

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement**

**30 CFR Parts 701, 724, 750, 773, 774, 775, 778, 785, 795, 817, 840, 842, 843, 846, 847, 874, 875, 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947**

**RIN 1029-AB94**

**Application and Permit Information Requirements; Permit Eligibility; Definitions of Ownership and Control; the Applicant/Violator System; Alternative Enforcement**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are publishing final rules to amend application and permit information requirements and to redesign permit eligibility criteria under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), as amended. In this final rule, we are also amending related provisions in our regulations to incorporate changes for internal consistency. This rule fulfills our April 21, 1997, commitment to undertake new rulemaking, including public notice and comment, on ownership and control and related regulatory issues in the wake of the January 31, 1997, decision of the United States Court of Appeals for the District of Columbia Circuit.

This final rule also reflects the findings in another decision of the United States Court of Appeals. On May 28, 1999, the appeals court issued a ruling shortly after the initial close of the comment period for the proposed rule upon which this final rulemaking is based. We later found it advisable to reopen and extend the comment period in order to seek public comment on the effects of the May 1999 decision. As a result, we modified the provisions in this final rule in order to be consistent with the 1999 decision. Thus, this final rule is fully consistent with both court decisions.

**EFFECTIVE DATE:** January 18, 2001.

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and related documents may be found on OSM's Internet home page (Internet address: <http://www.osmre.gov>) and on our AVS Office's Internet home page (Internet address: <http://www.avs.osmre.gov>).

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**I. What Events Precipitated This Rulemaking?**

The National Mining Association (NMA) and the National Wildlife Federation filed suit challenging the validity of three of OSM's rules implementing section 510(c) of SMCRA, 30 U.S.C. 1260(c). These rules are generally known as the 1988 ownership and control rule, the 1989 permit information rules and the 1989 improvidently issued permits rule, which is also referred to as the permit rescission rule. In separate decisions dated August 31, 1995, the U.S. District Court for the District of Columbia upheld the three challenged rules in their entirety. See *National Wildlife Federation v. Babbitt*, Nos. 88-3117, 88-3464, 88-3470 (consolidated) (D.D.C. Aug. 31, 1995); *National Wildlife Federation v. Babbitt*, Nos. 89-1130, 89-1167 (consolidated) (D.D.C. Aug. 31, 1995); *National Wildlife Federation v. Babbitt*, Nos. 89-1751, 89-1811 (consolidated) (D.D.C. Aug. 31, 1995).

NMA appealed the rulings and, on January 31, 1997, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's decisions and invalidated the three sets of rules on narrow grounds. See *National Mining Association v. U.S. Department of the Interior*, 105 F.3d 691 (D.C. Cir. 1997) (*NMA v. DOI I*). The appeals court held that the clear language of section 510(c) of SMCRA, 30 U.S.C. 1260(c), authorizes regulatory authorities to deny a permit only on the basis of violations of "any surface coal mining operation owned or controlled by the applicant." *NMA v. DOI I*, 105 F.3d at 693-94. Because OSM's 1988 ownership and control rule also allowed regulatory authorities to deny a permit on the basis of violations of any person who owned or controlled the applicant, the appeals court invalidated that rule in its entirety. In addition, the court held that because OSM's permit information and permit rescission rules

were “centered on the ownership and control rule \* \* \*, they too must fall.” *Id.* at 696.

While the court of appeals identified only one specific defect with the 1988 and 1989 rules, it nonetheless invalidated the three sets of rules in their entirety. This had the effect of invalidating many provisions of the regulations to which the court expressed no specific objection. At the same time, nothing in the court’s decision eliminated the responsibility of OSM and State regulatory authorities to implement the permit eligibility requirements of section 510(c), 30 U.S.C. 1260(c). This meant that OSM and the States faced making permitting decisions required by the Act without any regulations to flesh out the statutory directive. The appeals court’s action created a gap in the regulatory program and a great deal of uncertainty among State regulatory authorities about how to continue to meet their responsibilities to determine who was eligible to receive a permit under section 510(c), 30 U.S.C. 1260(c).

Following the appeals court’s decision, we made adjustments in our process for responding to regulatory authorities’ requests for permitting recommendations from our Applicant/Violator System (AVS). In each case, before we offered a permitting recommendation to support the system recommendation, we determined if the recommendation would be consistent with the court’s decision. In those cases where it would have been inconsistent, *i.e.*, where the recommendation would be based on the violations of those who owned or controlled the applicant, we informed the regulatory authority that we could no longer recommend that it deny the permit.

As an initial regulatory step to remove the uncertainty created by the decision and to ensure there would be no lapse in permitting provisions under approved State programs, we published an interim final rule (IFR) on an emergency basis on April 21, 1997. See 62 FR 19451 (1997). We published the IFR to implement the Court of Appeals’ decision in *NMA v. DOI I* and to close the regulatory gap created by that decision. In the IFR, we removed the portions of the 1988 and 1989 rules which were inconsistent with the appeals court’s interpretation of SMCRA in *NMA v. DOI I*. Most significantly, the IFR did not authorize OSM to deny permits based on outstanding violations of an applicant’s owners and controllers. Because the emergency publication of the IFR did not include public notice and opportunity for comment, we stated in the preamble to

the IFR that we intended to replace the IFR through rulemaking conducted in accordance with standard notice and comment procedures under the Administrative Procedure Act. In honoring this commitment, we published proposed rules on December 21, 1998. See 63 FR 70580 (1998).

In June 1997, NMA filed suit in the U.S. District Court for the District of Columbia, challenging the IFR on broad grounds. On June 15, 1998, the district court issued a decision upholding the IFR in its entirety. *National Mining Association v. Babbitt*, No. 97-1418 (AER) (D.D.C. June 15, 1998).

On May 28, 1999, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in NMA’s appeal of the district court’s ruling. *National Mining Association v. U.S. Department of the Interior*, 177 F.3d 1 (D.C. Cir. 1999) (*NMA v. DOI II*). The court agreed with OSM that section 510(c) of SMCRA, 30 U.S.C. 1260(c), allows an applicant to be held accountable for violations cited at operations that the applicant owns or controls, including “limitless downstream violations” at operations indirectly owned or controlled by an applicant through intermediary entities. *Id.* at 4-5. The court agreed with NMA, however, that “[f]or violations of an operation that the applicant ‘has controlled’ but no longer does, \* \* \* the Congress authorized permit-blocking only if there is ‘a demonstrated pattern of willful violations’” under section 510(c) of SMCRA. *Id.* at 5.

Next, the court addressed NMA’s challenge to certain of the IFR’s presumptions of ownership or control. At 30 CFR 773.5(b)(1) through (6), the IFR contains six separate presumptions of ownership or control. If subject to one of the presumptions, the applicant (or other person subject to the presumption) could attempt to rebut the presumption by demonstrating that he or she “does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted.” 30 CFR 773.5(b). NMA challenged four of these presumptions, which applied when a person: (1) was an officer or director of an entity (§ 773.5(b)(1)); (2) had the ability to commit the financial or real property assets or working resources of an entity (§ 773.5(b)(3)); (3) was a general partner in a partnership (§ 773.5(b)(4)); or (4) owned 10 through 50 percent of an entity (§ 773.5(b)(5)). NMA did not challenge the presumptions pertaining to being the operator of a surface coal mining operation (§ 773.5(b)(2)) or owning or controlling coal to be mined by another

person and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation (§ 773.5(b)(6)). Therefore, the court did not rule on their validity. *NMA v. DOI II*, 177 F.3d at 6 n.6.

In addressing NMA’s challenge to the presumptions, the court described a general standard for evaluating the validity of rebuttable presumptions and then applied that standard to the four rebuttable presumptions challenged by NMA. The court found two of the challenged ownership or control presumptions—having the ability to control the assets of an entity and being a general partner in a partnership—to be “well-grounded.” *Id.* at 7. However, the court agreed with NMA that OSM cannot presume that officers and directors or 10 through 50 percent shareholders are controllers of mining operations. *Id.* at 6.

On the applicability of the 5-year statute of limitations at 28 U.S.C. 2462, the court agreed with OSM that the section 2462 limitations period does not apply to violations when determining permit eligibility under section 510(c) of SMCRA, 30 U.S.C. 1260(c). *Id.* at 7-8. However, the court agreed with NMA that the rule was impermissibly retroactive in its effect to the extent it authorized permit denials based on indirect control in cases where *both* the assumption of indirect control and the violation occurred before November 2, 1988, the effective date of OSM’s 1988 ownership and control rule. *Id.* at 8.

NMA also challenged the IFR’s permit application information provisions, which required like our previous rules, an applicant to submit information in addition to the information expressly required by sections 507 and 510(c) of SMCRA, 30 U.S.C. 1257 and 1260(c). The court agreed with OSM that SMCRA’s information requirements “are not exhaustive” and that OSM can require the submission of additional information “needed to ensure compliance with the Act.” *Id.* at 9.

Finally, on NMA’s challenge to the IFR’s suspension and rescission provisions relative to improvidently issued permits, the court agreed with OSM that section 201(c) of SMCRA, 30 U.S.C. 1211(c), expressly authorizes OSM to suspend or rescind improvidently issued permits. In addition to that express authority, the court also found that OSM retained “implied” authority to suspend or rescind improvidently issued permits “because of its express authority to deny permits in the first instance.” *Id.* at 9. However, the court decided that OSM

may only order cessation of State-permitted operations in accordance with the procedures established under section 521 of SMCRA, 30 U.S.C. 1271. Specifically, OSM may order immediate cessation of a State-permitted operation if the operation poses an "imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm \* \* \*" SMCRA section 521(a)(2), 30 U.S.C. 1271(a)(2). Absent these circumstances, OSM may order cessation of a State-permitted operation only in accordance with section 521(a)(3), which includes the requirements to: (1) Provide a notice of violation to the permittee or his agent; (2) establish an abatement period; (3) provide opportunity for a public hearing; and (4) make a written finding that abatement of the violation has not occurred within the abatement period. *Id.* at 9-10; SMCRA at section 521(a)(3), 30 U.S.C. 1271(a)(3).

## II. How Did We Obtain and Consider Public Input To Assist in Developing This Final Rule?

In June of 1997, a team of Department of the Interior employees met with State regulatory authorities to discuss rulemaking options. We also sought input from citizens and the regulated industry. Subsequently, we decided to reevaluate all aspects of our regulations pertaining to ownership and control and related issues.

On October 29, 1997, we published an Advance Notice of Proposed Rulemaking in the **Federal Register**. In the notice, we committed to hold public meetings and solicit comments from all interested parties on a wide range of topics related to ownership and control, with the ultimate goal of proposing new rules. See 62 FR 56139 (1997).

We conducted outreach from October 29, 1997, through January 16, 1998. We invited approximately 900 people and organizations to participate in the outreach effort. We provided them with an issue paper to use as the basis to elicit ideas, comments, and suggestions on potential regulatory topics and issues. Seventy people attended seven public meetings held in different locations throughout the United States. We also received written comments from some parties. During the outreach period, we offered to meet separately with any person or group wanting such a meeting. As a result of our offer, members of the team also met with an industry association and held individual discussions with several environmental advocates.

At the conclusion of the outreach, the team began to develop rulemaking

options on many regulatory provisions related to ownership and control. The team continued its discussions with State regulatory authorities to keep them informed of our progress. A meeting with the States was held January 28 through 30, 1998, to discuss the results of the outreach.

We published a proposed rule for public review and comment on December 21, 1998 (63 FR 70580). We originally scheduled the comment period to close on February 19, 1999. In response to requests, we reopened the comment period from February 23, 1999 to March 25, 1999 (64 FR 8763); from March 31, 1999 to April 15, 1999 (64 FR 15322); and from May 4, 1999 to May 10, 1999 (64 FR 23811). On June 7, 2000, we reopened and extended the comment period to July 7, 2000 (65 FR 36097) in order to obtain input from the public on the effects of *NMA v. DOI II*.

During the comment period, we received separate requests from two State associations, an industry association, and representatives of several environmental organizations to meet with the team to ask questions about the proposal. We met with representatives of the two State associations, the industry association, and the representatives from environmental organizations (via a telephone conference call). A summary of each meeting is recorded in the Administrative Record for this rulemaking.

We received 103 comment documents specific to the proposed rule: 18 from private citizens, 36 from companies and associations affiliated with the coal mining industry, 31 from environmental advocates and organizations, and 18 from Federal, State, and local government entities and associations. Since no one requested a public hearing, we did not hold a hearing. In developing the final rule, we considered all comments that were germane to the proposed rule. In this preamble, we discuss how we modified certain concepts and provisions in response to comments and the *NMA v. DOI II* decision. We also explain the disposition of those comments that did not result in a change from the proposed rule.

## III. How Does the Final Rule Differ Stylistically From the Proposed Rule?

On June 1, 1998, the President issued an Executive Memorandum requiring the use of plain language in all proposed and final rulemaking documents published after January 1, 1999. The memorandum provides the following description of plain language.

Plain language requirements vary from one document to another, depending on the intended audience. Plain language documents have logical organization, easy-to-read design features, and use:

- Common, everyday words, except for necessary technical terms;
- You and other pronouns;
- The active voice; and
- Short sentences.

On June 10, 1998, the Office of the Secretary of the Interior issued a memorandum requiring the immediate use of plain language in proposed and final rulemaking documents. We met this requirement by incorporating plain language principles to an even greater extent in this final rule than in the proposed rule.

The plain language principles, to the extent they were used in the proposed rule, generated a substantial number of comments. We address two of the comments here regarding the use of pronouns. One commenter asked, regarding proposed § 846.1, if "we" means only OSM, and whether this means the States do not have to use alternative enforcement or only have to use it on Federal lands. Another commenter asked, regarding proposed § 774.13(e), does "us" mean OSM if a State has not yet adopted a counterpart? In this preamble, "we", "our", and "us" refer to OSM, unless otherwise stated. In our rule language the pronouns "we", "our" and "us" refer to both the Federal and State regulatory authorities, or whichever one applies in the specific situation, generally OSM for Federal programs or the State regulatory authority for an approved State program, unless otherwise indicated.

We also note that we use several terms with respect to the temporal aspect of this rulemaking. In this rulemaking, we refer to "previous," "existing," "proposed," and "final" rules and regulations. "Previous" regulations are those that, once this rulemaking is effective, will no longer exist. "Existing" regulations are those that are unaffected by this rulemaking. "Proposed" regulations are those provisions we published in our December 21, 1998, proposed rule. "Final" rule and "final" regulations refer to this rulemaking, including existing regulations that are redesignated in this rulemaking.

The rest of the comments we received on plain language issues are discussed in section V.E. of this preamble.

## IV. Derivation Tables

Following are the Derivation Tables for this final rule. The Derivation Tables provide a useful tool for ascertaining in

which sections our final provisions were proposed (if applicable) and where our previous, analogous provisions existed (if applicable). When two asterisks (\*\*) appear in the "proposed rule" column, it means we retained an existing section or provision, verbatim (or nearly verbatim if only plain

language principles were applied), but redesignated the section or provision in this final rule for organizational purposes. Three asterisks (\*\*\*) in the "proposed rule" column means the final provision was not proposed, but that we added the provision: (1) In response to comments, or (2) in response to the

decision in *NMA v. DOI II*, or (3) because a provision proposed to be removed is continued in this final rulemaking, or (4) because the provision is needed for *internally consistency* with other adopted provisions.

