

### Unfunded Mandates Reform Act of 1995

The rules will not cause State, local, or tribal governments, or the private sector, to spend \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

### Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E—Congressional Review Act)

These rules are not “major rules” as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 Subtitle E—Congressional Review Act), now codified at 5 U.S.C. 804(2). The rules will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies. Moreover, these are rules of agency practice or procedure that do not substantially affect the rights or obligations of non-agency parties, and do not come within the meaning of the term “rule” as used in Section 804(3)(C), now codified at 5 U.S.C. 804(3)(C). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

### List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Prisoners, Probation and parole.

### The Final Rule

Accordingly, the U. S. Parole Commission is adopting the following amendment to 28 CFR part 2.

### PART 2—[AMENDED]

1. The authority citation for 28 CFR part 2 continues to read as follows:

**Authority:** 18 U.S.C. 4203(a)(1) and 4204(a)(6).

2. Revise § 2.17 (b) to read as follows:

#### § 2.17 Original jurisdiction cases.

(a) \* \* \*

(b) A Commissioner may designate a case as an original jurisdiction case if the case involves an offender:

- (1) Who committed a serious crime against the security of the nation;
- (2) Whose offense behavior included an unusual degree of sophistication or planning or was part of a large scale criminal conspiracy or continuing criminal enterprise;
- (3) Who received national or unusual attention because of the nature of the

crime, arrest, trial, or prisoner status, or because of the community status of the offender or a victim of the crime;

(4) Whose offense behavior caused the death of a law enforcement officer while the officer was in the line of duty; or

(5) Who was sentenced to a maximum term of at least 45 years or life imprisonment.

\* \* \* \* \*

3. Revise § 2.63 by designating the existing text as paragraph (a) and adding paragraph (b) as follows:

#### § 2.63 Quorum.

(a) \* \* \*

(b)(1) In the event of a tie vote of the Commission’s membership on a matter, the matter that is the subject of the vote is not adopted by the Commission.

(2) If the matter that is the subject of the tie vote is the disposition of an offender’s case, then the result of the tie vote is the offender’s status quo ante, *i.e.*, no action is taken that is more favorable or more adverse regarding the offender. If in an earlier decision the Commission has given an offender a presumptive release date or a date for a 15-year reconsideration hearing, then the result of the tie vote is no change in the presumptive date or the date of the 15-year reconsideration hearing. If an offender is facing possible parole rescission or revocation, the result of the tie vote is the offender’s retention of the parole effective date or the offender’s return to supervision. *Exception:* If there is a tie vote in making one of the findings required by § 2.53 in a mandatory parole determination, the result of the tie vote is that the prisoner must be granted mandatory parole.

(3) The Commission may re-vote on a case disposition to resolve a tie vote or other impasse in satisfying a voting requirement of these rules.

Dated: December 21, 2010.

**Isaac Fulwood,**

*Chairman, United States Parole Commission.*

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### FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

#### 29 CFR Part 2700

#### Simplified Proceedings

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

**ACTION:** Final rule.

**SUMMARY:** The Federal Mine Safety and Health Review Commission (the “Commission”) is an independent adjudicatory agency that provides

hearings and appellate review of cases arising under the Federal Mine Safety and Health Act of 1977, or Mine Act. Hearings 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 publishing a final rule to simplify the procedures for handling certain civil penalty proceedings.

**DATES:** The final rule takes effect on March 1, 2011. The Commission will accept written and electronic comments received on or before January 12, 2011.

**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, or sent via facsimile to 202–434–9944. Persons mailing written comments shall provide an original and three copies of their comments. Electronic comments should state “Comments on Simplified Proceedings” in the subject line and be sent to [mmccord@fmsrhrc.gov](mailto:mmccord@fmsrhrc.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:

#### Background

On May 20, 2010, the Commission published in the **Federal Register** a rule proposing Simplified Proceedings in certain civil penalty proceedings. 75 FR 28223. The Commission explained that since 2006, the number of new cases filed with the Commission has dramatically increased, and that in order to deal with that burgeoning caseload, the Commission is considering methods to simplify and streamline its procedures for handling certain civil penalty proceedings.

