becomes secondary or supplemental only under a coordination-of-benefits provision.

(ii) The rules of this paragraph (c)(5) are illustrated by the following example:

Example. (i) Facts. An employer sponsors a group health plan that provides coverage for both active employees and retirees. The coverage for retirees supplements benefits provided by Medicare, but does not meet the requirements for a supplemental policy under section 1882(g)(1) of the Social Security Act.

(ii) Conclusion. In this Example, the coverage provided to retirees does not meet the definition of supplemental excepted benefits under this paragraph (c)(5) because the coverage is not Medicare supplemental insurance as defined under section 1882(g)(1) of the Social Security Act, is not a TRICARE supplemental program, and is not supplemental to coverage provided under a group health plan.

(d) Treatment of partnerships. For purposes of this part:

(1) Treatment as a group health plan. Any plan, fund, or program that would not be (but for this paragraph (d)) an employee welfare benefit plan and that is established or maintained by a partnership, to the extent that the plan, fund, or program provides medical care (including items and services paid for as medical care) to present or former partners in the partnership or to their dependents (as defined under the terms of the plan, fund, or program), directly or through insurance, reimbursement, or otherwise, is treated (subject to paragraph (d)(2)) as an employee welfare benefit plan that is a group health plan.

(2) Employment relationship. In the case of a group health plan, the term employer also includes the partnership in relation to any bona fide partner. In addition, the term employee also includes any bona fide partner. Whether or not an individual is a bona fide partner is determined based on all the relevant facts and circumstances, including whether the individual performs services on behalf of the partnership.

(3) Participants of group health plans. In the case of a group health plan, the term participant also includes any individual described in paragraph (d)(3)(i) or (ii) of this section if the individual is, or may become, eligible to receive a benefit under the plan or the individual’s beneficiaries may be eligible to receive any such benefit.

(i) In connection with a group health plan maintained by a partnership, the individual is a partner in relation to the partnership.

(ii) In connection with a group health plan maintained by a self-employed individual (under which one or more employees are participants), the individual is the self-employed individual.

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§ 2700.1 Scope; applicability of other rules; construction.

(a) Scope. (1) This part sets forth rules applicable to proceedings before the Federal Mine Safety and Health Review Commission ("the Commission") and its Administrative Law Judges. The Commission is an adjudicative agency that provides administrative trial and appellate review of legal disputes arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. ("the Act"). The Commission is an independent agency, not a part of nor affiliated in any way with the U.S. Department of Labor or its Mine Safety and Health Administration ("MSHA"). The location of the Commission’s headquarters is at 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004–1710; its primary phone number is 202–434–9900; and the fax number of its Docket Office is 202–434–9954. The Commission maintains a Web site at http://www.fmshrc.gov where these rules, recent and many past decisions of the Commission and its Judges, and other information regarding the Commission, can be accessed.

(2) Unless the Commission provides otherwise, amendments to these rules are effective 60 days following publication in the Federal Register, and apply to cases initiated after they take effect. They also apply to further proceedings in cases pending on the effective date, except to the extent that application of the amended rules would not be feasible, or would work injustice, in which event the former rules of procedure would continue to apply.

(b) Applicability of other rules. On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

(c) Construction. These rules shall be construed to secure the just, speedy and inexpensive determination of all proceedings, and to encourage the participation of miners and their representatives. Wherever the masculine gender is used in these rules, the feminine gender is also implied.


§ 2700.2 Definitions.

For purposes of this part, the definitions contained in section 3 of the Act, 30 U.S.C. 802, apply.

§ 2700.3 Who may practice.

(a) Attorneys. Attorneys admitted to practice before the highest court of any State, Territory, District, Commonwealth or possession of the United States are permitted to practice before the Commission.

(b) Other persons. A person who is not authorized to practice before the Commission as an attorney under paragraph (a) of this section may practice before the Commission as a representative of a party if he is:

(1) A party;

(2) A representative of miners;

(3) An owner, partner, officer or employee of a party when the party is a labor organization, an association, a partnership, a corporation, other business entity, or a political subdivision; or

(4) Any other person with the permission of the presiding judge or the Commission.

(c) Entry of appearance. A representative of a party shall enter an appearance in a proceeding under the Act or these procedural rules by signing the first document filed on behalf of the party with the Commission or Judge in accordance with §2700.6: filing a written entry of appearance with the Commission or Judge; or, if the Commission or Judge permits, by orally entering an appearance in open hearing.

(d) Withdrawal of appearance. Any representative of a party desiring to
§ 2700.5  General requirements for pleadings and other documents; status or informational requests.

(a) Jurisdiction. A proposal for a penalty under section 110, 30 U.S.C. 820(c); an answer to a notice of contest of a citation or withdrawal order issued under section 104, 30 U.S.C. 814; an answer to a notice of contest of an order issued under section 107, 30 U.S.C. 817; a complaint issued under section 105(c) or 111, 30 U.S.C. 815(c) and 821; and an application for temporary reinstatement under section 105(c)(2), 30 U.S.C. 815(c)(2), shall allege that the violation or imminent danger took place in or involves a mine that has products withdraw his appearance shall file a motion with the Commission or Judge. The motion to withdraw may, in the discretion of the Commission or Judge, be denied where it is necessary to avoid undue delay or prejudice to the rights of a party.


§ 2700.4  Parties, intervenors, and amici curiae.

(a) Party status. A person, including the Secretary or an operator, who is named as a party or who is permitted to intervene, is a party. In a proceeding instituted by the Secretary under section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), the complainant on whose behalf the Secretary has filed the complaint is a party and may present additional evidence on his own behalf. A miner, applicant for employment, or representative of a miner who has filed a complaint with the Commission under section 105(c)(3) or 111 of the Act, 30 U.S.C. 815(c)(3) and 821, and an affected miner or his representative who has become a party in accordance with paragraph (b) of this section, are parties.

(b) Intervention—(1) Intervention by affected miners and their representatives. Before a case has been assigned to a Judge, affected miners or their representatives shall be permitted to intervene upon filing a written notice of intervention with the Executive Director, Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004-1710. If the case has been assigned to a Judge, the notice of intervention shall be filed with the Judge. The Commission or the Judge shall mail forthwith a copy of the notice to all parties. After the start of the hearing, affected miners or their representatives may intervene upon just terms and for good cause shown.

(2) Intervention by other persons. (i) Motions by other persons for leave to intervene shall be filed before the start of a hearing on the merits unless the Judge, for good cause shown, allows a later filing. The motion shall set forth:

(A) The interest of the movant relating to the property or events that are the subject of the proceeding;
(B) The reasons why such interest is not otherwise adequately represented by the parties already involved in the proceeding; and
(C) A showing that intervention will not unduly delay or prejudice the adjudication of the issues.

(ii) Such intervention is not a matter of right but of the sound discretion of the Judge. In denying a motion to intervene, the Judge may alternatively permit the movant to participate in the proceeding as amicus curiae.

(c) Procedure for participation as amicus curiae. Any person may move to participate as amicus curiae in a proceeding before a Judge. Such participation as amicus curiae shall not be a matter of right but of the sound discretion of the Judge. A motion for participation as amicus curiae shall set forth the interest of the movant and show that the granting of the motion will not unduly delay or prejudice the adjudication of the issues. If the Judge permits amicus curiae participation, the Judge’s order shall specify the time within which such amicus curiae memorandum, brief, or other pleading must be filed and the time within which a reply may be made. The movant may conditionally attach its memorandum, brief, or other pleading to its motion for participation as amicus curiae.

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which enter commerce or has operations or products that affect commerce. Jurisdictional facts that are alleged are deemed admitted unless specifically denied in a responsive pleading.

(b) How to file. Unless otherwise provided for in the Act, these rules, or by order, filing may be accomplished in person, by U.S. Postal Service, by third-party commercial carrier, by facsimile transmission, or by electronic transmission. Instructions for electronic filing may be accessed on the Commission’s Web site (http://www.fmshrc.gov).

(c) Where to file. Unless otherwise provided for in the Act, these rules, or by order:


(2) Filing in person, by U.S. Postal Service, by third-party commercial carrier, or by facsimile transmission—(i) Before a Judge has been assigned. Before a Judge has been assigned to a case, all documents shall be filed with the Commission. Documents filed with the Commission shall be addressed to the Executive Director and mailed or delivered to the Docket Office, Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004–1710; facsimile delivery shall be transmitted to (202) 434–9954.

(ii) After a Judge has been assigned. After a Judge has been assigned, and before a decision has been issued, documents shall be filed with the Judge at the address set forth on the notice of the assignment.

(iii) Interlocutory review. Documents filed in connection with interlocutory review shall be filed with the Commission in accordance with §2700.76.

(iv) After a Judge has issued a final decision. After the Judge has issued a final decision, documents shall be filed with the Commission as described in paragraph (c)(2)(i) of this section.

(d) 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 email 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.

(e) Privacy considerations. Persons submitting information to the Commission shall protect information that tends to identify certain individuals or tends to constitute an unwarranted intrusion of personal privacy in the following manner:

(1) All but the last four digits of social security numbers, financial account numbers, driver’s license numbers, or other personal identifying numbers, shall be redacted or excluded;

(2) Minor children shall be identified only by initials;

(3) If dates of birth must be included, only the year shall be used;

(4) Parties shall exercise caution when filing medical records, medical treatment records, medical diagnosis records, employment history, and individual financial information, and shall redact or exclude certain materials unnecessary to a disposition of the case.

(f) Effective date of filing. Unless otherwise provided for in the Act, these rules, or by order:

(1) Filing by electronic transmission. When filing is by electronic transmission, filing is effective upon successful receipt by the Commission. The electronic transmission shall be in the manner specified by the Commission’s Web site (http://www.fmshrc.gov).

(2) Filing in person, by U.S. Postal Service, by third-party commercial carrier, or by facsimile transmission. When filing is by U.S. Postal Service, filing is effective upon mailing, except that the filing of a motion for extension of time, any document in an emergency response plan dispute proceeding, a petition for review of a temporary reinstatement order, a motion for summary decision, a petition for discretionary review, and a motion to exceed page limit is effective only upon receipt. See §§2700.9(a), 2700.24(d), 2700.45(f), 2700.67(a), 2700.70(a), (f), and 2700.75(f). When filing is in person, by
third-party commercial carrier, or by facsimile, filing is effective upon successful receipt by the Commission.

(g) **Number of copies.** Unless otherwise ordered or stated in this part, only the original of a document shall be filed.

(h) **Form of pleadings.** All documents, including those filed electronically, shall appear in at least 12-point type on paper 8½ by 11 inches in size, with margins of at least 1 inch on all four sides. Text and footnotes shall appear in the same size type. Text shall be double spaced. Headings and footnotes may be single spaced. Quotations of 50 words or more may be single spaced and indented left and right. Excessive footnotes are prohibited. The failure to comply with the requirements of this paragraph or the use of compacted or otherwise compressed printing features may be grounds for rejection of a pleading.

(i) **Citation to a decision of a Judge.** Each citation to a decision of a Judge should include “(ALJ)” at the end of the citation.

(j) **Status or informational requests.** Information concerning filing requirements, the status of cases, or docket information may be accessed through the Commission’s Web site (http://www.fmshrc.gov). In the event such information is unavailable through the Commission’s Web site or the requesting party does not have access to the Web site, such status or informational requests must be directed to the Docket Office of the Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004–1710.

[78 FR 77356, Dec. 23, 2013]

§ 2700.6 **Signing of documents.**

(a) **Signature—(1) Documents not filed by electronic transmission.** A party or representative of the party shall sign a document by handwriting his signature.

(2) **Documents filed by electronic transmission.**

(i) A party or representative of the party may sign a document by including the notation “/s/” followed by the typewritten name of the party or representative of the party filing the document.

(ii) A party or representative of the party may sign a document by including a graphical duplicate of his handwritten signature.