PART 701

Final rule	Proposed rule	Previous regulations
§ 701.5	§ [as indicated below]	§ [as indicated below].
Applicant/Violator System or AVS	§ 701.5 Applicant/Violator System or AVS	§ 773.5 Applicant/Violator System or AVS.
Control or controller	§ 778.5(a)(1) through (a)(8) and 778.5(b)(2) Control.	§ 773.5 Owned or controlled and Owns or controls.
Knowing or knowingly	§ 701.5 Knowing or knowingly	§ 724.5 and 846.5 Knowingly.
Own, owner, or ownership	§ 778.5(b)(1) Ownership	§ 773.5 Owned or controlled and Owns or controls.
Successor in interest*	§ 701.5 Successor in interest	§ 701.5 Successor in interest.
Violation	§ 701.5 Violation notice	§ 773.5 Violation notice.
Violation, failure or refusal	§ 846.5 Violation, failure, or refusal	§ 724.5 and 846.5 Violation, failure or refusal.
Violation notice	§ 701.5 Violation notice	§ 773.5 Violation notice.
Willful or willfully	§ 701.5 Willful or willfully	§ 724.5 and 846.5 Willfully.
Willful violation is removed	Willful violation proposed to be removed	§ 701.5 Willful violation.

\*Successor in interest is unchanged from the previous definition.

FINAL PART 724

Final rule	Proposed rule	Previous regulations
§ 724.5 is removed	§ [as indicated below] § 701.5 Knowing or knowingly § 846.5 Violation, failure, or refusal. § 701.5 Willful or willfully	§ 724.5 Definitions. Knowingly. Violation, failure, or refusal Willfully.

FINAL PART 773

Final rule	Proposed rule	Previous regulation
§ 773.3	§ 773.10	§ 773.10.
(a)	(a)	(a).
(b)	(b)	(b).
§ 773.4	(**)	§ 773.11.
§ 773.5	(**)	§ 773.12.
§ 773.6	(**)	§ 773.13.
§ 773.7	(**)	§ 773.15.
(a)	(**)	§ 773.15(a)(1).
(b)	(**)	§ 773.15(a)(2).
§ 773.8	(***)	
(a)	§§ 773.15(b)(1), (b)(2) and (b)(3)	
(b)	§ 773.15(b)(1)	§ 773.22(d).
(b)(1)	§ 773.15(b)(1)	§ 773.22(d).
(b)(2)	§ 773.22(c)	§ 773.23(a)(2).
(c)	§ 773.22(c)	§ 773.22(d).
§ 773.9	§ 773.15(b)	§ 773.22.
(a)	§ 773.15(b)(1)	§ 773.22(a).
(b)	§ 773.15(a)(3)	
§ 773.10	§ 773.15(b)(2)	§ 773.22(a).
(a)	§ 773.15(b)(2)(i)	§ 773.22(a).
(b)	§§ 773.15(a)(3) and (b)(2)(ii)	§ 773.22(b).
(c)	§ 773.15(b)(2)(iii)	§ 773.22(b).
§ 773.11	§ 773.15(b)(3)	§ 773.23.
(a)	§ 773.15(b)(3)	§ 773.23(a).
(a)(1)	§ 773.(b)(3)(i)(A)	§ 773.23(a)(1).
(a)(2)	§ 773.15(b)(3)(i)(A)	§ 773.23(a).
(a)(3)	§ 773.15(b)(3)(i)(A)	§ 773.23(a)(1) and (b).
(a)(4)	§ 773.15(b)(3)(i)(A)	§ 773.159(b)(1) and 773.23(a).
(b)	§§ 773.15(a)(3) and (b)(3)(i)(A)	§ 773.23(a).
§ 773.12	§ 773.16	§ 773.15(b).
(a)	§ 773.16(a)	§ 773.15(b)(1).
(a)(1)	§ 773.15(b)(3)(i)(B)	§ 773.15(b)(1).

FINAL PART 773—Continued

Final rule	Proposed rule	Previous regulation
(a)(2) .....	(***) .....	
(a)(3) .....	(***) .....	
(b) .....	(***) .....	
(c) .....	§ 773.15(b)(i)(D) .....	§ 773.15(b)(3).
(d) .....	§ 773.15(e) .....	§ 773.15(e).
(e) .....	§ 773.16(a)(2) .....	
§ 773.13 .....	(**) .....	§ 773.15(b)(4).
(a) .....	(**) .....	§§ 773.15(b)(4) and (b)(4)(i)(B).
(a)(1) .....	(**) .....	§ 773.15(b)(4)(i)(A).
(a)(2) .....	(**) .....	§ 773.15(b)(4)(i)(C).
(a)(2)(i) .....	instruction #8.d .....	§ 773.15(b)(4)(i)(C)(1).
(a)(2)(ii) .....	(**) .....	§ 773.15(b)(4)(i)(C)(2).
(b) .....	(**) .....	§ 773.15(b)(4)(ii).
(b)(1) .....	(**) .....	§ 773.15(b)(4)(ii)(A).
(b)(2) .....	(**) .....	§ 773.15(b)(4)(ii)(B).
(b)(3) .....	(**) .....	§ 773.15(b)(4)(ii)(C).
§ 773.14 .....	§ 773.16(b) .....	§§ 773.15(b)(1) and (b)(2).
(a) .....	§ 773.16(b) .....	§§ 773.15(b)(1) and (b)(2).
(a)(1) .....	§§ 773.16(b) and (b)(1)(ii) .....	§§ 773.15(b)(1) and (b)(2).
(a)(2) .....	§ 773.15(b)(3)(i)(C) .....	
(b) .....	§§ 773.16(b) .....	§ 773.15(b)(2).
(b)(1) .....	(***) .....	§ 773.15(b)(2).
(b)(2) .....	§§ 773.16(b)(3) and 773.15(b)(3)(i)(B)(1) .....	
(b)(3) .....	(***) .....	
(b)(3)(i) .....	(***) .....	
(b)(3)(ii) .....	(***) .....	
(b)(4) .....	§ 773.15(b)(3)(i)(B)(2) .....	§ 773.15(b)(1)(ii).
(c) .....	§ 773.20(b) .....	§ 773.20(a) and (b).
(c)(1) .....	§ 773.16(b)(2)(iii) .....	§ 773.20(b)(1)(ii)(A).
(c)(2) .....	§§ 773.20(b)(2)(ii) and (b)(3) .....	§ 773.20(b)(1)(ii)(B).
(c)(3) .....	§ 773.15(b)(3)(i)(B)(2) .....	§ 773.15(b)(1)(ii).
(c)(4) .....	(***) .....	
§ 773.15 .....	(**) .....	§ 773.15(c).
(a) .....	(**) .....	§ 773.15(c)(1).
(n) .....	§ 773.15(a)(3) .....	
§ 773.21 .....	§ 773.20 .....	§ 773.20.
(a) .....	§§ 773.20(a) and (b)(1) .....	§§ 773.20(a) and (b)(1)(i).
(b) .....	§ 773.20(b) .....	§ 773.20(b).
(b)(1) .....	§ 773.20(b)(3) .....	§ 773.20(b)(2)(ii).
(b)(2) .....	§ 773.20(b)(2)(i) .....	§ 773.20(b)(1)(ii)(A).
(b)(3) .....	§ 773.20(b)(2)(i) .....	§ 773.20(b)(1)(ii)(A).
(c) .....	§ 773.21 .....	§ 773.21.
(c)(1) .....	§ 773.21 .....	§ 773.21.
(c)(2) .....	(***) .....	
(d) .....	§§ 773.21(a)(1) thru (a)(5) .....	§§ 773.21(a) and (a)(1) thru (a)(4).
(e) .....	(***) .....	§§ 773.20(b)(2) and (b)(2)(i).
§ 773.22 .....	§§ 773.20 and 773.21 .....	§§ 773.20 and 773.21.
(a) .....	§ 773.21 .....	§ 773.20(c)(2).
(a)(1) .....	§ 773.21(a) .....	§ 773.20(a).
(a)(2) .....	(***) .....	
(b) .....	§ 773.21(a) .....	§ 773.21(a).
(c) .....	§ 773.21(a) .....	§ 773.21(a).
(d) .....	(***) .....	
(e) .....	§ 773.20(c)(2) .....	§ 773.20(c)(2).
(f) .....	§ 773.20(c)(2) .....	§ 773.21.
(g) .....	(***) .....	
(h) .....	§ 773.20(c)(2) .....	§ 773.20(c)(2).
§ 773.23 .....	§ 773.21(a) .....	§ 773.21(a)(2).
(a) .....	§ 773.21(a)(2) .....	§ 773.21(a)(4).
(a)(1) .....	§ 773.21(a)(4) .....	§ 773.21(a)(1).
(a)(2) .....	§ 773.21(a)(1) .....	§ 773.21(a)(3).
(a)(3) .....	§ 773.21(a)(3) .....	§ 773.21(a)(3).
(a)(4) .....	§ 773.21(a)(3) .....	§ 773.21(b).
(a)(5) .....	§ 773.21(b) .....	§ 773.21(b).
(a)(6) .....	§ 773.21(a)(5) .....	
(b) .....	(***) .....	
(c) .....	§ 773.21(b) .....	§ 773.21(b).
(c)(1) .....	§ 773.21(b) .....	§ 773.21(b).
(c)(2) .....	(***) .....	
(d) .....	§ 773.20(c)(2) .....	§ 773.20(c)(2).
§ 773.24 is removed .....	§ 773.24 .....	§ 773.24.
§ 773.25 .....	§ 773.24(a) .....	§ 773.24(a)(1).

FINAL PART 773—Continued

Final rule	Proposed rule	Previous regulation
(a) .....	§ 773.24(a) .....	§ 773.24(a)(1).
(b) .....	§ 773.24(a) .....	
(c) .....	§ 773.24(a) .....	§ 773.24(a)(1).
§ 773.26 .....	§ 773.24(b) .....	§ 773.24(b).
(a) .....	§ 773.24(b) .....	§ 773.24(b).
(a)(1) .....	§ 773.25(b)(2) .....	§ 773.24(b).
(a)(2) .....	§ 773.25(b)(3) .....	§ 773.24(b).
(b) .....	§ 773.24(d) .....	
(c) .....	§§ 773.25(b)(1) and (b)(2) .....	§§ 773.25(b)(1) and (ii).
(d) .....	(***) .....	
§ 773.27 .....	§ 773.25(c) .....	§ 773.25(c)(1).
(a) .....	§ 773.25(c)(2) .....	§ 773.25(c)(1)
(a)(1) .....	§ 773.25(c)(2) .....	§ 773.25(c)(1)(i)
(a)(2) .....	§ 773.25(c)(2) .....	§ 773.25(c)(1)(i).
(b) .....	§ 773.25(c)(3) .....	§ 773.25(c)(2).
(c) .....	§ 773.25(c)(3)(i) .....	§ 773.25(c)(2).
(c)(1) .....	§ 773.25(c)(i)(A) .....	§ 773.25(c)(2)(i)(A).
(c)(2) .....	§ 773.25(c)(i)(B) .....	§ 773.25(c)(2)(i)(B).
(c)(3) .....	§ 773.25(c)(3)(i)(C) .....	§ 773.25(c)(2)(i)(C).
(c)(4) .....	§ 773.25(c)(3)(i)(D) .....	§ 773.25(c)(2)(i)(D).
(c)(4)(i) .....	§ 773.25(c)(3)(i)(D) .....	§ 773.25(c)(2)(i)(D).
(c)(4)(ii) .....	§ 773.25(c)(3)(i)(D) .....	§ 773.25(c)(2)(i)(D).
(c)(4)(iii) .....	§ 773.25(c)(3)(i)(D) .....	§ 773.25(c)(2)(i)(D).
§ 773.28 .....	§ 773.24(c) .....	§ 773.24(c).
(a) .....	§ 773.24(c)(1) .....	§ 773.24(c).
(b) .....	§ 773.24(c)(2) .....	§ 773.24(d)(2)(i).
(b)(1) .....	§ 773.24(c)(2) .....	§ 773.24(d)(2)(i).
(b)(12) .....	§ 773.24(c)(2) .....	§ 773.24(d)(2)(i).
(c) .....	§ 773.24(c)(2) .....	§ 773.24(d)(2)(i).
(d) .....	(***) .....	
(e) .....	§ 773.24(c)(3) .....	§ 773.24(d)(2)(ii).
(f) .....	§ 773.25(d) .....	§ 773.24(d).

\*\* Section/provision redesignation only. This section was not redesignated in the proposed rule.

\*\*\* This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of section IV.B. of this preamble.

FINAL PART 774

Final rule	Proposed rule	Previous regulation
§ 774.1 .....	*** .....	§ 774.1.
§ 774.9 .....	§ 774.10 .....	§ 774.10.
(a) .....	(a) .....	(a).
(b) .....	(b) .....	(b).
§ 774.10 .....	(**)	§ 774.11.
§ 774.11 .....	§ 773.22 .....	
(a) .....	§ 773.22(d) .....	§ 773.15(b)(1).
(a)(1) .....	§ 773.15(b)(2)(i) .....	§ 773.15(b)(1).
(a)(2) .....	§ 773.22(c) .....	§ 773.15(b)(1).
(a)(3) .....	§§ 774.13(e) and 774.17(a)(2) .....	§§ 773.15(b)(1) and 773.22(d).
(a)(4) .....	§ 773.22(c) .....	§ 773.15(b)(1).
(b) .....	§§ 773.22(a) and 773.25(d) .....	§ 773.22(d).
(c) .....	§ 773.15(b)(3)(i)(D) .....	§ 773.15(b)(3).
(c)(1) .....	§ 773.15(b)(3)(i)(D)(1) .....	§ 773.15(b)(3).
(c)(2) .....	§ 773.15(b)(3)(i)(D)(2) .....	§ 773.15(b)(3).
(d) .....	§ 773.15(b)(3)(i)(E) .....	§ 773.15(b)(3).
(e) .....	§§ 773.17(k) and 773.25(d) .....	§ 773.25(d).
(f) .....	§§ 773.15(b)(1)(i), (b)(1)(i)(A), (b)(1)(i)(B), and 773.17(k).	
(f)(1) .....	§ 773.17(k) .....	
(f)(2) .....	§§ 773.25(d) .....	§ 773.25(d).
(f)(3) .....	§ 778.13(c)(3) .....	§ 778.13(c).
(f)(3)(i) .....	§ 778.13(c)(3) .....	§ 778.13(c).
(f)(3)(ii) .....	§§ 773.17(k) and 778.13(m) .....	
(g) .....	§§ 773.17(k) and 773.24 .....	
§ 774.12 .....	§§ 773.17(h), and 774.13(e) .....	§ 773.17(h).
(a) .....	§ 773.17(h) .....	§ 773.17(h).
(b) .....	*** .....	
(c) .....	§§ 774.13(e) and 774.17(a)(2) .....	§ 774.17(a).
(c)(1) .....	§§ 774.13(e) and 774.17(a)(2) .....	§ 774.17(a).

FINAL PART 774—Continued

Final rule	Proposed rule	Previous regulation
(c)(2) .....	§§ 774.13(e), 774.17(a)(2), and 778.13(c)(1)(iii) ....	§ 778.13(c)(3).

\*\* Section/provision redesignation only. This section/provision was not redesignated in the proposed rule.

