

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

April 20, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2007-74
Petitioner	:	A.C. 15-10753-100293
	:	
v.	:	
	:	
CLEAN ENERGY MINING COMPANY,	:	Mine #1
Respondent	:	

**ORDER DENYING RESPONDENT'S
MOTION TO DISMISS**

Before: Judge Feldman

Commission Rule 28(a), 29 C.F.R. § 2700.28(a), specifies that the Secretary shall file a petition for assessment of civil penalty with this Commission within 45 days of receipt of a mine operator's timely contest of the Secretary's proposed penalty assessment. The Respondent filed its notice of contest with the Secretary's Mine Safety and Health Administration (MSHA) on October 31, 2006. Thus, the date for the Secretary's timely filing of her penalty assessment petition with the Commission was December 15, 2006. However, the Secretary filed her petition on January 12, 2007.

Consequently, the Respondent has filed a motion to dismiss the subject petition for assessment of civil penalty as untimely. The Secretary opposes the Respondent's motion asserting that the delay was caused by the Secretary's mistaken belief, apparently due to a processing error, that the Respondent's contest was received by MSHA on November 28, 2006.

In their filings, both parties acknowledge that, absent a showing of prejudice, the 45-day filing period for the Secretary's petition for assessment of civil penalty is not jurisdictional. *See Lone Mountain Processing Incorporated*, 17 FMSHRC 839 (May 1995) (ALJ) (citations omitted). Moreover, processing guidelines generally are intended to "spur the Secretary to action," rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Sec'y of Labor v. Twentymile Coal Company*, 411 F.3d 256, 261 (D.C. Cir. 2005). Accordingly, the Respondent's motion to dismiss **IS DENIED**.

Jerold Feldman
Administrative Law Judge

Distribution:

Christian P. Barber, Esq., Office Of The Solicitor, U.S. Department Of Labor, 618 Church St., Suite 230, Nashville, TN 37219-2440

Ramonda C. Lyons, Esq., Dinsmore & Shohl, LLP, Huntington Square, 900 Lee Street, Suite 600, P.O. Box 11887, Charleston, WV 25339

mh