(b) **Meaning of Signature.** A document or signature may not be denied legal effect or enforceability solely because it is in electronic form. When a party or representative of the party signs a document in the manner described in paragraph (a) of this section, that person’s signature shall constitute his certificate:

(1) That under the provisions of the law, including these rules and all federal conflict of interest statutes, he is authorized and qualified to represent the particular party in the matter; and

(2) That he has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

[78 FR 77357, Dec. 23, 2013]

§ 2700.7 **Service.**

(a) **Generally.** A copy of each document filed with the Commission shall be served on all parties. Whenever a party is represented by an attorney or other authorized representative who has entered an appearance on behalf of such party pursuant to §2700.3, service thereafter shall be made upon the attorney or other authorized representative. In addition, a copy of a notice of contest of a citation or order, a petition for assessment of penalty, a discrimination complaint, a complaint for compensation, and an application for temporary relief shall be served upon the representative of miners, if known.

(b) **Posting.** A copy of an order, citation, notice, or decision required under section 109 of the Act, 30 U.S.C. 819, to be posted on a mine bulletin board shall, upon receipt, be immediately posted on such bulletin board by the operator.

(c) **Manner of service.** Unless otherwise provided for in the Act, these rules, or by order:
§ 2700.8 Computation of time.

Unless otherwise provided for in the Act, these rules, or by order, the due date for a pleading or other deadline for party or Commission action (hereinafter “due date”) is determined sequentially as follows:

(a) Except to the extent otherwise provided herein (see, e.g., §§ 2700.24 and 2700.45), when the period of time prescribed for action is less than 11 days, Saturdays, Sundays, and federal holidays shall be excluded in determining the due date.

(b) When a party serves a pleading by a method of delivery resulting in other than same-day service, the due date for party action in response is extended 5 additional calendar days beyond the date otherwise prescribed, after consideration of paragraph (a) of this section where applicable.

(c) The day from which the designated period begins to run shall not be included in determining the due date. The last day of the prescribed period for action, after consideration of paragraphs (a) and (b) of this section where applicable, shall be included and be the due date, unless it is a Saturday, Sunday, federal holiday, or other day on which the Commission’s offices are not open or the Commission is open but unable to accept filings, in which event the due date shall be the next day which is not one of the aforementioned days.

(d) The time of filing with the Commission shall be determined using Washington, DC, local time. For filing by electronic means and by facsimile transmission, the due date ends at midnight Washington, DC, local time. For filing by other means, the due date ends at 5:00 p.m. Washington, DC, local time.

Example 1: A motion is filed with the Commission on Monday, July 1, 2013. Under §2700.10(d), other parties in the proceeding have 8 days in which to respond to the motion. Because the response period is less than 11 days, intervening weekends and holidays, such as Thursday, July 4, 2013, are excluded in determining the due date. A response is thus due by Friday, July 12, 2013. In addition, those parties not served with the motion on the day it was filed have 5 additional calendar days in which to respond, or until Wednesday, July 17, 2013.

Example 2: A Commission Judge issues his final decision in a case on Friday, July 5, 2013. Under §2700.70(a), parties have until August 4, 2013, to file with the Commission a petition for discretionary review of the Judge’s decision. Even though the decision was mailed, 5 additional calendar days are not added, because paragraph (b) of this section only applies to actions in response to parties’ pleadings. However, because August 4, 2013, is a Sunday, the actual due date for the petition is Monday, August 5, 2013.

Example 3: Pursuant to §2700.24(a), the Secretary of Labor files a referral of a citation arising out of a dispute over the content of an operator’s emergency response plan. Certain subsequent deadlines in such cases are specifically established by reference to calendar days, and thus paragraph (a) of this section would not necessarily apply in determining due dates. For instance, if the referral was filed on
Thursday, July 11, 2013, the short and plain statement the operator must file in response within 5 calendar days would be due Tuesday, July 16, 2013, because the intervening weekend days would not be excluded in determining the due date. If the fifth calendar day were to fall on a weekend, holiday, or other day on which the Commission is not open however, the terms of paragraph (c) would apply and the due date would be the next day the Commission is open.

[78 FR 77358, Dec. 23, 2013]

§ 2700.20 Notice of contest of a citation or order issued under section 104 of the Act.

(a) Who may contest. (1) An operator may contest:
(i) A citation or an order issued under section 104 of the Act, 30 U.S.C. 814;
(ii) A modification of a citation or an order issued under section 104 of the Act; and
(iii) The reasonableness of the length of time fixed for abatement in a citation or modification thereof issued under section 104 of the Act.

(2) A miner or representative of miners may contest:

§ 2700.9 Extensions of time.

(a) The time for filing or serving any document may be extended for good cause shown. Filing of a motion requesting an extension of time is effective upon receipt. A motion requesting an extension of time shall be received no later than 3 days prior to the expiration of the time allowed for the filing or serving of the document, and shall comply with § 2700.10. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by electronic transmission (email) is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery.

(b) In exigent circumstances, an extension of time may be granted even though the request was filed after the designated time for filing has expired. In such circumstances, the party requesting the extension must show, in writing, the reasons for the party’s failure to make the request before the time prescribed for the filing had expired.

(c) This rule does not apply to petitions for discretionary review filed pursuant to section 113(d)(2)(A)(i) of the Act, 30 U.S.C. 823(d)(2)(A)(i), and § 2700.70(a).

§ 2700.10 Motions.

(a) An application for an order shall be by motion which, unless made during a hearing or a conference, shall be made in writing and shall set forth the relief or order sought.

(b) Written motions shall be set forth in a document separate from other pleadings.

(c) Prior to filing any motion other than a dispositive motion, 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.

(d) A statement in opposition to a written motion may be filed by any party within 8 days after service upon the party. Unless otherwise ordered, oral argument on motions will not be heard. Where circumstances warrant, a motion may be ruled upon prior to the expiration of the time for response; a party adversely affected by the ruling may seek reconsideration.

§ 2700.11 Withdrawal of pleading.

A party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission.

§ 2700.12 Consolidation of proceedings.

The Commission and its Judges may at any time, upon their own motion or a party’s motion, order the consolidation of proceedings that involve similar issues.

Subpart B—Contests of Citations and Orders

§ 2700.20 Notice of contest of a citation or order issued under section 104 of the Act.

(a) Who may contest. (1) An operator may contest:
(i) A citation or an order issued under section 104 of the Act, 30 U.S.C. 814;
(ii) A modification of a citation or an order issued under section 104 of the Act; and
(iii) The reasonableness of the length of time fixed for abatement in a citation or modification thereof issued under section 104 of the Act.

(2) A miner or representative of miners may contest:

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(i) The issuance, modification or termination of any order issued under section 104 of the Act; and
(ii) The reasonableness of the length of time fixed for abatement in a citation or modification thereof issued under section 104 of the Act.

(b) Time to contest. Contests filed by an operator pursuant to paragraph (a)(1) of this section shall be filed with the Secretary at the appropriate Regional Solicitor’s Office or at the Solicitor’s Office, Mine Safety and Health Division, Arlington, Virginia, within 30 days of receipt by the operator of the contested citation, order, or modification. Contests filed by a miner or representative of miners pursuant to paragraph (a)(2) of this section shall be filed in the same manner within 30 days of receipt by the miner or representative of miners of the contested order, modification, or termination.

(c) Notification by the Secretary. The Secretary, in accordance with section 105(d) of the Act, 30 U.S.C. 815(d), shall immediately advise the Commission of such notice of contest upon its receipt.

(d) Copy to Commission. The contesting party shall also file a copy of his notice of contest with the Commission at the time he files with the Secretary.

(e) Contents of notice of contest. (1) A notice of contest shall contain a short and plain statement of:

(i) The party’s position with respect to each issue of law and fact that the party contends is pertinent; and
(ii) The relief requested by the party.

(2) A legible copy of the contested citation or order shall be attached to the notice of contest. If a legible copy is not available, the notice of contest shall set forth the text of the contested citation or order.

(f) Answer. Within 20 days after service of a notice of contest, the Secretary shall file an answer responding to each allegation of the notice of contest.

§ 2700.21 Effect of filing notice of contest of citation or order.

(a) The filing of a notice of contest of a citation or order issued under section 104 of the Act, 30 U.S.C. 814, does not constitute a challenge to a proposed penalty assessment that may subsequently be issued by the Secretary under section 105(a) of the Act, 30 U.S.C. 815(a), which is based on that citation or order. A challenge to such a proposed penalty assessment must be filed as a separate notice of contest of the proposed penalty assessment. See § 2700.26.

(b) An operator’s failure to file a notice of contest of a citation or order issued under section 104 of the Act, 30 U.S.C. 814, shall not preclude the operator from challenging, in a penalty proceeding, the fact of violation or any special findings contained in a citation or order including the assertion in the citation or order that the violation was of a significant and substantial nature or was caused by the operator’s unwarrantable failure to comply with the standard.


§ 2700.22 Notice of contest of imminent danger withdrawal orders under section 107 of the Act.

(a) Time to file. A notice of contest of a withdrawal order issued under section 107 of the Act, 30 U.S.C. 817, or any modification or termination of the order, shall be filed with the Commission by the contesting party within 30 days of receipt of the order or any modification or termination of the order.

(b) Contents of notice of contest. (1) A notice of contest shall contain a short and plain statement of:

(i) The contesting party’s position on each issue of law and fact that the contesting party contends is pertinent; and
(ii) The relief requested by the contesting party.

(2) A legible copy of the contested order shall be attached to the notice of contest. If a legible copy is not available, the notice of contest shall set forth the text of the contested order.

(c) Answer. Within 15 days after service of the notice of contest, the Secretary shall file an answer responding to each allegation of the notice of contest.

§ 2700.23 Review of a subsequent citation or order.

(a) The contesting party shall file any subsequent citation or order that

modifies or terminates the citation or order under review within 30 days of its receipt. The notice of contest under section 105 or section 107 of the Act, 30 U.S.C. 815 and 817, unless withdrawn, shall be deemed to challenge any such subsequent citation or order.

(b) A person who is not a party in a pending proceeding for review of a citation or order may obtain review of a modification or termination of the citation or order by filing a notice of contest under section 105 or section 107 of the Act. The notice of contest shall be filed within 30 days of receipt of the citation or order that modifies or terminates the citation or order being reviewed.

§ 2700.24 Emergency response plan dispute proceedings.

(a) Referral by the Secretary. The Secretary shall immediately refer to the Commission any citation arising from a dispute between the Secretary and an operator with respect to the content of the operator’s emergency response plan, or any refusal by the Secretary to approve such a plan. Any referral made pursuant to this paragraph shall be made within two business days of the issuance of any such citation.

(b) Contents of referral. A referral shall consist of a notice of plan dispute describing the nature of the dispute; a copy of the citation issued by the Secretary; a short and plain statement of the Secretary’s position with respect to any disputed plan provision; and a copy of the disputed provision of the emergency response plan.

(c) Short and plain statement by the operator. Within five calendar days following the filing of the referral, the operator shall file with the Commission a short and plain statement of its position with respect to the disputed plan provision.

(d) Filing and service of pleadings. The filing with the Commission of any document in an emergency response plan dispute proceeding, including the referral, is effective upon receipt. A copy of each document filed with the Commission in such a proceeding shall be served on all parties and on any miner or miners’ representative who has participated in the emergency response plan review process by a method of service no less expeditious than that used for filing, except that if service by electronic transmission (email) is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery.

(e) Proceedings before the Judge—(1) Submission of materials. Within 15 calendar days of the referral, the parties shall submit to the Judge assigned to the matter all relevant materials regarding the dispute. Such submissions shall include a request for any relief sought and may include proposed findings of fact and conclusions of law. Such materials may be supported by affidavits or other verified documents, and shall specify the grounds upon which the party seeks relief. Supporting affidavits shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the matters stated.