\*\*\* This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

FINAL PART 778

Final rule	Proposed rule	Previous regulation
§ 778.8 .....	§ 778.10 .....	§ 778.10.
(a) .....	§ 778.10(a) .....	§ 778.19(a).
(b) .....	§ 778.10(b) .....	§ 778.10(b).
§ 778.9 .....	§ 778.13(o) .....	
(a) .....	§ 778.13(o) .....	
(a)(1) .....	§ 778.13(o) .....	
(a)(2) .....	§ 778.13(o) .....	
(a)(3) .....	§ 778.13(o) .....	
(b) .....	(***) .....	
(c) .....	§ 778.13(p) .....	
(d) .....	§§ 778.13(1) and 778.14(d) .....	§§ 778.13(k) and 778.14(d).
§ 778.11 .....	§ 778.13 .....	778.13.
(a) .....	§ 778.13 .....	§ 778.13.
(a)(1) .....	§ 778.13(a) .....	§ 778.13(a).
(a)(2) .....	§§ 778.13(b)(1) and (b)(3) .....	§ 778.13(b).
(b) .....	§ 778.13(b) .....	§ 778.13(b).
(b)(1) .....	§ 778.13(b)(1) .....	§ 778.13(b)(1)
(b)(2) .....	§ 778.13(b)(2) .....	§ 778.13(b)(2).
(b)(3) .....	§ 778.13(b)(3) .....	
(b)(4) .....	§ 778.13(b)(4) .....	§ 778.13(b)(3).
(c) .....	§ 778.13(c)(3) .....	§ 778.13(c).
(c)(1) .....	§ 778.13(c)(3)(i) .....	§ 778.13(c).
(c)(2) .....	§ 778.13(c)(3)(ii) .....	§ 778.13(c).
(c)(3) .....	§ 778.13(c)(3)(iii) .....	§ 778.13(c).
(c)(4) .....	§ 778.13(c)(3)(v) .....	§ 778.13(c).
(c)(5) .....	§ 778.13(c)(3)(iv) .....	§ 778.13(c).
(d) .....	§ 778.13(m) .....	
(e) .....	§ 778.13(c)(1) .....	§ 778.13(c).
(e)(1) .....	§ 778.13(c)(1)(i) .....	§ 778.13(c)(1).
(e)(2) .....	§§ 778.13(c)(1)(ii) and (iii) .....	§§ 778.13(c)(2) and (c)(3).
(e)(3) .....	§ 778.13(c)(1)(iii) .....	§ 778.13(c)(3).
§ 778.12 .....	§§ 778.13(e), (f), and (g) .....	§§ 778.13(d), (e), and (f).
(a) .....	§ 778.13(e) .....	§ 778.13(d).
(b) .....	§ 778.13(f) .....	§ 778.13(e).
(c) .....	§ 778.13(g) .....	§ 778.13(d) and (f).
(c)(1) .....	§ 778.13(g) .....	§ 778.13(f)(1).
(c)(2) .....	§ 778.13(g) .....	§ 778.13(f)(1).
(c)(3) .....	§ 778.13(g) .....	§ 778.13(f)(1).
(c)(4) .....	§ 778.13(g) .....	§ 778.13(f)(1).
(c)(5) .....	778.13(g) .....	§ 778.13(f)(2).
§ 778.13 .....	§ 778.13(h), (i), (j), and (k) .....	§§ 778.13(g), (h), (i), and (j).
(a) .....	§ 778.13(h) .....	§ 778.13(g).
(a)(1) .....	§ 778.13(h) .....	§ 778.13(g).
(a)(2) .....	§ 778.13(h) .....	§ 778.13(g).
(a)(3) .....	§ 778.13(h) .....	§ 778.13(g).
(b) .....	§ 778.13(i) .....	§ 778.13(h).
(c) .....	§ 778.13(k) .....	§ 778.13(j).
(d) .....	§ 778.13(j) .....	§ 778.13(i).
§ 778.14 .....	§ 778.14 .....	§ 778.14.
(a) .....	§§ 778.14 and 778.14(a) .....	§§ 778.14 and 778.14(a).
(a)(1) .....	§ 778.14(a)(1) .....	§ 778.14(a)(1)
(a)(2) .....	§ 778.14(a)(2) .....	§ 778.14(a)(2).
(b) .....	§ 778.14(b) .....	§ 778.14(b).
(b)(1) .....	§ 778.14(b)(1) .....	§ 778.14(b)(1).
(b)(2) .....	§§ 778.14(b)(1) and (b)(4) .....	§§ 778.14(b)(1) and (b)(4).
(b)(3) .....	§ 778.14(b)(2) .....	§ 778.14(b)(2).
(b)(4) .....	§ 778.14(b)(3) .....	§ 778.14(b)(3).
(b)(5) .....	§§ 778.14(b)(4) and (b)(5) .....	§§ 778.14(b)(4) and (b)(5).
(c) .....	§ 778.14(c) .....	§ 778.14(c).
(c)(1) .....	§ 778.14(c)(1) .....	§ 778.14(c)(1).
(c)(2) .....	§ 778.14(c)(1) .....	§ 778.14(c)(1).
(c)(3) .....	§ 778.14(c)(1) .....	§ 778.14(c)(1).

FINAL PART 778—Continued

Final rule	Proposed rule	Previous regulation
(c)(4) .....	§ 778.14(c)(1) .....	§ 778.14(c)(1).
(c)(5) .....	§ 778.14(c)(2) .....	§ 778.14(c)(2).
(c)(6) .....	§ 778.14(c)(3) .....	§ 778.14(c)(3).
(c)(7) .....	*** .....	§ 778.14(c).
(c)(8) .....	§ 778.14(c)(5) .....	§ 778.14(c)(5).

\*\* Section/provision redesignation only. This section/provision was not redesignated in the proposed rule.

\*\*\* This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

FINAL PART 842

Final rule	Proposed rule	Previous regulation
§ 842.11: (e)(3)(i) .....	proposed to be removed .....	§ 842.11(e)(3)(i).

FINAL PART 843

Final rule	Proposed rule	Previous regulation
§ 843.5 .....	proposed to be removed .....	§ 843.5.
§ 843.11		
(g) .....	§ 843.11(g) .....	§ 843.11(g).
§ 843.13 .....	proposed as § 846.14 .....	§ 843.13.
§ 843.21 .....	§ 843.21 .....	§ 843.21.
(a) .....	§ 843.21(a) .....	§ 843.21(a).
(a)(1) .....	§ 843.21(a) .....	§ 843.21(a).
(a)(2) .....	(***) .....	
(b) .....	§ 843.21(b) .....	§ 843.21(b).
(b)(1) .....	§ 843.21(b)(1) .....	§ 843.21(b)(1).
(b)(2) .....	§ 843.21(b)(2) .....	§ 843.21(b)(2).
(b)(3) .....	§§ 843.21(d)(1)(ii) and (d)(4) .....	§ 843.21(d).
(c) .....	§ 843.21(c) .....	§ 843.21(c).
(c)(1) .....	§ 843.21(c) .....	§ 843.21(c)(1).
(c)(2) .....	(***) .....	
(c)(3) .....	(***) .....	
(d) .....	§§ 843.21(d) and (d)(1)(i) .....	§ 843.21(b).
(e) .....	§ 843.21(d)(1) .....	§ 843.21(d).
(e)(1) .....	§ 843.21(d)(2) .....	§ 843.21(d).
(e)(2) .....	§ 843.21(d)(2)(i) .....	§ 843.21(d).
(f) .....	§ 843.21(e) .....	§ 843.21(e).
(f)(1) .....	§ 843.21(e)(1) .....	§ 843.21(e)(1).
(f)(2) .....	§ 843.21(e)(2) .....	§ 843.21(e)(2).
(f)(2)(i) .....	§ 843.21(e)(2)(i) .....	§ 843.21(e)(2)(i).
(f)(2)(ii) .....	(***) .....	
(f)(2)(iii) .....	§ 843.21(e)(2)(ii) .....	§ 843.21(e)(2)(ii).
(f)(2)(iv) .....	§ 843.21(e)(2)(ii) .....	§ 843.21(e)(2)(ii).
(f)(2)(v) .....	(***) .....	
(g) .....	§ 843.21(f) .....	§ 843.21(f).

\*\*\* This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

FINAL PART 846

Final rule	Proposed rule	Previous regulation
§ 846.1 is unchanged .....	§ 846.1 .....	§ 846.1.
§ 846.5 is removed .....	§ 846.5 .....	§ 846.5.
§ 846.12 is unchanged .....	§ 846.12(a) .....	§ 846.12.
§ 846.14 is unchanged .....	§ 846.12(b) .....	§ 846.14.
§ 846.17 is unchanged .....	§ 846.12(c) .....	§ 846.17.
§ 846.18 is unchanged .....	§ 846.12(d) .....	§ 846.18.

FINAL PART 847

Final rule	Proposed rule	Previous regulation
Part 847 .....	(***) .....	
§ 847.1 .....	§ 846.1.	

FINAL PART 847—Continued

Final rule	Proposed rule	Previous regulation
§ 847.2 .....	(**).	
(a) .....	§ 846.1.	
(b) .....	§ 773.22(d).	
(c) .....	(**).	
(d) .....	(**).	
§ 847.11 .....	§§ 846.11 and 846.11(a).	
(a) .....	§ 846.11(a)(1).	
(b) .....	§ 846.11(a)(2).	
(b)(1) .....	§ 846.11(a)(2)(i).	
(b)(2) .....	§ 846.11(a)(2)(ii).	
(c) .....	§ 846.11(a)(3).	
§ 847.16 .....	§ 846.16.	
(a) .....	§ 846.16(a).	
(a)(1) .....	§ 846.16(a)(1)(i).	
(a)(2) .....	§ 846.16(a)(1)(ii).	
(a)(3) .....	§ 846.16(a)(1)(iii).	
(a)(4) .....	§ 846.16(a)(1)(iv).	
(a)(5) .....	§ 846.16(a)(1)(v).	
(a)(6) .....	§ 846.16(a)(1)(vi).	
(b) .....	§ 846.16(a)(2).	
(c) .....	§ 846.16(b).	
(d) .....	§ 846.16(c).	

\*\* Section/provision redesignation only. This section/provision was not redesignated in the proposed rule.

\*\*\* This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

**V. What General Comments Did We Receive on the Proposed Rule and How Have We Addressed These Comments in This Final Rule?**

*A. Withdraw the Proposal*

Several commenters suggested that we withdraw the proposed rule and rewrite it using the “precise language” of the Act. We appreciate the concerns of these commenters. However, section 501(b) of the Act requires that we adopt regulations that not only implement the Act, but also “are written in plain, understandable language.” Furthermore, the courts have held in previous litigation concerning SMCRA that we have a duty to either flesh out the requirements or explain why it is unnecessary to do so.

A commenter recommended withdrawing the proposed rule because “the added burdens are not justified by the rate of non-compliance, which OSM’s own figures show is low.” The commenter said we should “simplify, rather than complicate, the permitting process and the limited non-compliance problems that do exist.” The low rate of noncompliance is partially the result of the ownership and control and AVS-related regulations that have been in force since 1988. Moreover, in this final rule we are simplifying the permitting process to clarify the scope of the review and who is eligible for a permit under section 510(c) of the Act, 30 U.S.C. 1260(c).

A commenter said the proposed rule must be withdrawn because it does not

adequately respond to or incorporate comments provided in response to the Advance Notice of Proposed Rulemaking. The commenter said two organizations sent comments to OSM urging that OSM retain the requirement that imputes primary responsibility for compliance on those entities which own or control permit applicants and have outstanding unresolved violations of SMCRA or other environmental laws. The commenter said the agency’s response to these comments has been wholly unsatisfactory.

We disagree. The commenter asks that we devise a compliance and permit eligibility scheme that the court has ruled to be unlawful. Under *NMA v. DOI I*, we cannot “block” applicants under section 510(c) based upon the outstanding violations of an applicant’s owners and controllers. However, we can and must determine responsibility for outstanding violations and use all enforcement provisions available under the Act to achieve compliance from persons responsible for outstanding violations. Nothing in *NMA v. DOI I* or *NMA v. DOI II* changes this statutory requirement.

The same commenter also said the proposed rule fails to require that States (and OSM in Federal program states) use common law mechanisms to disregard corporate forms where applicants seek to apply for permits on behalf of owners and controllers who would be barred in their own right. Common law mechanisms exist independently from the enforcement

provisions under SMCRA and are always available for a regulatory authority’s use when circumstances warrant.

The same commenter also said the proposed rule fails to address coal exploration operations. We included coal exploration among the subjects in our solicitation for ideas and suggestions to be considered in the development of the proposed rule. States opposed requiring review under section 510(c) of SMCRA, 30 U.S.C. 1260(c), for coal exploration permits. These comments persuaded us not to address coal exploration, in the context of section 510(c), in this rulemaking.

*B. Compliance With the Administrative Procedure Act*

One commenter claimed that we provided no explanations for the proposed rule and that we thus had violated the Administrative Procedure Act (APA) by denying interested parties the opportunity to provide meaningful comments. Other commenters, expressed similar APA concerns.

We disagree with the various criticisms of our proposed rule with respect to the APA. First, the proposed rule did not deny interested parties the opportunity to provide meaningful comment. We provided the proposed rule language and an extensive preamble, explaining the subjects and issues involved. We received 103 written comments on the proposed rule, totaling over 800 pages of comments. We extended the comment period four

times in response to requests for extensions, including a reopening to accept comments on the effects of the *NMA v. DOI II* decision. See section II of this preamble. Before the development of the proposed rule, we provided public notice of our intent to propose a rule. We conducted both informal outreach and an extensive formal public outreach to gather ideas, suggestions, and concepts to consider in the development of the proposed rule. We hosted and attended meetings with the major groups of parties interested in this rulemaking. Taken together, these activities provided more than sufficient opportunity for input into this rulemaking. Not only have we fully complied with the APA, we actively reached out to bring all affected parties into this rulemaking process.

Commenters said the proposed rule is a radical departure from past ownership and control rules. They also said the 60-day comment period was "woefully inadequate" to allow meaningful public participation, and that OSM's advance pronouncement that no extensions of the comment period would be considered was arbitrary and capricious. In fact, we extended the comment period on the proposed rule three times in response to requests for extensions and reopened the comment period to allow for comments on the effects of *NMA v. DOI II* on the proposed rule. The final comment period totaled 140 days.

### C. Public Participation

Several commenters suggested that citizens should have rights in the permitting process and related matters. These commenters also said OSM should expressly allow citizens to petition the agency to take enforcement action where citizens have a reason to believe that a violation exists, whether or not the State regulatory authority has taken action. Another commenter also expressed concerns about the citizen complaint process, and said it is important that citizens continue to be part of the SMCRA process so that they can voice concerns about inadequate data collection and tracking of violators by OSM.

We support public participation in regulatory processes, as required by the Act. Citizens have the right to voice their concerns regarding any aspect of a regulatory program. This final rule strengthens public participation in processes related to permit eligibility determinations. We further address public participation as it applies to this rulemaking, in our responses to comments received on specific sections

of the proposed rule. See, e.g., sections VI.M. and Y. of this preamble.

Further, our existing regulations emphasize the role of the public under SMCRA. The provisions for public participation in permit processing were found at previous 30 CFR 773.13 and existing 30 CFR part 775, which includes the ability of persons who have an interest which is or may be adversely affected to raise ownership and control issues during the permitting process and to request a hearing on the reasons for a permitting decision. Previous 30 CFR 773.13 is redesignated 30 CFR 773.6 in this final rule. Additional provisions pertaining to public participation and access to public records are found at existing 30 CFR 842.11, 842.12, and 842.16 and final § 843.21.

We also made AVS available to the public to increase public access to the computer system. AVS software is provided free of charge and can be ordered from the AVS Office in Lexington, Kentucky, by calling, toll-free, 1-800-643-9748. The software can also be downloaded from the AVS Office's Internet home page (Internet address: <http://www.avs.osmre.gov>). Citizens may also use the traditional method of visiting Federal and State offices to view application, permit, violation, ownership and control challenge, and enforcement records.

