significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children From Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: March 12, 2003.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. 03–6707 Filed 3–19–03; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary of the Interior

43 CFR Part 4

Special Rules Applicable to Surface Coal Mining Hearings and Appeals

AGENCY: Office of the Secretary.

ACTION: Petition for rulemaking.

SUMMARY: The Office of Hearings and Appeals is publishing for comment a petition for rulemaking received from the National Mining Association. The petition requests amendment of several existing rules relating to the burden of proof in proceedings under the Surface Mining Control and Reclamation Act of 1977.

DATES: You should submit your comments by May 19, 2003.

ADDRESSES: Send comments to: Director, Office of Hearings and Appeals, Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203. Phone: (703) 235–3750. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION: In January 2003, the National Mining Association (NMA) re-submitted a petition for rulemaking to the Director, Office of Hearings and Appeals, that it had originally submitted in January 1996. NMA summarized its January 1996 petition in an accompanying letter:

The NMA requests amendments and revisions to the allocation of the burden of proof for proceedings under SMCRA [the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*] governed by § 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d), in view of the decision of the United States Supreme Court in *Director, Office of Workers' Compensation Programs, Department of Labor* v. *Greenwich Collieries,* 114 S.Ct. 2251 (1994). In that decision, the Supreme Court clarified that under § 7(c) of the APA, the burden of proof placed upon the proponent of a rule or order means not merely the burden of production, but also the burden of persuasion. Accordingly, when the Office of Surface Mining is the proponent of an order, *e.g.*, notice of violation, cessation order, order to show cause, the burden of proof remains with the agency.

At the time the NMA originally filed its petition, it was the plaintiff in a challenge to several Departmental rules, including those allocating the burden of proof in 43 CFR 4.1374 and 4.1384. Although NMA did not include those rules in its petition, the then-Director of OHA replied that ''it would be prudent to await the outcome of that litigation before considering whether to proceed with your suggested rulemaking.''

That litigation was concluded in June 2001 with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *National Mining Association* v. *United States Department of the Interior,* 251 F.3d 1007 (D.C. Cir. 2001). In that decision the Court concluded that OHA ''did not improperly shift the burden of proof'' in §§ 4.1374 and 4.1384. *Id.* at 1013–14.

In its January 2003 re-submission, NMA states:

Unlike that case, the regulations at issue in NMA's petition for rulemaking are governed by different sections of SMCRA that do not expressly allocate the burden of proof to the operator, and in some cases expressly allocate it to whomever is challenging the permit.

NMA's petition argues OHA must amend its regulations to allocate the ultimate burden of persuasion to the Office of Surface Mining in proceedings to review assessment of civil penalties (§ 4.1155); proceedings to review notices of violation or orders of cessation (§ 4.1171); proceedings for suspension or revocation of permits (§ 4.1194; formerly § 4.1193, *see* 67 FR 61506, 61507, 61510, Oct. 1, 2002); proceedings to review individual civil penalty

assessments (§ 4.1307); and proceedings to review permit revisions ordered by OSM (§ 4.1366(b)).

Both the APA and SMCRA provide for petitions for rulemaking. 5 U.S.C. 553(e); 30 U.S.C. 1211(g). The Department has implemented these provisions in 43 CFR part 14 and 30 CFR 700.12. 43 CFR 4.1 provides that OHA is the authorized representative of the Secretary for the purpose of hearing, considering, and determining matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary. 30 CFR 700.4(e) provides that the Director of OHA is responsible for the administration of administrative hearings and appeals required or authorized by SMCRA pursuant to the regulations in 43 CFR part 4.

Accordingly, OHA requests comments on the following petition.

Dated: March 6, 2003.

Robert S. More,

Director, Office of Hearings and Appeals.

Before the Office of Hearings and Appeals United States Department of Interior; Petition for Rulemaking Under the Surface Mining Control and Reclamation Act of 1977; Submitted by: The National Mining Association

I. Introduction

Pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA, or ''the Act''), 30 U.S.C. § 1211(g), its implementing regulations, 30 CFR 700.12, and the Administrative Procedure Act, 5 U.S.C. 553(e), the National Mining Association (NMA) petitions the Director of the Office of Hearings and Appeals (OHA) for certain amendments and modifications to 43 CFR 4.1155, 4.1171, 4.1194,[1] 4.1307, and 4.1366(b). Pursuant to 43 CFR 4.1 the Office of Hearings and Appeals is the authorized representative of the Secretary for the consideration and determination of matters within the jurisdiction of the Department involving hearings and appeals and other review functions, including the rules establishing the procedure governing such hearings and appeals. This petition involves the rules governing procedures for the hearing of appeals related to matters arising under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.* (1988).

