedings in 43 CFR 4.1190 et seq. is not appropriate for the finding under section 510(c). The requirement in Section 4.1351 that OSM's notice of a preliminary finding of a demonstrated pattern "shall state with specificity the violations upon which the preliminary finding is based," and the revision of the burden of proof discussed above have resulted in a proceeding in which OSM is required "to initiate and sustain its preliminary finding."

REQUEST FOR REVIEW OF APPROVAL OR DISAPPROVAL OF APPLICATIONS FOR NEW PERMITS (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS), 43 CFR 4.1360 et seq.

1. One comment suggested that the existing regulation governing parties, 43 CFR 4.1105, should be amended to include references to an applicant under Section 4.1360, in order to assure service of a request for review on the applicants under 43 CFR 4.1109. The suggestion is accepted. 43 CFR 4.1105(a)(2) is amended to include references to Section 4.1360 et seq. as well as to other proceedings covered by these regulations. Correspondingly, 43 CFR 4.1109(a) is amended to provide for simultaneous service of initiating documents on the date of filing, to provide current addresses in the regulation, and to provide that any party or other person must simultaneously serve any document filed with OHA subsequent to the filing of a document that initiates a proceeding on all other parties and all other persons participating in the proceeding. See *51 FR 35249*.

2. One comment suggested expanding the scope of decisions covered by Section 4.1360 et seq. to include "review of the alleged failure of OSM to reach such decisions in a timely manner," referring specifically to the obligation imposed by section 514(b) of the Act, *30 U.S.C. 1264(b)*, that OSM notify an applicant whether the application has been approved or disapproved in whole or in part "within a reasonable time as determined by the regulatory authority and set forth in regulations," based on several specified factors. Although it is for OSM to promulgate the regulations called for by section 514(b), not OHA, it is not the intent of these OHA regulations to prescribe consideration of the issue of timeliness, and, indeed, the issue has been considered in the context of at least one appeal adjudicated by the Interior Board of Land Appeals (IBLA). See *Peabody Coal Co. v. The Hopi Tribe*, *91 IBLA 59 (1986)*. The suggestion is not accepted.

3. Another comment recommends that the record in a permit review proceeding under Section 4.1360 et seq. be limited to information before OSM at the time of its decision or, alternatively, that any additional technical data must be filed by a specified date before the hearing. The hearing provides the applicant, OSM, and any other party the opportunity to present evidence on behalf of or against the decision granting or denying an application. This opportunity

includes evidence generated after the decision appealed from. See *Benton C. Cavin*, 83 IBLA 107, 114-15 (1984). The administrative law judge has the authority specified in Section 4.1121(a) as well as that under Section 4.1121(b) to order a prehearing conference. This authority is adequate to ensure that all parties have a fair opportunity to present their evidence and arguments without taking advantage of other parties. The limitation on the record suggested is not consistent with the intent of Congress that there be a full public hearing on the application governed by 5 U.S.C. 554. S. Rep. No. 337, 95th Cong., 1st Sess. 107 (1977). The suggestion is not accepted.

4. Two commenters suggest that the right to request a hearing under Section 4.1361 (as well as under Sections 4.1371, 4.1381, and 4.1391) be limited to persons who not only have an interest which is or may be adversely affected, as proposed, but also have participated in administrative proceedings before OSM. This would "conform to" section 514(a) of the Act, 30 U.S.C. 1264(a), and be "consistent with" section 514(f), with the Administrative Procedure Act, and with "the prevailing case law that one who challenges agency action is limited to those grounds raised initially before the agency" (citing *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973)), it is argued. Further, it is argued, the legislative history cited at 51 FR 34349 in support of rejecting this suggestion before "has no applicability."

Section 514(a) of the Act requires the regulatory authority to furnish the applicant for a permit and "persons who are parties to the administrative proceedings" with a written finding granting or denying a permit within 60 days if an informal conference has been held under section 513(b) of the Act, 30 U.S.C. 1263(b). Section 514(b) provides that if there has been no such informal conference the regulatory authority is to notify the applicant within a reasonable time. Section 514(c), which proposed rules Sections 4.1360-4.1369 are designed to implement, provides that the applicant "or any person with an interest which is or may be adversely affected" may request a hearing on the reasons for the final determination on an application within 30 days after the applicant is notified of it. Nothing in the language of section 514(c) nor in its legislative history indicates that only persons who have filed written objections or requested an informal conference under section 513(b) may request a hearing under section 514(c). Section 514(c) was added to the bill by the committee of conference on H.R. 2 with the following explanation: "The conferees further provided for a full public hearing after the decision on the application to be governed by 5 U.S.C. 554 if the Secretary is the regulatory authority." S. Rep. No. 337, 95th Cong., 1st Sess., 107 (1977). Adding a full public hearing after the decision on the application does not indicate an interest to limit the hearing to those who participated in the application proceedings. As section 514(b) makes clear, there may not have been either an informal conference or any written objections under section 513(b), so it is logical that section 514(c) provides that the applicant or any person with an interest which is or may be adversely affected may request a hearing, not only a person who has participated under section 513(b).

Section 514(f) provides a right of appeal to an applicant or "any person with and interest which is or may be adversely affected who has participated in the administrative proceedings as an objector, and who is aggrieved by the decision of the regulatory authority." The "administrative proceedings" referred to in section 514(f) are those provided for in section 514(c) and the right of appeal granted is a right to judicial review under section 526, 30 U.S.C. 1276. Section 514(f) provides no basis for limiting who may request that a hearing be held by the Department under section 514(c).

Thus, the language of section 514 (a) and (f), taken in context, does not support the suggestion in the comments that availability of administrative review before OHA should be limited to those who participated while an application was being considered by OSM.

Because Congress specified in section 514(c) who may request a hearing on a permit application determination, the Administrative Procedure Act (APA) does not control this question. The comparable language in 5 U.S.C. 702 provides a similar standard for right of review -- "A person . . . adversely affected by . . . agency action" -- and neither 5 U.S.C. 554 nor 557 contains any requirement of prior participation in adjudication proceedings. *Portland Cement*, cited in the comment, states that challenges made on judicial review to standards established in rulemakings "must be limited to points made by petitioners in agency proceedings," *id.*, 486 F.2d at 394, not to parties in adjudicatory proceedings. Thus, nothing analogous to section 514(c) in the APA indicates that one must have participated in a prior agency proceeding in order to be able to request a hearing under section 514(c).

One of the purposes of the Act is to "assure that appropriate proceedings are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under the Act." 30 U.S.C. 1202(i). Both the House of Representatives and the Senate explained the reason for this purpose:

“The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. . . . While citizen participation is not, and cannot be, a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help ensure that the decisions and actions of the regulatory authority are grounded upon complete and full information. In addition, providing citizen access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the Act.”