A commenter said that the public often has important information concerning ownership and control and that the Congress was very clear in demanding a public role in administrative and judicial processes, including the permitting process. According to the commenter, the proposed rule reflects a limited, insular, two-way relationship between the regulatory authority (we) and the applicant (you) that excludes affected citizens (us) because there is no pronoun for the general public.

We have and will continue to ensure that public participation is considered in all facets of the regulatory program. We heard very clearly the concerns expressed during the public outreach regarding citizen participation in regulatory processes. To the extent possible, we address those concerns in this rulemaking. We are always willing to accept information from citizens which may bear upon our responsibilities, or the responsibilities of the regulated industry, under the Act. Both our existing regulations and the provisions we adopt today expressly require us to consider information provided by the public, when appropriate.

### D. Oversight

A commenter said that the proposal has serious implications for the States in terms of OSM's oversight of permitting decisions and all facets of the regulatory program. The commenter said States are most concerned about oversight expectations in the quantity of application information and the level of detail that should be devoted to investigations. Two commenters asked what oversight States can expect since AVS will not make permitting recommendations. The same commenters asked if oversight will be consistent and whether States will be "taken to task" over their permitting decisions during oversight. In contrast, another commenter said the proposed rule will result in inadequate oversight because OSM plans to cease providing permitting recommendations. Other commenters said oversight should be consistent and that OSM should adopt uniform review criteria. Two commenters asked whether the oversight reviews required for this final rule would be left to the OSM regional offices. These commenters suggested that the determinations required under the proposed rule would require OSM to give discretion and flexibility to States.

Our oversight obligations under the Act and regulations will not diminish as a result of these rules. To facilitate oversight of AVS, OSM's Directive REG-8, "Oversight of State Regulatory Programs," provides that OSM will monitor States' responses to complaints and requests for assistance and services and each year will review a sample of one or more specified State activities, including permit eligibility determinations. We prepare an oversight findings report for each review and the findings report is summarized in the annual report for each State.

Concerning the level of detail that should be devoted to investigation, in this final rule we leave that decision principally to the regulatory authorities. We are not adopting specific references to investigations in part 773 in these final rules. However, we expect that regulatory authorities will investigate when circumstances warrant.

We previously provided permit eligibility recommendations to, among other things, assist in expediting the States' permitting processes. We are aware that the purpose of the recommendations was sometimes misinterpreted as a mandate. We also know that many States benefitted from the recommendations and some expressed their appreciation. However, the States now possess sufficient technology as well as familiarity with

the uses of the information in the computer system that they no longer require permitting recommendations. See further discussion of this point in section VI.E. of this preamble.

*E. Plain Language*

“Shall” Is the Language of the Act

We received numerous comments on the use of plain language principles in the proposed rule and our failure to use the word “shall.” Some commenters argued that the word “shall” is the language of the Act and that no other word is sufficient as the language of command. However, the guidance on plain language principles prohibits use of “shall” in rulemaking. The Department has provided two guidance documents on plain language, *Writing User-Friendly Regulations* and *Writing Readable Regulations*, by Thomas A. Murakowski. The regulations in this final rule are consistent with plain language principles. We use “must” instead of “shall” as the language of command. Where the Act or regulations provides for a mandatory action, we use “must.” Where previous regulations used “shall” to indicate a future action, we use “will.” When an action is not mandatory, we use “may,” except that the use of “may not,” is equivalent to a mandatory prohibition.

Changing “shall” to “may” Undermines Mandatory Enforcement of the Act

Many commenters said that changing “shall” to “may” undermines mandatory enforcement under the Act and that “may” is an unacceptable substitute. Some of the commenters said the change gives regulatory authorities the option not to enforce the regulations.

The absence of the word “shall” does not compromise obligations under our regulations or the obligations of the States and the industry to comply with the Act and regulatory requirements. To the contrary, we believe using the word “shall” creates confusion in the minds of readers. We are not alone in this belief. In his book, *Plain English for Lawyers*, Richard C. Wydick, Professor of Law at the University of California at Davis, has this to say about the word “shall”:

When you draft rules \* \* \* be precise in using words of authority. \* \* \* The biggest troublemaker is *shall*. Sometimes lawyers use it to impose a duty: “The defendant *shall* file an answer within 30 days. \* \* \*” Other times lawyers use it to express future action (“the lease shall terminate \* \* \*”) or even an entitlement (“the landlord shall have the right to inspect \* \* \*”). Drafting experts have identified several additional shades of meaning *shall* can carry. To make matters

worse, many lawyers do not realize how slippery *shall* is, so they use it freely, unaware of the booby traps they are laying for their readers \* \* \*. In recent years \* \* \* many U.S. drafting authorities have come around to the British Commonwealth view: don’t use *shall* for any purpose—it is simply too unreliable.<sup>1</sup>

In the proposed rule, we used the words “must,” “will,” and “may.” We were cognizant of the effect of these words in each instance they were used. In this final rule, we consistently employed the following principles with respect to “must,” “will,” and “may.”

We use the word * * *	to indicate that * * *
must .....	an action is mandatory.
will .....	an action will occur in the future.
may .....	an action could occur, but is not mandatory.
may not .....	not taking the specified action is mandatory.

Any change in meaning that the reader may perceive because we used the words in the table is due solely to the former use of the imprecise word “shall” to indicate that an action must, will, or may occur.

Plain Language Attempt is Unsuccessful

Several commenters said our attempt to use plain language principles in the proposed rule was unsuccessful and inconsistent with President Clinton’s June 1, 1998, memorandum. The commenters also claimed that we failed to follow the recommendations of the **Federal Register Document Drafting Handbook** because we used more than three paragraph levels within a section. The commenters said we should create more sections instead of using more than three paragraph levels.

Our use of plain language principles in the proposed rule was consistent with the President’s June 1, 1998, memorandum. However, we acknowledge that the proposed rule did not fully conform with plain language principles. This final rule, more fully uses plain language principles.

Most notably, in this final rule, we reorganized parts 773 and portions of parts 774 and 778 to accommodate fuller use of plain language principles. We divided lengthy sections into smaller, more numerous but more concise, sections; eliminated duplicate provisions; streamlined provisions, incorporated tables; and eliminated

excessive paragraph levels within sections. The guidance provided to us regarding plain language is not optional. Rather, we are expected to adhere to the guidance, unless specific circumstances allow for variance within the rule language structure.

Use of Pronouns

Several commenters expressed concern over our use of pronouns in the proposed rule. Some of these commenters said that the use of “we” and “you” is confusing. These commenters also said that “you” should always mean the person to whom the regulation applies because industry will claim that “you” only means the applicant and that all other uses of “you” are irrelevant. Other commenters said the use of plain language implies that there are only two sides represented in the regulations—industry and regulators—and that there is no pronoun used to represent citizens.

The guidance documents on plain language that we previously cited in this section of the preamble provide explicit instructions on the use of personal pronouns. According to the guidance, the use of personal pronouns “straightens out sentences and saves words.” As with the preferred use of “shall,” we must use pronouns in our regulations unless we are avoiding a grammatical fracture or redundancy, or to make a distinction between or among the subjects that make up “we” or “you.”

We acknowledge that our use of pronouns in the proposed rule sometimes may have been confusing. We eliminate that confusion in this final rule. Within the Department’s restrictions, we always use “we” to mean OSM and the State regulatory authorities, unless otherwise stated. We always use “you” to mean whoever must comply with the regulation. Therefore, “you” almost always means an applicant or permittee, as applicable. For example, when we use the phrase, “you, the applicant,” it clarifies that “you” means “the applicant” whenever “you” appears in the provisions of that section.

We elected not to define “we” or “you” generically in these regulations because the antecedent for these pronouns varies in our regulations. Instead, we specified the meaning of “we” or “you” in each section of this final rule. As more of our regulations are converted to plain language, we will incorporate greater use of “we” and “you.”

A commenter called the use of pronouns an informal, quasi-conversational style. This commenter

<sup>1</sup> Richard C. Wydick, *Plain English for Lawyers*, Durham, 1998, pp. 66–67.

also said our use of “you” and “we” does not conform to the guidance in the *Federal Register Document Drafting Handbook*.

Our use of “we” and “you” conforms to the guidance in the *Federal Register Document Drafting Handbook*. For example, the *Handbook* says we must use “you” to designate “whoever must comply.” (October 1998 Revision at MRR-1) This is how we used “you” in the proposed rule and how we use it in this final rule.

#### F. Other General Comments

A commenter expressed concern that the proposed rule will result in permit-specific eligibility determinations instead of entity or company-specific eligibility determinations and that this result is a step backward. Permit eligibility is inherently application or permit specific because violations are specific to a particular operation. The permit block sanction of section 510(c) applies only to the extent that a person remains responsible for that violation.

A commenter claimed that the proposed rules establish complex processes for determining eligibility and meeting information disclosure requirements. The commenter also claimed that “owners” and “controllers” are newly created categories that would be targeted for novel enforcement tools such as “blocking permits where a permit applicant is an owner or controller of an operation with an outstanding violation,” “permanent ineligibility” for a permit, “special permit conditions,” and “joint and several liability for violations of permits to an extent not contemplated by the Act.”

The review process and eligibility determination are not complex and, in fact, have been simplified in this final rule. A regulatory authority will review applicant, operator, and ownership or control information; permit history information; and compliance information to arrive at an eligibility determination under section 510(c) of the Act, 30 U.S.C. 1260(c). A finding of permit eligibility is the end-product of a regulatory authority’s review under section 510(c) of the Act, 30 U.S.C. 1260(c). This final rule also attempts to make information disclosure requirements clearer by organizing the requirements for providing applicant, operator, and ownership and control information; permit history; property interests; and violation information into separate, more easily understood sections. An applicant also may certify as to which parts of this information already in AVS are accurate and complete. See final § 778.9(a).

We disagree that “owners” and “controllers” are newly created categories. These designations are clearly anticipated under section 510(c) of SMCRA, 30 U.S.C. 1260(c), which uses the phrase “owned or controlled.” We also disagree that the final rule creates “novel enforcement tools.” We are not adopting the provisions concerning joint and several liability or special permit conditions. Under the final rule, the section 510(c) permit block sanction applies only to the extent authorized under *NMA v. DOI I* and *NMA v. DOI II*.

Commenters said they agreed with OSM that “scofflaws” should not be allowed to abandon one mining operation with uncorrected violations and uncompleted reclamation only to obtain permits for new operations “through subterfuge or abusive manipulation of corporate entities.” However, the commenters said, AVS relied upon massive information-gathering and mechanical name-linking and that this approach caused paperwork delays for legitimate operators. The commenters claimed the proposed rule would not reduce the burdens for legitimate operators “to any significant level” and that it “does violence” to a number of established legal principles and threatens new confusion, delays, and litigation.

We disagree that our regulations cause either massive information-gathering or delays in permitting for legitimate operators. Further, in *NMA v. DOI II*, the court ruled that we and the States may require information from permit applicants in excess of the information requirements specifically stated in the Act so long as the information is necessary to ensure compliance with the Act. *Id.*, 177 F.3d at 9. The information requirements in this final rule are, necessary to ensure compliance with the Act, including the permit block sanction of section 510(c).

A commenter expressed appreciation for OSM’s efforts to propose regulations that are consistent with *NMA v. DOI I*. However, the commenter said the proposed rule appears more cumbersome and burdensome than the previous regulations, would require much additional effort to administer, and may detract from ensuring good reclamation in the field.

Our principal goal in this rulemaking is to adopt revised or new regulations that improve our implementation of SMCRA and with *NMA v. DOI I* and *NMA v. DOI II*. We have streamlined procedures and reduced burdens to the extent that we could do so while still retaining our ability to fully implement the permit block sanction of section

510(c). We relied upon the input of many sources, including our State partners, in developing the proposed and final rules. We disagree that the changes in our regulations, will detract from or inhibit good reclamation. On the contrary, we believe the provisions that allow a regulatory authority to better know an applicant will contribute to a more accurate forecast of whether an applicant, as a permittee, will be able to complete its reclamation and other statutory and program obligations.

Several commenters expressed concern that the changes in the proposed rule represent a weakening of the Federal rules and appeared to give unauthorized options to regulatory authorities relative to required enforcement actions. Some opposed the proposed rule changes because, they said, SMCRA requires OSM and the States to take enforcement action against every violation, that is, “when you see a violation, you write a violation.” These commenters asserted that SMCRA has a mandatory enforcement system that does not allow discretion when considering enforcement actions. We agree that violations, when known to a regulatory authority, must be cited. Nothing in this rulemaking alters that principle.

Several commenters asserted that the proposed rule weakens Federal protections, undercuts those State requirements that may exceed Federal requirements, and allows owners and controllers to engage in sham business arrangements to contravene section 510(c) of SMCRA. We believe this final rule strengthens the ability of regulatory authorities to take a variety of actions both inside and outside the permitting process to ensure compliance with SMCRA. The rule strengthens the information disclosure requirements for applicants and operators. It also clarifies the post-permit issuance obligations of regulatory authorities and permittees with respect to submitting new information, updating AVS, and other matters. It also emphasizes other enforcement provisions that may be used if applicants, permittees, operators, and other persons subject to the regulations fail to comply. Taken together, these revisions not only clarify and emphasize our ability to enforce section 510(c), 30 U.S.C. 1260(c), but other SMCRA provisions as well.

Another commenter said the proposed rule would not adequately address the regulatory gap left by the appeals court decision in *NMA v. DOI I*. The commenter claimed the industry has used the gap to continue to profit from past non-compliance of contract miners. The commenter said the proposed rule

would not require States to use all available procedures to bar owners and controllers from receiving new permits or to prosecute them. We disagree. The permit eligibility criteria and related procedures in the final rule are as restrictive as the rationale in the *NMA v. DOI I* and *II* decisions will allow.

A commenter said the proposal fails to address how to prevent new permit-related damage by entities who are owned or controlled by violators since section 510(c) of SMCRA can no longer be used. The commenter stated that, instead of lowering compliance requirements, regulatory authorities should adjust performance bonds to address the risk of default on reclamation obligations. This final rule does not reduce compliance requirements. Furthermore, section 509(a) of the Act and 30 CFR 800.14(b) already require that the amount of the bond be sufficient to assure completion of the reclamation plan if the work has to be performed by the regulatory authority in the event of forfeiture.

## VI. In What Sections Did We Propose Revisions, What Specific Comments Did We Receive on Them, and How Have We Addressed These Comments in This Final Rule?

### A. Section 701.5—Definitions

We proposed to make several changes to our regulatory definitions. We intended that the proposed changes would result in clearer and more useful regulatory definitions. One commenter said the definitions were satisfactory as proposed. Based upon our review of the comments and further deliberation, we modify most of the proposed definitions in this final rule. Each proposed definition is discussed below.

Comments on a proposed definition and modifications adopted in this final rule are included in the discussion of each proposed definition.

#### Applicant/Violator System or AVS

We proposed to revise the definition for *Applicant/Violator System* or *AVS* and to move the definition to § 701.5. We received no comments on the proposed definition. The final rule modifies the proposed definition to clarify that AVS assists in implementing the Act. It is clearly not the only tool we use to implement the purposes of the Act. AVS is among several automated systems and other mechanisms that we rely upon to assist in implementing the Act. We modified the final definition to remove any potential confusion on this point.