II. Petitioner

The National Mining Association (NMA) is a trade association whose members include producers of most of the nation's coal, metals and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment and supplies; state mining associations; and engineering and consulting firms and financial institutions that serve the mining industry. The coal-producing members of NMA conduct surface coal mining operations pursuant to permits under SMCRA in almost every coal-producing state throughout the country, and are therefore directly impacted by these proposed amendments and modifications to OSM's regulations.

III. Proposed Amendments and Modifications

Petitioner requests amendments and modifications to the burden of proof requirements for proceedings governed by § 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d) (1988).

The APA establishes the framework for those proceedings required by statute to be determined on the record after an opportunity for a hearing. 5 U.S.C. 554. This procedural framework indicates that ''[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.'' 5 U.S.C. 556(d). A controlling Supreme Court decision clarifies that the burden of proof means not merely the burden of production, but also the burden of persuasion. *Director, Office of Workers' Compensation Programs, Department of Labor* v. *Greenwich Collieries,* 512 U.S. 267, 276, 279 (1994).

There are various proceedings under SMCRA which the statute requires to be administered on the record after an opportunity for a hearing. In many of these proceedings, the existing OHA rules improperly relieve the proponent, OSM, of the burden of persuasion under the APA, even though such procedure is not ''otherwise provided by [SMCRA].'' Accordingly, in view of the Supreme Court's recent pronouncement in *Greenwich Collieries* on the meaning of the ''burden of proof'' in § 556(d) of the APA, the Department must initiate a rulemaking to revise OHA's regulations as presented below.

A. Amend § 4.1155 to Read as Follows:

§ 4.1155 Burden of Proof in civil penalty proceedings.

In civil penalty proceedings, OSM shall have both the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of the violation and the amount of the civil penalty.

B. Amend § 4.1171 to Read as Follows:

§ 4.1171 Burden of proof in review of section 521 notices or orders.

In review of section 521 notices of violation or orders of cessation or the modification, vacation, or termination thereof, including expedited review under § 4.1180, OSM shall have both the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the validity of the notice, order, or modification, vacation, or termination thereof.

Any person other than the permittee-applicant who contests the modification, vacation, or termination of notices of violation or orders of cessation shall have both the burden of going forward to establish a prima facie case and the ultimate burden of persuasion.

C. Amend § 4.1194 to Read as Follows:

§ 4.1194 Burden of proof in suspension or revocation proceedings.

In proceedings to suspend or revoke a permit, OSM shall have both the burden of going forward to establish a prima facie case and the ultimate burden of persuasion for suspension or revocation of the permit.

D. Amend § 4.1307 to Read as Follows:

§ 4.1307 Elements; burden of proof.

(a) OSM shall have the burden of going forward with evidence to establish a prima facie case and the ultimate burden of persuasion that:

(1) A corporate permittee either violated a condition of a permit or failed or refused to comply with an order issued under § 521 of the Act or an order incorporated in a final decision by the Secretary under the Act (except an order incorporated in a decision issued under sections 518(b) or 703 of the Act or implementing regulations), unless the fact of violation or failure or refusal to comply with an order has been upheld in a final decision in a proceeding under § 4.1150 through § 4.1158, § 4.1160 through § 4.1171, or § 4.1180 through § 4.1187, and § 4.1270 or § 4.1271 of this part, and the individual is one against whom the doctrine of collateral estoppel may be applied to preclude relitigation of fact issues;

(2) The individual, at the time of the violation, failure or refusal, was a director, officer, or agent of the corporation; and

(3) The individual willfully and knowingly authorized, ordered, or carried out the corporate permittee's violation or failure or refusal to comply.

Delete existing paragraph ''(b),'' redesignate paragraph ''(c)'' as paragraph ''(b),'' and revise as follows:

(b) OSM shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the amount of the penalty.

E. Amend § 4.1366(b) to Read as Follows:

§ 4.1366 Burdens of proof.

* * * * *

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

* * * * *

IV. Statement of Facts and Law Supporting the Amendment and Modification of Existing Federal Enforcement Regulations

A. Background

Since the passage of the Administrative Procedure Act (APA) in 1946, 5 U.S.C. 551, *et seq.,* various views emerged about the meaning of ''burden of proof'' as used in § 7(c) of the APA. Section 7(c) of the APA states that:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

[1] Formerly 43 CFR 4.1193 (*See* 67 FR 61510 (October 1, 2002)).