(2) Hearing. (i) Within 5 calendar days following the filing of the Secretary’s referral, any party may request a hearing and shall so advise the Commission’s Chief Administrative Law Judge or his designee, and simultaneously notify the other parties.

(ii) Within 10 calendar days following the filing of the Secretary’s referral, the Commission’s Chief Administrative Law Judge or his designee may issue an order scheduling a hearing on the Judge’s own motion, and must immediately so notify the parties.

(iii) If a hearing is ordered under paragraphs (e)(2)(i) or (ii) of this section, the hearing shall be held within 15 calendar days of the filing of the referral. The scope of such a hearing is limited to the disputed plan provision or provisions. If no hearing is held, the Judge assigned to the matter shall review the materials submitted by the parties pursuant to paragraph (e)(1) of this subsection, and shall issue a decision pursuant to paragraph (f) of this section.

(f) Disposition—(1) Decision of the Judge. Within 15 calendar days following receipt by the Judge of all submissions and testimony made pursuant to paragraph (e) of this subsection, the Judge shall issue a decision that constitutes the Judge’s final disposition of the proceedings. The decision shall be
in writing and shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order. The parties shall be notified of the Judge’s decision by the most expeditious means reasonably available. Service of the decision shall be by certified or registered mail, return receipt requested.

(2) Stay of plan provision. Notwithstanding §2700.69(b), a Judge shall retain jurisdiction over a request for a stay in an emergency response plan dispute proceeding. Within two business days following service of the decision, the operator may file with the judge a request to stay the inclusion of the disputed provision in the plan during the pendency of an appeal to the Commission pursuant to paragraph (g) of this section. The Secretary shall respond to the operator’s motion within two business days following service of the motion. The judge shall issue an order granting or denying the relief sought within two business days after the filing of the Secretary’s response.

(g) Review of decision. Any party may seek review of a Judge’s decision, including the Judge’s order granting or denying a stay, by filing with the Commission a petition for discretionary review pursuant to §2700.70. Neither an operator’s request for a stay nor the issuance of an order addressing the stay request affects the time limits for filing a petition for discretionary review of a Judge’s decision with the Commission under this subparagraph. The Commission shall act upon a petition on an expedited basis. If review is granted, the Commission shall issue a briefing order. Except as otherwise ordered or provided for herein, the provisions of §2700.75 apply. The Commission will not grant motions for extension of time for filing briefs, except under extraordinary circumstances.

section of the Act or regulations alleged to be violated.

(2) Include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act, 30 U.S.C. 820(i), unless a single penalty assessment has been proposed under 30 CFR 100.4.

(3) State whether the citation or order has been contested pursuant to §2700.20 and the docket number of any contest proceeding.

(4) Advise the party against whom the petition is filed that an answer to the petition must be filed within 30 days pursuant to §2700.29 and that the answer must be filed regardless of whether the party has already filed a notice of contest of the citation, order, or proposed penalty assessment involved.

(c) Attachments. A legible copy of each citation or order for which a penalty is sought shall be attached to the petition for assessment of penalty. If a legible copy is not available, the petition for assessment of penalty shall set forth the text of the citation or order.


§ 2700.29 Answer.

A party against whom a petition for assessment of penalty is filed shall file an answer within 30 days after service of the petition for assessment of penalty. An answer shall include a short and plain statement responding to each allegation of the petition.

§ 2700.30 Assessment of penalty.

(a) In assessing a penalty the Judge shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) of the Act, 30 U.S.C. 820(i), and incorporate such determination in a written decision. The decision shall contain findings of fact and conclusions of law on each of the statutory criteria and an order requiring that the penalty be paid.

(b) In determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary or by any offer of settlement made by a party.

§ 2700.31 Penalty settlement.

(a) General. A proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion. In all penalty proceedings, except for discrimination proceedings arising under section 105(c) of the Mine Act, 30 U.S.C. 815(c), a settlement motion must be accompanied by a proposed order approving settlement. In discrimination proceedings, a party shall file a motion to approve settlement that includes the factual support described in paragraph (b)(1) of this section, and that shall be filed and served in accordance with the provisions of 29 CFR 2700.5 and 2700.7, respectively. In discrimination proceedings, a party need not file a proposed order.

(b) Content of motion.

(1) Factual support. A motion to approve a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. Rather than setting forth such information in detail, the motion may incorporate by reference the information which has been included in the accompanying proposed order as required by paragraph (c)(1) of this section.

(2) Certification. The party filing a motion must certify that the opposing party has authorized the filing party to represent that the opposing party consents to the granting of the motion and the entry of the proposed order approving settlement.

(c) Content of proposed order.

(1) Factual support. A proposed order approving a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. Forms for proposed orders approving settlement are available on the Commission’s Web site (http://www.fmshrcc.gov). Although parties are not required to use the forms on the Commission’s Web site, if proposed orders fail to include pertinent information, the motion and proposed order may be rejected for filing by the Commission in accordance with paragraph...
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(f) of this section. Proposed orders shall not be submitted in PDF format.

(2) Appearance by CLR. If a motion has been filed by a Conference and Litigation Representative (“CLR”) on behalf of the Secretary, the proposed order approving settlement accompanying the motion shall include a provision in which the Judge accepts the CLR to represent the Secretary in accordance with the notice of either limited or unlimited appearance previously filed with the Commission. A CLR does not need to obtain authorization from the Commission to represent the Secretary before the CLR files a motion to approve settlement and proposed order.

(d) Filing and service of motion accompanied by proposed order—(1) Electronic filing. A motion and proposed order shall be filed electronically according to the requirements set forth in this rule and instructions on the Commission’s Web site (http://www.fmshrc.gov). Filing is effective upon successful receipt by the Commission.

(i) Signatures. Any signature line set forth within a motion to approve settlement submitted electronically shall include the notation “/s/” followed by the typewritten name of the party or representative of the party filing the document, or by the graphical duplicate of the handwritten signature of the party or representative of the party filing the document. Such representation of the signature shall be deemed to be the original signature of the representative for all purposes unless the party representative shows that such representation of the signature was unauthorized. See 29 CFR 2700.6.

(ii) Status of documents. A motion and proposed order filed electronically constitute written documents for the purpose of applying the Commission’s procedural rules (29 CFR part 2700), and such rules apply unless an exception to those rules is specifically set forth in this rule.

(2) Filing by non-electronic means. A party may file a motion to approve settlement and an accompanying proposed order by non-electronic means only with the permission of the Judge.

(3) Service. A settlement motion and proposed order shall be served on all parties or, if parties are represented, upon their representatives, by the most expeditious method possible and at least five business days before the motion and proposed order are filed with the Commission. If a party cannot be served by email, facsimile transmission, or commercial delivery, a copy of the motion and proposed order may be served by mail. A certificate of service shall accompany the motion and proposed order setting forth the date, method of service, and all contact information used.

(e) Filing of motion and proposed order prior to filing of petition. If a motion to approve settlement and proposed order is filed with the Commission before the Secretary has filed a petition for assessment of penalty, the filing party must also submit as attachments, electronic copies of the proposed penalty assessment and citations and orders at issue. If such attachments are filed, the Secretary need not file a petition for assessment of penalty.

(f) Non-acceptance of motion and proposed order. If a party filing a motion to approve settlement and a proposed order fails to include in the motion and proposed order pertinent information required by this rule and the Commission’s instructions posted on the Commission’s Web site, the Commission will not accept for filing the motion and proposed order. Rather, the Commission will inform the filing party of the need for correction and resubmission.

(g) Final order. Any order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record. Such order shall become the final order of the Commission 40 days after issuance unless the Commission has directed that the order be reviewed. A Judge may correct clerical errors in an order approving settlement in accordance with the provisions of 29 CFR 2700.69(c).

§ 2700.35 Time to file.
A complaint for compensation under section 111 of the Act, 30 U.S.C. 821, shall be filed within 90 days after the beginning of the period during which the complainants are idled or would have been idled by the order that gives rise to the claim.

§ 2700.36 Contents of complaint.
A complaint for compensation shall include:
(a) A short and plain statement of the facts giving rise to the claim, including the period for which compensation is claimed;
(b) The total amount of the compensation claimed, if known; and
(c) A legible copy of any pertinent order of withdrawal or, if a legible copy is not available, the text of the order.

§ 2700.37 Answer.
Within 30 days after service of a complaint for compensation, the operator shall file an answer responding to each allegation of the complaint.

Subpart E—Complaints of Discharge, Discrimination or Interference

§ 2700.40 Who may file.
(a) The Secretary. A discrimination complaint under section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), shall be filed by the Secretary if, after an investigation conducted pursuant to section 105(c)(2), the Secretary determines that a violation of section 105(c)(1), 30 U.S.C. 815(c)(1), has occurred.
(b) Miner, representative of miners, or applicant for employment. A discrimination complaint under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary, after investigation, has determined that the provisions of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), have not been violated.

§ 2700.41 Time to file.
(a) The Secretary. A discrimination complaint shall be filed by the Secretary within 30 days after his written determination that a violation has occurred.
(b) Miner, representative of miners, or applicant for employment. A discrimination complaint may be filed by a complaining miner, representative of miners, or applicant for employment within 30 days after receipt of a written determination by the Secretary that no violation has occurred.

§ 2700.42 Contents of complaint.
A discrimination complaint shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested.

§ 2700.43 Answer.
Within 30 days after service of a discrimination complaint, the respondent shall file an answer responding to each allegation of the complaint.

§ 2700.44 Petition for assessment of penalty in discrimination cases.
(a) Petition for assessment of penalty in Secretary’s complaint. A discrimination complaint filed by the Secretary shall propose a civil penalty of a specific amount for the alleged violation of section 105(c) of the Act, 30 U.S.C. 815(c). The petition for assessment of penalty shall include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act, 30 U.S.C. 820(i).
(b) Petition for assessment of penalty after sustaining of complaint by miner, representative of miners, or applicant for employment. Immediately upon issuance of a decision by a Judge sustaining a discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), the Judge shall notify the Secretary in writing of such determination. The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of receipt of such notice.
§ 2700.45 Temporary reinstatement proceedings.

(a) Service of pleadings. A copy of each document filed with the Commission in a temporary reinstatement proceeding shall be served on all parties by a method of service as expeditious as that used for filing, except that if service by electronic transmission (email) is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery.

(b) Contents of application. An application for temporary reinstatement shall state the Secretary’s finding that the miner’s discrimination complaint was not frivolously brought and shall be accompanied by an affidavit setting forth the Secretary’s reasons supporting his finding. The application also shall include a copy of the miner’s complaint to the Secretary, and proof of notice to and service on the person against whom relief is sought by the most expeditious method of notice and delivery reasonably available.

(c) Request for hearing. Within 10 calendar days following receipt of the Secretary’s application for temporary reinstatement, the person against whom relief is sought shall advise the Commission’s Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary’s application and, if based on the contents thereof the Judge determines that the miner’s complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement.

(d) Hearing. The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner’s complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

(e) Order on application. (1) Within 7 calendar days following the close of a hearing on an application for temporary reinstatement, the Judge shall issue a written order granting or denying the application. However, in extraordinary circumstances, the Judge’s time for issuing an order may be extended as deemed necessary by the Judge.

(2) The Judge’s order shall include findings and conclusions supporting the determination as to whether the miner’s complaint has been frivolously brought.

(3) The parties shall be notified of the Judge’s determination by the most expeditious means reasonably available. Service of the order granting or denying the application shall be by certified or registered mail, return receipt requested.

(4) A Judge’s order temporarily reinstating a miner is not a final decision within the meaning of §2700.69, and except during appellate review of such order by the Commission or courts, the Judge shall retain jurisdiction over the temporary reinstatement proceeding.