“Control or controller” and “Own, Owner, or Ownership”

Section 510(c) of SMCRA, 30 U.S.C. 1260(c), provides that a surface coal mining permit will not be issued when a surface coal mining operation “owned or controlled by the applicant” is currently in violation of SMCRA or other laws pertaining to air or water quality. However, the Act does not define the phrase “owned or controlled.” We first defined the phrase in the 1988 “ownership or control” rule, 53 FR 38868 (October 3, 1988). In that rule, the concepts of ownership and control were defined together through a series of statuses or relationships under which OSM would either “deem” or “presume” ownership or control. *See, e.g.,* previous § 773.5. In the proposal underlying this final rule, we proposed to define “ownership” and “control” separately, eliminate presumptions of ownership or control, and provide examples to support the proposed definitions of ownership and control. *See* proposed §§ 778.5(a) and (b).

After the close of the comment period for the proposed rule, the D.C. Circuit issued its decision in *NMA v. DOI II*, 177 F.3d 1 (D.C. Cir. 1999). The court struck down two of the six presumptions of ownership or control in our previous ownership or control definitions at 30 CFR 773.5, and upheld two of the six. The court did not address the remaining two presumptions or the categories of “deemed” ownership or control, since these provisions were not challenged. The court’s ruling on presumptions had no direct effect on our proposed definitions of ownership and control, since we had already proposed to eliminate all presumptions of ownership or control, including those invalidated by the court. Like the proposal, this final rule does not contain rebuttable presumptions.

The court also upheld our ability to deny permits based on *indirect* ownership or control. We retained a similar provision in this final rule. However, since the ability to deny permits based on indirect ownership or control, or “downstream” relationships, pertains more to how the definitions are applied than to the definitions themselves, we addressed the applicability of the court’s holding in the discussion of permit eligibility determinations in section VI.E. of this preamble. At this point, however, we note that this final rule continues our prior ability to deny permits based on both direct ownership or control and indirect ownership or control through intermediary entities. We also retained the ability to ascertain ownership or

control at all levels of a corporate chain through any combination of relationships establishing ownership or control under the definitions we adopt today. For example, if Company A owns Company B under our definition of ownership, Company A also owns all entities and operations which Company B owns or controls, and so on.

In this final rule, we retained the basic approach and substance of the proposed rule. However, based on comments, guidance from the court, and further deliberation, we made certain modifications which clarify the scope and applicability of the definitions and examples.

We moved the definitions and examples from proposed § 778.5 to final § 701.5. This will improve the organization by having all of our definitions in one section; this modification also emphasizes the general applicability of the definitions throughout 30 CFR parts 773, 774, and 778 and § 843.21 of our regulations (except as noted otherwise). We also modified the defined terms, from “ownership” and “control” to “*own, owner, or ownership*” and “*control or controller*”, to clarify that the definitions encompass all forms of the words “own” and “control,” including both the verb and noun forms.

We retained the approach of defining ownership and control separately, to emphasize that section 510(c) uses the disjunctive phrase “owned or controlled.” This is significant in that section 510(c) requires permit denials when the applicant either owns or controls an operation with current violations. We moved the proposed examples of ownership or control to follow one of the categories of control—*see* final paragraph (5) of the definition—since the examples are more appropriately viewed as examples of control, rather than ownership. In this final rule, the examples are used to indicate when a person may, but does not necessarily, have “the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted.” Since the focus of the inquiry is on who controls an entity or mining operation, in this preamble we use the phrase “examples of control” to refer to this regulatory provision. Thus, our final definition of control contains categories of “deemed” control (paragraphs (1) through (5)) and examples of control (paragraphs (5)(i) through (5)(vi)).

Our final definition of “*own, owner, or ownership*” is largely the same as our proposed definition of “ownership,” except that we moved the “general

partner” criterion from this definition to the definition of “*control or controller*” in final § 701.5 and eliminated the phrase “or having the right to use, enjoy, or transmit to others the rights granted under a permit.” We also added language to clarify that the final definition does not apply to ownership of real property, such as under final § 778.13 of this rule and 30 CFR § 778.15 of the existing rule. The final definition of “*own, owner, or ownership*” includes being a sole proprietor or possessing or controlling in excess of 50 percent of the voting securities or other instruments of ownership of an entity (*i.e.*, majority ownership). We added the term “controlling” based on the reality that sometimes persons who do not technically own stock (or other instruments of ownership) nonetheless have the ability to control the stock, either by holding the voting rights associated with the stock or other arrangement with the owner of record. Under this definition, if the predicate facts are present—*i.e.*, a person is a sole proprietor or majority shareholder—then the person is an owner. Our rationale for the greater than 50 percent threshold is explained below in our responses to comments. Also, while a sole proprietor is subsumed within the category of majority ownership, we decided to retain that criterion for the sake of clarity. We also reiterate that the definition we adopt today encompasses both direct ownership and indirect ownership through intermediary entities. Thus, if Company A owns 51 percent of Company B, and Company B owns 51 percent of Company C, Company A owns Company C. However, if Company A owns 49 percent of Company B, and Company B owns 51 percent of Company C, Company A *does not* own Company C, since Company A does not own Company B. In summary, if an entity owns another entity, it also owns all entities the other entity owns or controls.

We defined “*control or controller*” in terms of a series of specific relationships and statuses, which are individually enumerated, rather than the more general definition of control in the proposal. In our experience, since we first promulgated definitions of ownership and control in 1988, the relationships and statuses identified in the “deemed” portion of the definition (paragraphs (1) through (5)) will always constitute control, assuming the predicate facts are true. For example, if someone is a permittee, that fact alone, without further inquiry, demonstrates

control under the definition. By contrast, in the examples of control listed in paragraphs (5)(i) through (5)(vi) of the definition, even if the predicate facts are true, that person may or may not be a controller, depending on the particular circumstances. Thus, a 20 percent shareholder of a corporation may be a controller, but only if that person also has “the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted.” See final paragraph (5) of the definition. We provide the examples to identify statuses and relationships which, in our experience since 1988, often indicate actual control. Regulatory authorities and the regulated industry should consider the examples, and any other relevant factors or information, in meeting their responsibilities under this final rule. However, we stress that these examples do not give rise to a presumption of control and do not necessarily constitute control. Finally, as with our definition of “*own, owner, or ownership*”, the definition of “*control or controller*” we adopt today encompasses both direct control and indirect control through intermediary entities. For example, if Company A controls Company B, Company A also controls all entities which Company B owns or controls.

Consistent with the view expressed in the preceding paragraph, we incorporated some of the proposed examples into the deemed categories of control because the person will always be a controller if the predicate facts are true. For example, we decided to move the examples encompassing permittees and operators from the proposed examples to the “deemed” portion of the final definition. We also moved the “general partner in a partnership” criterion from the proposed definition of “ownership” to the final definition of “*control or controller*.” Finally, based on comments, guidance from the court decisions, and further deliberation, we added two new examples of control. See final examples (5)(iii) and (5)(iv).

One other general point we emphasize is that our definition of “*control or controller*” includes the *ability* to control as well as the exercise of control. The reason is simple: The failure to exercise one’s ability to control in order to prevent or to abate violations is as damaging to the environment or as dangerous to the public as actively causing violations. As such, paragraph (5) of the definition specifically provides that those who have the *ability* to determine the manner in which a surface coal mining operation is conducted, not just those

who actually exercise control, are encompassed within our final definition of “*control or controller*.” When we use the term “actual control” in this preamble, we are referring to both the exercise of control and the ability to control.

#### Comments on the Proposed Definition of “Ownership”

A commenter said the Congress intended that new permits should not be issued to an applicant who has an ownership relationship to a violation. The commenter said the proposed rule appears to make ownership irrelevant. The commenter suggested that all references to control should also include references to ownership. The thrust of the comment is that “ownership alone, or control alone, are sufficient to impute responsibility.” Another commenter said that proposed §§ 778.5(b)(1) and (b)(2) refer to “owner” and “controller” separately as though they have different meanings, while proposed § 778.5(a) defines “owner or controller” without distinguishing between the two.

We agree that an applicant’s ownership of an operation with a current violation, standing alone, renders the applicant ineligible for a permit under section 510(c) of the Act, 30 U.S.C. 1260(c). As explained above, because section 510(c) uses the disjunctive phrase “owned or controlled” (emphasis added), we retained our proposed approach of defining ownership and control separately to give independent meaning to the two terms. This is significant in that section 510(c) requires permit denials when the applicant either owns or controls an operation with current violations. In the proposal, we made it clear that either ownership or control of operations with violations could form the basis of a permit denial. See, *e.g.*, proposed §§ 773.15(b)(3)(i)(A) and (B); 773.16(a). When appropriate, this final rule references ownership and control concepts together to emphasize the statutory requirement of section 510(c). Also, we clarified that the examples pertain to control, and not to ownership.

This final rule emphasizes that the scope of permit denials under section 510(c) does not depend solely on the presence of control. Mere ownership, without control, can provide a basis for a permit denial. As such, a person who is an owner under the definition we adopt today cannot successfully challenge such ownership by demonstrating a lack of ability to control. The only way to successfully challenge ownership is to demonstrate that the predicate facts indicating

ownership are not true, *i.e.*, the person is not a sole proprietor or majority shareholder.

The same commenter said that the 10 percent threshold of ownership in section 507 of the Act, 30 U.S.C. 1257, should also be the threshold of ownership under our definition because, under certain circumstances, 10 percent ownership "gives effective control to an entity." Another commenter agreed, making the same argument relative to section 507 of the Act, 30 U.S.C. 1257. The commenter claims, in substance: (1) The greater than 50 percent threshold is "too restrictive for any meaningful application" of SM CRA provisions; (2) few, if any, coal companies have a 50 percent owner; and (3) owners of substantial means in the company should be on notice of their ownership obligations to encourage compliance.

We disagree that the greater than 50 percent threshold is too restrictive and that the 10 percent threshold referenced in section 507 of the Act, 30 U.S.C. 1260(c), is appropriate. As noted, the Act does not define the term "owned." Congress, in using that term, did not indicate if it meant partially owned or wholly owned. Thus, arguments can be made that as little as a few shares of stock all the way to 100 percent ownership, or anywhere in between, should constitute ownership. We adopted the greater than 50 percent threshold because greater than 50 percent ownership will usually confer control. However, we emphasize that a regulatory authority need not demonstrate actual control to deny a permit based on our definition of ownership.

We agree that even as little as 10 percent ownership may constitute effective control of an entity. Indeed, in striking down our previous presumption of ownership or control based on 10 through 50 percent ownership of an entity, the court of appeals, in *NMA v. DOI II*, noted that as little as 10 percent ownership "may, under specific circumstances, confer control." \* \* \* 177 F.3d at 6-7. As such, we adopted the 10 through 50 percent criterion as an example which *may* constitute control. See final paragraph (5)(iii). For ownership of 50 percent or less, it is appropriate to tie such ownership to control. Under paragraph (5) of the definition of "control or controller," a regulatory authority attempting to sustain a finding of control based on 10 through 50 percent ownership must also demonstrate that that person has the ability to determine the manner in which mining is conducted. At paragraph (5)(iii), we also introduced

the concept of "relative percentage" of ownership as an example of possible control. For example, a person may own only 20 percent of an entity, but may nonetheless be the greatest single owner of the entity. In that context, what may seem like a relatively small percentage of ownership may in fact confer actual control. Finally, while we note that less than 10 percent ownership is not likely to confer control, if a 10 percent shareholder does in fact control an entity, the applicant is required to identify the person in a permit application. Also, in identifying owners or controllers which are not disclosed by the applicant, a regulatory authority has leeway under paragraph (5) of the control definition to establish that even such minimal ownership constitutes control.

A commenter suggested that we change the portion of the proposed definition of "ownership" regarding percentage of ownership to "more than 50 percent or controlling interest in the stock." In substance, this commenter believes that a controlling interest of less than 50 percent is sufficient to impute ownership.

We disagree. The final definition of ownership includes "possessing or controlling in excess of 50 percent of the voting securities or other instruments of ownership of an entity." A person must own or control greater than 50 percent of the instruments of ownership in order to fall within our definition of ownership. If a person is the greatest single owner, but owns less than 50 percent, that is an indicator of actual control under paragraph (5)(iii) of our definition of *control* or *controller*, but it does not constitute ownership under this final rule.

Several commenters suggested that we delete the last part of the proposed definition: "or having the right to use, enjoy, or transmit to others the rights granted under a permit." These commenters said that the phrase could "result in improper interpretations" by regulatory authorities. Alternatively, they agreed that it is unnecessary because it is clear that an owner possesses these rights. We agree with the latter comment. Therefore, we removed the phrase from the final definition of "*own, owner, or ownership*."

A commenter said that the proposed definition of ownership was "without any consistent context," and that, "[f]or the purposes of section 510(c), ownership means one thing—ownership of the mine operation." The commenter continued: "The definition here does not even reference [a] mine operation." Another commenter said: "[t]hese

paragraphs do not specify 'owner or controller' of what: no operation is referred to in this section, only violations."

We disagree that the proposed definition was without consistent context. However, we modified the proposed definition of "ownership" for the sake of simplification. Our definitions of ownership and control are not restricted to the implementation of section 510(c); rather, as explained above, the definitions also relate to the permit application requirements of section 507 and its implementing regulations. As such, while the definitions are of obvious importance to our implementation of section 510(c), we see no particular reason to define ownership or control exclusively in terms of that one section of the Act. At the same time, our definition of ownership is fully consistent with section 510(c).

As explained in more detail in section VI.F. of this preamble, we disagree with the argument that ownership of an entity does not equate to ownership of that entity's surface coal mining operations. Indeed, this argument was advanced and rejected in *NMA v. DOI II*. Under this final rule, as well as our previous rules, if a parent company owns or controls a subsidiary, the parent company is also a *de facto* owner or controller of the subsidiary's operations. The commenter's statement that under section 510(c) ownership means ownership of the mine operation begs the question: What does "ownership" mean? We answered that question by adopting a definition of "*own, owner, or ownership*" in this final rule. We chose to define the term and apply it in a manner which encompasses both direct ownership and indirect ownership through intermediary entities.

Finally, a commenter suggested, in substance, that we add "may" to the definition of "ownership" to clarify that the proposed factors do not always constitute ownership. We decline to adopt this commenter's suggestion. Our final definition of "*own, owner, or ownership*" comprises only two specific circumstances, which always constitute ownership. If the predicate facts are true, then the person is an owner. As such, there is no need to add "may" to the definition.

Comments on the Proposed Definition of "Control"

Our final definition of control includes five categories of persons who are deemed to be controllers. Four of the five categories were proposed as examples of ownership or control; we

will address comments on the proposed examples in the relevant section below.

The one category that was not proposed as an example is paragraph (5) of the final control definition, which identifies as controllers those persons "having the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted." We modified and adopted this criterion from paragraph (b)(2) of the definition of control in proposed § 778.5. This provision is carried forward, in substance, from the "deemed" portion of our definition at previous § 773.5. In addition to the specific factors establishing control—*e.g.*, being a permittee, operator, etc.—it is important to retain a general category which allows regulatory authorities and the regulated industry to identify persons who have the ability to control a surface coal mining operation, regardless of their official title, label, or status. This will also allow regulatory authorities to consider specific facts pertaining to a relationship—such as the existence of personal relationships, informal agreements, and the mining histories of the parties in question—in determining whether control is present. In the absence of such a provision, persons could easily use creative titles or business arrangements to evade regulation.

Several commenters objected to the repeated use of the term "controller" in the proposed rule language. They said the use of the term "controller" is a new term or concept that represents an expansion of OSM's authority under section 510(c) of SMCRA, 30 U.S.C. 1260(c). Two of these commenters asked that we define "controller" in § 701.5 or stop using the term in the regulations. Other commenters noted that the proposed rule uses the terms "ownership" and "control" several times before defining them in § 778.5. Several of these commenters preferred that the term be eliminated but said that if it is used, it should only refer to an applicant.