H.R. Rep. No. 218, 95th Cong., 1st Sess. 88-89 (1977); S. Rep. No. 128, 95th Cong., 1st Sess. 59 (1977).

Section 514(c) provides for a right to a hearing to the applicant or "any person with an interest which is or may be adversely affected." This language occurs in several other provisions of the Act. See, e.g., 30 U.S.C. 1263(b), 1270(a), 1275(a). Congress adopted this language concerning participation in the permit process over an alternative standard (any person "with a valid legal interest"). H.R. Rep. No. 493, 95th Cong., 1st Sess. 106-107 (1977). It had previously revised this language to establish "a test of standing consistent with other provisions of the bill." H.R. Rep. No. 218, 95th Cong., 1st Sess. 66 (1977). The Congress made its purpose in establishing these provisions clear: "[I]n imposing several provisions which contemplate active citizen involvement, the committee is carrying out its conviction that the participation of private citizens is a vital factor in the regulatory program as established by the Act." *Id.* at 89. It also made its intent about how this language was to be interpreted clear: "It is the intent of the Committee that the phrase 'any person having an interest which is or may be adversely affected' shall be construed to be coterminous with the broadest standing requirements enunciated by the United States Supreme Court." *Id.* at 90. "The Committee intends that this includes persons who meet the requirements for standing to sue set out by the Supreme Court in *Sierra Club v. Morton* (405 U.S. 727 1972))." S. Rep. No. 28, 94th Cong., 1st Sess. 217 (1975).

This statutory language -- "person with an interest which is or may be adversely affected" -- is defined in regulations adopted by the Secretary as including "any person a) who uses any resource of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the State regulatory authority or b) whose property is or may be adversely affected" by these same activities or actions. 30 CFR 700.5. In devising this definition the legislative history referred to above, as well as additional references, were relied on, as were various United States Supreme Court decisions. 44 FR 14912-14913 (Mar. 13, 1979). The statutory language is reflected in several other regulations adopted by the Secretary, including 30 CFR 775.11(a) authorizing administrative review of permit decisions. 30 CFR 775.11(a) applies not only to review of the approval or denial of applications for permits but to permit revisions and renewals, applications for the transfer, sale, or assignment of permit rights, and applications for coal exploration permits. See also 43 CFR 4.1105(a)(2), 4.1110(b).

Thus, both the legislative history and the regulatory history of the phrase "any person with an interest which is or may be adversely affected" contradict the suggested limitation on who may file a request for review under proposed 43 CFR 4.1361, 4.1371, 4.1381, and 4.1391. The suggestion is rejected.

5. Another comment suggested revising 4.1361 to provide that if a person (e.g., an Indian tribe) that otherwise has sovereign immunity filed a request for a hearing, it should be deemed to have waived its sovereign immunity from suit by any other party for costs and expenses under section 525(e) of the Act or for administrative or judicial review of the outcome of the request for a hearing. The suggestion is not accepted. An Indian tribe does not waive its sovereign immunity against a counterclaim by initiating legal action. *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985), rev'd on other grounds, 106 S. Ct. 289 (1985); *United States v. U.S. Fidelity and Guaranty Co.*, 309 U.S. 506, 512 (1940). Without authority from the Congress, the Secretary may not waive tribal immunity. *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 170 n.9 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

6. One comment observed that requiring a request for review to be filed "within 30 days after the applicant is notified of OSM's written decision" under 4.1362(a) does not provide a clear deadline unless there is a record of when that notification takes place. Under "OSM's procedures * * * considerable question can arise as to what constitutes 'notification' of the applicant," the comment states. The regulation -- as well as Sections 4.1372(a), 4.1382(a), and 4.1391(b) -- is revised to provide that notification of the applicant or permittee occurs on the date of publication in a local newspaper of notice of OSM's decision. This form of notification is required only for purposes of being able to

establish clearly whether a request for review was timely filed with OHA; it does not preclude other forms of notification (e.g., oral, personal service) for other purposes.

7. A comment suggested deleting Section 4.1363 (c) and (d) on the grounds that statutory time limits imposed by section 514(c) should not be able to be avoided by inartful drafting of requests for hearings. These paragraphs have been revised to require filing of amendments and responses within 15 and 10 days of filing of requests for review and amendments, respectively, so that there can be no violation of the requirement that a hearing be commenced within 30 days of a filing of a request for hearing, and a provision has been added to Section 4.1363(c) proscribing the granting of a motion for leave to amend unless all parties agree to an extension of the date of the commencement of the hearing under Section 4.1364.

8. A comment suggested revising Section 4.1364(a) to delete the reference to an amended request for review and the requirement for simultaneous notification of "all interested parties" on the grounds that it might be interpreted to require notice by publication for which there would not be time given the time limits imposed by section 514(c). The suggestion to delete the reference to an amended request for review is not accepted, in view of the revisions to Section 4.1363. The suggestion concerning notification is also not accepted. The regulation is not intended to require notice by publication, although it would not preclude it. In any event, the requirement that a hearing commence within 30 days of the filing of the request for review would control.

9. Two comments suggested that Section 4.1364(b) authorizing waivers of the deadlines for holding a hearing and issuing a decision imposed by *30 U.S.C. 1264(c)* upon the agreement of all parties be revised to make clear that the rule "may be implemented through specified extensions of time to which all parties agree," as well as indefinite extensions, so that parties are not reluctant to agree for fear of losing their right to a decision within an established time frame. The suggestion is accepted and the rule has been revised accordingly. In addition, Section 4.1364 has been revised to limit it to waivers of the time limit for commencing a hearing. Waivers of the time limit for issuing a decision are provided for in revised Section 4.1368.

10. One comment observed that it "is not possible" for OSM to file a request for review of a permit it has itself granted, as implied in the first paragraph of the discussion of Section 4.1366 on *51 FR 35250*. It was not the intent of the comment to indicate this was possible; the comment responded to a hypothetical question concerning the allocation of the burden of proof. Another comment suggested revising Section 4.1336 to conform to 30 CFR 775.11(b)(5). The present phrasing is retained to distinguish the burden of going forward with the evidence from the burden of ultimate persuasion.

11. One comment observed that the expedited time frames in Sections 4.1368 and 4.1369 "place a substantial burden on parties having to develop and draft pleadings and briefs. We are concerned that full and fair consideration of the issues may not always result. Because permit challenges often are complex and present issues of first impression, a total of 30 days for two sets of briefs, an administrative law judge decision, and Board decision is inadequate." The commenter suggested establishing longer periods by rule, noting that if a party were aggrieved by the period for review extending beyond 30 days it could seek judicial relief under section 514(f). Alternatively, the commenter suggested that filing be effective upon receipt, rather than on mailing as provided currently in 43 CFR 4.1107, and that provisions similar to existing rules 43 CFR 4.1184(b), 4.1185, and 4.1186 be adopted for permit review proceedings under Section 4.1360.

