

**FOR FURTHER INFORMATION CONTACT:**

Paula Hart, Acting Director, Office of Indian Gaming, (202) 219-4066.

**SUPPLEMENTARY INFORMATION:**

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701-2721, was signed into law on October 17, 1988. IGRA, 25 U.S.C. 2710, authorizes class III gaming activities on Indian lands when authorized by an approved ordinance, located in a State that permits such gaming and conducted in conformance with a Tribal-State compact. IGRA, 25 U.S.C. 2710(d)(8)(A), (B) and (C), authorizes the Secretary to approve, disapprove or consider approved a Tribal-State compact or compact amendment and publish notice of that approval or considered approval in the **Federal Register**. The submission process for the Tribal-State compact or compact amendment is not clear. Therefore, BIA published a proposed rule on July 2, 2008 (73 FR 37907) to establish procedures for submitting Tribal-State compacts and compact amendments.

The authority to issue this document is vested in the Secretary of the Interior by 5 U.S.C. 301 and 25 U.S.C. 2, 9, and 2710. The Secretary has delegated this authority to the Assistant Secretary—Indian Affairs by part 209 of the Departmental Manual.

Dated: August 26, 2008.

**George T. Skibine,**

*Acting Deputy Assistant Secretary for Policy and Economic Development—Indian Affairs.*

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## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

### 29 CFR Part 2700

#### Procedural Rules

**AGENCY:** Federal Mine Safety and Health Review Commission.

**ACTION:** Advanced notice of proposed rulemaking.

**SUMMARY:** The Federal Mine Safety and Health Review Commission (the "Commission") is an independent adjudicatory agency that provides trials and appellate review of cases arising under the Federal Mine Safety and Health Act of 1977 (2000) (the "Mine Act"). Trials are held before the Commission's Administrative Law Judges, and appellate review is provided by a five-member Review Commission appointed by the President and confirmed by the Senate. The Commission is seeking suggestions for improving its procedures for processing

requests for relief from default and reducing the number of cases in which a party seeks relief before the Commission after default.

**DATES:** Written and electronic comments must be submitted on or before November 3, 2008.

**ADDRESSES:** Written comments should be mailed to Michael A. McCord, General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001. Persons submitting written comments shall provide an original and three copies of their comments. Electronic comments should state "Comments on Advanced Notice of Proposed Rulemaking" in the subject line and be sent to [mmccord@fmshrc.gov](mailto:mmccord@fmshrc.gov).

**FOR FURTHER INFORMATION CONTACT:**

Michael A. McCord, General Counsel, Office of the General Counsel, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001, telephone 202-434-9935; FAX: 202-434-9944.

**SUPPLEMENTARY INFORMATION:** The Mine Act sets forth dual filing requirements for parties' contests of citations and orders and their associated proposed civil penalties. 30 U.S.C. 815(a), (d). The Commission has implemented these requirements in 29 CFR part 2700 subparts B and C. Subpart B sets forth the manner in which a party may contest a citation or order before the Secretary has proposed a civil penalty for the alleged violation described in the citation or order. Subpart C sets forth the manner in which a party may contest a civil penalty after a proposed penalty assessment has been issued. If a party chooses not to file a contest of a citation or order under subpart B, it may nonetheless contest the proposed penalty assessment under subpart C. In such circumstances, in addition to contesting the proposed penalty assessment, the party may challenge the fact of violation and any special findings alleged in the citation or order. See 29 CFR 2700.21(b) ("An operator's failure to file a notice of contest of a citation or order \* \* \* shall not preclude the operator from challenging, in a penalty proceeding, the fact of violation or any special findings \* \* \*"); *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1621-23 (Sept. 1987) (holding that fact of violation and special findings may be placed in issue by the operator in a civil penalty proceeding regardless of whether the operator has availed itself of the opportunity to file a contest proceeding under subpart B). However, if a party files a contest of a citation or order

under subpart B, it must also file additional pleadings under subpart C in order to challenge the proposed penalty assessment related to the citation or order.

The Mine Act's dual filing requirements have often led to confusion by parties who may fail to timely file required documents and have their cases result in default. The Commission receives requests for relief from default that generally fall into two categories. Requests in the first category involve circumstances in which a party has failed to file a timely contest of a proposed penalty assessment and the proposed penalty thereby becomes a final order of the Commission by operation of section 105(a) of the Mine Act, 30 U.S.C. 815(a). Requests in the second category involve circumstances in which a Commission Administrative Law Judge issues a default order because a party has failed to file an answer to a petition for assessment of penalty filed by the Secretary of Labor. Currently, the large majority of requests for relief received by the Commission fall within the first category.

Under the Commission's present practice, requests for relief from default are directed to the Review Commission. In evaluating requests for relief from default, the Review Commission finds guidance in Rule 60(b) of the Federal Rules of Civil Procedure ("Rule 60(b)"). See 29 CFR 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993). The Review Commission has recognized that Rule 60(b) "is a tool which \* \* \* courts are to use sparingly \* \* \*." *Id.* at 789 (citation omitted); *Atlanta Sand and Supply Co.*, 30 FMSHRC \_\_\_, slip op. at 4, No. SE 2008-327-M (July 16, 2008). The Review Commission has also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Upon application of this standard, if the Review Commission concludes that a request for relief is potentially sufficient on its face to support reopening, but cannot conclusively determine from the record whether relief should be granted, it remands the matter to the Chief Administrative Law Judge. The Chief Administrative Law Judge exercises his discretion to engage in any further fact-finding and determines whether good cause exists for a failure to timely respond. If the

Judge finds good cause, the case proceeds pursuant to the Mine Act and the Commission's Procedural Rules in 29 CFR part 2700.