The Commission invited comments on the proposed rule through June 21, 2010. The Commission received comments from: (1) The Law Offices of Adele L. Abrams; (2) the United Mine Workers of America; (3) the Secretary of Labor through the Office of the Solicitor (“MSHA” or the “Secretary”); (4) Public Citizen; (5) Industrial Minerals Association-North America; (6) Alliance Coal, LLC; (7) Chris Barber; (8) Arch Coal, Inc.; (9) Jackson Kelly PLLC; and (10) Imerys.

The major differences between the simplified procedures set forth in the proposed rule and current conventional

procedures were that, under the proposed simplified procedures, answers to petitions for assessment of penalty would not be required; motions would be eliminated to the greatest extent practicable; early discussions among the parties and the Commission Administrative Law Judge (“Judge”) would be required to narrow and define the disputes between parties; parties would be required to disclose certain materials early in the proceedings; discovery would not be permitted except as ordered by the Judge; interlocutory appeals would not be permitted; and post-hearing briefs would not be allowed, except as ordered by the Judge. Although the administrative process would be streamlined, hearings would remain full due process hearings as they are under conventional procedures. The proposed rule is unchanged in many ways, and the characteristics of Simplified Proceedings described above also are present in this final rule.

#### **Pilot Program**

A commenter suggested that the Commission should implement Simplified Proceedings as a pilot program and then conduct an independent evaluation of whether the new procedures were successful in streamlining and simplifying cases before finalizing the Simplified Proceedings rule. The Commission agrees that Simplified Proceedings should be implemented as a pilot program for a finite period of time. Accordingly, this final rule shall be implemented as a pilot program for nine to twelve months. During the pilot program, the Commission will gather information to assess the success of Simplified Proceedings (e.g., comparing how long it takes to process cases under Simplified Proceedings compared to processing under conventional procedures, and whether there is any beneficial impact on the Commission’s backlog of undecided cases). The Commission intends to publish the results of its pilot program and request comments regarding the regulated community’s experience with Simplified Proceedings. These comments and the information gathered from the Commission during the pilot program will form the basis of any future final Simplified Proceedings rule.

#### **Eligibility**

The Commission proposed various characteristics to describe which cases might be eligible for Simplified Proceedings. Under the proposed rule, cases designated for Simplified Proceedings by the Chief Judge or the

Judge’s designee would not involve complex issues of law or fact and would generally include one or more of the following characteristics: (1) Limited number of citations; (2) an aggregate proposed penalty of not more than \$15,000 per docket and not more than \$50,000 per proceeding; (3) no citation or order issued under sections 104(b), 104(d), 104(e), 105(c), 107(a), 110(b), 110(c), or 111 of the Mine Act; (4) not involving a fatality; or (5) a hearing that is expected to take not more than one day.

In the preamble to the proposed rule, the Commission discussed the difficulty in describing the criteria for eligibility for Simplified Proceedings, noting that it would be useful for the Commission to consider, at an early stage, all of the contested civil penalties that might be at issue in a single hearing. The Commission explained that it plans to review each petition for assessment of penalty and proposed penalty assessment form in its consideration of whether a case is appropriate for Simplified Proceedings. MSHA currently groups citations and orders and their proposed penalties on a proposed penalty assessment form based upon a 30-day billing cycle. Under MSHA’s current practice for grouping citations and orders, the Commission would not have a complete view of all of the contested penalties that may be relevant in a particular hearing. Accordingly, the Commission requested suggestions regarding criteria that might be used to better group proposed penalties and the underlying citations and orders.

Industry commenters suggested that citations and orders should be grouped by inspection on a proposed assessment form. MSHA agreed that citations and orders should be grouped by inspection (which MSHA designates by an “event number”), and further by inspector where more than one inspector is involved in an inspection.