OHA agrees that the time frames in proposed Sections 4.1368 and 4.1369 are impractical. Therefore, Section 4.1368 is revised to allocate the entire 30-day period mandated by section 514(c) of the Act for the issuance of a decision to the administrative law judge and to provide that this time limit may be waived in writing by the parties if they wish to allow more time after the hearing record is closed, i.e., after the filing of any post-hearing briefs, for the issuance of a decision. As under Section 4.1364, the agreement may specify the length of the extension agreed to.

Section 4.1369 has been revised to provide that any party aggrieved by a decision of the administrative law judge granting or denying a permit in whole or in part may elect to file a petition for discretionary review with the Board, or it may seek judicial review in accordance with *30 U.S.C. 1276(a)(2)*. This election is similar to the one available for review of decisions granting or denying temporary relief under 43 CFR 4.1367(f). If the Board grants the petition, it shall decide the appeal expeditiously.

A provision based on 43 CFR 4.1184(b) has been added as Section 4.1363(e).

REQUESTS FOR REVIEW CONCERNING PERMIT REVISIONS, PERMIT RENEWALS, AND THE TRANSFER, ASSIGNMENT, OR SALE OF RIGHTS GRANTED UNDER PERMITS (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS), 43 CFR 4.1370 et seq.

1. One comment objects to any differences between the review procedures and time requirements applicable to permit revisions, renewals, and the transfer, assignment, or sale of rights under Section 4.1370 et seq. and those applicable to new permits under Section 4.1360 et seq. on the grounds that 30 CFR 775.11 provides the same procedures under state programs and "the slower, more cumbersome procedures proposed for decisions on existing permits under federal programs would place operators subject to federal programs at a severe disadvantage in comparison to operators under state programs conducted pursuant to 30 CFR 775.11." Section 4.1360 et seq. should be applicable to all permit decisions, the commenter concludes, and Section 4.1370 et seq. should be deleted.

The differences in time requirements, burdens of proof, etc., between Section 4.1360 et seq. and Section 4.1370 et seq. are based on differences in the provisions of the Act concerning these matters in sections 506, 510, 511, and 514, *30 U.S.C. 1256, 1260, 1261, and 1264*. The time limits imposed in section 514(c), for example, are not contained in the other sections (see, e.g., section 511(a)(2)). Similarly, the burden of proof on applications for renewals is specified by section 506(d)(1) to be on any opponents. Thus, different administrative review procedures for federal, state, and federal lands programs were chosen "because of the statutory and institutional differences between the three programs." *44 FR 15104* (Mar. 13, 1979). The suggestion to apply Section 4.1360 et seq. to all permit decisions is not accepted.

A new Section 4.1379 has been added, however, authorizing any party to a proceeding under Section 4.1370 et seq. to request that an administrative law judge or the Board grant expedited consideration to a case. The request must set forth the exigent circumstances that warrant expedited consideration.

2. One comment objects that a "right to public participation in a hearing under 30 CFR 775.11(a) and 43 CFR 4.1370 et seq. of the transfer assignment and sale of permit rights cannot be created when no right to a hearing is created pursuant to section 511" of the Act.

The origin of the right specified in 30 CFR 775.11(a) and (c) is described in the preamble to the equivalent regulation Section 787.11) when it was promulgated:

"10. As is discussed in the preamble to Section 7[7]6.14, the Office accepted comments suggesting that the right to an adjudicatory hearing be provided with respect to decisions of regulatory authorities to approve or disapprove applications to conduct coal exploration in which more than 250 tons of coal is to be removed in any one location. This was done by cross-referencing to Section 787.11. Appropriate revisions were also made to Section 787.11 to include these appeals within its scope. Similarly, the requirements of Section 787.11 have also been made applicable, as suggested by commenters, to Section 786.17(d) hearings, Section 788.11 hearings, and to review of the decision of the regulatory authority under Sections 788.17-788.19." [Emphasis added.]

44 FR 15105 (Mar. 13, 1979). (788.17-788.19 applied to the transfer, assignment, or sale of permit rights. See *44 FR 15108-09* (Mar. 13, 1979).)

The discussion in the preamble to Section 776.14 referred to in this comment explained:

"3. Several commenters questioned whether there should be an opportunity for a hearing on the approval or disapproval of coal explorations over 250 tons. As proposed, Section 776.14 conferred discretion to the regulatory authority to hold a hearing after approval or disapproval of exploration applications. Under the due-process requirements of the 5th and 14th amendments to the United States Constitution, the Federal and State governments can only take property or deprive individuals of their due-process rights if opportunity for an adjudicatory hearing is afforded on particularized, factual determinations. Furthermore, the Federal Administrative Procedure Act (*5 U.S.C. 554*) and most State laws provide for a similar right to a hearing. Therefore, any person adversely affected by the decision of the regulatory authority on an exploratory application must be given an opportunity for a hearing. The type of hearing to be

afforded is specified in Part 787, which itself has been modified in the final rule to account for exploration application approval and disapproval hearings.”

44 FR 15020 (Mar. 13, 1979).

Section 775.11(a) "is the previous 787.11(a), with minor editorial changes." 48 FR 44383 (Sept. 28, 1983). "Section 775.11(c) . . . is the same as previous 787.11(c), with the changes described below." 48 FR 44384 (Sept. 28, 1983). Both 787.11(a) and 787.11(c) provided for administrative review of decisions on applications for the transfer, sale, or assignment of rights granted under permits. 44 FR 15382 (Mar. 13, 1979).

REQUEST FOR REVIEW OF APPROVAL OR DISAPPROVAL OF A COAL EXPLORATION PERMIT APPLICATION (FEDERAL PROGRAM), 43 CFR 4.1380 et seq.

1. One comment objects to the provision of Section 4.1385 that filing a request for review stays issuance of a permit pending completion of administrative review. "No valid distinction exists for treating the status of a coal exploration permit decision differently from other permitting decisions," the commenter argues. The argument is persuasive. The review of an application for a coal exploration permit, though somewhat less extensive, is similar to that for an application for a new permit. The process does include public notice and the opportunity for comment. The rule has been revised so that filing a request for review will not stay issuance of a coal exploration permit. Interested persons adversely affected by the issuance of the coal exploration permit may seek temporary relief, including a stay, under 43 CFR 4.1387.

