

#### §4.1153

made within the time period provided in §4.1151 (a) or (b), the appropriateness of the amount of the penalty, and the fact of the violation if there is no proceeding pending under section 525 of the Act of review the notice of violation or cessation order involved, shall be deemed admitted, the petition shall be dismissed, and the civil penalty assessed shall become a final order of the Secretary.

[43 FR 34386, Aug. 3, 1978, as amended at 51 FR 16321, May 2, 1986; 59 FR 1488, Jan. 11, 1994]

#### §4.1153 Answer.

OSM shall have 30 days from receipt of a copy of the petition within which to file an answer to the petition with the Hearings Division, OHA.

#### §4.1154 Review of waiver determination.

(a) Within 10 days of the filing of a petition under this part, petitioner may move the administrative law judge to review the granting or denial of a waiver of the civil penalty formula pursuant to 30 CFR 723.16 or 845.16.

(b) The motion shall contain a statement indicating all alleged facts relevant to the granting or denial of the waiver;

(c) Review shall be limited to the written determination of the Director of OSM granting or denying the waiver, the motion and responses to the motion. The standard of review shall be abuse of discretion.

(d) If the administrative law judge finds that the Director of OSM abused his discretion in granting or denying the waiver, the administrative law judge shall hold the hearing on the petition for review of the proposed assessment required by section 518(b) of the act and make a determination pursuant to §4.1157.

[43 FR 34386, Aug. 3, 1978, as amended at 59 FR 1488, Jan. 11, 1994]

#### §4.1155 Burdens of proof in civil penalty proceedings.

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

#### 43 CFR Subtitle A (10-1-03 Edition)

the civil penalty. The person who petitioned for review shall have the ultimate burden of persuasion as to the fact of the violation.

[53 FR 47694, Nov. 25, 1988]

#### §4.1156 Summary disposition.

(a) In a civil penalty proceeding where the person against whom the proposed civil penalty is assessed fails to comply on time with any prehearing order of an administrative law judge, the administrative law judge shall issue an order to show cause why—

(1) That person should not be deemed to have waived his right to a hearing; and

(2) The proceedings should not be dismissed and referred to the assessment officer.

(b) If the order to show cause is not satisfied as required, the administrative law judge shall order the proceedings summarily dismissed and shall refer the case to the assessment officer who shall enter the assessment as the final order of the Department.

(c) Where the person against whom the proposed civil penalty is assessed fails to appear at a hearing, that person will be deemed to have waived his right to a hearing and the administrative law judge may assume for purposes of the assessment—

(1) That each violation listed in the notice of violation or order occurred; and

(2) The truth of any facts alleged in such notice or order.

(d) In order to issue an initial decision assessing the appropriate penalty when the person against whom the proposed civil penalty is assessed fails to appear at the hearing, an administrative law judge shall either conduct an ex parte hearing or require OSM to furnish proposed findings of fact and conclusions of law.

(e) Nothing in this section shall be construed to deprive the person against whom the penalty is assessed of his opportunity to have OSM prove the violations charged in open hearing with confrontation and cross-examination of witnesses, except where that person fails to comply with a prehearing order or fails to appear at the scheduled hearing.