The Commission also received comments suggesting that some factors should be added to make more cases eligible for Simplified Proceedings, such as that cases should be included in which parties mutually agree to opt-in to Simplified Proceedings. The Commission received other suggestions for excluding cases from Simplified Proceedings, such as that cases should be excluded if they involve special assessments, pure legal issues, expert witnesses, and the occurrence of injury or illness. Commenters had varying opinions on the number of citations, penalty amount, and hearing length that should make a case eligible for Simplified Proceedings.

The Commission agrees that, prior to docketing, citations and orders for some cases should be grouped by inspection, and further by inspector where more than one inspector is involved in an inspection. The Commission should then have a clearer picture of the citations and orders that might be at issue in a hearing and whether the case is appropriate for Simplified Proceedings. The Commission has conferred with MSHA regarding the grouping of citations and orders. We expect this grouping to occur prior to the effective date of this final rule.

As to eligibility criteria for Simplified Proceedings, the Commission has concluded that cases designated for Simplified Proceedings shall not involve fatalities or the occurrence of injuries or illnesses. Furthermore, cases designated for Simplified Proceedings will generally include one or more of the following characteristics: (1) The case involves only citations issued under section 104(a) of the Mine Act; (2) the proposed penalties were not specially assessed under 30 CFR 100.5; (3) the case does not involve complex issues of law or fact; (4) the case involves a limited number of citations to be determined by the Chief Judge or his designee; (5) the case involves a limited penalty amount to be determined by the Chief Judge or his designee; (6) the case will involve a hearing of limited duration to be determined by the Chief Judge or his designee; (7) the case does not involve only legal issues; and (8) the case does not involve expert witnesses. Information gathered during the pilot program may better clarify appropriate criteria for Simplified Proceedings eligibility.

#### **Designation of Case for Simplified Proceedings**

The Commission proposed that a civil penalty proceeding would be designated for Simplified Proceedings by the Chief Judge or the Judge’s designee. Under proposed section 2700.102, after a case has been designated for Simplified Proceedings, the Commission would issue a notice of designation to the parties, which would also provide certain information, such as contact information for the Judge assigned to the case, including the Judge’s e-mail address. In addition, parties would be required to file a notice of appearance providing specific contact information for the counsel or representative acting on behalf of the party, if that information had not already been provided. The operator would not be required to file an answer to the petition for assessment of civil penalty.

Under proposed section 2700.103, even if a case had not been designated for Simplified Proceedings by the Chief Judge or the Judge's designee, a party had the opportunity to request that a case be designated. The Commission proposed that the request would need to be in writing and state whether the request is opposed. The request would also address the characteristics specified in the rule that make the case appropriate for designation. If a request for designation were granted, under the proposed rule, the parties would be required to file and serve notices of appearance providing specific contact information unless such contact information had already been provided. Under the proposed rule, if a party requested Simplified Proceedings, the deadline for filing an answer to a petition for assessment of penalty would be suspended. If a request were denied, the time for filing an answer would begin to run upon issuance of the Judge's order denying the request.

The Commission received comments suggesting that the decision to opt-in to Simplified Proceedings should be exclusively controlled by the parties. Some commenters also suggested that parties should be able to opt-in to Simplified Proceedings at any time, that all cases should be eligible for Simplified Proceedings, and that any request to opt-in should be consented to by all parties.

The Commission has declined to adopt these suggestions and has made very few changes to proposed sections 2700.102 and 2700.103. Similar to the Simplified Proceedings rule adopted by the Occupational Safety and Health Review Commission ("OSHRC") (see 29 CFR 2200.203), the Commission concludes that some cases that meet certain criteria should be designated for Simplified Proceedings by the Commission, and that the decision to opt-in should not be within the exclusive control of the parties. If a party disagrees with a case's designation for Simplified Proceedings, the party may file a motion to opt-out pursuant to section 2700.104. The Commission has further determined that parties should not be able to automatically opt-in to Simplified Proceedings in any type of case even with the mutual consent of all parties. However, a mutual request to opt-in involving a case that does not meet the eligibility criteria may be granted at the discretion of the Judge. Regarding the timing of a party's request for Simplified Proceedings, proposed section 2700.103 did not set forth a specific time for when a party must file its request for Simplified Proceedings, and a deadline has not been set forth in

the final rule. The Commission is not requiring that all requests to opt-in must be consented to by all parties. Finally, the Commission has determined that paragraph (d) should be revised to conform more closely with the language of section 2700.100(b)(1).