(f) Review of order. Review by the Commission of a Judge’s written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition, which shall be captioned “Petition for Review of Temporary Reinstatement Order,” with supporting arguments, within 5 business days following receipt of the Judge’s written order. The filing of any such petition is effective upon receipt. The filing of a petition shall not stay the effect of the Judge’s order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances. Any response shall be
§ 2700.52 Expedition of proceedings.

(a) Motions. In addition to making a written motion pursuant to §2700.10, a party may request expedition of proceedings by oral motion, with concurrent notice to all parties. Oral motions filed within 5 business days following service of a petition. Pleadings under this rule shall include proof of service on all parties by means of delivery no less expeditious than that used for filing, except that if service by electronic transmission (email) is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery. The Commission’s ruling on a petition shall be made on the basis of the petition and any response (any further briefs will be entertained only at the express direction of the Commission), and shall be rendered within 10 calendar days following receipt of any response or the expiration of the period for filing such response. In extraordinary circumstances, the Commission’s time for decision may be extended.

(g) Dissolution of order. If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), and §2700.40(b) of these rules.

§ 2700.47 Contents of application.

(a) An application for temporary relief shall contain:
(1) A showing of substantial likelihood that the findings and decision of the Judge or the Commission will be favorable to the applicant;
(2) A statement of the specific relief requested; and
(3) A showing that such relief will not adversely affect the health and safety of miners in the affected mine.

(b) An application for temporary relief may be supported by affidavits or other evidence.

Subpart F—Applications for Temporary Relief

§ 2700.46 Procedure.

(a) When to file. As provided in section 105(b)(2) of the Act, 30 U.S.C. 815(b)(2), an application for temporary relief from any modification or termination of any order or from any order issued under section 104 of the Act, 30 U.S.C. 814, may be filed at any time before such order becomes final. No temporary relief shall be granted with respect to a citation issued under section 104(a) or (f) of the Act, 30 U.S.C. 814(a) and (f).

(b) Statements in opposition. Any party opposing the application shall file a statement in opposition within 4 days after receipt of the application.

(c) Prior hearing required. Temporary relief shall not be granted prior to a hearing on such application.

(d) Service of pleadings. A copy of each document filed with the Commission under subpart F of this part must be served on all parties by a means of delivery no less expeditious than that used for filing, except that if service by electronic transmission (email) is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery.

Subpart G—Hearings

§ 2700.50 Assignment of Judges.

 Judges shall be assigned cases in rotation as far as practicable.

§ 2700.51 Hearing dates and sites.

All cases will be assigned a hearing date and site by order of the Judge. In fixing the time and place of the hearing, the Judge shall give due regard to the convenience and necessity of the parties or their representatives and witnesses, the availability of suitable hearing facilities, and other relevant factors.

§ 2700.52 Expedition of proceedings.

(a) Motions. In addition to making a written motion pursuant to §2700.10, a party may request expedition of proceedings by oral motion, with concurrent notice to all parties. Oral motions
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shall be reduced to writing within 24 hours.

(b) *Timing of hearing.* Unless all parties consent to an earlier hearing, an expedited hearing on the merits of the case shall not be held on less than 4 days notice.


§ 2700.53 Prehearing conferences and statements.

(a) The Judge may require the parties to participate in a prehearing conference, either in person or by telephone. The participants at any such conference may consider and take action with respect to:

(1) The formulation and simplification of the issues;

(2) The possibility of obtaining stipulations, admissions of fact and of documents that will avoid unnecessary proof and advance rulings from the Judge on the admissibility of evidence;

(3) The exchange of exhibits and the names of witnesses and a synopsis of the testimony expected from each witness;

(4) The necessity or desirability of amendments to the pleadings and the joinder of parties;

(5) The possibility of agreement disposing of any or all of the issues in dispute;

(6) Such other matters as may aid in the expedition of the hearing or the disposition of the case.

(b) The Judge may also require the parties to submit prehearing statements addressing one or more of the matters set forth in paragraph (a) of this section.

§ 2700.54 Notice of hearing.

Except in expedited proceedings, written notice of the time, place, and nature of the hearing, the legal authority under which the hearing is to be held, and the matters of fact and law asserted shall be given to all parties at least 20 days before the date set for hearing. The notice shall be mailed by certified or registered mail, return receipt requested.

§ 2700.55 Powers of Judges.

Subject to these rules, a Judge is empowered to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas authorized by law;

(c) Rule on offers of proof and receive relevant evidence;

(d) Order depositions to be taken;

(e) Regulate the course of the hearing;

(f) Hold conferences for the settlement or simplification of the issues;

(g) Dispose of procedural requests or similar matters;

(h) Make decisions in the proceedings before him, provided that he shall not be assigned to make a recommended decision; and

(i) Take other action authorized by these rules, by 5 U.S.C. 556, or by the Act.

§ 2700.56 Discovery; general.

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; or requests for admissions, for production of documents or objects or for permission to enter upon property for inspecting, copying, photographing, and gathering information.

(b) *Scope of discovery.* Parties may obtain discovery of any relevant, nonprivileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.

(c) *Limitation of discovery.* Upon motion by a party or by the person from whom discovery is sought or upon his own motion, a Judge may, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense.

(d) *Initiation of discovery.* Discovery may be initiated after an answer to a notice of contest, an answer to a petition for assessment of penalty, or an answer to a complaint under section 105(c) or 111 of the Act has been filed. 30 U.S.C. 815(c) and 821.

(e) *Completion of discovery.* Discovery shall not unduly delay or otherwise impede disposition of the case, and must be completed at least 20 days prior to the scheduled hearing date. For good
§ 2700.57 Depositions.

(a) Generally. Any party, without leave of the Judge, may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories.

(b) Orders for deposition. If the parties are unable to agree, the time, place, and manner of taking depositions shall be governed by order of the Judge.

§ 2700.58 Interrogatories, requests for admissions and requests for production of documents.

(a) Interrogatories. Any party, without leave of the Judge, may serve written interrogatories upon another party. A party served with interrogatories shall answer each interrogatory separately and fully in writing under oath within 25 days of service unless the proponent of the interrogatories agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to an interrogatory shall state the basis for the objection in its answer.

(b) Requests for admissions. Any party, without leave of the Judge, may serve a written request for admissions on another party. A party served with a request for admissions shall respond to each request separately and fully in writing within 25 days of service, unless the party making the request agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to a request for admissions shall state the basis for the objection in its response. Any matter admitted under this rule is conclusively established for the purpose of the pending proceeding unless the Judge, on motion, permits withdrawal or amendment of the admission.

(c) Request for production, entry or inspection. Any party, without leave of the Judge, may serve on another party a written request to produce and permit inspection, copying or photocopying of designated documents or objects, or to permit a party or his agent to enter upon designated property to inspect and gather information. A party served with such a request shall respond in writing within 25 days of service unless the party making the request agrees to a longer time. The Judge may order a shorter or longer period for responding. A party objecting to a request for production, entry or inspection shall state the basis for the objection in its response.

§ 2700.59 Failure to cooperate in discovery; sanctions.

Upon the failure of any person, including a party, to respond to a discovery request or upon an objection to such a request, the party seeking discovery may file a motion with the Judge requesting an order compelling discovery. If any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate, including deeming as established the matters sought to be discovered or dismissing the proceeding in favor of the party seeking discovery. For good cause shown the Judge may excuse an objecting party from complying with the request.

§ 2700.60 Subpoenas.

(a) Compulsory attendance of witnesses and production of documents. The Commission and its Judges are authorized to issue subpoenas, on their own motion or on the oral or written application of a party, requiring the attendance of witnesses and the production of documents or physical evidence. A subpoena may be served by any person who is at least 18 years of age. A subpoenaed witness shall be paid the same fees and mileage as are paid in the district courts of the United States. The witness fees and mileage shall be paid by the party at whose request the witness appears, or by the Commission if a witness is subpoenaed on the motion of the Commission or a Judge. This paragraph does not apply to Government
employees who are called as witnesses by the Government.

(c) Motions to revoke or modify subpoenas. Any person served with a subpoena may move within 5 days of service or at the hearing, whichever is sooner, to revoke or modify the subpoena. The Commission or the Judge, as appropriate, shall revoke or modify the subpoena if it seeks information outside the proper scope of discovery as set forth in §2700.56(b); or if it does not describe with sufficient particularity the evidence required to be produced; or if for any other reason it is found to be invalid or unreasonable. The Commission or the Judge shall set forth a concise statement of the grounds for such ruling.

(d) Availability of transcript. Persons compelled to submit evidence at a public proceeding are entitled to obtain, on payment of prescribed costs, a transcript of that part of the proceeding that sets forth their testimony or refers to their production of evidence.

(e) Failure to comply. Upon the failure of any person to comply with an order to testify or with a subpoena issued by the Commission or the Judge, the Judge or the Commission's General Counsel, at the request of the Judge or at the direction of the Commission, may undertake to initiate proceedings in the appropriate district court of the United States for the enforcement of the subpoena.

§ 2700.61 Name of miner informant.

A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.

§ 2700.62 Name of miner witness.

A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness.

§ 2700.63 Evidence; presentation of case.

(a) Relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible.

(b) The proponent of an order has the burden of proof. A party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

§ 2700.64 Retention of exhibits.

All exhibits received in evidence in a hearing or submitted for the record in any proceeding before the Commission shall be retained with the official record of the proceeding. The withdrawal of original exhibits may be permitted by the Commission or the Judge, upon request and after notice to the other parties, if true copies are substituted, where practical, for the originals.

§ 2700.65 Proposed findings, conclusions and orders.

The Judge may require the submission of proposed findings of fact, conclusions of law, and orders, together with supporting briefs. The proposals shall be served upon all parties, and shall contain adequate references to the record and authorities.

§ 2700.66 Summary disposition of proceedings.

(a) Generally. When a party fails to comply with an order of a Judge or these rules, except as provided in paragraph (b) of this section, an order to show cause shall be directed to the party before the entry of any order of default or dismissal. The order shall be mailed by registered or certified mail, return receipt requested.

(b) Failure to attend hearing. If a party fails to attend a scheduled hearing, the Judge, where appropriate, may find the party in default or dismiss the proceeding without issuing an order to show cause.

(c) Penalty proceedings. When the Judge finds a party in default in a civil penalty proceeding, the Judge shall also enter an order assessing appropriate penalties and directing that such penalties be paid.
§ 2700.67 Summary decision of the Judge.

(a) Filing of motion for summary decision. At any time after commencement of a proceeding and no later than 25 days before the date fixed for the hearing on the merits, a party may move the Judge to render summary decision disposing of all or part of the proceeding. Filing of a summary decision motion and an opposition thereto shall be effective upon receipt.

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

(1) That there is no genuine issue as to any material fact; and

(2) That the moving party is entitled to summary decision as a matter of law.

(c) Form of motion. A motion shall be accompanied by a memorandum of points and authorities specifying the grounds upon which the party seeks summary decision and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue. Each material fact set forth in the statement shall be supported by a reference to accompanying affidavits or other verified documents.

(d) Form of opposition. An opposition to a motion for summary decision shall include a memorandum of points and authorities specifying why the moving party is not entitled to summary decision and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered in favor of the moving party.

(e) Affidavits. Supporting and opposing affidavits shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the matters stated. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to the affidavit or be incorporated by reference if not otherwise a matter of record. The judge shall permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, admissions, or further affidavits.

(f) Case not fully adjudicated on motion. If a motion for summary decision is denied in whole or in part, the Judge shall ascertain what material facts are controverted and shall issue an order directing further proceedings as appropriate.


§ 2700.68 Substitution of the Judge.

(a) Generally. Should a Judge become unavailable to the Commission, the proceedings assigned to him shall be reassigned to a substitute Judge.