5 U.S.C. 556(d).

OHA interpreted the term ''burden of proof'' to mean the ''burden of going forward to establish a prima facie case.'' In adopting this interpretation, OHA relied primarily on a supplemental opinion in a single case holding that the ''burden of proof'' in § 7(c) of the APA is the burden of going forward with proof, and not the ultimate burden of persuasion. 43 FR 34381 (August 3, 1978), quoting *Environmental Defense Fund, Inc.* v. *EPA,* 548 F.2d 998 (D.C. Cir. 1976).

However, this interpretation by OHA has proven to be incorrect by the U.S. Supreme Court's decision in *Director, Office of Workers' Compensation Programs, Department of Labor* v. *Greenwich Collieries,* 512 U.S. 267, 276 (1994). That case involved the use of the Department of Labor's ''true doubt'' rule as it applied to adjudications under the Black Lung Benefits Act (BLBA), 83 Stat. 792, as amended, 30 U.S.C. 901 *et seq.* (1988), and the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.* (1984). The ''true doubt'' rule allowed the benefit claimant to prevail when the evidence was equally balanced, or in equipoise. Thus, the rule essentially placed the burden of persuasion upon the party opposing the benefits instead of the proponent of the rule, the benefit claimant. In determining whether or not the ''true doubt'' rule violates the APA, the Court determined first, whether the burden of proof established in § 7(c) applies to adjudications under the LHWCA and the BLBA, and second, the meaning of the term ''burden of proof.''

In holding that the APA was applicable to hearings under the LHWCA and BLBA (and that these statutes do not ''provide otherwise''), the Supreme Court noted that it does not lightly presume exemptions from the APA. 512 U.S. at 271, citing *Brownwell* v. *Tom We Shung,* 352 U.S. 180, 185 (1956). And, although the LHWCA provides that the agency's hearings ''shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure * * *'', 33 U.S.C. 923(a), the Court found this provision insufficient to exempt the LHWCA from § 7(c) of the APA. *Id; See also Maher Terminals Inc.* v. *Director, Office of Workers' Compensation Programs, United States Department of Labor,* 992 F.2d 1277, 1281 n.3 (3rd Cir. 1993) (holding that § 12 of the APA, 5 U.S.C. 559, allows only express statutory language to supersede the APA), aff'd, 512 U.S. 267 (1994).

With regard to the meaning of the term ''burden of proof,'' the Court, after a lengthy discussion of the APA and its legislative history, held that: ''These principles lead us to conclude that the drafters of [§ 7(c) of] the APA used the term 'burden of proof' to mean the burden of persuasion.'' *Id.* at 276. In other words, when an agency is a proponent of a rule or order, the burden of proof referred to in § 7(c) of the APA means the burden of going forward to establish a prima facie case *and* the burden of persuasion. *Id.* at 279. This holding by the Court requires that in situations governed by the APA where OSM is the proponent of a rule or order, the agency has both the burden of going forward to establish a prima facie case and the ultimate burden of persuasion.

The Senate Committee report on the APA explains that:

Except as applicants for a license or other privilege may be required to come forward with a prima facie showing, no agency is entitled to presume that the conduct of any person or status of any enterprise is unlawful or improper.

S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945), reprinted in S. Doc. 248 at 208; Accord, H.R. Rep. 1980, 79th Cong., 2d Sess. 34 (1946), reprinted in S. Doc. 248 at 270.

As the Court in Greenwich Collieries held:

That Congress intended to impose a burden of production does not mean that Congress did not also intend to impose a burden of persuasion. Moreover, these passages are subject to a natural interpretation compatible with congressional intent to impose a burden of persuasion on the party seeking an order.

