Medicare Part B premium would receive the benefit of this reduction under this rule. If a beneficiary is paying the premium, he or she would pay a lower premium. If another entity pays the premium, they would receive the savings.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final rule would impose no direct requirement costs on State and local governments, would not preempt State law, or have any Federalism implications. Participation is strictly voluntary.

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget. This final rule is not a major rule as defined at 5 U.S.C. 804(2).

V. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule. The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. The notice of proposed rulemaking can be waived, however, if an agency finds good cause that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, and it incorporates a statement of the finding and its reasons in the rule issued.

Publishing a proposed rule is unnecessary in this instance, as this final rule only makes conforming changes to the regulations to implement sections of the BIPA in which the Congress allowed no discretion as to the actions to be taken and the times in which they must be completed. These changes were enacted by the Congress, and would be in effect on the date mandated by the legislation without regard to whether they are reflected in conforming changes to the regulation text, since a statute controls over a regulation. In this final rule we merely have revised the regulation text to reflect these new statutory provisions. The BIPA provisions have been incorporated virtually verbatim, with no interpretation necessary. We do not believe that publishing a notice of proposed rulemaking is necessary, nor would it be practicable given that a number of the provisions have already taken effect consistent with the effective dates established under the BIPA.

List of Subjects in 42 CFR Part 408

Medicare.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV, part 408 as set forth below:

PART 408—PREMIUMS FOR SUPPLEMENTAL MEDICAL INSURANCE

■ 1. The authority citation for part 408 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart B—Amount of Monthly Premiums

■ 2. Section 408.21 is added to read as follows:

§ 408.21 Reduction in Medicare Part B premium as an additional benefit under Medicare+Choice plans.

(a) *Basis for reduction in Part B premium.* Beginning January 1, 2003 an M+C organization may elect to receive a reduction in its payments under § 422.250(a)(1) of this chapter if—

(1) 80 percent of the payment reduction is applied to reduce the standard Medicare Part B premiums of its Medicare enrollees.

(2) The Medicare Part B premium is reduced monthly and is offered to all Medicare enrollees in a specific plan benefit package.

(b) *Administrative requirements for the Part B premium reduction.* (1) The Medicare Part B premium reduction cannot be greater than the standard premium amount determined for the year, under section 1839(a)(3) of the Act. However, it may be less.

(2) The Medicare Part B premium reduction must be a multiple of 10 cents.

(3) The Medicare Part B premium reduction is applied regardless of who pays or collects the Part B premium on behalf of the beneficiary.

(4) The Medicare Part B premium can never be less than zero and will never result in a payment to a beneficiary for a specific month.

(c) *Beneficiary eligibility.* In order for a beneficiary to be eligible for the Medicare Part B premium reduction, the beneficiary must be enrolled in an M+C plan that offers the Medicare Part B premium reduction as an additional benefit.

(d) *Notifications.* After determining the Medicare Part B premium reduction amount for each eligible beneficiary, CMS will—

(1) Transmit this information to the Social Security Administration, Railroad Retirement Board, or the Office of Personnel Management, as appropriate, which will adjust the benefit check amounts as appropriate and notify the beneficiaries of their new benefit amount.

(2) Notify states and formal groups and direct billed beneficiaries of their reduced premium amounts in the regular monthly billing process.

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: May 6, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: July 28, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 03–28718 Filed 11–26–03; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 4

RIN 1090–AA92

Special Rules Applicable to Surface Coal Mining Hearings and Appeals

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: The Office of Hearings and Appeals is publishing a final rule that revises an existing regulation allocating the burden of proof in a proceeding under the Surface Mining Control and Reclamation Act of 1977.

EFFECTIVE DATE: December 29, 2003.

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, telephone 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.