We agree that "control" should be defined in § 701.5; for the reasons stated above we adopted this modification. Also, while the proposed definition of "control" encompassed the noun form of the word—"controller"—we modified the defined term to *control* or *controller* to remove any confusion. The modifications we adopted add to the clarity of the definition.

The term "controller," as used in the proposal and this final rule, is not a new term or concept. The statuses and relationships which constituted control and the examples of control in the

proposed rule were largely imported from the valid portions of our previous regulations. This final rule carries forward many of the control concepts contained in the valid portions of our previous regulations and the proposal. Further, as previously noted, since "control" is not defined in the Act, it is important for us to define the term so that we may adequately implement section 510(c) and other sections of the Act. We also disagree that "controller" should be used to refer only to an applicant. Persons other than applicants routinely own or control mining operations. To arbitrarily restrict the definition only to applicants would circumvent the plain meaning and intent of the Act.

Various commenters said the proposed definition of "control" was inconsistently used, over-broad, ambiguous, and inherently contradictory. These commenters also said the proposed definition contradicted the proposed definition of "ownership," expanded the base for assignment of potential liabilities, and exceeded statutory authority. These and other commenters also suggest that the proposed definition was vague, and that the final definition should be clear and concise. One commenter said the vagueness of the proposal dooms its application as unlawful because it fails to provide fair notice of what is expected prior to any sanctions or deprivation of rights. Another commenter echoed the objection stating that because the proposed definition of "control" is vague, it could mean delays in permitting, as well as penalties and other sanctions, for failure to disclose all controllers in applications. The commenter said: "Before the applicant is subjected to this sanction, it should be afforded an ample and complete opportunity to understand, clearly and concisely, the types of entities and relationships that OSM expects to be disclosed when the applicant submits its application."

We disagree with these commenters. First, we are well within our statutory authority to define the terms ownership and control, which are not defined in the Act. Our final definition of "*control* or *controller*" is reasonable and fully consistent with section 510(c) of the Act, 30 U.S.C. 1260(c), as well as the two rulings of the D.C. Circuit in the *NMA* litigation. Second, as stated previously, the definition is logical, consistent, and well supported by our experience implementing SMCRA since its enactment in 1977. Also, this final rule substantially improves upon the proposal in terms of conciseness and clarity. We find nothing "inherently

contradictory" about either the proposal or the final rule.

Also, this final rule does not expand "the base for assignment of potential liabilities," as the commenters assert. As we stress throughout this preamble, the ownership or control definitions and permit eligibility aspects of this rule do not purport to hold a person personally liable for another person's violations. Rather, the definitions of ownership or control are relevant to, among other things, the information submission requirements for applicants and permittees, the section 510(c) compliance review obligations of regulatory authorities, regulatory authorities' findings of ownership and control, and challenges to ownership or control listings or findings. Despite the view of some commenters, denial of a permit does not equate to personal liability. True, the ownership and control information we receive may assist us in initiating enforcement actions under SMCRA, but that is entirely consistent with and appropriate under the Act. Indeed, the *NMA v. DOI II* court expressly upheld our right to require submission of information "needed to ensure compliance with the Act." 177 F.3d at 9.

One of the commenters said the proposed definition of "control" is inconsistent with the way control information is used to determine permit eligibility. The commenter also asked whether a controller controls the operation as a whole, or just a part of an operation.

There is no precise correlation between the permit information disclosure requirements of the final rule and the section 510(c) permit eligibility determination required under final § 773.12. That is, the Act and our regulations require the submission of specific information, which the D.C. Circuit has ruled cannot form the basis of our permit eligibility determinations. For example, while we must still require certain information pertaining to persons who own or control the applicant, we may no longer routinely consider that information in the section 510(c) permit eligibility process. However, we have no authority to delete information disclosure requirements imposed by other sections of the Act. Furthermore, the information required by the Act and this final rule is pertinent to other statutory obligations beyond permit eligibility determinations, such as enforcement actions, including individual civil penalty assessments.

With regard to whether a controller controls the entire operation, or just a portion thereof, the answer is twofold.

For the most part, the persons identified in the deemed portion of the definition (paragraphs (1) through (5)), as well as the examples of control in paragraphs (5)(i) through (vi), will control the entire operation. However, we recognize that some persons will have control over a significant aspect of an operation, but not necessarily the entire operation. In light of this reality, and in response to several comments, we modified the proposal in key respects. As to the information submission requirements in final § 778.11(c)(5), we now allow applicants to identify the “portion or aspect of the surface coal mining operation” which their owners and controllers own or control. Further, in the final challenge procedures at §§ 773.25 through 773.28, we allow persons to challenge their alleged ownership or control “of an entire surface coal mining operation, or any portion or aspect thereof.” These requirements and procedures will allow regulatory authorities to link the proper persons to violations, as intended by section 510(c), and allow persons to challenge an ownership or control listing or finding by demonstrating that they do not own or control a particular portion or aspect of the operation. In our view, this approach properly takes into account the reality of ownership and control relationships in the coal mining industry.

Another commenter said the central focus in identifying control relationships should remain “the capability of an entity to direct or affect the compliance status of the operations and activities of the nominal applicant, *i.e.*, to direct which reserves are to be mined, to design or control the manner of operation, to direct the flow of coal, etc.” We agree that these are important factors in determining control; they are encompassed in paragraph (5) of the final definition of control.

A commenter noted that the proposed definition included those who “own, manage, or supervise” and asked if it is our “intent to require the listing of mine management personnel responsible for day-to-day operating decisions at a mine.” The commenter said that “these are the people most often responsible for the causation and abatement of violations.”

The final definition of “*control or controller*” does not include the phrase, “own, manage, or supervise.” We also did not adopt the proposed example relating to persons who direct the day-to-day business of the surface coal mining operation. See proposed § 778.5(a)(2). If these persons are controllers, they will be covered under final paragraph (5) of the definition. We

do not necessarily disagree with the commenter that mine management personnel are “the people most often responsible for the causation and abatement of violations.” However, these persons may not always be controllers of a surface coal mining operation. Instead, the controllers may be the persons who direct mine management personnel. Nonetheless, depending on the size of a company, the number of operators and employees at a site, or the delegation of authority within a company, mine management or other personnel may in fact have the ability to determine the manner in which a surface coal mining operation is conducted. The initial onus is on the applicant to identify its owners or controllers, consistent with the final definitions. See final § 778.11(c)(5). Regulatory authorities then have the authority to identify owners or controllers who might not have been disclosed. See final § 774.11(f).

A commenter objected to what the commenter called an “ability to control standard.” The commenter suggested that the standard should be actual control and not ability to control or influence. As explained above, we retained the “ability to control” concept at paragraph (5) of the final definition of “*control or controller*.” In our view, it is the power or authority to control, and not the exercise of control, which is the primary determinant of “actual control.” As previously explained, when we use the term “actual control” in this preamble, we are referring to both the exercise of control and the ability to control. The failure to exercise one’s ability to control, when such control could be exercised, in order to prevent or to abate violations is of the same nature as an action causing a violation.

We also note that we removed the term “influence” from the definition of control. However, one of the examples of control refers to persons who contribute capital or other working resources and substantially influence the conduct of a surface coal mining operation. This example is discussed below.

The same commenter also said that the ability to control should be limited to the elements of an agency relationship “established between the applicant and other persons.” We disagree that “control” should be so narrowly defined. The definition we adopt today includes relevant agents of an applicant or permittee and all other persons who can determine the manner in which a surface coal mining operation is conducted. Our definition is reasonable and consistent with

section 510(c) of SMCRA, 30 U.S.C. 1260(c).

A commenter suggested, in substance, that we add “may” to the definition of “control” to clarify that the factors in the proposed definition do not always constitute control. As stated above, our final definition of “*control or controller*” consists of a series of statuses or relationships which *always* constitute control (paragraphs (1) through (5)), and a series of examples in paragraphs (5)(i) through (5)(vi) which *may* constitute control. Use of the word “may” is appropriate when referring to the examples of control in paragraph (5), but it would be inappropriate in the other portions of the definition, since the identified statuses and relationships will, and do, constitute control in all cases.

#### Comments on the Proposed Examples of (Ownership or) Control

The proposed rule provided examples of ownership or control. See proposed § 778.5(a). In this final rule, we modified the proposed examples and moved them to the definition of “*control or controller*” to emphasize that they are more properly viewed as examples of control, not ownership. The examples now pertain only to paragraph (5) of the definition, which refers to a “person having the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted.” With respect to the conduct of surface coal mining operations, this criterion is the essence of “control.” Thus, when we refer to “examples of control,” we are referring to the examples enumerated in paragraphs (5)(i) through (5)(vi) of the final control definition. The list of examples is not exhaustive; a regulatory authority retains flexibility to consider any and all facts or circumstances which may indicate that a control relationship exists.

#### General Comments on the Proposed Examples of Control

A commenter suggested that we adopt the first sentence in proposed paragraph (a): “This part applies to any person who engages in or carries out mining operations as an owner or controller,” but not adopt any of the eight proposed examples. The commenter said we should eliminate the examples and, “in the spirit of primacy,” leave it up to the regulatory authorities to determine who is an owner or controller. The commenter said the list of examples contains broad, vague, and potentially confusing definitions, and that “definitions for ‘ownership’ and

'control' at [proposed] § 778.5(b)(1) and (2) provide [regulatory authorities with] sufficient guidance."

We agree that the definitions of "own, owner, or ownership" and "control or controller" stand alone, but the examples are useful for both the regulated industry and regulatory authorities to consider in determining who may be controllers under paragraph (5) of the final definition of control. We derived the examples from our experience in implementing SMCRA since 1977 and from comments received on the proposed rule. We see no reason not to pass on the benefit of our experience, via the examples of control, to persons who have responsibilities under this final rule. We also note that regulatory authorities providing comments on the proposed examples of control did not raise concerns regarding State primacy.

A commenter said that OSM proposed eight categories of "conclusively deemed 'owners or controllers.'" The commenter argued that "no manager or supervisor other than the mine manager [should] be considered a controller." Finally, the commenter also asserted that requiring permittees to notify the regulatory authority under proposed § 774.13(e) each time there was a change in personnel or in the ownership or control structure would impose a significant burden.

As explained above, we clarified that the examples at paragraphs (5)(i) through (vi) of the final control definition do not conclusively establish control. In addition, we did not adopt proposed § 774.13(e), which would have required updates of certain information, including changes of officers and directors, under the requirements for permit revisions. Instead, we adopted a notification-only process in final § 774.12 that is not subject to the application, notice, and public participation requirements for permit revisions. We disagree with the commenter's assessment that only a mine manager should be considered a controller; other managers and supervisors may well be controllers, depending on their responsibilities and conduct. Neither do we agree that the mine manager is always a controller. The definition we adopt today reasonably identifies persons who control a surface coal mining operation.

The same commenter expressed concern regarding OSM's attempt to distinguish between employees of mining operations and those who engage in or carry out mining operations. The commenter said its own "participatory management style" has "'pushed down' responsibility for many

activities, including reclamation and environmental compliance, to the lowest possible level."

A business entity is free to adopt any management model it desires. However, persons meeting the definition of ownership or control cannot escape their responsibilities under the Act simply because they choose unique management styles or "push down" their responsibilities to lower management levels. As explained above, the lower level employees to whom the commenter refers will not routinely be "controllers" under the regulatory definition. However, if these employees do in fact have the ability to determine the manner in which mining is conducted, then they have the authority and responsibility normally accorded to higher level managers. In such cases, they should be held accountable to exercise their authority and execute their responsibilities in ensuring that mining and reclamation are conducted in accordance with the requirements of the permit. However, the fact that subordinate employees may exercise control does not allow higher level managers, who have the ability to control those employees, to escape their status as controllers.

A commenter said that "the 'control' parameters exceed the scope of SMCRA and violate the spirit, if not the letter, of (*NMA v. DOI I*), by allowing OSM to expand 'ownership and control' beyond the plain meaning and common legal interpretation of those terms."

We disagree. We adopted limited and succinct definitions of "control or controller" and "own, owner, or ownership," which are consistent with section 510(c) and other provisions of the Act. Also, neither the final definition of "control or controller" nor the supporting examples violates the D.C. Circuit's rulings in *NMA v. DOI I* or *NMA v. DOI II*. In *NMA v. DOI I*, the court did not invalidate the definition of ownership or control itself, just the application of the definition in the permit eligibility context. *NMA v. DOI I*, 105 F.3d at 694. The *NMA v. DOI II* court did rule specifically on our previous definition, but only in terms of our use of rebuttable presumptions. *NMA v. DOI II*, 177 F.3d at 5-7. In this final rule, we eliminated the use of rebuttable presumptions. Further, the court did not rule on any of the deemed categories of ownership or control, including paragraph (a)(3) of the definition at previous § 773.5, which defined ownership or control, among other things, as: "[h]aving any other relationship which gives one person authority directly or indirectly to determine the manner in which an

applicant, an operator, or other entity conducts surface coal mining operations." We retained the substance of the previous (a)(3) category in paragraph (5) of the final definition of "control or controller."

A commenter said that the proposed rule: (1) Created newly defined persons and entities, (2) identified them as "owners" and "controllers" and (3) created "novel enforcement tools" that focus on the owners and controllers. The commenter also said OSM lacks the authority to extend the use of the terms "owner" and "controller" beyond section 510(c) of SMCRA, 30 U.S.C. 1260(c). We disagree. Neither the proposed rule, nor this final rule, creates newly defined persons or entities. Rather, we define "own, owner, or ownership" and "control or controller" in a manner which is fully consistent with section 510(c) of the Act (30 U.S.C. 1260(c)), the decisions of the D.C. Circuit in the *NMA* litigation, and fundamental tenets of corporate law. Also, we did not create "novel enforcement tools." The enforcement provisions we adopt today at final part 847 are derived from the plain language of, and are fully consistent with, the Act. Finally, we also disagree that "owner" and "controller" are terms that must be confined to section 510(c), 30 U.S.C. 1260(c). As the D.C. Circuit expressly held, SMCRA's information requirements at section 507(b), 30 U.S.C. 1257(b), "are not exhaustive," and OSM may require the submission of additional information "needed to ensure compliance with the Act." *NMA v. DOI II*, 177 F.3d at 9. Under this rationale, the court upheld our previous information disclosure requirements, which required applicants to disclose information—including ownership and control information—beyond the requirements expressly set out in section 507, 30 U.S.C. 1257; this final rule carries forward much of our previous information provisions. As explained elsewhere in this preamble, the ownership and control information we require applicants to submit pursuant to final § 778.11(c)(5), (d), and (e) is necessary to enforce both section 510(c), and other provisions of the Act. Several commenters claim that the proposed rule disregards the corporate form to impose personal liability on officers, directors, and shareholders (including parent corporations) of a corporation. Several of these commenters cited the decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), in support of their contention. We disagree. Nothing in the permit eligibility provisions of this rule or in section 510(c) of the Act renders a

person legally liable or responsible for another person's outstanding violations. A finding of ownership or control under section 510(c) and this rule *does not* require a person subject to the finding to abate any violations (though he or she may be directly liable for abatement under other provisions of the Act). The permit eligibility aspect of this rule is not a direct enforcement mechanism brought to bear against owners or controllers since the permit eligibility provisions, which rely on the definitions of "own, owner, or ownership" and "control or controller," cannot lead to an injunction or judgment against owners or controllers. They may, however, result in permit ineligibility pursuant to section 510(c)'s mandate that a permit "shall not be issued" if an operation owned or controlled by the applicant is currently in violation of the Act or other applicable laws. We also stress that owners or controllers may be subject to direct enforcement actions, as appropriate, under other provisions of the Act and our regulations.