In January 2006, while considering changes to its procedural rules, the Commission determined that its procedures for processing requests for relief should be made more efficient through informal means rather than through the rulemaking process. 71 FR 553, 554, Jan. 5, 2006. The Commission explained that such informal means include making available a summary of the Commission's procedural rules described in simple terms and placing on the Commission's Web site ([www.fmshrc.gov](http://www.fmshrc.gov)) a page of frequently asked questions and answers regarding Commission procedure. *Id.*

The Commission has since employed a number of informal means in an effort to reduce the number of cases resulting in default. For instance, it has worked with the Department of Labor's Mine Safety and Health Administration ("MSHA") to clarify instructions provided to parties for the filing of various documents, including the filing of a contest of a proposed penalty assessment. The Commission did so believing that if such instructions were clearer, parties would be more likely to timely file their documents and avoid default.

In addition, the Commission has created and made available three guides to Commission proceedings intended to clarify Commission procedure. The first guide, "How a Case Proceeds before the Commission," provides charts and summaries of procedural requirements for different types of proceedings before the Commission. The second guide, "Frequently Asked Questions," provides a wide variety of information pertaining to Commission procedure in question and answer format. It includes a section devoted to problems in contesting penalties and provides parties with information for seeking relief from a proposed penalty assessment that becomes a final Commission order after the party failed to file a timely contest of a proposed penalty assessment. The third guide, "Guide to Commission Proceedings," describes Commission proceedings in simple terms. The Commission has made these guides available on its Web site (<http://www.fmshrc.gov/guides/guides.html>). It intends to publish and distribute a paper compilation of the three guides in the near future.

Although the Commission has taken such actions, it has been receiving an increasingly large number of requests for relief from operators large and small, who have failed to file a timely contest

of a proposed penalty assessment. As a result, the Commission is exploring additional means for improving its handling of requests for relief and for decreasing the number of cases that result in default.

One of the Commission's key considerations is whether it should set forth requirements for requesting relief from default in a rule, or whether further guidance should be provided in an informal document. In order to aid its consideration, the Commission is requesting comment from members of the interested public. In considering the feasibility of promulgating a rule pertaining to requests for relief from default, the Commission invites the public to consider any or all of the following questions. Members of the public are not limited to commenting on these questions and may offer any suggestion related to the subject.

**Scope of Rule:** Should a rule be limited to requests for relief from citations and orders that have become final by operation of section 105(a) of the Mine Act when a party failed to timely file a contest of a proposed penalty assessment? Should the rule also address requests for relief from a default order issued by an administrative law judge after a party has failed to timely file an answer to the Secretary of Labor's petition for assessment of penalty? To what extent should the rule be modeled on Rule 60(b)?

**Time Limitations:** When should a request for relief be filed? To what extent should a rule follow the time limitations set forth in Rule 60(b)? How should the Commission interpret the "reasonable time" requirement of Rule 60(b)? Should the one-year time limitation pertaining to Rule 60(b)(1), (2), and (3) be applied in certain circumstances? When an order becomes final by operation of Mine Act section 105(a), what effect should an operator's receipt of a delinquency notice from MSHA have on the time within which the operator should file a motion to reopen?

**Standard for Relief:** What standard should apply to entitle a party to relief? In determining whether to grant relief, how closely should the Commission be guided by federal case law interpreting Rule 60(b)? Should the Commission require a movant to set forth specific facts which support the grounds alleged under Rule 60(b) and, if so, what level of specificity should be required? Should the Commission require a movant to show a meritorious claim or defense as a prerequisite to granting relief? Should the Commission also be guided by the standard for setting aside

defaults in Rule 55(c) of the Federal Rules of Civil Procedure? Should the Commission apply a different standard depending upon certain factors relating to the movant, such as whether the movant is represented by counsel, or the size of an operator?

**Documentation:** Should a rule require that allegations be established by sworn written statements by individuals with personal knowledge of the facts and/or other sufficiently reliable documentation? Should a rule require that the movant include in its request for relief copies of all relevant documents in its possession including, but not limited to, the proposed penalty assessment? Should the signature of an attorney on a request for relief be treated as a substitute for any required documentation?

**Process:** Should requests for relief be filed directly with the Chief Administrative Law Judge or with the Review Commission? What service requirements should apply?

#### Public Review of Comments

All comments responding to this notice will be a matter of public record and available for public inspection and copying by appointment with Ella Waymer, between the hours of 9 a.m. and 5 p.m. on business days at the Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., 9th Floor, Room 9536, Washington, DC 20001; telephone 202-434-9935.

Dated: August 27, 2008.

**Michael F. Duffy,**

*Chairman, Federal Mine Safety and Health Review Commission.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R08-OAR-2008-0340; FRL-8700-6]

#### Approval and Promulgation of Air Quality Implementation Plans; State of Utah; Revised Transportation Conformity Consultation Process, and Approval of Related Revisions

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve State Implementation Plan (SIP) revisions submitted by the State of Utah on June 26, 2007 and April 17, 2008. The June 26, 2007 revision updates