SUPPLEMENTARY INFORMATION:

I. Background

On March 20, 2003, the Office of Hearings and Appeals (OHA) published for comment a petition for rulemaking that it had received from the National Mining Association (NMA). 68 FR 13657–13661 (Mar. 20, 2003). On the basis of the decision of the U.S. Supreme Court in *Director, Office of*

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

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

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

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

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

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

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

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

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

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

> A permittee issued a notice or order by the Secretary pursuant to the provisions of subparagraphs (a)(2) and (3) of section 521 of this title [30 U.S.C. 1271], or pursuant to a Federal program or the Federal lands program, or any person having an interest which is or may be adversely affected by such notice or order or by any modification, vacation, or termination of such notice or order, may apply to the Secretary for review of the notice or order within thirty days of receipt thereof or within thirty days of its modification, vacation, or termination. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. *Such investigation shall provide an opportunity for a public hearing,* at the request of the applicant or the person having an interest which is or may be adversely affected, *to enable the applicant or such person to present information relating to the issuance and continuance of such notice or order or the modification, vacation, or termination thereof.* The filing of an application for review under this subsection shall not operate as a stay of any order or notice.

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

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

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

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

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

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

hearing the burden ''to present information relating to the issuance and continuance of such order [Section 104(a) withdrawal order].''' *Id.* at 36 (bracketed text in original). The court agreed:

> We think that an examination of the statutory scheme as a whole, as well as a review of the legislative history of the Act * * *, supports respondents' argument that the Secretary's regulation is consistent with the intent of Congress to place upon the mine operator the primary responsibility for the safety of miners.

Id. The court found ''no compelling indications that the Secretary was wrong in interpreting the Act to place the burden of proof on the petitioner.'' *Id.* On Petition for Rehearing, the court clarified that, ''[i]n practice * * *, the burden of proof is split, with the Government bearing the burden of going forward [to establish a prima facie case], and the mine operator bearing the ultimate burden of persuasion.'' *Id.* at 39, 40.

Since *Old Ben* dealt with the exception language in 5 U.S.C. 556(d), rather than the meaning of the term ''burden of proof,'' it remains good law after the Supreme Court's decision in *Greenwich Collieries.* II Richard J. Pierce, Jr., *Administrative Law Treatise* § 10.7 (4th ed. 2002), at 760–61.

A similar examination of SMCRA's language and legislative history demonstrates that the allocation of the burden of proof in 43 CFR 4.1171 is likewise consistent with the intent of Congress. The purpose of the hearing provided in section 525(a)(1) is not for the Secretary to prove that a violation exists but ''to enable *the applicant* * * * to present information relating to the issuance and continuance of [the] notice or order * * *.'' (emphasis supplied). Thus SMCRA itself places the burden of proof on the applicant. This interpretation is clear from the legislative history:

> In order to assure expeditious review and due process for persons seeking administrative relief of enforcement decisions of Federal inspectors under the provisions of section [521], section [525] establishes clear, definitive administrative review procedures. Those persons having standing to request such administrative review include permittees against whom notices and orders have been issued pursuant to section [521] and persons having an interest which is or may be adversely affected by such notice or order. Any person with standing may request a public hearing which must be of record and subject to the Administrative Procedure Act. *The person seeking review shall have the ultimate burden of proof in proceedings to review notices and orders issued under Section [521].* Pending review the notice or order complained of will remain in effect. * * *

S. Rep. No. 95–128, 95th Cong., 1st Sess., 92–93 (1977).

The legislative history also confirms what is obvious from the language of the two statutes, namely, that SMCRA's enforcement provisions were modeled after those in the Coal Mine Health and Safety Act. *Id.* at 58. Thus, comparable to the regulation at issue in *Old Ben,* 43 CFR 4.1171 properly allocates to OSM the burden of going forward to establish a prima facie case as to the validity of the notice of violation or cessation order (or its modification, vacation, or termination), and to the applicant for review the ultimate burden of persuasion.

B. Civil Penalty Proceedings

Section 518(a) of the Act, 30 U.S.C. 1268(a), provides that a permittee who violates the Act or a permit condition may be assessed a civil penalty. Section 518(b) provides that the penalty may only be assessed after the person charged with a violation has been given the opportunity for a public hearing conducted in accordance with section 554 of the APA. Section 518(c) provides that the person charged may contest the amount of the penalty or the fact of the violation.

Section 518(b) also provides that, when there has been a hearing, ''the Secretary shall * * * issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted'' and ''shall consolidate such hearings with other proceedings under section 521'' when appropriate.