*United States v. Bestfoods* assessed the standards to determine the financial liability of parent companies for the actions of their subsidiaries under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Unlike the provisions at issue in *Bestfoods*, our definition and the associated rules do not impose personal financial liability on officers, directors, or shareholders. It instead, determines when persons are eligible to receive permits under section 510(c) of SMCRA. Being ineligible to receive a permit based on ownership or control of operations with outstanding violations is not the same as being personally liable for the debts or wrongs of a corporation. As such, *Bestfoods* is simply not applicable to this rulemaking. Indeed, in *NMA v. DOI II*, which was decided *after* the decision in *Bestfoods*, the court upheld rules which allowed parent companies to be denied permits based on the violations of their subsidiaries. *NMA v. DOI II*, 177 F.3d at 4-5. The final rule adheres to this principle.

In a similar vein, two commenters said it is a misconception that persons who own or control a corporate permittee or operator thereby "engage in or carry out" the surface coal mining operations owned by that permittee or operator. In substance, these commenters believe that, under *Bestfoods*, ownership or control of an entity does not equate to ownership or control of the entity's operations.

Again, we disagree. This argument was presented and rejected in *NMA v.*

*DOI II*, which was decided *after* the decision in *Bestfoods*. The court expressly upheld our previous regulations, which allowed for permit denials when an applicant indirectly owned or controlled "downstream" operations through ownership or control of "intermediary entities." As such, the court expressly endorsed rules which allowed for permit denials based on ownership or control of entities, rather than direct ownership or control of operations. *NMA v. DOI II*, 177 F.3d at 4-5. The final rule adheres to this principle.

A commenter said that "any suggestion that section 506 and section 510(c) together allow the agency to attribute the responsibilities of one who holds a permit (the "permittee") to anyone the agency deems as an owner or controller of mining operations is simply arbitrary." The permit eligibility aspects of this rule do not impose personal liability or responsibility on owners or controllers to abate or correct violations at operations they own or control, although they may be liable for abatement under other provisions of the Act and our implementing regulations. The preamble to this rule and the underlying proposed rule explain the rationale for each category of ownership and control.

A commenter asked the meaning of "engages in or carries out." The commenter said that the language of the proposed rule does not distinguish between employees and those "who OSM describes, under the amorphous phrase, as persons 'who engage in or carry out mining operations.'" In an effort to simplify and clarify our final ownership and control definitions, we are not adopting the phrase "engages in or carries out" in the final regulatory language. The final definitions identify those persons who must be disclosed in permit applications as owners or controllers of the applicant.

Another commenter said that the proposed examples capture people who do not engage in or carry out surface coal mining operations, and thus fall outside the jurisdictional reach of SMCRA. The commenter said our definition should focus on actual control. The definition we adopt today does focus on actual control, which includes both the ability to control and the exercise of control.

#### Elimination of the Rebuttable Presumption for Ownership or Control

Paragraph (b) of our prior definition of ownership or control listed six relationships which were "presumed to constitute ownership or control." 30 CFR 773.5 (1997). The presumption

could have been rebutted if the person subject to the presumption could demonstrate that he/she in fact "does not have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted." *Id.* Once a regulatory authority made a *prima facie* showing that the presumption applied because the person fit into one of the enumerated categories, the burden shifted to the person to disprove that he or she was an owner or controller. Our rationale for shifting the burden rested on our belief that the person subject to the presumption was most likely to have access to the information regarding the nature of the relationship and thus should bear the burden of producing evidence demonstrating a lack of control.

In our 1998 proposed rule, we proposed to eliminate rebuttable presumptions from our ownership and control definitions. See 63 FR 70604 for an explanation of our rationale. After the proposal was published, the *NMA v. DOI II* court struck down two of the previous rule's presumptions pertaining to officers and directors and 10 through 50 percent owners of entities. This ruling provided further impetus to move forward with our proposed elimination of presumptions.

Our final rule emphasizes that applicants have the burden to identify all owners or controllers in a permit application (see final § 778.11(c)(5)), which must be accurate and complete before a permit can be issued. SMCRA section 510(b)(1), 30 U.S.C. 1257(b)(1); final 30 CFR §§ 778.9(b) and 777.15(a). Further, if we find that there has been a knowing withholding of information required under 30 CFR part 778, including ownership or control information, we will refer the evidence to the Attorney General for prosecution under final 30 CFR 847.11(a)(3) and section 518(g) of the Act, 30 U.S.C. 1268(g). See also final 30 CFR 773.9(d). Also, regulatory authorities have the ability to later identify owners or controllers who were not disclosed in the permit application. The proposed provisions, taken together, will ensure that all owners and controllers are properly identified.

A commenter opposed eliminating the rebuttable presumptions, noting that rebuttable presumptions are an evidentiary tool used to shift the burden of producing information to the individual or individuals most likely to have access to information. The commenter also said OSM had not sufficiently justified eliminating the presumptions "since the underlying questions of whether control exists or

not, and whether ownership exists or not, will still be required to be adjudicated." According to the commenter, the absence of presumptions of ownership or control would increase the burden on the agency to demonstrate the existence of the relationship. The commenter stated that the permit applicant should bear that responsibility under section 507(b) of the Act.

Consistent with the commenter's observation that persons subject to our previous presumptions were most likely to have access to pertinent information, applicants are also most likely to possess the knowledge and information necessary to determine their owners and controllers. Thus, this rule requires applicants to identify all owners and controllers and list them in the permit application. As explained above, the information submitted by applicants must be accurate and complete. If applicants properly identify all owners and controllers in a permit application, there is no additional burden on regulatory authorities. However, if an applicant fails to disclose an owner or controller, and a regulatory authority attempts to identify an owner or controller under final § 774.11(f), the regulatory authority will appropriately bear the initial burden of establishing the existence of the ownership or control relationship. The rule does not alter the burdens and responsibilities that section 507 of the Act assigns to permit applicants.

Another commenter stated that we should not eliminate the two presumptions that were not challenged by the National Mining Association, or the two presumptions on which we prevailed. The commenter suggested that as to the two presumptions which were invalidated, the court of appeals did not preclude regulatory authorities from making a finding that a 10 through 50 percent shareholder, officer, or director in fact owns or controls a violating entity.

The commenter presented no new arguments in favor of retaining the presumptions. Therefore, for the reasons set forth in the preamble to the proposed rule, the final rule does not include presumptions. However, we agree with the commenter that the court of appeals did not preclude regulatory authorities from making findings of fact with regard to persons covered by the invalidated presumptions. Nothing in the final rule precludes regulatory authorities from doing so. We also added final § 774.11(f) to allow regulatory authorities to make findings of ownership or control if the applicant fails to disclose all required ownership

or control information in its application, or to update the information as necessary.

#### Proposed § 778.5(a)

Proposed § 778.5(a) stated that "this part applies to any person who engages in or carries out mining operations as an owner or controller," and provided examples of owners or controllers to support the definitions of "ownership" and "control" at proposed § 778.5(b). Several commenters said that we should clarify that the persons identified in the examples "are not automatically considered owners and controllers." We agree. As explained above, this final rule clarifies that the categories at paragraphs (5)(i) through (vi) of the final definition of "control or controller" are merely examples of those persons who could have control, they are not deemed categories of control.

#### Proposed § 778.5(a)(1)—Officers, Directors, and Agents

Our first example of owners or controllers was "the president, other officers, directors, agents or persons performing functions similar to a director." We retained the substance of this provision as an example of control at paragraph (5)(i) of our final definition of "control or controller." While we anticipate that the president of a business entity will almost always control the entity, a president will not necessarily do so in every instance. Therefore, we included presidents as an example of persons who may control an entity rather than classify presidents as "deemed" controllers.

Two commenters said that our statement in the preamble to the proposed rule that we do not intend for all employees to be identified in a permit application is inconsistent with our proposal "to define 'owner or controller' to include agents" and our "acknowledg[ment] that all employees are 'agents.'" According to the commenters, if agents are owners or controllers, and if all employees are agents, then the proposal would have required all employees to be identified in the application as owners or controllers. These commenters also said that "the class of employees who actually engage in mining operations would include the very employees with the least ability to control the permittee's decisions concerning mining operations: equipment operators, pumpers, truck drivers, drillers, etc."

We did not intend for every employee to be identified in an application. The final definition of "control or controller" lists agents as an example of persons who *may* have actual control.

This rule does not require all agents or employees to be disclosed in a permit application, only those agents and employees who meet our final definition. As a general matter, our final definition does not encompass the specific employees identified by the commenters—"equipment operators, pumpers, truck drivers, drillers, etc."—since these individuals typically do not have the ability to determine the manner in which a surface coal mining operation is conducted. Rather, these employees are typically under the supervision of, or take orders from, management personnel who do possess the ability to control the operation. However, should the responsibilities, duties, or actions of these employees meet the definition of "control or controller," then they must be disclosed as, or may be found to be, controllers under final §§ 778.11(c)(5) and 774.11(f), respectively.

A commenter asked for an explanation of the phrase "functions similar to a director." A corporate board of directors controls and manages the business affairs of the corporation in accordance with applicable State law, articles of incorporation, and corporate by-laws. The board of directors has ultimate decision-making authority with respect to significant corporate matters. The will of the board is usually manifested by a majority vote of the directors. A person, such as a director, cannot escape being a controller under this final rule by asserting that he or she is a member of a group, *e.g.*, a board of directors, and can only exercise authority collectively with the group. At final paragraph (5), we clarify that a controller is a person who has the ability, *alone or in concert with others*, to determine the manner in which a surface coal mining operation is conducted. Thus, if a director votes with the majority of the board, we cannot foresee an instance in which that director is not a controller of that particular aspect of the corporation's operations. However, a director who dissents with regard to a particular course of action—or can otherwise prove that he or she took meaningful actions to prevent or abate a violation—likely is not a controller as to that aspect of the operation.

The phrase "functions similar to a director," which we borrow from section 507(b)(4) of the Act, 30 U.S.C. 1257(b)(4), clarifies that a person may have the functional power, but not the official title, of a director. In essence, a person who, alone in or concert with others, exercises final managerial control or authority over the affairs of a business entity—be it a corporation or

other entity—performs a function similar to a director.

Proposed § 778.5(a)(2)—Day-to-Day Activities

Our second example pertained to those “persons who have the ability to direct the day-to-day business of the surface coal mining operation.” We are not adopting this example because it is subsumed within final paragraph (5) of the control definition.

Proposed § 778.5(a)(3)—Permittees and Operators

Our third example encompassed permittees and operators. We decided to include permittees and operators in the deemed portion of the final control definition at paragraphs (1) and (2), respectively. There is no time when a permittee does not control its entire surface coal mining and reclamation operation. In addition, experience has demonstrated that there is no time when an operator does not control its own conduct on a surface coal mining and reclamation operation. However, we recognize that non-permittee operators will not necessarily control the entire operation. The final challenge procedures at §§ 773.25 through 773.28 allow persons, including operators who are listed as or found to be controllers, to challenge their alleged ownership or control “of an entire surface coal mining operation, or any portion or aspect thereof.” There were no specific comments on the proposed third example.

Proposed § 778.5(a)(4)—Partnerships and Limited Liability Companies

Our fourth example pertained to “[p]artners in a partnership, the general partner in a limited partnership, or the participants, members, or managers of a limited liability company.” Based in part on guidance from the D.C. Circuit in *NMA v. DOI II*, we moved the general partner in a partnership criterion to the deemed portion of the control definition at final paragraph (3). We retained the remainder of the proposed provision as an example of control at final paragraph (5)(ii).

With regard to our previous definition identifying general partners in a partnership as presumptive owners or controllers, the D.C. Circuit stated: “As for subsection (4)’s presumption that control vests in each general partner, it naturally flows from ‘the tenet of partnership law that a general partner has control of partnership affairs as against the outside world.’” *NMA v. DOI II*, 177 F.3d at 7 (citations omitted). While the court was ruling in terms of a presumption of control, and not a

category of deemed control, the court’s statement clearly supports our inclusion of general partners of a partnership in the deemed portion of our control definition. Our experience in administering SMCRA also bears out this reality.

On the other hand, partners in a partnership and participants, members, or managers of a limited liability corporation will not always control the business entity, though they certainly might. Therefore, we included these persons as examples of potential controllers in paragraph (5)(ii) of the final definition.

A commenter said limited liability companies should not be treated in the same manner as limited partnerships, since, unlike limited partners, the individuals in a limited liability company do not retain the capability to make decisions. The commenter also said OSM should “re-evaluate the historic policy of allowing new permits to be issued based only on the evaluation of the general partner in a partnership.” Another commenter suggested that members of a limited liability company are often passive investors who “have little to do with the functional operation of any company, let alone a mining company” and “know little or nothing about the mining industry, let alone having any control over an operation.”

The final rule defines owners or controllers of business entities or mining operations without any regard to the particular form of the business entity. Hence, we treat partners in a partnership and members of a limited liability company similarly to the extent that we include them as examples of persons who may control an entity. Under paragraph (5) of our final definition, control determinations rest upon a person’s ability to determine the manner in which a surface coal mining operation is conducted, not the type of business entity or the person’s title. It is incorrect to say that OSM’s “historic policy” included only an examination of general partners in a partnership. While not specifically mentioned in a deemed or presumed category of ownership or control, regulatory authorities certainly had flexibility to determine whether other persons had authority to determine the manner in which a surface coal mining operation was conducted. See previous § 773.5, at paragraph (a)(3) of the ownership or control definition. Finally, we do not fully agree with the commenter’s generalization that the members, managers, or participants in limited liability companies are merely passive investors with little involvement with a

company’s operations and little or no knowledge of the mining industry. If that statement is true in a given instance, then the person is highly unlikely to be a controller under our definition any way.

Proposed § 778.5(a)(5)—Contract Mining

Our fifth example pertained to “persons owning the coal (through lease, assignment, or other agreement) and retaining the right to receive or direct delivery of the coal.” We retained the substance of this provision as an example at paragraph (5)(v) of the final control definition. Under the final rule, persons who own or control the coal to be mined by another person through lease, assignment, or other agreement and have the right to receive or direct delivery of the coal after mining are potential controllers. The circumstance described in this example is generally referred to as “contract mining,” wherein an entity (generally referred to as a “contract miner” or “captive contractor”) obtains a SMCRA permit in its own name, mines the coal belonging to another person (the owner or lessor), and must deliver the mined coal to that person or pursuant to that person’s directions. The obligation to deliver the coal to the owner/lessor is often referred to as a “captive coal supply contract.” Generally, persons who have the ability to control contract miners are controllers who should be barred from receiving new permits under section 510(c) of the Act, 30 U.S.C. 1260(c), if they fail to prevent or correct violations. Further, most coal lessors who retain the right to receive the mined coal will be controllers because they have typically chosen to structure their relationship with an operator so as to retain the ability to control the mining operation.

Several judicial and administrative decisions support our inclusion of the contract mining example. For example, in *United States v. Rapoca Energy Co.*, 613 F. Supp. 1161 (1985) (“*Rapoca*”), OSM sued under section 402(a) of the Act, 30 U.S.C. 1232(a), to collect reclamation fees from the Rapoca Energy Company, which had contracted with others to mine the coal it owned. The issue was “whether a large coal company that contracts with independent companies to produce coal that it owns or leases is an ‘operator’ responsible for the payment of [such] fees.” *Id.* at 1163. Finding that Rapoca was liable for payment of the fees, the court stated:

Because of the degree of control which Rapoca Energy Company exerts over the mining companies with respect to crucial aspects of the mining process, along with the

corresponding lack of freedom regarding the mining companies ability to sell to anyone other than Rapoca, this court must conclude that the "independent contractors" are no more than Rapoca's agents.