REQUEST FOR REVIEW OF OSM DETERMINATIONS OF ISSUES UNDER 30 CFR PART 761 (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS), 43 CFR 4.1390 et seq.

1. Two comments observe that a determination by OSM under 30 CFR Part 761 could either take place in advance of an application for a permit or in the context of a decision on such an application. There is need for only one determination, however, and therefore for only one opportunity to request review of that determination. If the determination is made separately from a permit application, the review procedures provided in Section 4.1390 et seq. apply; if it is made in the context of a permit application decision, administrative review of the determination will occur in accordance with the procedures applicable to review of the decision on the permit application, i.e., Sections 4.1360 et seq., 4.1370 et seq., or 4.1380 et seq.

2. One comment objects to the applicability of 43 CFR 4.21(a) to OSM decisions under 30 CFR Part 761 that are the subject of a request for review. See 4.1392. "The proposal contravenes [the Act] by substituting Section 4.21(a) for the specific statutory scheme which uniformly [sic] requires that those who object to OSM's decisions affirmatively seek relief. See, *Virginia Surface Mining and Reclamation Assn. v. Andrus*, 604 F.2d 312 (4th Cir. 1979)," the commenter argues.

The general rule in 43 CFR 4.21(a), contained in Section 4.1393, is provided so that there is an opportunity for administrative review on behalf of the Secretary before agency action is final for purposes of judicial review. See 5 U.S.C. 704; *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971); *Conoco, Inc. v. Watt*, 559 F. Supp. 627, 629 (E.D. La. 1982). The rule implements the policy that the Secretary structure adjudication procedures to assure objective administrative review of initial decisions. See 43 U.S.C. 1701(a)(5). It provides an opportunity for OHA to develop and review a record and it protects private parties from investing resources on the basis of an initial decision that may be erroneous. With the exception noted in the response to the preceding comment, OSM decisions under Part 761 take place before decisions concerning permits. In addition, such decisions more often involve legal rather than technical issues. For both these reasons there is less reason to exempt decisions under Part 761 from the general rule in 43 CFR 4.21(a).

Except for sections 514(c) and 506(d)(1)), discussed above, the Act does not contain a "specific statutory scheme," as suggested by the comment, that precludes application of the general rule to decisions by OSM under 30 CFR Part 761. Application of the rule does not alter the parties' burdens of proof, it simply provides for the conduct of administrative review. *Andrus*, cited by the comment, deals with the showings that must be made to obtain temporary relief from

decisions of the Secretary during judicial review under section 526. It does not speak to any such uniform requirements during administrative review by the Secretary. The suggestion in the comment that Section 4.21(a) not apply is rejected.

3. Section 4.1391(a) has been revised to provide for filing of a request for review in the office of the OSM official making the determination, with a copy to the Board. Cf. 43 CFR 4.1282(a). OSM will file the administrative record with the Board as soon as practicable.

Determination of Effects

Because these rules only set forth the details of procedures for conducting hearings and appeals of decisions of OSM under the Surface Mining Control and Reclamation Act of 1977, the Department has determined that they are not major, as defined by Executive Order 12291, and will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (*5 U.S.C. 601 et seq.*).

National Environmental Policy Act

The Department has determined that these rules will not significantly affect the quality of the human environment on the basis of the categorical exclusion of regulations of a procedural nature set forth in 516 DM 2, Appendix 1, section 1.10.

Paperwork Reduction Act

These rules contain no information collection requirements requiring Office of Management and Budget approval under *44 U.S.C. 3501 et seq.*

The author of these regulations is Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, Office of Hearings and Appeals.

LIST OF SUBJECTS IN 43 CFR PART 4

Administrative practice and procedure, Mine, Public lands-mineral resources, Surface mining.

For the reasons set forth in the preamble, Subparts L and M of Part 4 of Title 43 of the Code of Federal Regulations are amended as set forth below.

Dated: October 15, 1987.

Donald Paul Hodel, Secretary.

PART 4 -- [AMENDED]

43 CFR Part 4 is amended as follows:

1. The authority citation for Part 4, Subpart M, continues to read as follows:

Authority: 5. U.S.C. 301.

SECTIONS 4.1300-4.1310 [Redesignated as Sections 4.1600-4.1610].

2. 43 CFR Part 4, Subpart M, is amended by redesignating existing Section 4.1300-4.1310 as 4.1600-4.1610. All references to Sections 4.1300-4.1310 are changed to reference Sections 4.1600-4.1610 respectively.

2a. The authority citation for Part 4, Subpart L, continues to read as follows:

Authority: *30 U.S.C. 1256, 1260, 1261, 1264, 1268, 1271, 1272, 1275, 1293; 5 U.S.C. 301.*

3. 43 CFR 4.1105 is amended by revising paragraph (a)(2) to read as follows:

SECTION 4.1105 - PARTIES.

(a) * * *

(2) In a review proceeding under Sections 4.1160 et seq., 4.1180 et seq., 4.1300 et seq., 4.1350 et. seq., 4.1360 et seq., 4.1370 et seq., 4.1380 et seq., or 4.1390 et seq., of this part, OSM, as represented by the Office of the Solicitor, Department of the Interior, and --

(i) If an applicant, operator, or permittee files an application or request for review, the applicant, operator, or permittee; and

(ii) If any other person having an interest which is or may be adversely affected files an application or request for review, the applicant, operator, or permittee and the person filing such application;

* * * * *

4. 43 CFR 4.1109 is amended by revising paragraph (a) to read as follows:

SECTION 4.1109 - SERVICE.

(a) Any party initiating a proceeding in OHA under the Act shall simultaneously serve, on the date of filing, copies of the initiating documents on the Field or Regional Solicitor, Division of Surface Mining, U.S. Department of the Interior, representing OSM in the state in which the mining operation is located, and on any other statutory parties under 4.1105. The addresses and telephone numbers of the field and regional solicitors follow.

For cases arising in Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia: Office of the Field Solicitor, U.S. Department of the Interior, P.O. Box 15006, Knoxville, Tennessee 37901. Phone 615-673-4233.

For cases arising in Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming: Office of the Regional Solicitor, U.S. Department of the Interior, Denver Federal Center, P.O. Box 25007, Denver, Colorado 80225. Phone 303-236-8444.

For cases arising in Connecticut, Delaware, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, and West Virginia: Office of the Field Solicitor, U.S. Department of the Interior, Suite 502J, U.S. Post Office and Courthouse, Pittsburgh, Pennsylvania 15219. Phone 412-644-4455.

Any party or other person shall simultaneously serve any other documents being filed subsequently with OHA on all other parties and all other persons participating in the proceeding.