512 U.S. 267, 279 (1994).

The Court in Greenwich Collieries was not oblivious to the repercussions of their holding, nor were they unaware of their previous statements on this issue. The Court noted that ''We recognize that we have previously asserted the contrary conclusion as to the meaning of burden of proof in § 7(c) of the APA.'' *Id.* at 276. However, the Court also noted that the APA was a statute designed ''to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other.'' *Id.* at 280–281, (quoting *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 41 (1950)). The Court's opinion manifests an appreciation for the situation that many administrative agencies, including OHA, find themselves in today. That is, when the burden of proof was thought to mean only the burden of going forward to establish a prima facie case, it left each agency free to decide who shall bear the ultimate burden of persuasion. Greenwich Collieries at 281. Such a chaotic and arbitrary system is exactly what Congress was trying to prevent in establishing the uniform procedures under the APA. That is why, in the words of the Supreme Court, ''[Agencies] cannot allocate the burden of persuasion in a manner that conflicts with the APA.'' *Id.*

Moreover, the Court *expressly* rejected the analysis of *EDF* v. *EPA* regarding the legislative history of § 7(c) of the APA, which OHA has relied upon in shifting the burden of persuasion to the regulated party in several of its regulations. After noting the Department of Labor's reliance on *NLRB* v. *Transportation Management,* 462 U.S. 393 (1983), and on Judge Leventhal's analysis in the *EDF* v. *EPA* case, the Court held that ''We find this legislative history unavailing.'' Greenwich Collieries at 278.

In those proceedings where SMCRA does not expressly [2] provide a burden of proof distinct from that set forth in the APA, OHA has improperly relieved OSM of the burden of persuasion when OSM is the proponent of a rule or order. This is in direct conflict with Greenwich Collieries, which states that ''The Department cannot allocate the burden of persuasion in a manner that conflicts with the APA.'' 512 U.S. at 281. Since the ultimate burden of persuasion under § 7(c) of the APA requires the agency as a proponent of a rule or order to prove its case by a preponderance of the evidence, *Steadman* v. *SEC,* 450 U.S. 91 (1981), OHA must revise its regulations concerning the burden of proof to require OSM, as the proponent of a rule or order, to prove its case by a preponderance of the evidence.

B. Administrative History

1. Office of Hearings and Appeals

Commenters have recommended changes in the burdens of proof assigned in OHA regulations since the first rules were published in 1978. These early comments objected to inconsistencies between the burden of proof allocation in § 7(c) of the APA, 5 U.S.C. 556(d), and 43 CFR 4.1171 and 4.1194 which assign the ultimate burden of persuasion to the applicant seeking review of enforcement actions. OHA, however, refused to place the ultimate burden of persuasion in these regulations on the agency. In response to recommended changes in § 4.1171, OHA stated that:

* * * The comment was rejected. Section 556(d) of the APA * * * was analyzed by Judge Leventhal in his supplemental opinion on petition for rehearing in *Environmental Defense Fund* v. *EPA,* 548 F.2d 998, 1012 (D.C. Cir. 1976). He concluded at 1013 that the burden of proof referred to in section 556 ''is the burden of going forward with proof, and not the ultimate burden of persuasion.'' In addition, the legislative history clearly states that an applicant for review has the ultimate burden of proof in proceedings to review notices and orders. S. Rep. No. 128, 95th Cong. 1st Sess. 93 (1977).

43 FR 34381 (August 3, 1978).

The Supreme Court decision in Greenwich Collieries now provides a clear statement of law which requires OHA to revisit and revise these regulations. The two primary justifications that OHA has used in the past to shift the burden of persuasion from the agency to the permittee has been the *EDF* v. *EPA* case, quoted supra, and the argument that SMCRA's legislative history supports this result. However, the central holding of the *EDF* v. *EPA* case, that the burden of proof in § 7(c) of the APA means only the burden of going forward with a prima facie case, was expressly rejected in Greenwich Collieries. 512 U.S. at 279. This rationale, therefore, can no longer be accepted.

The second rationale, OHA's reliance on SMCRA's ''legislative history,'' is also unavailing. First, the isolated passage OHA relied upon conflicts with the language of SMCRA. In this case, SMCRA requires compliance with § 7(c) of the APA because it does not provide for a distinct burden of proof. Moreover, in many instances the statute expressly cross-references the APA. As the Supreme Court has made very clear, legislative history may not be used to override the plain language of a statute. *Ratzlaf* v. *United States,* 114 S.Ct. 655, 662 (1994) (One does not resort to legislative

[2] *See* Maher Terminals, 992 F.2d 1277, 1281 n.3 (3rd Cir. 1993), aff'd, 512 U.S. 267.

history to cloud a statutory text that is clear); *Davis* v. *Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989) (legislative history is irrelevant to the interpretation of an unambiguous statute); *Immigration and Naturalization Service* v. *Cardoza-Fonsecca,* 480 U.S. 421, 432 (1987) (when the plain language appears to settle the question, the strong presumption is that Congress expresses its intent through the language it chooses).