When OHA originally adopted the regulation governing burdens of proof in civil penalty proceedings, 43 CFR 4.1155, it allocated both the burden of going forward to establish a prima facie case and the burden of persuasion to OSM, with respect to both the fact of violation and the amount of the penalty. 43 FR 34376, 34393 (Aug. 3, 1978). The result was that the allocation of the ultimate burden of persuasion as to the fact of a violation was inconsistent with the legislative history of the Act discussed above in connection with section 525. In addition, when there was a consolidated hearing to review a notice or order issued under section 521 and a civil penalty proposed under section 518, there were contradictory provisions allocating the ultimate burden of persuasion as to the fact of a violation: § 4.1171 to the applicant for review and § 4.1155 to OSM. 52 FR 38246–38247 (October 15, 1987).

In 1988, therefore, OHA amended § 4.1155 to provide that ''OSM shall have the burden of going forward to establish a prima facie case as to the fact of the violation and the amount of the civil penalty and the ultimate burden of persuasion as to the amount of the civil penalty.'' A person who petitions for review of a proposed assessment of a civil penalty, however, has ''the ultimate burden of persuasion as to the fact of the violation.''

Viewing the statutory scheme as a whole, including the interplay among SMCRA sections 518, 521, and 525, and in view of the legislative history and case precedent discussed above, OHA concludes that the burden of proof as to the fact of the violation in civil penalty proceedings fits within the exception language of 5 U.S.C. 556(d) and that 43 CFR 4.1155 is consistent with Congressional intent.

C. Individual Civil Penalty Proceedings

Section 518(f) of the Act, 30 U.S.C. 1268(f), provides that, when a corporate permittee violates a condition of its permit or fails or refuses to comply with any order issued under section 521 of the Act or any order in a final decision by the Secretary (with certain exceptions), any director, officer, or agent of the corporation who willfully and knowingly authorized, ordered, or carried out the corporation's violation or its failure or refusal to comply, ''shall be subject to the same civil penalties * * * that may be imposed upon a person'' under section 518(a).

43 CFR 4.1307(a) allocates to OSM the burden of going forward with evidence to establish a prima facie case that (1) the corporation violated a permit condition or failed or refused to comply with an order; (2) the individual was a director, officer, or agent of the corporation at the time of the violation; and (3) the individual acted willfully and knowingly. Section 4.1307(b) imposes on the individual the ultimate burden of persuasion as to (1) whether the corporation violated a permit condition or failed or refused to comply with an order and (2) whether he or she was a director or officer at the time of the violation or refusal. Section 4.1307(c) imposes on OSM the ultimate burden of persuasion as to (1) whether the individual was an agent of the corporation and (2) the amount of the individual civil penalty.

Just as the statutory scheme, legislative history, and court precedent discussed above assign the burden of persuasion as to the fact of a violation to a corporate permittee under section 518(a), so they support allocating the burden of proof on that issue to the individual under section 518(f). However, the same conclusion cannot be drawn as to the individual's role in the corporation. Since SMCRA does not

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

D. Permit Suspension or Revocation Proceedings

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

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

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

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

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

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

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

As with the fact-of-the-violation issue in proceedings under sections 525(a)(1), 518(b), and 518(f), therefore, SMCRA provides its own allocation of the burden of proof in permit suspension or revocation proceedings, and the language of 5 U.S.C. 556(d) assigning the burden to the proponent of the order does not apply.

E. Proceedings To Review Permit Revisions Ordered by OSM

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

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

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

> A comment suggested due process requires that 43 CFR [4.1365] should provide that the filing of a request for review would stay an OSM order requiring revision of a permit because it is an ''ex parte action by OSM''* * * . [B]ecause the purpose of such an order is to ensure compliance with the Act (*see* 30 CFR 774.11(b)), no stay is appropriate, just as it is not under 30 U.S.C. 1275(a)(1) when an application for review is filed for a notice of violation or cessation order (unless temporary relief is granted). *Cf.* 43 CFR 4.1116. *Because of the enforcement nature of such an order, the ultimate burden of persuasion is properly on the permittee in 43 CFR [4.1366(b)]. Cf.* 43 CFR 4.1171(b).

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

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

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

F. Conclusion

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

II. Review Under Procedural Statutes and Executive Orders

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

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

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

the allocation of the burden of proof in one kind of proceeding under SMCRA.