* * * * *

5. 43 CFR Part 4, Subpart L, is further amended by adding new center headings and Sections 4.1350 through 4.1394 to read as follows:

REQUEST FOR HEARING ON A PRELIMINARY FINDING CONCERNING A DEMONSTRATED PATTERN OF WILLFUL VIOLATIONS UNDER SECTION 510(c) OF THE ACT, 30 U.S.C. 1260(c) (Federal Program; Federal Lands Program; Federal Program for Indian Lands)

Section	
4.1350	Scope.
4.1351	Preliminary finding by OSM.
4.1352	Who may file; where to file; when to file.
4.1353	Contents of request.
4.1354	Determination by the administrative law judge.
4.1355	Burden of proof.
4.1356	Appeals.

REQUEST FOR REVIEW OF APPROVAL OR DISAPPROVAL OF APPLICATIONS FOR NEW PERMITS (Federal Program; Federal Lands Program; Federal Program for Indian Lands)

Section	
4.1360	Scope.
4.1361	Who may file.
4.1362	Where to file; when to file.
4.1363	Contents of request; amendment of request; responses.
4.1364	Time for hearing; notice of hearing; extension of time for hearing.
4.1365	Status of permit pending administrative review.
4.1366	Burden of proof.
4.1367	Requests for temporary relief from a decision to approve or disapprove a permit application in whole or in part.
4.1368	Determination by the administrative law judge.
4.1369	Petitions for discretionary review; judicial review.

REQUESTS FOR REVIEW CONCERNING PERMIT REVISIONS, PERMIT RENEWALS, AND THE TRANSFER, ASSIGNMENT, OR SALE OF RIGHTS GRANTED UNDER PERMITS (Federal Program; Federal Lands Program; Federal Program for Indian Lands)

Section	
4.1370	Scope.
4.1371	Who may file; where to file.
4.1372	When to file.
4.1373	Contents of request; amendment of request; responses.
4.1374	Notice of hearing.
4.1375	Status of decision pending administrative review.
4.1376	Burden of proof.
4.1377	Request for temporary relief.
4.1378	Petitions for discretionary review.
4.1379	Request for expedited consideration.

REQUEST FOR REVIEW OF APPROVAL OR DISAPPROVAL OF A COAL EXPLORATION PERMIT APPLICATION (Federal Program)

Section	
4.1380	Scope.
4.1381	Who may file.
4.1382	Where to file; when to file.
4.1383	Contents of request; amendment of request; responses.
4.1384	Notice of hearing.
4.1385	Status of permit pending administrative review.
4.1386	Burden of proof.
4.1387	Request for temporary relief.
4.1388	Petitions for discretionary review.

REQUEST FOR REVIEW OF OSM DETERMINATIONS OF ISSUES UNDER 30 CFR PART 761 (Federal Program; Federal Lands Program; Federal Program for Indian Lands)

Section	
4.1390	Scope.
4.1391	Who may file; where to file; when to file; filing of administrative record.
4.1392	Contents of request; amendment of request; responses.
4.1393	Status of decision pending administrative review.
4.1394	Burden of proof.

REQUEST FOR HEARING ON A PRELIMINARY FINDING CONCERNING A DEMONSTRATED PATTERN OF WILLFUL VIOLATIONS UNDER SECTION 510(c) OF THE ACT, 30 U.S.C. 1260(c) (Federal Program; Federal Lands Program; Federal Program for Indian Lands)

SECTION 4.1350 - SCOPE.

These rules set forth the procedures for obtaining review of a preliminary finding by OSM, prior to approval or disapproval of a permit application, that the applicant, or operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this Act or the applicable State or Federal program.

SECTION 4.1351 - PRELIMINARY FINDING BY OSM.

If OSM determines during review of the permit application that the applicant, or operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply, OSM shall issue the applicant or operator a notice of such preliminary finding. The notice shall state with specificity the violations upon which the preliminary finding is based.

SECTION 4.1352 - WHO MAY FILE; WHERE TO FILE; WHEN TO FILE.

(a) The applicant or operator may file a request for hearing on OSM's preliminary finding of a demonstrated pattern of willful violations.

(b) The request for hearing shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (phone 703-235-3800), within 30 days of receipt by the applicant or operator of the notice of the preliminary finding.

(c) Failure to timely file a request shall constitute a waiver of the opportunity for a hearing prior to a final finding by OSM concerning a demonstrated pattern of willful violations, and the request shall be dismissed.

SECTION 4.1353 - CONTENTS OF REQUEST.

The request for hearing shall include --

- (a) A clear statement of the facts entitling the one requesting the hearing to administrative relief;
- (b) An explanation of the alleged errors in OSM's preliminary finding; and
- (c) Any other relevant information.

SECTION 4.1354 - DETERMINATION BY THE ADMINISTRATIVE LAW JUDGE.

The administrative law judge shall promptly set a time and place for and give notice of the hearing to the applicant or operator and shall issue a decision within 60 days of the filing of a request for hearing. The hearing shall be of record and governed by 5 U.S.C. 554.

SECTION 4.1355 - BURDEN OF PROOF.

OSM shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the existence of a demonstrated pattern of willful violations of the Act or the applicable State or Federal program which are of such nature, duration, and with such resulting irreparable damage to the environment as to indicate an intent to comply.

SECTION 4.1356 - APPEALS.

- (a) Any party aggrieved by the decision of the administrative law judge may appeal to the Board under procedures set forth in Section 4.1271 et seq. of this subpart, except that the notice of appeal must be filed within 20 days of receipt of the administrative law judge's decision.
- (b) The Board shall order an expedited briefing schedule and shall issue a decision within 45 days of the filing of the appeal.

REQUEST FOR REVIEW OF APPROVAL OR DISAPPROVAL OF APPLICATIONS FOR NEW PERMITS (Federal Program; Federal Lands Program; Federal Program for Indian Lands)

SECTION 4.1360 - SCOPE.

These rules set forth the procedures for review of decisions by OSM on applications for new permits, including applications under 30 CFR Part 785, and the terms and conditions imposed or not imposed in permits by those decisions. They do not apply to decisions on applications to mine on Federal lands in states where the terms of a cooperative agreement provide for the applicability of alternative administrative procedures (see 30 CFR 775.11(c)), but they do apply to OSM decisions on applications for Federal lands in states with cooperative agreements where OSM as well as the state issue Federal lands permits.

SECTION 4.1361 - WHO MAY FILE.

The applicant or any person having an interest which is or may be adversely affected by a decision of OSM to approve or disapprove a permit application, in whole or in part, may file a request for review of that decision.

SECTION 4.1362 - WHERE TO FILE; WHEN TO FILE.

(a) The request for review shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (phone 703-235-3800), within 30 days after the applicant is notified by publication in a local newspaper of notice of OSM's written decision approving or disapproving the permit application in whole or in part.