Second, the legislative history that the agency relied upon appears in only the Senate committee's report on the bill. It is nowhere to be found in either the House or the conference report. If this were a proper interpretation, it would have been agreed to by both the House and Senate conferees and included in their report. In any event, the single passage in the Senate report is most likely based upon the same ambiguity the Supreme Court notes in Greenwich Collieries that has led to the misapprehension that the APA burden of proof meant only the burden of production. 512 U.S. at 276. Immediately preceding the SMCRA legislative history discussion on the burden of proof is the clear statement that hearings of record under SMCRA are ''subject to the Administrative Procedure Act.'' S. Rep. No. 128 at 93. In short, this single isolated passage in the Senate report cannot carry the day in the face of the statutory language of SMCRA and the APA.[3]

More recently, OSM has acknowledged the changes in burden of proof requirements that resulted from Greenwich Collieries. The agency stated:

* * *the Court held that, under that APA provision [§ 7(c)], the proponent of an order has the burden of persuasion, not just the burden of production (or the burden of going forward with the evidence). [512 U.S. 267].

60 FR 16740 (March 31, 1995).

Not only did OSM acknowledge that the *agency* bears the ultimate burden of persuasion in cases governed by § 7(c) of the APA, but the agency also bears the burden of going forward with the evidence (the burden of production).

2. Other Agencies

While OHA attempts to place the ultimate burden of persuasion on parties other than OSM, other agencies have followed a more logical approach. For example, the Federal Mine Safety and Health Review Commission (FMSHRC) also has promulgated regulations that place the burden of proof on the proponent of an order. 29 CFR 2700.63(b) (1994). In cases before the Commission's ALJs, it is clear that when an operator avails itself of statutory rights to a formal hearing to contest a citation, the government shoulders the ultimate burden of persuasion as to both the fact and the seriousness of the violation. *National Independent Coal Operators' Association et al.* v. *Kleppe, Secretary of the Interior,* 423 U.S. 388, 397 (1976) (holding that under the predecessor Coal Mine Safety and Health Act, when a hearing is requested, the burden of proof remains with the Secretary); *Secretary of Labor, Mine Safety and Health Administration (MSHA)* v. *Garden Creek Pocahontas Company,* 11 FMSHRC 2148, 2152 (November 21, 1989) (holding that the Mine Act imposes on the Secretary the burden of proving the violation the Secretary alleges by a preponderance of the evidence); *Secretary of Labor (MSHA)* v. *Consolidation Coal Company,* 11 FMSHRC 966, 973 (June 27, 1989) (holding that the Mine Act imposes on the Secretary the burden of proving a violation alleged by a preponderance of the evidence in a civil penalty proceeding).

Numerous decisions from the Courts of Appeals have made it clear that in proceedings governed by the APA's § 7(c), the government must bear the burden of proof when it is the proponent of a rule or order. *Kirby* v. *Shaw,* 358 F.2d 446, 449 (9th Cir. 1966) (holding that in a formal hearing under the APA, the burden rested on the Post Office Department as the proponent of the order denying the use of the mails); *Twigger* v. *Schultz,* 484 F.2d 856, 862 (3rd Cir. 1973) (holding that in license suspension proceeding, the Secretary of the Treasury, as proponent of suspension order, had burden of proof under 5 U.S.C. 556(d)); *Rice* v. *National Transportation Safety Board,* 745 F.2d 1037, 1039 (6th Cir. 1984) (holding that the burden of proof in a proceeding to suspend pilot's license is upon the agency, rather than upon the pilot).

As these cases demonstrate, when agencies are the proponents of orders in proceedings on the record, they are expected to carry their burden by a preponderance of the evidence. The Supreme Court has now made this proposition clear in the recent *Greenwich Collieries* decision.

C. The Rules OHA Must Revise To Place the Ultimate Burden of Persuasion on the Agency Where the Agency is the Proponent of a Rule or Order Governed by § 556(d) of the APA

1. § 4.1155 Burdens of Proof in Civil Penalty Proceedings

This regulation divides the burden of proof between OSM and the petitioner regarding the fact of the violation. 43 CFR 4.1155 (1994). Under the existing rule, OSM is charged with the burden of going forward to establish a prima facie case, and the person who petitioned for review is improperly assigned the ultimate burden of persuasion. Civil penalty proceedings are governed by § 518 of the Act, which provides that:

A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing * * * Any hearing under this section *shall be of record and shall be subject to section 554 of title 5* of the United States Code. (emphasis added)

30 U.S.C. 1268(b).

Section 554 of the APA provides in relevant part:

The agency shall give all interested parties opportunity for—

(1) * * *

(2) * * * hearing and decision on notice and in accordance with sections 556 and 557 of this title.