3. This rule will not alter the budgetary effects of entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. The existing regulation has to do with the burden of proof in one kind of proceeding under SMCRA, not with entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

4. This rule does not raise novel legal or policy issues. Rather, it conforms OHA's regulations to recent court precedent.

B. *Regulatory Flexibility Act.* The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Changing the allocation of the burden of proof on one issue in individual civil penalty proceedings under SMCRA will have no effect on small entities. A Small Entity Compliance Guide is not required.

C. *Small Business Regulatory Enforcement Fairness Act.* This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act.

1. This rule will not have an annual effect on the economy of $100 million or more. Changing the allocation of the burden of proof in one kind of proceeding under SMCRA will have no effect on the economy.

2. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions. Changing the allocation of the burden of proof in one kind of proceeding under SMCRA will not affect costs or prices for citizens, individual industries, or government agencies.

3. This rule will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Changing the allocation of the burden of proof in one kind of proceeding under SMCRA will have no effects, adverse or beneficial, on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. *Unfunded Mandates Reform Act.* In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*), the Department finds as follows:

1. This rule will not have a significant or unique effect on state, local, or tribal governments or the private sector. Changing the allocation of the burden of proof in one kind of proceeding under SMCRA will neither uniquely nor significantly affect these governments. A statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1531 *et seq.*, is not required.

2. This rule will not produce an unfunded Federal mandate of $100 million or more on state, local, or tribal governments or the private sector in any year, *i.e.*, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

E. *Takings (E.O. 12630).* In accordance with Executive Order 12630, the Department finds that this rule will not have significant takings implications. A takings implication assessment is not required. Imposing on OSM the burden of proof on one issue in one kind of proceeding under the SMCRA will have no effect on property rights.

F. *Federalism (E.O. 13132).* In accordance with Executive Order 13132, the Department finds that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. States with approved regulatory programs may be affected to the extent they make a conforming change to their own rules and consequently bear the burden of proof on the issue of whether someone who receives a proposed individual civil penalty assessment was an officer, director, or agent of the corporation. These effects are so minor that a Federalism Assessment is not required.

G. *Civil Justice Reform (E.O. 12988).* In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. This rule, because it simply changes the allocation of the burden of proof proceedings in one kind of proceeding under SMCRA, will not burden either administrative or judicial tribunals.

H. *Paperwork Reduction Act.* This rule will not require an information collection from 10 or more parties, and a submission under the Paperwork Reduction Act is not required. An OMB form 83–I has not been prepared and has not been approved by the Office of Policy Analysis. This rule will only change the allocation of the burden of proof in one kind of proceeding under SMCRA; it will not require the public to provide information.

I. *National Environmental Policy Act.* The Department has analyzed this rule in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, Council on Environmental Quality (CEQ) regulations, 40 CFR part 1500, and the Department of the Interior Departmental Manual (DM). CEQ regulations, at 40 CFR 1508.4, define a ''categorical exclusion'' as a category of actions that the Department has determined ordinarily do not individually or cumulatively have a significant effect on the human environment. The regulations further direct each department to adopt NEPA procedures, including categorical exclusions. 40 CFR 1507.3. The Department has determined that this rule is categorically excluded from further environmental analysis under NEPA in accordance with 516 DM 2, Appendix 1, which categorically excludes ''[p]olicies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature.'' In addition, the Department has determined that none of the exceptions to categorical exclusions, listed in 516 DM 2, Appendix 2, applies to this rule. This rule is an administrative and procedural rule, relating to the allocation of the burden of proof in one kind of proceeding under SMCRA. Therefore, neither an environmental assessment nor an environmental impact statement under NEPA is required.

J. *Government-to-Government Relationship with Tribes.* In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and 512 DM 2, the Department has evaluated potential effects of this rule on Federally recognized Indian tribes and has determined that there are no potential effects. This rule will not affect Indian trust resources; it will simply change the allocation of the burden of proof in one kind of proceeding under SMCRA.

K. *Effects on the Nation's Energy Supply.* In accordance with Executive Order 13211, the Department finds that this regulation does not have a significant effect on the nation's energy supply, distribution, or use. Changing the allocation of the burden of proof in one kind of proceeding under SMCRA will not affect energy supply or consumption.