#### **Discontinuance of Simplified Proceedings**

Under proposed section 2700.104, if it became apparent at any time that a case was not appropriate for Simplified Proceedings, the assigned Judge could discontinue Simplified Proceedings upon the Judge's own motion or upon the motion of any party. A party would have the opportunity to move to discontinue the Simplified Proceedings at any time during the proceedings but no later than 30 days before the scheduled hearing. The moving party would be required to confer with the other parties and state in the motion if any other party opposes or does not oppose the motion. Parties opposing the motion would have eight business days after service of the motion to file an opposition. The Commission proposed that if Simplified Proceedings were discontinued, the Judge would issue such orders as are necessary for an orderly continuation under conventional rules.

The Commission received some comments suggesting that opting-out of Simplified Proceedings should be exclusively controlled by the parties, while other comments expressed agreement with the language proposing that opting-out should be within the discretion of the Judge. Another commenter suggested that more information should be provided regarding the grounds for a Judge's decision to discontinue Simplified Proceedings.

The Commission has concluded that the rule should be adopted as proposed. However, if the pilot program reveals that revisions should be made to the process for discontinuing Simplified Proceedings, the Commission will consider making those revisions.

#### **Pre-Hearing Exchange of Information**

The Commission proposed in section 2700.107 that discovery would "only be allowed under the conditions and time limits set by the Judge." Rather than requiring the disclosure of documents and materials through discovery, the Commission proposed a more expeditious means for disclosure through the mandatory exchange of documents and materials and through a pre-hearing conference. More specifically, proposed section 2700.105 provided that within 30 calendar days

after a case had been designated for Simplified Proceedings, each party would provide to all other parties copies of all documents, electronically stored information and tangible things that the disclosing party had and would use to support its claims or defenses. Materials required to be disclosed under the proposed rule would include, but would not be limited to, inspection notes, citation documentation, narratives, photos, diagrams, preshift and onshift reports, training documents, mine maps and witness statements (subject to the provisions of 29 CFR 2700.61). Under proposed section 2700.106, as early as practicable after the parties received these materials, the Judge would order and conduct a pre-hearing conference. Proposed section 2700.106 further provided that at the pre-hearing conference, the parties would discuss the following: Settlement of the case; the narrowing of issues; an agreed statement of issues and facts; defenses; witnesses and exhibits; motions; and any other pertinent matter. At the conclusion of the conference, the Judge would issue an order setting forth any agreements reached by the parties and would specify in the order the issues to be addressed by the parties at the hearing.

The industry commenters generally suggested that there should not be a ban on discovery, and that they should be permitted to depose the inspector who issued the contested citations and orders. MSHA, on the other hand, commented that discovery should be allowed only in extraordinary circumstances. The Commission believes that the limit on discovery is a key provision to simplifying and streamlining cases designated for Simplified Proceedings. The final rule replaces the language in proposed section 2700.107 with the language of proposed section 2700.100(b)(5), which more clearly articulates that discovery is generally prohibited.

Regarding the mandatory disclosure of information by parties set forth in proposed section 2700.105, commenters suggested that the time-frame for disclosure of documents should be changed from 30 to 45 days. Commenters also suggested expanding the information which must be disclosed to include all documents related to a matter that are in a party's possession (and not just those that it would use in litigation) and the disclosure of documents supporting the opposing party's claims.

The final rule changes the time-frame for disclosure to 45 days and requires the exchange of information suggested in the comments. The Commission has

further expanded disclosure to include rebuttal forms and to specify requirements for privilege logs. An expanded exchange of information balances the lack of discovery permitted by the Simplified Proceedings rule.