5 U.S.C. 554(c).

Since § 554 of the APA requires the agency to comply with § 556 of the APA, the proponent of the rule or order must bear the burden of proof unless otherwise provided by statute. 5 U.S.C. 556(d). In cases of civil penalties, the agency is the proponent of the rule or order. *See Merrit* v. *U.S.,* 960 F.2d 15 (2nd Cir. 1992) (stating that the Shipping Act of 1984 allocates burden of proof according to APA § 556(d) and that the Federal Maritime Commission was proponent of order assessing fines for violation of that Act); and *Hazardous Waste Treatment Council* v. *EPA,* 886 F.2d 355, 367 (D.C. Cir. 1989) (holding that EPA administrator bears burden of proof in APA § 554 hearing to review agency compliance order), *cert. denied,* 498 U.S. 849 (1989). In a case involving civil penalty proceedings conducted in accordance with 43 C.F.R. § 4.1155, there can be no doubt that OSM, in seeking to charge a violation of SMCRA, is the proponent of the order, and therefore must carry both the burden of production and the burden of persuasion.

Moreover, the statute does not ''provide otherwise'' for a different party to bear the burden of proof, other than the agency. To the contrary, it expressly references the APA and further requires *the Secretary* to ''make findings of fact, and * * * issue a written decision as to the occurrence of the violation *and* the amount of the penalty which is warranted * * * (emphasis added) 30 U.S.C. § 1268(b). Nowhere in that section did Congress manifest an intent to either (1) place the ultimate burden of persuasion on the petitioner as to his innocence, or (2) provide differing burdens for the fact of the violation and the amount of the penalty. It is clear that Congress intended that the Secretary bear the burden of proof, and that the fact of the violation and the amount of the penalty be proven by the same party. Therefore, in light of the decision in *Greenwich Collieries,* 43 CFR 4.1155 must be amended to place the ultimate burden of persuasion on the agency for both the fact of the violation and the amount of the penalty.

2. Review of Section 521 Notices or Orders—§ 4.1171

This regulation also divides the burden of proof between the petitioner and the agency. The applicant for review is improperly charged with the burden of persuasion in reviewing § 521 notices of violation or orders of cessation. This regulation was issued pursuant to SMCRA § 525, 30 U.S.C. 1275, titled ''Review by the Secretary.'' Section 525(a)(1) provides a permittee with an opportunity to request review of the notice or order by the Secretary, and requires the Secretary to cause ''such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing * * *'' Section 525(a)(2) further dictates that ''Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code.''

Read together, subsections (a)(1) and (a)(2) of § 525 clearly require the Secretary, as the

[3] As the Third Circuit noted in Maher Terminals, only as express statutory provision may override the standards of the APA; and legislative history, longstanding use of a rule, judicial acceptance of the rule, or Congressional inaction do not constitute an express statutory provision having the authority to supercede the APA. 992 F.2d 1277, 1281 n.3 (3rd Cir. 1993), aff'd, 512 U.S. 267.

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

3. Permit Suspension or Revocation Proceedings—§ 4.1194

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

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

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

This regulation inappropriately requires ''the individual'' to carry the burden of proof on the issues of (1) whether the individual at the time of the violation, failure, or refusal was a director or officer of the corporation; and (2) whether the individual violated a condition of a permit or failed or refused to comply with an order issued under § 521 of the Act or an order incorporated in a final decision by the Secretary under the Act. 43 CFR 1307(b) (1994). This regulation was issued pursuant to § 518(f) of the Act.

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

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

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

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

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

V. Conclusion

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

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

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

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

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

Respectfully submitted,

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[FR Doc. 03–6555 Filed 3–19–03; 8:45 am]

BILLING CODE 4310–79–P

[4] In additioin to properly allocating the burden of proof to OSM in review of suspension or revocation proceedings, this modification to 43 CFR § 4,1194 would correct an inconsistency with 43 CFR § 4.1355. In § 4.1355, OHA correctly allocated to OSM both the burden of going forward with a prima facie case and the ultimate burden of persuasion as to the existence of a demonstrated pattern of willful violations.