(b) Substitution following a hearing. The substitute Judge may render a decision based upon the existing record, provided the parties are notified of his intent and they are given an opportunity to object. An objection to the Judge rendering a decision based upon the existing record shall be filed within 10 days following receipt of the Judge’s notice, or the objection shall be deemed to be waived. An objection shall be founded upon a showing of a need for the resolution of conflicting material testimony requiring credibility determinations. Upon good cause shown the Judge may order a further hearing on the merits, which shall be limited, so far as practicable, to the testimony in dispute.

§ 2700.69 Decision of the Judge.

(a) Form and content of the Judge’s decision. The Judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include all findings of fact and conclusions of law, and 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 after the filing of the transcript. An order by a Judge approving a
§ 2700.70 Petitions for discretionary review.

(a) Procedure. Any person adversely affected or aggrieved by a Judge’s decision or order may file with the Commission a petition for discretionary review within 30 days after issuance of the decision or order. Filing of a petition for discretionary review is effective upon receipt. Two or more parties may join in the same petition; the Commission may consolidate related petitions. Procedures governing petitions for review of temporary reinstatement orders are found at § 2700.45(f).

(b) Review discretionary. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission. Review by the Commission shall be granted only by affirmative vote of at least two of the Commissioners present and voting.

(c) Grounds. Petitions for discretionary review shall be filed only upon one or more of the following grounds:

1. A finding or conclusion of material fact is not supported by substantial evidence;
2. A necessary legal conclusion is erroneous;
3. The decision is contrary to law or to the duly promulgated rules or decisions of the Commission;
4. A substantial question of law, policy, or discretion is involved; or
5. A prejudicial error of procedure was committed.

(d) Requirements. Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record, when assignments of error are based on the record, and by statutes, regulations, or other principal authorities relied upon. Except by permission of the Commission and for good cause shown, petitions for discretionary review shall not exceed 35 pages. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the Judge had not been afforded an opportunity to pass.

(e) Statement in opposition to petition. A statement in opposition to a petition for discretionary review may be filed, but the opportunity for such filing shall not require the Commission to delay its action on the petition.

(f) Motion for leave to exceed page limit. A motion requesting leave to exceed the page limit shall be received not less than 3 days prior to the date the petition for discretionary review is due to be filed, shall state the total number of pages proposed, and shall comply with § 2700.10. Filing of a motion requesting an extension of page limit is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by electronic transmission (email) is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery.
(g) **Scope of review.** If a petition is granted, review shall be limited to the issues raised by the petition, unless the Commission directs review of additional issues pursuant to §2700.71.

(h) **Denial of petition.** A petition not granted within 40 days after the issuance of the Judge's decision is deemed denied.


§ 2700.71 **Review by the Commission on its own motion.**

At any time within 30 days after the issuance of a Judge's decision, the Commission may, by the affirmative vote of at least two of the Commissioners present and voting, direct the case for review on its own motion. Review shall be directed only upon the ground that the decision may be contrary to law or Commission policy or that a novel question of policy has been presented. The Commission shall state in such direction for review the specific issue of law, Commission policy, or novel question of policy to be reviewed. Review shall be limited to the issues specified in such direction for review.

§ 2700.72 [Reserved]

§ 2700.73 **Procedure for intervention.**

After the Commission has directed a case for review, a person may move to intervene. A motion to intervene shall be filed within 30 days after the Commission's direction for review unless the Commission, for good cause shown, allows a later filing. Intervention before the Commission shall not be a matter of right but of the sound discretion of the Commission. A motion for participation as amicus curiae shall set forth the interest of the movant; indicate which party's position, if any, the movant supports; the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case; and show that the granting of the motion will not unduly delay the proceeding or prejudice any party. The movant may conditionally attach its brief to its motion for participation as amicus curiae.

(b) The brief of an amicus curiae shall be filed within the initial briefing period (see §2700.75(a)(1)) allotted to the party whose position the amicus curiae supports.

(c) In the interest of avoiding duplication of argument, however, the Commission may permit the filing of an amicus curiae brief within 20 days after the close of the briefing period set forth in §2700.75(a)(1), provided that the amicus curiae’s motion for participation as an amicus curiae is filed within the initial briefing period (see §2700.75(a)(1)) allotted to the party whose position the amicus curiae supports. If the Commission grants any such motion, the Commission’s order shall specify the time within which a
response or reply may be made to the amicus curiae brief.

(d) Any person who does not support a party in the proceeding must file its motion for participation as amicus curiae and brief no later than 20 days after initial briefs are filed (see §2700.75(c)). A brief of amicus curiae must comply with the requirements set forth in paragraph (a) of this section. A brief of amicus curiae must comply with §2700.75(c).

§ 2700.75 Briefs.

(a) Time to file—(1) Opening and response briefs. Within 30 days after the Commission grants a petition for discretionary review, the petitioner shall file his opening brief. If the petitioner desires, he may notify the Commission and all other parties within the 30-day period that his petition and any supporting memorandum are to constitute his brief. Other parties may file response briefs within 30 days after the petitioner’s brief is served. If the Commission directs review on its own motion, all parties shall file any opening briefs within 30 days of the direction for review. In such cases, a party may file a response brief within 20 days after service of the opposing party’s opening brief.

(2) Reply briefs. In cases where the Commission has granted a petition for discretionary review, the petitioner may file a reply brief within 20 days after the service of the response briefs.

(b) Additional briefs. No further briefs shall be filed except by leave of the Commission.

(c) Length of brief. Except by permission of the Commission and for good cause shown, opening and response briefs shall not exceed 35 pages, and reply briefs shall not exceed 15 pages. A brief of an amicus curiae shall not exceed 25 pages. A brief of an intervenor shall not exceed the page limitation applicable to the party whose position it supports in affirming or reversing the Judge, or if a different position is taken, such brief shall not exceed 25 pages. Tables of contents or authorities shall not be counted against the length of a brief.

(d) Motion for extension of time. A motion for an extension of time to file a brief shall comply with §2700.9. The Commission may decline to accept a brief that is not timely filed.

(e) Consequences of petitioner’s failure to file brief. If a petitioner fails to timely file a brief or to designate the petition as his brief, the direction for review may be vacated.

(f) Motion for leave to exceed page limit. A motion requesting leave to exceed the page limit for a brief shall be received not less than 3 days prior to the date the brief is due to be filed, shall state the total number of pages proposed, and shall comply with §2700.10. Filing of a motion requesting an extension of page limit is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by electronic transmission (email) is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery.

(g) Number of copies. Unless otherwise ordered or stated in this part, only the original of a document shall be filed.

(h) Table of contents. Each opening and response brief filed with the Commission shall contain a table of contents. Unless otherwise ordered by the Commission, a party is not required to submit a table of contents for a previously filed petition for discretionary review that has been designated as the party’s opening brief pursuant to paragraph (a) of this section.

§ 2700.76 Interlocutory review.

(a) Procedure. Interlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission. Procedures governing petitions for review of temporary reinstatement orders are found at §2700.45(f).

(1) Review cannot be granted unless:
§ 2700.80 Standards of conduct; disciplinary proceedings.

(a) Standards of conduct. Individuals practicing before the Commission or before Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

(b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct; has failed to comply with these rules or an order of the Commission or its Judges; has been disbarred or suspended by a court or administrative agency; or has been disciplined by a Judge under paragraph (e) of this section.

(c) Disciplinary proceedings shall be subject to the following procedure:

(i) The judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding; or

(ii) The Judge has denied a party’s motion for certification of the interlocutory ruling to the Commission, and the party files with the Commission a petition for interlocutory review within 30 days of the Judge’s denial of such motion for certification.

(2) In the case of either paragraph (a)(1)(i) or (ii) of this section, the Commission, by a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission, may grant interlocutory review upon a determination that the Judge’s interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding. Interlocutory review by the Commission shall not operate to suspend the hearing unless otherwise ordered by the Commission. Any grant or denial of interlocutory review shall be by written order of the Commission.

(b) Petitions for interlocutory review. Where the Judge denies a party’s motion for certification of an interlocutory ruling and the party seeks interlocutory review, a petition for interlocutory review shall be in writing and shall not exceed 15 pages. A copy of the Judge’s interlocutory ruling sought to be reviewed and of the Judge’s order denying the petitioner’s motion for certification shall be attached to the petition.

(c) Briefs. When the Commission grants interlocutory review, it shall also issue an order which addresses page limits on briefs and the sequence and schedule for filing of initial briefs, and, if permitted by the order, reply briefs.

(d) Scope of review. Unless otherwise specified in the Commission’s order granting interlocutory review, review shall be confined to the issues raised in the Judge’s certification or to the issues raised in the petition for interlocutory review.

§ 2700.81 Disciplinary referral. Except as provided in paragraph (e) of this section, a Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission shall forward to the Commission for action such information in the form of a written disciplinary referral. Whenever the Commission receives a disciplinary referral, the matter shall be assigned a docket number.

(2) Inquiry by the Commission. The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted. The Commission may require persons to submit affidavits setting forth their knowledge of relevant circumstances. If the Commission determines that disciplinary proceedings are not warranted, it shall issue an order terminating the referral.

(3) Transmittal and hearing. Whenever, as a result of its inquiry, the Commission, by a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission, determines that the circumstances warrant a hearing, the Commission’s Chief Administrative Law Judge shall assign the matter to a Judge, other than the referring Judge, for hearing and decision. The Commission shall specify the disciplinary issues to be resolved through hearing and may designate counsel to prosecute the matter before the Judge. The Judge shall provide the opportunity for reply and hearing on the specific disciplinary matters at issue. The individual shall have the opportunity to present evidence and cross-examine witnesses. The Judge’s decision shall include findings of fact and conclusions of law and either an order dismissing the proceedings or an appropriate disciplinary order, which may include reprimand, suspension, or disbarment from practice before the Commission.

(e) Misconduct before a Judge. A Judge may order the removal of any person, including a representative of a party, who engages in disruptive conduct in the Judge’s presence. If a representative is ordered removed, the Judge shall allow the party represented by the person a reasonable time to engage another representative. In all instances of removal of a person for disruptive conduct, the Judge shall place in the record a written statement on the matter. A party aggrieved by a Judge’s order of removal may appeal by requesting interlocutory review pursuant to §2700.76 or, alternatively, may assign the Judge’s ruling as error in a petition for discretionary review.


§ 2700.81 Recusal and disqualification.

(a) Recusal. A Commissioner or a Judge may recuse himself from a proceeding whenever he deems such action appropriate.

(b) Request to withdraw. A party may request a Commissioner or a Judge to withdraw on grounds of personal bias or other disqualification. A party shall make such a request by promptly filing an affidavit setting forth in detail the matters alleged to constitute personal bias or other grounds for disqualification.

(c) Procedure if Commissioner or Judge does not withdraw. If, upon being requested to withdraw pursuant to paragraph (b) of this section, the Commissioner or the Judge does not withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling. If the Judge does not withdraw, he shall proceed with the hearing, or, if the hearing has been completed, he shall proceed with the issuance of his decision, unless the Commission stays the hearing or further proceedings upon the granting of a petition for interlocutory review of the Judge’s decision not to withdraw.

§ 2700.82 Ex parte communications.

(a) For purposes of this section, the following definitions shall apply:

(1) Ex parte communication means an oral or written communication not on the public record concerning any matter or proceeding with respect to which
reasonable prior notice to all parties has not been given. A status or informational request does not constitute an ex parte communication.

(2) Status or informational request means a request for a status report on any matter or proceeding or a request concerning filing requirements or other docket information.

(3) Merits of a case, which shall be broadly construed by the Commission, includes discussion of the factual or legal issues in a case or resolution of those issues.

(b) Prohibited ex parte communication. There shall be no ex parte communication with respect to the merits of a case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties, intervenors, representatives, amici, or other interested persons.