Regarding proposed section 2700.106, the Commission received comments stating that, since admissions made in the interest of settlement are not intended to be admissible in formal proceedings, a Judge assigned to a Simplified Proceedings case, who will ultimately decide the case, should not hear settlement discussions during a pre-hearing conference. A commenter also suggested that the hearing date should be set during the pre-hearing conference.

The Commission agrees that the Judge assigned to a Simplified Proceedings case should not hear the content of the settlement discussions during the pre-hearing conference, and that the rule should clarify that only settlement efforts by the parties (not the actual content of settlement) will be discussed during pre-hearing conferences. The final rule further requires that a settlement discussion occur between parties before the pre-hearing conference. In order to allow as much flexibility as possible, the rule has not been revised to require a hearing date to be set at the end of the pre-hearing conference.

### Hearing

The Commission proposed in section 2700.108 that as soon as practicable after the conclusion of the pre-hearing conference, the Judge would hold a hearing on any issue that remained in dispute. The hearing would be a full due process hearing. Each party would present oral argument at the close of the hearing, and post-hearing briefs would not be permitted except by order of the Judge. The Judge would issue a written decision that would constitute the final disposition of the proceedings within 60 calendar days after the hearing. If the Judge announced a decision orally from the bench, it would be reduced to writing within 60 calendar days after the hearing.

The Commission received no comments on proposed section 2700.108 and adopts the rule without change.

### Miscellaneous

The Commission proposed conforming changes to Rule 5(c), 29 CFR 2700.5(c). Those changes conform the contact information required in Simplified Proceedings with the contact information required in all proceedings. The Commission received no comments

on the proposed changes to Rule 5(c) and adopts the rule as proposed.

The Commission received a comment suggesting that rulemaking comments should be posted on the Commission's Web site. The Commission agrees and shall make rulemaking comments, including those to this final rule, available on the Commission's Web site (<http://www.fmshrc.gov>).

A commenter stated that the Commission should provide sufficient information to allow the commenter to assess whether the Simplified Proceedings rule is sufficient to help draw down the Commission's backlog of undecided cases quickly. The Commission intends to provide such information after it conducts the pilot program.

The Commission received comments that it should adopt settlement procedures similar to those found in OSHRC's rules at 29 CFR part 2200, subpart H. The Commission will consider the appropriateness of promulgating a settlement subpart after the conclusion of the pilot program for Simplified Proceedings.

### Notice and Public Procedure

Although notice-and-comment rulemaking requirements under the Administrative Procedure Act ("APA") do not apply to rules of agency procedure (*see* 5 U.S.C. 553(b)(3)(A)), the Commission invites members of the interested public to submit comments on this final rule. The Commission will accept public comments until January 12, 2011.

The Commission is an independent regulatory agency and, as such, is not subject to the requirements of E.O. 12866, E.O. 13132, or the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.*

The Commission has determined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this rule would not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Statement and Analysis has not been prepared.

The Commission has determined that the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) does not apply because this rule does not contain any information collection requirements that require the approval of the Office of Management and Budget.

The Commission has determined that the Congressional Review Act, 5 U.S.C. 801, is not applicable here because, pursuant to 5 U.S.C. 804(3)(C), this rule "does not substantially affect the rights or obligations of non-agency parties."

### List of Subjects in 29 CFR Part 2700

Administrative practice and procedure, Mine safety and health, Penalties, Whistleblowing.

■ For the reasons stated in the preamble, the Federal Mine Safety and Health Review Commission amends 29 CFR part 2700 as follows:

### PART 2700—PROCEDURAL RULES

■ 1. The authority citation for part 2700 continues to read as follows:

**Authority:** 30 U.S.C. 815, 820, 823, and 876.

■ 2. Section 2700.5 is amended by revising paragraph (c) to read as follows:

#### § 2700.5 General requirements for pleadings and other documents; status or informational requests.

\* \* \* \* \*

(c) *Necessary information.* All documents shall be legible and shall clearly identify on the cover page the filing party by name. All documents shall be dated and shall include the assigned docket number, page numbers, and the filing person's address, business telephone number, cell telephone number if available, fax number if available, and e-mail address if available. Written notice of any change in contact information shall be given promptly to the Commission or the Judge and all other parties.