III. Determination To Issue Final Rule

The Department has determined that prior publication of a proposed rule to amend 43 CFR 4.1307 is not required by the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), because an opportunity was provided to comment on the change

as proposed in NMA's petition for rulemaking (68 FR 13657).

List of Subjects in 43 CFR Part 4

Administrative practice and procedure; Mines; Public lands; Surface mining.

Dated: November 13, 2003.

P. Lynn Scarlett,

Assistant Secretary—Policy, Management and Budget.

■ For the reasons set forth in the preamble, part 4, subpart L, of title 43 of the Code of Federal Regulations is amended as set forth below:

PART 4—[AMENDED]

Subpart L—Special Rules Applicable to Surface Coal Mining Hearings and Appeals

■ 1. The authority for 43 CFR 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.

■ 2. In § 4.1307, revise paragraphs (b) and (c) to read as follows:

§ 4.1307 Elements; burden of proof.

* * * * *

(b) The individual shall have the ultimate burden of persuasion by a preponderance of the evidence as to the elements set forth in paragraph (a)(1) of this section.

(c) OSM shall have the ultimate burden of persuasion by a preponderance of the evidence as to the elements set forth in paragraphs (a)(2) and (a)(3) of this section and as to the amount of the individual civil penalty.

[FR Doc. 03–29695 Filed 11–26–03; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 15 and 76

[CS Docket No. 97–80; PP Docket No. 00–67; FCC 03–225]

Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Commission adopts rules that set technical and other criteria that manufacturers would have to meet in order to label or market unidirectional digital cable televisions and other unidirectional digital cable products as ''digital cable ready.'' The rules also require cable operators to support operation of unidirectional digital cable products on digital cable systems and set limits on the levels of content protection that could be triggered by MVPDs. This action is taken to further the digital television transition and the commercial availability of navigation devices pursuant to section 629 of the Communications Act.

DATES: Effective December 29, 2003, except for §§ 15.123, 76.1905, and 76.1906 which contains information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register, as of December 29, 2003, except for the incorporation by reference in § 15.123 which will be approved as of the effective date announced in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Susan Mort, *susan.mort@fcc.gov,* (202) 418–1043. For additional information concerning the information collection(s) contained in this document, contact Leslie Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554, or via the Internet at *Leslie.Smith@fcc.gov.*, or at 202–418–0217.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03–225, adopted on September 10, 2003, and released on October 9, 2003. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *Brian.Millin@fcc.gov.*

Paperwork Reduction Act

The Second Report and Order portion of this document contains either a new or modified information collection(s). The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Second Report and Order, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due January 27, 2004.

In addition to filing comments with the Secretary, a copy of any PRA comments on the information collections contained herein should be submitted to Leslie Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Leslie.Smith@fcc.gov,* and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503, or via the Internet to *Kim_A._Johnson@omb.eop.gov.*

Summary of the Second Report and Order

1. In the *Second Report and Order* portion of this *Second Report and Order and Second Further Notice of Proposed Rulemaking,* the Commission is adopting final rules that set technical and other criteria that manufacturers would have to meet in order to label or market unidirectional digital cable televisions and other unidirectional digital cable products as ''digital cable ready.'' This regime includes testing and self-certification standards. The final rules also require consumer information disclosures to purchasers of unidirectional digital cable televisions receivers in appropriate post-sale materials that describe the functionality of these devices and the need to obtain a security module from their cable operator. Cable operators with digital systems of 750 MHz or greater activated channel capacity will be required to support operation of unidirectional digital cable products on digital cable systems. Certain other technical support requirements apply to all digital cable systems, regardless of channel capacity, including those systems whole only digital programming comes from HITS. In addition, all cable operators will be required to supply digital subscribers with point-of-deployment modules (''PODs'') and high definition set-top boxes that comply with certain technical standards by April 1, 2004 and July 1, 2005 deadlines. Finally, all MVPDs would be prohibited from encoding content to activate selectable output controls on consumer premises equipment, or the down-resolution of unencrypted broadcast television programming. MVPDs would also be limited in the levels of copy protection