(c) Procedure in case of violation. (1) In the event a prohibited ex parte communication occurs, the Commission or the Judge may make such orders or take such action to remedy the effect of the ex parte communication as circumstances require. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.

(2) A memorandum setting forth all ex parte communications, whether prohibited or not, shall be placed on the public record of the proceeding.

(d) Inquiries. Any inquiries concerning filing requirements, the status of cases before the Commission, or docket information shall be directed to the Office of General Counsel or the Docket Office of the Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004–1710.

§ 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.
§ 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
§ 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.
§ 2701.1 Purpose and scope.

(a) Purpose. The purpose of this part is to implement the Government in the Sunshine Act, 5 U.S.C. 552b. The rules in this part are intended to open, to the extent practicable, the meetings of the Commission to public observation while preserving the Commission’s ability to fulfill its responsibilities and respect the interests of persons in confidential consideration of sensitive matters.

(b) Scope. This part applies to all meetings of the Commission. A “meeting of the Commission” means a joint deliberation in person or by conference telephone call of at least a majority of either the members of the Commission or of a panel of three or more Commissioners that determines or results in the joint conduct or disposition of official Commission business, but does not include (1) deliberations regarding a decision to open or close a meeting, to withhold information about a meeting, and the circumstances of meetings, such as their time, place, and subject matter, and (2) the individual deliberations of Commission members of matters considered upon circulated documents or other notation procedure.

§ 2701.2 Open meetings policy; closure of meetings.

(a) Policy. Commission meetings will generally be open to public observation, including meetings concerning the disposition by the Commission of a formal adjudication. See 5 U.S.C. 522b(c)(10).

(b) Closure. Meetings may be closed, or certain information about a meeting may not be disclosed under the circumstances contemplated by 5 U.S.C. 522b(c)(1)–(10), and under the procedures specified by 5 U.S.C. 552b (d) and (f). Commission employees may attend closed meetings of the commission unless the notice of a closed meeting states otherwise.

§ 2701.3 Announcement of meetings.

(a) Generally. The Commission shall publicly announce and submit to the Federal Register at least 7 days before a meeting, the time, place, subject matter of a meeting, whether it is to be open or closed, and the name and phone number of the Commission employee who will respond to requests for information about the meeting. The description of the subject matter of a meeting at which the Commission will consider adjudicatory matters, shall include the names and docket numbers of the cases to be considered. The Commission shall also contact, by phone or mail, the parties to the cases to be considered at the meeting, shall post a copy of a notice of the meeting at the Office of Public Information, shall mail notices to persons who have requested inclusion of their names on a meeting mailing list, and may issue press releases.

(b) Shorter notice. If a majority of the members of the Commission or a panel of three or more Commissioners determines by a recorded vote that pressing Commission business requires that a meeting be called in less than 7 days, the announcement required by paragraph (a) of this section shall be made at the earliest practicable time.

(c) Changes in time, place, subject matter, and decision whether to open or close after public announcement of meeting. If the time or place of a meeting publicly announced is changed, or an item to be considered at such a meeting is to be deleted, the change or deletion shall be publicly announced without a recorded vote at the earliest practicable time in the manner required by paragraph (a) of this section. The subject matter of a meeting publicly announced shall not be expanded and the decision to open or close such a meeting shall not be changed unless a majority of the members of the Commission or if a panel of three or more Commissioners determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible; the Commission shall publicly announce such a change and the vote of each member upon the change at the earliest practicable time.
§ 2701.4 Request to open or close meeting.

Any person may request that the Commission open a meeting that it has earlier decided to close. Any person whose interest may be directly affected by the opening of a meeting may request that the meeting be closed. Two copies of a request shall be filed in writing with the Executive Director of the Commission at the earliest practicable time, and no later than one hour before the meeting. A request to close shall state the interest of the person that may be adversely affected. The Commission shall take a recorded vote on the request if one member desires that it do so. The Executive Director shall inform the requesting person of whether a vote was taken, and, if so, its outcome. Requests shall be addressed as follows: Sunshine Act Request, Office of the Executive Director, Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004–1710.


§ 2701.5 Petition for review.

Any person may petition the Commission to review any action he alleges to be in violation of this part or 5 U.S.C. 552b that was taken by any employee or member of the Commission. The petition shall be in writing and shall be filed with the Executive Director within 30 days of the alleged violation. The Commission shall consider and rule upon the petition with expedition.

§ 2701.6 Discussion during open meetings.

Deliberations, discussions, comments, statements, or observations made during the course of an open meeting do not constitute actions of the Commission, nor do they necessarily represent the basis for any Commission action. Comments made by a Commissioner or an employee of the Commission may be advanced for purposes of discussion or argument, or as an aside, and may not reflect the views or ultimate position of that Commissioner or employee. Reasons for decisions stated by a Commissioner at an open meeting may be later changed by that Commissioner, as may a Commissioner’s vote. For these reasons, persons who choose to act on the basis of discussions at open meetings do so entirely at their own risk and without any assurance that the Commission’s final decisions will be reflective of the discussions or initial vote.

§ 2701.7 Expedited closing procedure.

(a) Policy. Although it is the general policy of the Commission to open to the public meetings that may be subject to closure, including meetings concerning adjudication of cases, the Commission may find it necessary in the public interest to close meetings. The purpose of this section is to provide an expedited closing procedure under 5 U.S.C. 552b(d)(4). The Commission has determined that, inasmuch as the Commission’s responsibilities are almost entirely adjudicatory, a majority of its meetings may properly be closed under 5 U.S.C. 552b(c)(10). Although the Commission has to date held few meetings, those that have been held concerned the adjudication of cases and could properly have been closed.

(b) Procedure. A meeting may be closed if a majority of either the members of the Commission or of a panel of three or more Commissioners votes by recorded vote at the beginning of such a meeting to close it to the public. The record of the vote shall reflect the vote of each voting member and shall be made available to the public. A public announcement of the time, place, and subject matter of the meeting shall be made at the earliest practicable time, except to the extent that such information is exempt from disclosure under 5 U.S.C. 552b(c). Section 2701.3 does not apply to meetings closed under this section.

PART 2702—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

Sec. 2702.1 Purpose and scope.
2702.2 Location of headquarters.
2702.3 Requests for information.
2702.4 Materials available.
2702.5 Fees applicable—categories of requesters.

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2702.7 No fees; waiver or reduction of fees.

2702.8 Advance payment of fees; interest; debt collection procedures.


SOURCE: 45 FR 33607, May 20, 1980, unless otherwise noted.

§ 2702.1 Purpose and scope.

The Federal Mine Safety and Health Review Commission (Commission) is an independent agency with authority to adjudicate contests between the Mine Safety and Health Administration of the U.S. Department of Labor and private parties, as well as certain disputes solely between private parties, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The purpose of the rules in this part is to establish procedures for implementing the Freedom of Information Act, 5 U.S.C. 552, as amended by the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, 110 Stat. 3048; to provide guidance for those seeking to obtain information from the Commission; and to make all information subject to disclosure pursuant to this subchapter and FOIA, and not otherwise protected by law, readily available to the public. Additional guidance on obtaining information from the Commission can be found in the document entitled “FOIA Guide,” which is available upon request from the Commission or on the Commission’s Web site (http://www.fmshrc.gov). These rules apply only to records or information of the Commission or in the Commission’s custody. This part does not affect discovery in adversary proceedings before the Commission. Discovery is governed by the Commission’s Rules of Procedure in 29 CFR part 2700.

[72 FR 71790, Dec. 19, 2007]

§ 2702.2 Location of headquarters.


[77 FR 48430, Aug. 14, 2012]

§ 2702.3 Requests for information.

(a) Content of request. All requests for information should be in writing and should be mailed or delivered to Chief FOIA Officer, Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004–1710. See FOIA Guide for more information on the Commission of requests, including requests submitted electronically or by facsimile. The words “Freedom of Information Act Request” should be printed on the face of the envelope. Requests for information shall describe the particular record requested to the fullest extent possible and specify the preferred form or format (including electronic formats) of the response. The Commission shall accommodate requesters as to form or format if the record is readily reproducible in the requested form or format. When requesters do not specify the preferred form or format of the response, the Commission shall respond in the form or format in which the record is most accessible to the Commission.

(b) Response to request. The Chief FOIA Officer will determine whether to comply with the request. Except in unusual circumstances, as described in paragraph (c) of this section, the determination will be made within 20 working days of receipt. Appeals of adverse decisions may be made, in writing, to the Chairman of the Commission, at the same address, within 20 working days of the decision. The sitting Commissioners, by majority vote, will decide appeals within 20 working days after receipt. In the event of a tie vote of those Commissioners, the Chief FOIA Officer’s initial determination will be deemed approved by the Commission. Records to be disclosed shall be provided with the initial letter setting forth the determination as to the request or shall be sent as soon as possible thereafter.

(c) Processing of request. (1) In unusual circumstances as described in this paragraph, when additional time is
needed to respond to the initial request, the Commission shall acknowledge the request in writing within the 20-day period, describe the circumstances requiring the delay, and indicate the anticipated date for a substantive response that may not exceed 10 additional working days, except as provided in paragraph (d) of this section. With respect to a request for which a written notice has extended the time limit by 10 additional working days, and the Commission determines that it cannot make a response determination within that additional 10 working day period, the requester will be notified and provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request. Refusal by the requester to reasonably modify the request or arrange for an alternative time frame may be considered as a factor in determining whether exceptional circumstances exist for purposes of paragraph (d) of this section. For purposes of this paragraph, “unusual circumstances” that may justify a delay are:

(i) The need to search for and collect the requested records from other facilities that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are requested in a single request;

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the agency having substantial subject matter interest in the request; or

(iv) The need to consult with the submitter of requested information.

(2) Whenever it reasonably appears that certain requests by the same requester, or a group of requesters acting in concert, actually constitute a single request that would otherwise satisfy the unusual circumstances specified in this paragraph, and the requests involve clearly related matters, such requests may be aggregated for purposes of this paragraph. Multiple requests involving unrelated matters will not be aggregated.

(d) Additional time to respond to request. In the event that the Commission is unable to comply with the time limits for responding to a request specified in paragraphs (a) and (c) of this section, it may request additional time to complete its review of the records, and request a court to retain jurisdiction and allow it such additional time to complete its review, if it can show that exceptional circumstances exist and that it is exercising due diligence in responding to the request. For purposes of this paragraph, “exceptional circumstances” do not include a delay that results from a predictable workload of requests, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests. Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing the request (or a modified request) under paragraph (c) of this section shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this paragraph.

(e) Expedited processing of request. (1) A person requesting records from the Commission pursuant to this section may request expedited processing of his request in cases in which he can demonstrate a compelling need for the records requested. For purposes of this paragraph a compelling need means:

(i) That a failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) The information is urgently needed by a person primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity.

(2) A demonstration of compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of his knowledge and belief. Notice of the determination whether to grant expedited processing in response to a requester’s claim of compelling need
shall be provided to the person making the request within 10 calendar days after receipt of the request. The Commission will provide expeditious consideration of administrative appeals of determinations whether to provide expedited processing. Once a determination has been made to grant expedited processing, the Commission will process the request as soon as practicable.

(f) Denial of request. In denying a request for records, in whole or in part, the Commission shall state the reason for the denial; set forth the name and title or position of the person responsible for the denial of the request; make a reasonable effort to estimate the volume of the records denied; and provide this estimate to the person making the request, unless providing such an estimate would harm an interest protected by the exemption pursuant to which the request is denied. If an appeal is denied, the Commission’s notice of denial shall inform the requester of the right to obtain judicial review of the Commission’s action under 5 U.S.C. 552(a)(4)(B)–(G).