\* \* \* \* \*

■ 3. A new subpart J is added to read as follows:

#### Subpart J—Simplified Proceedings

- Sec.
- 2700.100 Purpose.
- 2700.101 Eligibility for Simplified Proceedings.
- 2700.102 Commission Commencement of Simplified Proceedings.
- 2700.103 Party Request for Simplified Proceedings.
- 2700.104 Discontinuance of Simplified Proceedings.
- 2700.105 Disclosure of Information by the Parties.
- 2700.106 Pre-Hearing Conference.
- 2700.107 Discovery.
- 2700.108 Hearing.
- 2700.109 Review of Judge's Decision.
- 2700.110 Application.

#### Subpart J—Simplified Proceedings

##### § 2700.100 Purpose.

(a) The purpose of this Simplified Proceedings subpart is to provide simplified procedures for resolving civil penalty contests under the Federal Mine Safety and Health Act of 1977, so that parties before the Commission may reduce the time and expense of litigation while being assured due process and a hearing that meets the

requirements of the Administrative Procedure Act, 5 U.S.C. 554. These procedural rules will be applied to accomplish this purpose.

(b) Procedures under this subpart are simplified in a number of ways. The major differences between these procedures and those that would otherwise apply in subparts A, C, G, H, and I of this part are as follows.

(1) Answers to petitions for assessment of penalty are not required.

(2) Motions are eliminated to the greatest extent practicable.

(3) Early discussions among the parties and the Administrative Law Judge are required to narrow and define the disputes between the parties.

(4) The parties are required to provide certain materials early in the proceedings.

(5) Discovery is not permitted except as ordered by the Administrative Law Judge.

(6) Interlocutory appeals are not permitted.

(7) The administrative process is streamlined, but hearings will be full due process hearings. The parties will argue their case orally before the Judge at the conclusion of the hearing instead of filing briefs. In many instances, the Judge will render a decision from the bench.

#### **§ 2700.101 Eligibility for Simplified Proceedings.**

Cases designated for Simplified Proceedings will not involve fatalities, injuries or illnesses, and will generally include one or more of the following characteristics:

(a) The case involves only citations issued under section 104(a) of the Mine Act.

(b) The proposed penalties were not specially assessed under 30 CFR 100.5.

(c) The case does not involve complex issues of law or fact.

(d) The case involves a limited number of citations to be determined by the Chief Judge or designee.

(e) The case involves a limited penalty amount to be determined by the Chief Judge or designee.

(f) The case will involve a hearing of limited duration to be determined by the Chief Judge or designee.

(g) The case does not involve only legal issues.

(h) The case does not involve expert witnesses.

#### **§ 2700.102 Commission Commencement of Simplified Proceedings.**

(a) *Designation.* Upon receipt of a petition for assessment of penalty, the Chief Administrative Law Judge, or designee, has the authority to designate

an appropriate case for Simplified Proceedings.

(b) *Notice of designation.* After a case has been designated for Simplified Proceedings, the Commission will issue a Notice of Designation for Simplified Proceedings. The Notice will inform parties that the case has been designated for Simplified Proceedings, state the name and contact information for the Commission Administrative Law Judge assigned to the case, provide instructions for filing a notice of appearance in the Simplified Proceedings, and state that the operator need not file an answer to the petition for assessment of penalty. The Commission will send the notice of designation to the parties' addresses listed on the petition for assessment of penalty.

(c) *Notice of appearance.* Unless the contact information described in this paragraph has already been provided to the Judge, within 15 calendar days after receiving a notice of designation, the parties shall file notices of appearance with the assigned Judge. Each notice of appearance shall provide the following information for the counsel or representative acting on behalf of the party: Name, address, business telephone number, cell telephone number if available, fax number if available, and e-mail address if available. Notices of appearance shall be served on all parties in accordance with the provisions of § 2700.7.