(b) Failure to file a request for review within the time specified in paragraph (a) of this section shall constitute a waiver of a hearing and the request shall be dismissed.

SECTION 4.1363 - CONTENTS OF REQUEST; AMENDMENT OF REQUEST; RESPONSES.

(a) The request for review shall include --

- (1) A clear statement of the facts entitling the one requesting review to administrative relief;
- (2) An explanation of each specific alleged error in OSM's decision, including reference to the statutory and regulatory provisions allegedly violated;
- (3) A request for specific relief;
- (4) A statement whether the person requests or waives the opportunity for an evidentiary hearing; and
- (5) Any other relevant information.

(b) All interested parties shall file an answer or motion in response to a request for review, or a statement that no answer or motion will be filed, within 15 days of receipt of the request specifically admitting or denying facts or alleged errors stated in the request and setting forth any other matters to be considered on review.

(c) A request for review may be amended once as a matter of right prior to filing of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter, a motion for leave to amend the request shall be filed with the administrative law judge. An administrative law judge may not grant a motion for leave to amend unless all parties agree to an extension of the date of commencement of the hearing under Section 4.1364. A request for review may not be amended after a hearing commences.

(d) An interested party shall have 10 days from filing of a request for review that is amended as a matter of right or the time remaining for response to the original request, whichever is longer, to file an answer, motion, or statement in accordance with paragraph (b) of this section. If the administrative law judge grants a motion to amend a request for review, the time for an interested party to file an answer, motion, or statement shall be set forth in the order granting it.

(e) Failure of any party to comply with the requirements of paragraphs (a) or (b) of this section may be regarded by an administrative law judge as a waiver by that party of the right to commencement of a hearing within 30 days of the filing of a request for review if the administrative law judge concludes that the failure was substantial and that another party was prejudiced as a result.

SECTION 4.1364 - TIME FOR HEARING; NOTICE OF HEARING; EXTENSION OF TIME FOR HEARING.

Unless all parties agree in writing to waive the statutory requirement that a hearing be held within 30 days of a request, the administrative law judge shall commence a hearing within 30 days of the date of the filing of the request for review or amended request for review and shall simultaneously notify the applicant and all interested parties of the time and place of such hearing before the hearing commences. The hearing shall be of record and governed by 5 U.S.C. 554. An agreement to waive the time limit for commencement of a hearing may specify the length of the extension agreed to.

SECTION 4.1365 - STATUS OF PERMIT PENDING ADMINISTRATIVE REVIEW.

The filing of a request for review of the approval of an application for a permit shall not suspend the permit pending completion of administrative review.

SECTION 4.1366 - BURDEN OF PROOF.

(a) If the permit applicant is seeking review, OSM shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations or as to the appropriateness of the permit terms and conditions, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the permit or as to the inappropriateness of the permit terms and conditions.

(b) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the permit application fails in some manner to comply with the applicable requirements of the Act or the regulations, or that OSM should have imposed certain terms and conditions that were not imposed.

SECTION 4.1367 - REQUEST FOR TEMPORARY RELIEF FROM A DECISION TO APPROVE OR DISAPPROVE A PERMIT APPLICATION IN WHOLE OR IN PART.

(a) Where review is requested pursuant to Section 4.1362, any party may file a request for temporary relief at any time prior to a decision by an administrative law judge, so long as the relief sought is not the issuance of a permit where a permit application has been disapproved in whole or in part.

(b) The request shall be filed with the administrative law judge to whom the case has been assigned. If no assignment has been made, the application shall be filed in the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (phone 703-235-3800).

(c) The application shall include --

- (1) A detailed written statement setting forth the reasons why relief should be granted;
- (2) A statement of the specific relief requested;
- (3) A showing that there is a substantial likelihood that the person seeking relief will prevail on the merits of the final determination of the proceeding; and
- (4) A showing that the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(d) The administrative law judge may hold a hearing on any issue raised by the application.

(e) The administrative law judge shall issue expeditiously an order or decision granting or denying such temporary relief. Temporary relief may be granted only if --

- (1) All parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;
- (2) The person requesting such relief shows a substantial likelihood of prevailing on the merits of the final determination of the proceeding; and
- (3) Such relief will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(f) Appeals of temporary relief decisions.

(1) Any party desiring to appeal the decision of the administrative law judge granting or denying temporary relief may appeal to the Board, or, in the alternative, may seek judicial review pursuant to section 526(a), 30 U.S.C. 1276(a), of the Act.

(2) The Board shall issue an expedited briefing schedule and shall issue a decision on the appeal expeditiously.

SECTION 4.1368 - DETERMINATION BY THE ADMINISTRATIVE LAW JUDGE.

Unless all parties agree in writing to waive the statutory requirement that a decision be issued within 30 days after the hearing, the administrative law judge shall issue a written decision in accordance with 43 CFR 4.1127 within 30 days of the date the hearing record is closed by the administrative law judge. An agreement to waive the time limit for issuing a decision may specify the length of the extension agreed to.

SECTION 4.1369 - PETITION FOR DISCRETIONARY REVIEW; JUDICIAL REVIEW.

(a) Any party aggrieved by a decision of an administrative law judge granting or denying a permit in whole or in part may file a petition for discretionary review with the Board within 30 days of receipt of the decision, or, in the alternative, may seek judicial review of the decision in accordance with *30 U.S.C. 1276(a)(2)*. A copy of the petition shall be served on the administrative law judge who issued the decision, who shall forthwith forward the record to the Board, and on all other parties to the proceeding. The petition shall set forth specifically the alleged errors in the decision, with supporting argument, and shall attach a copy of the decision.

(b) Any party may file a response to a petition for discretionary review within 20 days of receipt of the petition.

(c) The Board shall grant or deny the petition within 30 days of receipt of the responses. If the petition is granted, the Board shall decide the appeal expeditiously.

REQUESTS FOR REVIEW CONCERNING PERMIT REVISIONS, PERMIT RENEWALS, AND THE TRANSFER, ASSIGNMENT, OR SALE OF RIGHTS GRANTED UNDER PERMITS (Federal Program; Federal Lands Program; Federal Program for Indian Lands)

SECTION 4.1370 - SCOPE.

These rules set forth the procedures for obtaining review of decisions by OSM concerning permit revisions, permit renewals, and the transfer, assignment, or sale of rights granted under permits.

SECTION 4.1371 - WHO MAY FILE; WHERE TO FILE.

The applicant, permittee, or any person having an interest which is or may be adversely affected by a decision of OSM ordering revision of a permit, or approving or disapproving applications for permit revisions, permit renewals, or the transfer, assignment, or sale of rights granted under permits, may file a request for review of that decision with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (phone 703-235-3800).