(g) Partial response to request. Any reasonably segregable portion of a record shall be provided to the person requesting it after the deletion of any exempt portions of the record. The amount of information deleted shall be indicated on the released portion of the record, at the place in the record the deletion is made if technically feasible, unless indicating the extent of the deletion would harm an interest protected by the exemption pursuant to which the deletion is made.

§ 2702.5 Fees applicable—categories of requesters.

(a) When documents are requested for commercial use, requesters will be assessed the full direct costs of searching for, reviewing for release, and duplicating the records sought.

(b) When records are being requested by educational or noncommercial scientific institutions whose purpose is scholarly or scientific research, and not for commercial use, the requester will be assessed only for the cost of duplicating the records sought, but no charge will be made for the first 100 paper pages reproduced.

(c) When records are being requested by representatives of the news media, the requester will be assessed only for the cost of duplicating the records sought, but no charge will be made for the first 100 paper pages reproduced.

(d) For any other request not described in paragraphs (a) through (c) of this section, the requester will be assessed the full direct costs of searching for and duplicating the records sought, except that the first two hours of manual search time and the first 100 paper pages of reproduction shall be furnished without charge.

(e) For purposes of paragraphs (b) through (d) of this section, whenever it reasonably appears that a requester, or
§ 2702.6 Fee schedule.

(a) Search fee. The fee for searching for information and records shall be the salary rate (that is, basic pay plus 16%) of the employee making the search. This hourly rate is listed on the Commission’s Web site at http://www.fmshrc.gov. Fees for searches of computerized records shall be the actual cost to the Commission, but shall not exceed $300 per hour. This fee includes machine time and that of the operator and clerical personnel. If search charges are likely to exceed $50, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Fees may be charged even if the documents are not located or if they are located but withheld on the basis of an exemption.

(b) Review fee. The review fee shall be charged for the Chief FOIA Officer’s initial examination of documents located in response to a request in order to determine if they may be withheld from disclosure, and for the deletion of portions that are exempt from disclosure, but shall not be charged for review by the Chairman or the Commissioners. See §2702.3. The review fee is the salary rate (that is, basic pay plus 16%) of the Chief FOIA Officer or the employee designated to perform the review. This hourly rate is listed on the Commission’s Web site at http://www.fmshrc.gov.

(c) Duplicating fee. The copy fee for each page of paper up to 8½” x 14” shall be $.15 per copy per page. Any private sector services required, including the fee for copying photographs and non-standard documents, will be the actual direct cost incurred by the Commission. For copies prepared by computer, such as tapes or printouts, the Commission shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, the Commission will charge the actual direct costs of producing the document(s). If duplication charges are likely to exceed $50, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated.

§ 2702.7 No fees; waiver or reduction of fees.

(a) No fees shall be charged to any requester, including commercial use requesters, if the anticipated cost of processing and collecting the fee would be equal or greater than the fee itself. Accordingly, the Commission has determined that fees of less than $20 shall be waived.

(b) Documents shall be furnished without any charge, or at a charge reduced below the fees otherwise applicable, if disclosure of the information is determined to be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(1) The following six factors will be employed in determining when such fees shall be waived or reduced:

(i) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government”;

(ii) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities;

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to “public understanding”;

(iv) The significance of contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities;

(v) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that...
would be furthered by the requested disclosure; and, if so
(vi) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

(2) The Chief FOIA Officer, upon request, shall determine whether a waiver or reduction of fees is warranted. Requests shall be made concurrently with requests for information under §2702.3. In accordance with the procedures set forth in §2702.3, appeals of adverse decisions may be made to the Commission within 5 working days. Determination of appeals will be made by the Commission within 10 working days of receipt.


§2702.8 Advance payment of fees; interest; debt collection procedures.

(a) Advance payment of fees generally will not be required. However, an advance payment (before work is commenced or continued on a request) may be required if the charges are likely to exceed $250.

(b) Requesters who have previously failed to pay a fee charged in timely fashion (i.e., within 30 days of the date of billing) may be required first to pay that amount plus any applicable interest (or demonstrate that the fee has been paid) and then make an advance payment of the full amount of the estimated fee before the new or pending request is processed.

(c) Interest charges may be assessed on any unpaid bill starting on the 31st day following the day on which the billing was sent at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of billing.

(d) The Debt Collection Act of 1982, Pub. L. 97–365, including disclosure to consumer credit reporting agencies and the use of collection agencies will be utilized to encourage payment where appropriate.

[54 FR 3023, Jan. 23, 1989]
§ 2704.100 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504, provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called “adversary adjudications”) before this Commission. An eligible party may receive an award when it prevails over the U.S. Department of Labor, Mine Safety and Health Administration (“MSHA”), unless the Secretary of Labor’s position in the proceeding was substantially justified or special circumstances make an award unjust. In addition to the foregoing ground of recovery, a non-prevailing eligible party may receive an award if the demand of the Secretary is substantially in excess of the decision of the Commission and unreasonable, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. The rules in this part describe the parties eligible for each type of award. They also explain how to apply for awards, and the procedures and standards that this Commission will use to make the awards. In addition to the rules in this part, the Commission’s general rules of procedure, part 2700 of this chapter, apply where appropriate.

(71 FR 44209, Aug. 4, 2006)

§ 2704.102 Applicability.

Section 2704.105(a) applies to adversary adjudications before the Commission pending or commenced on or after August 5, 1984. Section 2704.105(b) applies to adversary adjudications commenced on or after March 29, 1996.

[63 FR 63175, Nov. 12, 1998]

§ 2704.103 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by this Commission. These are adjudications before the Commission arising under the Mine Act in which the position of the Secretary of Labor is represented by an attorney or other representative who enters an appearance and participates in the proceeding. For this Commission, the types of proceedings generally covered include:
(1) Contests of citations or orders issued under section 104 or 107 of the Mine Act (30 U.S.C. 814, 817);

(2) Contests of penalties proposed under section 105(a) and (b) of the Mine Act (30 U.S.C. 815(a), (b));

(3) Challenges to claims of discrimination under section 105(c) of the Mine Act (30 U.S.C. 815(c)) where the Secretary of Labor represents the miner.

(b) The Commission may also designate a proceeding not listed in paragraph (a) of this section as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The Commission’s failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 2704.104 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The term “party” is defined in 5 U.S.C. 551(3). The applicant must show that it satisfies the conditions of eligibility set out in this subpart and in subpart B.

(b) For purposes of awards under §2704.105(a) for prevailing parties:

(1) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant’s direction and control. Part-time employees shall be included on a proportional basis.

(2) An applicant who owns an unincorporated business will be considered as an “individual” rather than a “sole owner of an unincorporated business” if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(3) The types of eligible applicants are as follows:

(i) An individual with a net worth of not more than $2 million;

(ii) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and employs not more than 500 employees;

(iii) Any other partnership, corporation, association, unit of local government, or public or private organization with a net worth of not more than $7 million and not more than 500 employees.

(c) For the purposes of awards for non-prevailing parties under §2704.105(b), eligible applicants are small entities as defined in 5 U.S.C. 601, subject to the annual-receipts and number-of-employees standards as set forth by the Small Business Administration at 13 CFR part 121.

(d) For the purpose of eligibility, the net worth, number of employees, or annual receipts of an applicant, as applicable, shall be determined as of the date the underlying proceeding was initiated under the Mine Act.

(e) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§ 2704.105 Standards for awards.

(a) A prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Secretary was substantially justified. The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of proof that an award should not be made to a prevailing applicant because the Secretary’s position was substantially justified is on the Secretary, who may
§ 2704.106 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of or acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under this part may exceed $125 per hour, except as provided in § 2704.107. No award to compensate an expert witness may exceed the highest rate at which the Secretary of Labor pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the administrative law judge shall consider the following:

1. If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

2. The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

3. The time actually spent in the representation of the applicant;

4. The time reasonably spent in light of the difficulty or complexity of the issues in the underlying proceeding; and

5. Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant’s case in the underlying proceeding.

§ 2704.107 Rulemaking on maximum rates for attorney’s fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), attorney’s fees may be awarded at a rate higher than $125 per hour. Any such increase in the rate for attorney’s fees will be made only upon a petition submitted by the applicant, pursuant to § 2704.201, and only if the administrative law judge determines, in his or her discretion, that it is justified. Any such adjustment in fees is subject to Commission review as specified in § 2704.308.

(b) Any person may file with the Commission a petition for rulemaking.
to increase the maximum rate for attorney fees. The petition should identify the rate the petitioner believes the Commission should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. The Commission will respond to the petition within 60 days after it is filed, by initiating an informal rulemaking proceeding, denying the petition, or taking other appropriate action.

§ 2704.108 Awards.
If an applicant is entitled to an award under §2704.105(a) or (b), the award shall be made by the Commission against the Department of Labor.

§ 2704.109 Delegations of authority.
The Commission retains authority to take final action on matters pertaining to the Equal Access to Justice Act in actions arising under the Mine Act. The Commission may, however, by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases to other subordinate officials or bodies.

Subpart B—Information Required From Applicants

§ 2704.201 Contents of application—in general.
(a) An application for an award of fees and expenses under the Act shall be made to the Chief Administrative Law Judge of the Commission at 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004–1710. The application shall identify the applicant and the underlying proceeding for which an award is sought.
(b) The application shall state the amount of fees and expenses for which an award is sought. The application may also include a request that attorney’s fees be awarded at a rate higher than $125 per hour because of an increase in the cost of living or other special factors.
(c) The application may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.
(d) The application should be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.
(e) Upon receipt of an application, the Chief Administrative Law Judge shall immediately assign it for disposition to the administrative law judge who presided over the underlying Mine Act proceeding.

§ 2704.202 Contents of application—where the applicant has prevailed.
(a) An application for an award under §2704.105(a) shall show that the applicant has prevailed in a significant and discrete substantive portion of the underlying proceeding and identify the position of the Department of Labor in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.
(b) The application also shall include a statement that the applicant’s net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants).
(c) Each applicant must provide with its application a detailed exhibit showing the net worth of the applicant when the underlying proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant’s assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The administrative law judge
may require an applicant to file additional information to determine its eligibility for an award.

[63 FR 63176, Nov. 12, 1998, as amended at 71 FR 54905, Sept. 20, 2006]

§ 2704.203 Contents of application—where the Secretary's demand is substantially in excess of the judgment finally obtained and unreasonable.

(a) An application for an award under §2704.105(b) shall show that the Secretary's demand is substantially in excess of the decision of the Commission; the application shall further allege that the Secretary's demand is unreasonable when compared with the Commission's decision.

(b) The application shall show that the applicant is a small entity as defined in 5 U.S.C. 601(6), and the application must conform to the standards of the Small Business Administration at 13 CFR 121.201 for mining entities. The application shall include a statement of the applicant's annual receipts or number of employees, as applicable, in conformance with the requirements of 13 CFR 121.104 and 121.106. The application shall describe briefly the type and purpose of its organization or business.

§ 2704.204 Confidential financial information.

Ordinarily, the net-worth and annual-receipts exhibits will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of such exhibits and believes there are legal grounds for withholding the information from disclosure may submit that portion of the exhibit directly to the administrative law judge in a sealed envelope labeled “Confidential Financial Information,” accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the Secretary of Labor against whom the applicant seeks an award, but need not be served on any other party to the proceeding. If the administrative law judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the established procedures under the Freedom of Information Act (29 CFR part 2702).

§ 2704.205 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the underlying proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The administrative law judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 2704.206 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the underlying proceeding or in a significant and discrete substantive portion of that proceeding. An application may also be filed by a non-prevailing party when a demand by the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision. In no case may an application be filed later than 30 days after the Commission's final disposition of the underlying proceeding, or 30 days after issuance of a court judgment that is
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final and nonappealable in any Commission adjudication that has been appealed pursuant to section 106 of the Mine Act, 30 U.S.C. 816.