(d) *No filing of an answer under Subpart C of this part.* If a case has been designated for Simplified Proceedings, an answer pursuant to § 2700.29 is not required to be filed.

#### **§ 2700.103 Party Request for Simplified Proceedings.**

(a) *Party request.* Any party may request that a case be designated for Simplified Proceedings. The request must be in writing and should address the characteristics specified in § 2700.101. The request must be filed with the Commission in accordance with the provisions of § 2700.5 and served on all parties in accordance with the provisions of § 2700.7. The requesting party shall confer or make reasonable efforts to confer with the other parties and shall state in the request if any other party opposes or does not oppose the request. Parties opposing the request shall have eight business days after service of the motion to file an opposition.

(b) *Judge's ruling on request.* The Chief Administrative Law Judge or the Judge assigned to the case may grant a party's request and designate a case for

Simplified Proceedings at the Judge's discretion.

(c) *Notice of appearance.* Unless the contact information described in this paragraph has already been provided to the Judge, within 15 calendar days after receiving an order granting a request for Simplified Proceedings, the parties shall file with the Judge notices of appearance described in § 2700.102(c). Notices of appearance shall be served on all parties in accordance with the provisions of § 2700.7.

(d) *No filing of an answer under Subpart C of this part.* If a case has been designated for Simplified Proceedings, an answer pursuant to § 2700.29 is not required to be filed. If a request for Simplified Proceedings is denied, the period for filing an answer will begin to run upon issuance of the Judge's order denying Simplified Proceedings.

#### **§ 2700.104 Discontinuance of Simplified Proceedings.**

(a) *Procedure.* If it becomes apparent at any time that a case is not appropriate for Simplified Proceedings, the Judge assigned to the case may, upon motion by any party or upon the Judge's own motion, discontinue Simplified Proceedings and order the case to continue under conventional rules.

(b) *Party motion.* At any time during the proceedings but no later than 30 days before the scheduled hearing, any party may move that Simplified Proceedings be discontinued and that the matter continue under conventional procedures. A motion to discontinue must explain why the case is inappropriate for Simplified Proceedings. The moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion. Parties opposing the motion shall have eight business days after service of the motion to file an opposition.

(c) *Ruling.* If Simplified Proceedings are discontinued, the Judge may issue such orders as are necessary for an orderly continuation under conventional rules.

#### **§ 2700.105 Disclosure of Information by the Parties.**

(a) Within 45 calendar days after a case has been designated for Simplified Proceedings, the parties shall provide any information in a party's possession, custody, or control that the disclosing party or opposing party may use to support its claims or defenses. Any material or object that cannot be copied, or the copying of which would be unduly burdensome, shall be described and its location specified. Materials

required to be disclosed include, but are not limited to, inspection notes from the entire subject inspection, rebuttal forms, citation documentation, narratives, photos, diagrams, preshift and onshift reports, training documents, mine maps, witness statements (subject to the provisions of § 2700.61), witness lists, and written opinions of expert witnesses, if any.

(b) If any items are withheld from disclosure on grounds of privilege, the disclosing party shall provide a log describing each item and stating the reason(s) why it was not produced. The privilege log shall provide an index, identifying the allegedly privileged documents and shall provide sufficient detail to permit an informed decision as to whether the document is at least potentially privileged. Specifically, the index must include: A description of the document, including its subject matter and the purpose for which it was created; the date the document was created; the name and job title of the author of the document; and if applicable, the name and job title of the recipient(s) of the document. The judge may order an *in camera* inspection of the privileged documents, if necessary, to determine the proper application of the privilege.

#### § 2700.106 Pre-Hearing Conference.

(a) *When held.* As early as practicable after the parties have received the materials set forth in § 2700.105, the presiding Judge will order and conduct a pre-hearing conference. At the discretion of the Judge, the pre-hearing conference may be held in person, by telephone, or electronic means. After receipt of the materials set forth in § 2700.105 and prior to the pre-hearing conference, parties are required to engage in a discussion to explore the possibility of settlement.