SECTION 4.1372 - WHEN TO FILE.

(a) The request for review shall be filed within 30 days after the applicant or permittee is notified by publication in a local newspaper of notice of OSM's written order or decision.

(b) Failure to file a request for review within the time specified in paragraph (a) of this section shall constitute a waiver of a hearing and the request shall be dismissed.

SECTION 4.1373 - CONTENTS OF REQUEST; AMENDMENT OF REQUEST; RESPONSES.

(a) The request for review shall include --

- (1) A clear statement of the facts entitling the one requesting review to administrative relief;

- (2) An explanation of the alleged errors in OSM's decision;
- (3) A request for specific relief;
- (4) A statement whether the person requests or waives the opportunity for an evidentiary hearing; and
- (5) Any other relevant information.

(b) All interested parties shall file an answer or motion in response to a request for review or a statement that no answer or motion will be filed, within 15 days of receipt specifically admitting or denying facts or alleged errors stated in the request and setting forth any other matters to be considered on review.

(c) A request for review may be amended once as a matter of right prior to receipt of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter, a motion for leave to amend the request shall be filed with the administrative law judge. A request for review may not be amended after a hearing commences.

(d) An interested party shall have 10 days from receipt of a request for review that is amended as a matter of right or the time remaining for response to the original request to file an answer, motion, or statement in accordance with paragraph (b) of this section, whichever is longer. If the administrative law judge grants a motion to amend a request for review, the time for an interested party to file an answer, motion, or statement shall be set forth in the order granting the motion.

SECTION 4.1374 - NOTICE OF HEARING.

The administrative law judge shall notify the applicant or permittee and all interested parties of the time and place of the hearing. The hearing shall be of record and governed by *5 U.S.C. 554*.

SECTION 4.1375 - STATUS OF DECISION PENDING ADMINISTRATIVE REVIEW.

The filing of a request for review of the approval or disapproval of an application for a permit revision, permit renewal, or the transfer, assignment, or sale of rights granted under a permit or of an order requiring revision of a permit shall not stay the effectiveness of the decision pending completion of administrative review.

SECTION 4.1376 - BURDEN OF PROOF.

(a) In a proceeding to review a permit revision ordered by OSM, OSM shall have the burden of going forward to establish a prima facie case that the permit should be revised and the permittee shall have the ultimate burden of persuasion.

(b) In a proceeding to review the approval or disapproval of an application for a permit renewal, those parties opposing renewal shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the renewal application should be disapproved.

(c) In a proceeding to review the approval or disapproval of an application for a permit revision or an application for the transfer, assignment, or sale of rights granted under a permit --

(1) If the applicant is seeking review, OSM shall have the burden of going forward to establish a prima facie case as to failure to comply with applicable requirements of the Act or the regulations, and the applicant requesting review shall have the ultimate burden of persuasion as to entitlement to approval of the application; and

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act and the regulations.

SECTION 4.1377 - REQUEST FOR TEMPORARY RELIEF.

(a) Where review is requested pursuant to Section 4.1371, any party may file a request for temporary relief at any time prior to decision by an administrative law judge, so long as the relief sought is not the issuance of a permit where an

application has been disapproved in whole or in part.

(b) The request shall be filed with the administrative law judge to whom the case has been assigned. If no assignment has been made, the request shall be filed in the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (phone 703-235-3800).

(c) The request shall include --

- (1) A detailed written statement setting forth the reasons why relief should be granted;
- (2) A statement of the specific relief requested;
- (3) A showing that there is a substantial likelihood that the person seeking relief will prevail on the merits of the final determination of the proceedings; and
- (4) A showing that the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(d) The administrative law judge may hold a hearing on any issue raised by the request.

(e) The administrative law judge shall issue expeditiously an order or decision granting or denying such temporary relief. Temporary relief may be granted only if --

- (1) All parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;
- (2) The person requesting such relief shows a substantial likelihood of prevailing on the merits of the final determination of the proceeding; and
- (3) Such relief will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(f) Appeals of temporary relief decisions.

(1) Any party desiring to appeal the decision of the administrative law judge granting or denying temporary relief may appeal to the Board or, in the alternative, may seek judicial review pursuant to section 526(a), 30 U.S.C. 1276(a), of the Act.

(2) The Board shall issue an expedited briefing schedule and shall issue a decision on the appeal expeditiously.

SECTION 4.1378 - PETITIONS FOR DISCRETIONARY REVIEW.

(a) Any party aggrieved by a decision of the administrative law judge on a request for review of a permit revision, permit renewal, or the transfer, assignment, or sale of rights may file a petition for discretionary review with the Board no later than 30 days from receipt of the decision. The time for filing a petition may not be extended.

(b) The petition shall contain a statement of reasons in support and shall attach a copy of the decision.

(c) All parties may file a response to the petition within 20 days of receipt.

(d) The Board shall grant or deny the petition by order within 30 days of the filing of responses.

SECTION 4.1379 - REQUEST FOR EXPEDITED CONSIDERATION.

Any party to a proceeding under Section 4.1370 et seq. may request an administrative law judge or the Board to grant expedited consideration of a request for review or petition for discretionary review. The request shall set forth the exigent circumstances that warrant expedited consideration. The administrative law judge or the Board has discretion whether to grant or deny the request.

REQUEST FOR REVIEW OF APPROVAL OR DISAPPROVAL OF A COAL EXPLORATION PERMIT APPLICATION (Federal Program)

SECTION 4.1380 - SCOPE.

These rules set forth the procedures for obtaining review, pursuant to 30 CFR 772.12(e)(2), of a decision by OSM to approve or disapprove a coal exploration permit application.

SECTION 4.1381 - WHO MAY FILE.

(a) The applicant or any person having an interest which is or may be adversely affected by a decision of OSM to approve or disapprove a coal exploration permit application, in whole or in part, may file a request for review of that decision.

SECTION 4.1382 - WHERE TO FILE; WHEN TO FILE.

(a) The request for review shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (phone 703-235-3800), within 30 days after the applicant is notified by publication in a local newspaper of notice of OSM's written decision approving or disapproving the coal exploration permit application.

(b) Failure to file a request for review within the time specified in paragraph (a) of this section shall constitute a waiver of a hearing and the request shall be dismissed.

SECTION 4.1383 - CONTENTS OF REQUEST; AMENDMENT OF REQUEST; RESPONSES.

(a) The request for hearing shall include --

- (1) A clear statement of the facts entitling the one requesting review to administrative relief;
- (2) An explanation of the alleged errors in OSM's decision;
- (3) A request for specific relief;
- (4) A statement whether the person requests or waives the opportunity for an evidentiary hearing; and
- (5) Any other relevant information.