(b) If review or reconsideration is sought or taken of a decision on the merits as to which an applicant has prevailed or has been subjected to a demand from the Secretary substantially in excess of the decision of the Commission and unreasonable when compared to that decision, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this part, final disposition before the Commission means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final (pursuant to sections 105(d) and 113(d) of the Mine Act (30 U.S.C. 815(d) and 823(d)) and unappealable, both within the Commission and to the courts (pursuant to sections 105(d) and 113(d) of the Mine Act (30 U.S.C. 815(d) and 823(d)) and unappealable).


Subpart C—Procedures for Considering Applications

§2704.301 Filing and service of documents.

Any application for an award or other pleading or other document related to an application, including a petition for discretionary review, shall be filed and served on all parties in the same manner as pleadings in the underlying proceeding, except as provided in §2704.202(b) for confidential financial information.

§2704.302 Answer to application.

(a) Within 30 days after service of an application, counsel representing the Secretary of Labor may file an answer to the application. Unless counsel requests an extension of time for filing, files a statement of intent to negotiate under paragraph (b), or a proceeding is stayed pursuant to §206(b), failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If counsel for the Secretary and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the administrative law judge upon request by counsel for the Secretary and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the position of the Secretary of Labor. If the answer is based on any alleged facts not already in the record of the proceeding, counsel shall include with the answer either supporting affidavits or a request for further proceedings under §2704.306 of this part.


§2704.303 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under §2704.306 of this part.

§2704.304 Comments by other parties.

Any party to a proceeding other than the applicant and counsel for the Secretary of Labor may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the administrative law judge determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§2704.305 Settlement.

In the event that counsel for the Secretary and an applicant agree to settle an EAJA claim after an application has been filed with the Commission, the
§ 2704.306 Further proceedings on the application.
(a) The determination of an award will be made on the basis of the record made during the proceeding for which fees and expenses are sought, except as provided in paragraphs (b) and (c) of this section.
(b) On request of either the applicant or the Secretary, or on the administrative law judge’s own initiative, the judge may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant’s eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application and shall be conducted as promptly as possible.
(c) If the proceeding for which fees and expenses are sought was conceded by the Secretary on the merits, withdrawn by the Secretary, or otherwise settled before any of the merits were heard, the applicant and the Secretary may supplement the administrative record with affidavits or other documentary evidence.
(d) A request that the judge order further proceedings under this section shall specifically identify the information sought on the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

[54 FR 6286, Feb. 9, 1989]

§ 2704.307 Decision of administrative law judge.
The administrative law judge shall issue an initial decision on the application within 75 days after completion of proceedings on the application. In all decisions on applications, the administrative law judge shall include written findings and conclusions on the applicant’s eligibility, and an explanation of the reasons for any difference between the amount requested and the amount awarded. As to applications filed pursuant to § 2704.105(a), the administrative law judge shall also include findings on the applicant’s status as a prevailing party and whether the position of the Secretary was substantially justified; if at issue, the judge shall also make findings on whether the applicant un- duly protracted or delayed the underlying proceeding or whether special circumstances make the award unjust. As to applications filed pursuant to § 2704.105(b), the administrative law judge shall include findings on whether the Secretary made a demand that is substantially in excess of the decision of the Commission and unreasonable when compared with that decision; if at issue, the judge shall also make findings on whether the applicant has committed a willful violation of the law or otherwise acted in bad faith or whether special circumstances make the award unjust. Under either paragraph, the decision shall include, if at issue, detailed findings and conclusions on whether an increase in the cost of living or any other special factor justifies a higher fee than the $125 per hour fee set forth in the statute. The initial decision by the administrative law judge shall become final 40 days after its issuance unless review by the Commission is ordered under § 2704.308 of this part.

[63 FR 63177, Nov. 12, 1998]

§ 2704.308 Commission review.
(a) Either the applicant or the Secretary of Labor may seek review by the Commission of the initial decision by the administrative law judge, but review shall be discretionary with the Commission.
(b) The party seeking review shall file a petition for discretionary review so as to be received by the Commission at 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004–1710 within 30 days of the issuance of the initial decision by the administrative law judge. Each issue in dispute shall be plainly and concisely stated, with supporting reasons set forth. Except for good cause shown, no issue not raised before the administrative law judge shall be set forth in the petition for discretionary review. Review by the
§ 2705.2

Commission shall be granted only by affirmative vote of two of the Commissioners within 40 days of the issuance of the initial opinion, except that within 30 days after the issuance of the initial decision by the administrative law judge, two or more Commissioners may in their discretion order the case for review without the filing of a petition. The latter procedure shall be reserved for novel questions of law or policy, however.

(c) If review of the initial decision of the administrative law judge is granted by the Commission, the Commission shall, after allowing opportunity for presentation of views by opposing parties, review the case and issue its own order affirming, modifying or vacating in whole or in part the initial decision or directing other appropriate relief.


§ 2704.309 Judicial review.

Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 2704.310 Payment of award.

Payment of awards made under the Equal Access to Justice Act by final orders of the Commission or its administrative law judge shall be in accordance with the applicable rules of the Department of Labor.

PART 2705—PRIVACY ACT IMPLEMENTATION

Sec.
2705.1 Purpose and scope.
2705.2 Definitions.
2705.3 Procedure for requests pertaining to individuals' records in a records system.
2705.4 Times, places, and requirements for the identification of the individual making a request.
2705.5 Access to requested information to the individual.
2705.6 Request for correction or amendment to the record.
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2705.8 Appeal of an initial adverse Commission determination on correction or amendment of the record.
2705.9 Disclosure of record to a person other than the individual to whom the record pertains.

2705.10 Fees.


SOURCE: 49 FR 38542, Oct. 1, 1984, unless otherwise noted.

§ 2705.1 Purpose and scope.

The purposes of these regulations are to:

(a) Establish a procedure by which an individual can determine if the Federal Mine Safety and Health Review Commission, hereafter the "Commission," maintains a system of records which includes a record pertaining to the individual. This does not include Commission files generated in adversary proceedings under the Federal Mine Safety and Health Act; and

(b) Establish a procedure by which an individual can gain access to a record pertaining to him or her for the purpose of review, amendment and/or correction.


§ 2705.2 Definitions.

For the purpose of these regulations—

(a) The term individual means a citizen of the United States or an alien lawfully admitted for permanent residence;

(b) The term maintain includes maintain, collect, use of disseminate;

(c) The term record means any item, collection or grouping of information about an individual that is maintained by the Commission, including, but not limited to, his or her employment history, payroll information, and financial transactions and that contains his or her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as social security number;

(d) The term system of records means a group of any records under control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual; and

(e) The term routine use means, with respect to the disclosure of a record, the use of such record for a purpose
§ 2705.3 Procedure for requests pertaining to individuals’ records in a records system.

An individual shall submit a request to the Executive Director to determine if a system of records named by the individual contains a record pertaining to the individual. If a record pertaining to the individual does exist in the specified system of records and the individual wishes to review that record he or she shall submit a request to the Executive Director of the Commission which states the individual’s desire to review his or her record.


§ 2705.4 Times, places, and requirements for the identification of the individual making a request.

An individual making a request to the Executive Director of the Commission pursuant to § 2705.3 shall present a written request at the Commission Office, 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004–1710, on any business day between the hour of 8:30 a.m. and 5:00 p.m. The individual submitting the request should present himself or herself at the Commission’s offices with a form of identification which will permit the Commission to verify that the individual is the same individual as contained in the record requested.


§ 2705.5 Access to requested information to the individual.

As soon as practicable after verification of identity the Commission shall disclose to the individual the information contained in the record which pertains to that individual.

§ 2705.6 Request for correction or amendment to the record.

The individual shall submit a written request to the Executive Director which states the individual’s desire to correct or to amend his or her record and details the specific corrections or amendments sought. This request is to be made in accord with provisions of § 2705.4.

§ 2705.7 Agency review of request for correction or amendment of the record.

Within ten working days of the receipt of the request to correct or to amend the record, the Executive Director will acknowledge in writing such receipt and promptly either—

(a) Make any correction or amendment to that portion of the record which the individual believes is not accurate, relevant, timely, or complete; or

(b) Inform the individual of the Executive Director’s refusal to correct or to amend the record in accordance with the request, and the procedures established by the Commission for the individual to request a review of that refusal.

§ 2705.8 Appeal of an initial adverse Commission determination on correction or amendment of the record.

An individual who disagrees with the refusal of the Executive Director to correct or to amend his or her record may submit a request for a review of such refusal to the Chairman, Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004–1710. The Chairman will, not later than thirty working days from the date on which the individual requests such review, complete such review and make final determination unless, for good cause shown, the Chairman extends such thirty-day period. If, after his or her review, the Chairman also refuses to correct or to amend the record in accordance with the request, the individual may file with the Commission a concise statement setting forth the reasons for his or her disagreement with the refusal of the Commission and may seek judicial review of the Chairman’s determination under 5 U.S.C. 552a(g)(1)(A).

§ 2705.9 Disclosure of record to a person other than the individual to whom the record pertains.

The Commission will not disclose a record to any individual other than the individual to whom the record pertains without receiving the prior written consent of the individual to whom the record pertains, unless the disclosure has been listed as a “routine use” in the Commission’s notices of its system of records, or falls within one of the special disclosure situations listed in the Privacy Act of 1974 (5 U.S.C. 552a(b)).

§ 2705.10 Fees.

If an individual requests copies of his or her record, he or she will be charged a reasonable fee, excluding the cost of any search for review of the record, in advance of receipt of the pages.

PART 2706—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

§ 2706.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 2706.102 Application.

This part applies to all programs or activities conducted by the agency.

§ 2706.103 Definitions.

For purposes of this part, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD’s), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant’s name and address and describes the agency’s alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.
Handicapped person means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) Physical or mental impairment includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term “physical or mental impairment” includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) Major life activities includes functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) Is regarded as having an impairment means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

Historic preservation programs means programs conducted by the agency that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Qualified handicapped person means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, a handicapped person who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency.

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) Qualified handicapped person is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by §2706.140.


Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.
§§ 2706.104–2706.109 [Reserved]

§ 2706.110 Self-evaluation.

(a) The agency shall, by August 24, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspection:

1. A description of areas examined and any problems identified, and
2. A description of any modifications made.

§ 2706.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 2706.112–2706.129 [Reserved]

§ 2706.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

1. Subject qualified handicapped persons to discrimination on the basis of handicap; or

2. Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination
under any program or activity conducted by the agency; or
   (ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 2706.131–2706.139 [Reserved]

§ 2706.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 2706.141–2706.148 [Reserved]

§ 2706.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in §2706.150, no qualified handicapped person shall, because the agency’s facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 2706.150 Program accessibility: Existing facilities.

(a) General. The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §2706.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens
but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) Methods—(1) General. The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(2) Historic preservation programs. In meeting the requirements of §2706.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to handicapped persons. In cases where a physical alteration to an historic property is not required because of §2706.150(a)(2) or (a)(3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide handicapped persons into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) Time period for compliance. The agency shall comply with the obligations established under this section by October 21, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by August 22, 1989, but in any event as expeditiously as possible.

(d) Transition plan. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by February 23, 1987 a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency’s facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§2706.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.
§ 2706.152–2706.159 [Reserved]

§ 2706.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf person (TDD’s) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §2706.160 would result in such alteration or burdens. The decision that compliance would result in such an alteration or such burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 2706.161–2706.169 [Reserved]

§ 2706.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The General Counsel shall be responsible for coordinating implementation of this section. Complaints may be sent to General Counsel, Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue NW., Suite 520N, Washington, DC 20004–1710.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended...
(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

1. Findings of fact and conclusions of law;
2. A description of a remedy for each violation found; and
3. A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §2706.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.


§§ 2706.171–2706.999 [Reserved]

PARTS 2707–2799 [RESERVED]