(b) *Content.* At the pre-hearing conference, the parties will discuss the following: Settlement efforts in the case; the narrowing of issues; an agreed statement of issues and facts; defenses; witnesses and exhibits; motions; and any other pertinent matter. Within a time determined by the Judge during the pre-hearing conference, the parties must provide each other with documents or materials intended for submission as exhibits at the hearing that have not already been provided in accordance with the provisions of § 2700.105. At the conclusion of the conference, the Judge will issue an order setting forth any agreements reached by the parties, and will specify in the order the issues to be addressed by the parties at hearing.

#### § 2700.107 Discovery.

Discovery is not permitted except as ordered by the Administrative Law Judge.

#### § 2700.108 Hearing.

(a) *Procedures.* As soon as practicable after the conclusion of the pre-hearing conference, the Judge will hold a hearing on any issue that remains in dispute. The hearing will be in accordance with subpart G of this part, except for §§ 2700.56, 2700.57, 2700.58, 2700.59, 2700.65, and 2700.67, which will not apply.

(b) *Agreements.* At the beginning of the hearing, the Judge will enter into the record all agreements reached by the parties as well as defenses raised during the pre-hearing conference. The parties and the Judge then will attempt to resolve or narrow the remaining issues. The Judge will enter into the record any further agreements reached by the parties.

(c) *Evidence.* The Judge will receive oral, physical, or documentary evidence that is relevant, and not unduly repetitious or cumulative. Testimony will be given under oath or affirmation. The parties are reminded that the Federal Rules of Evidence do not apply in Commission proceedings. Any evidence not disclosed as required by §§ 2700.105 and 2700.106(b), including the testimony of witnesses not identified pursuant to § 2700.106(b), shall be inadmissible at the hearing, except where extraordinary circumstances are established by the party seeking to offer such evidence.

(d) *Court reporter.* A court reporter will be present at the hearing. An official verbatim transcript of the hearing will be prepared and filed with the Judge.

(e) *Oral and written argument.* Each party may present oral argument at the close of the hearing. Post-hearing briefs will not be allowed except by order of the Judge.

(f) *Judge's decision.* The Judge shall make a decision that constitutes the final disposition of the proceedings within 60 calendar days after the hearing. The decision shall be in writing and shall include all findings of fact and conclusions of law; the reasons or bases for them on all the material issues of fact, law, or discretion presented by the record; and an order. If a decision is announced orally from the bench, it shall be reduced to writing within 60 calendar days after the hearing. An order by a Judge approving a settlement proposal is a decision of the Judge.

#### § 2700.109 Review of Judge's Decision.

After the issuance of the Judge's written decision, any party may petition the Commission for review of the Judge's written decision as provided for in subpart H of this part.

#### § 2700.110 Application.

The rules in this subpart will govern proceedings before a Judge in a case designated for Simplified Proceedings under §§ 2700.102 and 2700.103. The provisions of subparts A and I apply to Simplified Proceedings when consistent with these rules in subpart J. The provisions of subpart C of this part apply to Simplified Proceedings except for § 2700.29, which does not apply. The provisions of subpart G of this part apply to Simplified Proceedings except for §§ 2700.56, 2700.57, 2700.58, 2700.59, 2700.65, and 2700.67, which do not apply. The provisions of subpart H of this part apply to Simplified Proceedings except for § 2700.76, which does not apply. The provisions of subparts B, D, E and F of this part do not apply to Simplified Proceedings.

Dated: December 20, 2010.

**Mary Lu Jordan,**

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

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket No. USCG-2010-1109]

RIN 1625-AA00

#### Safety Zone; Columbia River, The Dalles Lock and Dam

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone on the waters of the Columbia River in the vicinity of The Dalles Lock and Dam while the Army Corps of Engineers completes repairs to the lock. The safety zone is necessary to help ensure the safety of workers conducting the repairs as well as the maritime public and will do so by prohibiting all persons and vessels from entering the construction zone.

**DATES:** This rule is effective in the CFR on December 28, 2010 through April 1, 2011. This rule is effective with actual notice for purposes of enforcement