(b) All interested parties shall file an answer or motion in response to a request for review or a statement that no answer or motion will be filed within 15 days of receipt specifically admitting or denying facts or alleged errors stated in the request and setting forth any other matters to be considered on review.

(c) A request for review may be amended once as a matter of right prior to receipt of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter, a motion for leave to amend the request shall be filed with the administrative law judge. A request for review may not be amended after a hearing commences.

(d) An interested party shall have 10 days from receipt of a request for review that is amended as a matter of right or the time remaining for response to the original request to file an answer, motion, or statement in accordance with paragraph (b) of this section, whichever is longer. If the administrative law judge grants a motion to amend a request for review, the time for an interested party to file an answer, motion, or statement shall be set forth in the order granting the motion.

SECTION 4.1384 - NOTICE OF HEARING.

The administrative law judge shall notify the applicant and all interested parties of the time and place of the hearing. The hearing shall be of record and governed by 5 U.S.C. 554.

SECTION 4.1385 - STATUS OF PERMIT PENDING ADMINISTRATIVE REVIEW.

The filing of a request for review of approval of an application for a coal exploration permit shall not stay the issuance of the permit pending completion of administrative review.

SECTION 4.1386 - BURDEN OF PROOF.

(a) If the coal exploration permit applicant is seeking review, OSM shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the approval.

(b) If any other person is seeking review, that person shall have the burden of going forward to establish prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act or the regulations.

SECTION 4.1387 - REQUEST FOR TEMPORARY RELIEF.

(a) Where review is requested pursuant to Section 4.1381, any party may file a request for temporary relief at any time prior to decision by an administrative law judge, so long as the relief sought is not the issuance of a permit where an application has been disapproved in whole or in part.

(b) The request shall be filed with the administrative law judge to whom the case has been assigned. If no assignment has been made, the request shall be filed in the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (phone 703-235-3800).

(c) The request shall include --

- (1) A detailed written statement setting forth the reasons why relief should be granted;
- (2) A statement of the specific relief requested;
- (3) A showing that there is a substantial likelihood that the person seeking relief will prevail on the merits of the final determination of the proceedings; and
- (4) A showing that the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(d) The administrative law judge may hold a hearing on any issue raised by the request.

(e) The administrative law judge shall issue expeditiously an order or decision granting or denying such temporary relief. Temporary relief may be granted only if --

- (1) All parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;
- (2) The person requesting such relief shows a substantial likelihood of prevailing on the merits of the final determination of the proceeding; and
- (3) Such relief will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(f) Appeals of temporary relief decisions.

(1) Any party desiring to appeal the decision of the administrative law judge granting or denying temporary relief may appeal to the Board or, in the alternative, may seek judicial review pursuant to section 526(a), 30 U.S.C. 1276(a), of the Act.

(2) The Board shall issue an expedited briefing schedule and shall issue a decision on the appeal expeditiously.

SECTION 4.1388 - PETITIONS FOR DISCRETIONARY REVIEW.

- (a) Any party aggrieved by a decision of the administrative law judge on a request for review of an application for a coal exploration permit may file a petition for discretionary review with the Board no later than 30 days from receipt of the decision. The time for filing a petition may not be extended.
- (b) The petition shall contain a statement of reasons in support and shall attack a copy of the decision.
- (c) All parties may file a response to the petition within 20 days of receipt.
- (d) The Board shall grant or deny the petition by order within 30 days of the filing of responses.

REQUEST FOR REVIEW OF OSM DETERMINATIONS OF ISSUES UNDER 30 CFR Part 761 (Federal Program; Federal Lands Program; Federal Program for Indian Lands)

SECTION 4.1390 - SCOPE.

These rules set forth procedures for obtaining review pursuant to 30 CFR 761.12(h) of a determination by OSM that a person holds or does not hold a valid existing right, or that surface coal mining operations did or did not exist on the date of enactment of the Act, on lands where operations are prohibited or limited by section 522(e) of the Act, *30 U.S.C. 1272(e)*, or that surface coal mining operations may be permitted within the boundaries of a national forest in accordance with section 522(e)(2).

SECTION 4.1391 - WHO MAY FILE; WHERE TO FILE; WHEN TO FILE; FILING OF ADMINISTRATIVE RECORD.

- (a) The permit applicant or any person with an interest which is or may be adversely affected by a determination of OSM that a person holds or does not hold a valid existing right, or that surface coal mining operations did or did not exist on the date of enactment of the Act, or that surface coal mining operations may be permitted within the boundaries of a national forest, may file a request for review of that determination with the office of the OSM official whose determination is being appealed and at the same time shall send a copy of the request to the Board of Land Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (phone 703-235-3750). The OSM official shall file with the Board the complete administrative record of the decision under review as soon as practicable.
- (b) The request for review shall be filed within 30 days after the applicant or permittee is notified by publication in a local newspaper of notice of OSM's written determination.
- (c) Failure to file a request for review within the time specified in paragraph (b) of this section shall constitute a waiver of the right to review and the request shall be dismissed.

SECTION 4.1392 - CONTENTS OF REQUEST; AMENDMENT OF REQUEST; RESPONSES.

- (a) The request for review shall include --
 - (1) A clear statement of the reasons for appeal;
 - (2) A request for specific relief;
 - (3) A copy of the decision appealed from; and
 - (4) Any other relevant information.
- (b) All interested parties shall file an answer or motion in response to a request for review or a statement that no answer or motion will be filed within 15 days of receipt specifically admitting or denying facts or alleged errors stated in the request and setting forth any other matters to be considered on review.

(c) A request for review may be amended once as a matter of right prior to receipt of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter, a motion for leave to amend the request shall be filed with the Board.

(d) An interested party shall have 10 days from receipt of a request for review that is amended as a matter of right or the time remaining for response to the original request to file an answer, motion, or statement in accordance with paragraph (b) of this section, whichever is longer. If the Board grants a motion to amend a request for review, the time for an interested party to file an answer, motion, or statement shall be set forth in the order granting the motion.

SECTION 4.1393 - STATUS OF DECISION PENDING ADMINISTRATIVE REVIEW.

43 CFR 4.21(a) applies to determinations of the Office of Surface Mining under *30 U.S.C. 1272(e)*.

SECTION 4.1394 - BURDEN OF PROOF.

(a) If the permit applicant is seeking review, OSM shall have the burden of going forward to establish a prima facie case and the permit applicant shall have the ultimate burden of persuasion.

(b) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that a person holds or does not hold a valid existing right, or that surface coal mining operations did or did not exist on the date of enactment of the Act, or that surface coal mining operations may or may not be permitted within the boundaries of a national forest.

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