*Id.* at 1164.

Similarly, in *S & M Coal Co. and Jewell Smokeless Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, 79 IBLA 350 (1984) ("*S & M Coal*"), the Department of the Interior's Office of Hearings and Appeals ("OHA") held a lessor of coal liable for violations at a mining site even though the coal produced at that site was mined by another party pursuant to an oral contract. In reaching its decision, OHA noted that the lessor's employees took an active part in the planning and engineering functions in support of the mining operations. OHA also held that while the amount of control actually exercised is indicative of the relationship between the owner of the coal and the company or individual extracting the coal, the determination regarding exercise of control should not solely be based on past exercise of control and that it is important to determine the extent that a party can exercise control.

Several commenters said that the example should be deleted because it is "unfair and discriminates against a coal company simply because it owns minerals, leases them, and happens to be in the business of selling coal." These and other commenters said, in substance, that retaining a right of first refusal to purchase coal from a third party, in an arm's length transaction, is not sufficient to establish control. Another commenter supported the example, agreeing that entities with an economic interest in the coal should be considered controllers to the extent that the entity does or can exercise control over, or derive benefits from, the mining operation.

We did not delete the contract mining example. Because owners or lessors of coal are not always "controllers" of contract mining operations, we included contract mining as an example of control in paragraph (5)(v) of the definition, rather than incorporating it into the deemed portion of the final definition of "control or controller." However, when an owner or lessor of coal controls salient features of an operation performed by a contractor, a determination of control over the coal mining operation is justified and should be established. Our extensive experience evaluating and analyzing contract mining arrangements supports a conclusion that leasing coal combined with the right to receive or direct delivery of the coal generally establishes

control. As to rights of first refusal, we agree that retaining such a right, in an arm's length transaction based on market conditions, will not, in and of itself, always establish control. However, a regulatory authority certainly has the authority to examine the particular circumstances to ascertain whether there are other indicators of control.

Another commenter said that:

rights sold to mining companies specifically describe the rights of each party. It's exceedingly presumptuous to state that those who happen to own the coal also have control over compliance with regulations when the coal is mined. Those rights generally stay with the entity mining the coal.

We disagree. The terms of a contract may establish the rights of the parties among themselves, but these terms are not a conclusive determination of the responsibilities of the parties under SMCRA. A contract in which an owner or lessor of coal purports to contract away the obligation to comply with SMCRA does not mean that the owner or lessor is not a controller under section 510(c) of the Act, 30 U.S.C. 1260(c). Again, what is relevant under this rule is whether the owner or lessor has the ability to determine the manner in which a surface coal mining operation is conducted.

#### Proposed § 778.5(a)(6)—Contribution of Capital or Other Resources

Our sixth example pertained to "[p]ersons who make the mining operations possible by contribution (to the permittee or operator) of capital or other resources necessary for mining to commence or for operations to continue at the site" We retained the substance of this provision as an example at paragraph (5)(vi) of our final definition of "control or controller." Under this final rule, persons who contribute capital or other working resources under conditions that allow that person to substantially influence the manner in which a surface coal mining operation is or will be conducted are potential controllers. We agree with commenters who suggested that influence is not equivalent to control; however, contribution of capital or other resources, coupled with substantial influence over the manner in which the surface coal mining operation is conducted, may be tantamount to control.

Numerous commenters said that OSM should not "extend the 'ownership or controller' definition to utilities that have a captive coal supply contract." We deleted direct reference to captive coal supply contracts in this example.

However, if a utility has a captive coal supply contract whereby it contributes capital to the operation, substantially influences the conduct of the operation, and can direct delivery of the coal, the utility is, in all likelihood, a controller under paragraph (5) of the final definition. That paragraph includes all persons and entities with the ability to control the manner in which the surface coal mining operation is conducted. A captive coal supply contract is typically indicative of a contract mining scenario, and may be covered under the contract mining example, which we discuss more fully above.

Numerous commenters said that OSM should not "extend the 'ownership or controller' definition to mining equipment rental and leasing companies." One asked if equipment dealers who provide credit in exchange for a security interest are controllers of the mining operation. Another said that equipment leasing is a valid arm's-length contract.

We adopted a subparagraph within the final example to clarify that providing mining equipment in exchange for the coal to be extracted is a factor which may indicate control. However, under paragraph (5)(vi)(A) of the final definition, equipment dealers who sell or lease equipment in arm's length transactions, but do not receive the mined coal, will not be routinely encompassed within the definition of "control or controller." To be classified as a controller, the person must have the ability to determine the manner in which the surface coal mining operation is conducted.

Three commenters said a family member or friend who provides a personal guarantee to obtain a reclamation bond should not be considered an owner or controller. Depending upon the circumstances of the guarantee, and the nature of the guarantor's relationship to the surface coal mining operation, a family member or friend may in fact be a controller. Again, the focus is on that person's ability to determine the manner in which the relevant surface coal mining operation is conducted.

Taking an opposing view, another commenter said that, in addition to personal guarantees to obtain a reclamation bond, the provision should also include "any type of guarantor on an indemnity agreement to get a reclamation bond." The commenter also said any person "or other entity who guarantees a bond should be listed under this provision." We decline to specifically add the language suggested by the commenter because persons who guarantee a bond generally do not have

the ability to determine the manner in which a surface coal mining operation is conducted. However, final paragraph (5)(vi) could encompass such persons, provided that they also substantially influence the conduct of the mining operation.

One commenter said this example should be deleted because none of the circumstances in the example “necessarily mean[s] that an entity can exercise control over the day-to-day operations at a mine site.” We agree that the examples do not constitute *de facto* control. The persons identified in the examples will only be controllers if, in addition to meeting the criteria in the examples, they also have the ability to determine the conduct of the mining operation.

A commenter asked if banks, other lending institutions, third parties that have never been to the mine, construction companies who lease equipment, limited liability partners in a leasing company, and utilities that receive 100 percent of a mine’s production are all controllers. The commenter expressed concern that if all these entities are controllers, they all would then be required “to submit signed, notarized certifications stating that they assume personal financial and criminal liability for a mine’s transgressions.” Other commenters said OSM should not “extend the ‘ownership or controller’ definition to banks or any other lending institutions or to some individual who makes an arm’s-length loan to a coal operator without any other ‘control’.”

As to banks, lending institutions, and individuals who make arm’s length loans, we revised the example in paragraph (5)(vi) of the final definition to include only these persons who contribute capital or other working resources under conditions that allow that person to substantially influence the manner in which the mining operation is conducted. Therefore, the mere act of lending money will not render a person a controller. Our previous discussion of other comments addresses the other scenarios posited by the commenters. Neither the proposed rule nor this final rule requires controllers to certify to personal financial or criminal liability.

#### Proposed § 778.5(a)(7)—Persons Who Can Commit Financial or Real Property Assets

Our seventh example pertained to persons “who control the cash flow or can cause the financial or real property assets of a corporate permittee or operator to be employed in the mining operation or distributed to creditors.”

We retained the substance of this provision and, based in part on guidance from the D.C. Circuit in *NMA v. DOI II*, moved it to the deemed portion of the definition of “control or controller” at paragraph (4). Final paragraph (4) includes as controllers persons having the ability to, directly or indirectly, commit the financial or real property assets or working resources of an applicant, permittee, or operator. This language largely mirrors one of our previous rebuttable presumptions of control. With regard to that presumption, the D.C. Circuit said:

There is nothing strained about section (3)’s presumption that one “[h]aving the ability to commit the financial or real property assets or working resources of an entity” controls it. The ability to control assets goes hand-in-hand with control and is typically entrusted, along with general managerial authority, to a single officer, often the president.

*NMA v. DOI II*, 177 F.3d at 7 (citations omitted). While the court was ruling in terms of a presumption of control, and not a category of deemed control, the court’s statement clearly supports our decision to include these persons in the deemed portion of our final control definition. Our experience in administering SMCRA also supports this action.

One commenter said the proposed example was vague. We disagree. The language in this final rule closely resembles and is consistent with the provision upheld by the D.C. Circuit, which found “nothing strained” about that provision.

A commenter asked if, under the proposed example, the following persons are “controllers”: chief accountant; payroll clerk; customers, by virtue of paying their bills; coal company customers; a bankruptcy court “authorized to disperse the assets of a company”; or a land agent who secures leases. As previously discussed, under paragraph (5)(vi) of the final definition, none of the listed persons would be considered controllers unless they have the ability to determine the manner in which a surface coal mining operation is conducted. The relevant inquiry is whether the person in question has the ability to commit the assets of a business entity in furtherance of the mining operation.

#### Proposed § 778.5(a)(8)

Our final proposed example pertained to “[p]ersons who cause operations to be conducted in anticipation of their desires or who are the animating force behind the conduct of operations.” We received many comments that said proposed § 778.5(a)(8) was “difficult to

understand and would be difficult to implement.” We did not adopt this example because the concepts that we intended to convey in the proposed example are adequately captured in paragraph (5) of the final definition of “control or controller.”

#### Final Paragraphs (5)(iii) and (5)(iv)—10 Through 50 Percent Ownership, Interlocking Directorates and Commonality of Officers

As explained above, we added two examples of control to this final rule. We addressed the first of these examples—10 through 50 percent ownership of an entity—in our responses to comments on our proposed definition of ownership. We added the second example—“an entity with officers or directors in common with another entity, depending upon the extent of overlap”—since interlocking directorates and commonality of officers tend to indicate that a control relationship may exist between two entities. However, as with our other examples, the mere existence of the factual scenario—*e.g.*, interlocking directorates—does not necessarily mean there is a control relationship. A person is not a controller under paragraph (5) of the final definition unless that person has the ability to determine the manner in which a surface coal mining operation is conducted.

#### “Federal Violation Notice” and “State Violation Notice”

We proposed to revise the definitions of *Federal violation notice* and *State violation notice*. Several commenters said *Federal violation notice* should specifically mean a Federal surface coal mining violation notice and that *State violation notice* should specifically mean a surface coal mining violation notice.

Upon further review, we determined that there is no need to define these terms. The definitions of “violation” and “violation notice” adopted in 30 CFR 701.5 of this final rule are sufficient. The commenters’ concern is addressed in the context of the rules in which these terms are used. They include only violations in connection with a surface coal mining operation. Therefore, we are not adopting definitions for *Federal violation notice* or *State violation notice* and will remove these terms from our regulations.

#### Knowing or Knowingly

We proposed to replace the definition of *knowingly* in §§ 724.5 and 846.5 with a new definition of “*knowing or knowingly*” in 30 CFR 701.5. The final

definition of “*knowing or knowingly*” reflects the proposed rule, although we revised the text of the definition to read: “*knowing or knowingly*” means “that a person who authorized, ordered, or carried out an act or omission knew or had reason to know that the act or omission would result in either a violation or a failure to abate or correct a violation.”

We revised the definition to ensure that its applicability would not be restricted to “violation, failure or refusal” as that term is defined in 30 CFR 701.5. We removed redundant language. In addition, we replaced the word “individual” with “person.” The Act and our regulations define *person* in a manner that includes both individuals and business entities, as is appropriate in the context in which the Act and regulations employ this term. See 30 CFR 700.5 and SMCRA at section 701(19), 30 U.S.C. 1291(19).

Two commenters addressed the proposed definition. Both objected to the “knowing” standard being applied to “administrative” violations, violations which the commenters describe as those that do not cause environmental harm. One of the commenters observed that “knowingly” and “willfully” were originally associated with the issuance of individual civil penalties to the officers and directors of corporate entities.

The “knowing” standard appears in sections 518(e), 518(f), and 518(g) of the Act, 30 U.S.C. 1268(e), 1268(f), and 1268(g). There is nothing in any of these sections that would support a regulatory authority’s use of this criterion to distinguish among violations when applying the “knowing” standard. Nor do we perceive the need to make such a distinction among violations of the Act and our regulations.

We agree that the “knowing” standard has been more visibly associated with individual civil penalties and corporate permittees. On February 8, 1988, at 53 FR 3664 *et seq.*, we adopted initial and permanent regulatory program provisions for individual civil penalties at 30 CFR parts 724 and 846. These regulations included definitions for “knowingly” and “willfully.” However, the “knowing” standard is employed in sections 518(e) and (g) of the Act, 30 U.S.C. 1268(e) and (g), not just in the individual civil penalty provisions of section 518(f), 30 U.S.C. 1268(f). Hence, the final rule broadens the applicability of the “knowing” standard because the standard is not exclusive to an individual civil penalty that may be assessed under section 518(f) of the Act, 30 U.S.C. 1268(f).

#### Link To a Violation

We proposed to add a definition of *link to a violation* to § 701.5. After considering the comments on the proposed definition and upon further deliberation, we are not adopting the proposed definition because the term is too closely associated with a previously defined term, *ownership or control link*, and the previous concept of presumptive ownership or control. The final rule does not use the term “links” and it eliminates the concept of presumptions.

#### Outstanding Violation

We proposed to add a definition for *outstanding violation*. Commenters expressed confusion about the meaning of this term and questioned its consistency with section 510(c) of the Act, 30 U.S.C. 1260(c). Upon further deliberation, we are not adopting the definition in this rulemaking.

Instead, when expiration of an abatement or correction period has significance, we use the phrase, “violation that is unabated or uncorrected beyond its abatement or correction period.” Under this final rule, the phrases “outstanding violation” and “unabated or uncorrected violations” are used interchangeably. The term “outstanding violation” means any violation that is unabated or uncorrected.

#### Successful Environmental Compliance

We proposed to add a definition of *successful environmental compliance*. However, we are not adopting the proposed rules that would have used this term. Since the term *successful environmental compliance* does not appear in the final rule, we are not adopting this proposed definition.

#### Successor in Interest

We proposed to revise the definition for *successor in interest*. A commenter said the term should be more thoroughly defined in terms of what is required in proposed § 774.17. Another commenter argued that, “[t]he proposed definition fails to capture the language or the intent of the term used in the Act and the Congressional Record.” The same commenter also said the definition alters the expressed intent of the Congress that there should be a brief but reasonable opportunity for a successor to continue the active mining operation while becoming the permittee.

After considering the comments on our proposed revision of § 774.17, we decided that transfer, assignment, or sale of permit rights and successor in interest issues require further study. As a result, we are not adopting either the

proposed changes to those provisions, or the proposed revision of the definition of *successor in interest*.

#### Violation and Violation Notice

We proposed to revise the definition of *violation notice*. The proposed revision included a notice of bond forfeiture when the cost of reclamation exceeded the amount forfeited, or in States with bond pools, a determination that additional reclamation or reimbursement is required.

After considering the comments we received and the changes we made to other provisions of the proposed rule, we decided to adopt definitions of both *violation* and *violation notice*. We moved most elements of our previous and proposed definitions of *violation notice* to the new definition of *violation*.

In this final rule, we redefine *violation notice* to mean “any written notification from a regulatory authority or other governmental entity, as specified in the definition of *violation* in this section.”

The final rule defines *violation* as that term is used in the context of the permit application information or permit eligibility requirements of sections 507 and 510(c) of the Act, 30 U.S.C. 1257 and 1260(c), and related regulations. The definition specifies that the term *violation* includes: (1) A failure to comply with an applicable provision of a Federal or State law or regulation pertaining to air or water environmental protection, as evidenced by a written notification from a governmental entity to the responsible person, and (2) a noncompliance for which OSM or a State regulatory authority has provided one or more of the following types of notices: (i) A notice of violation under 30 CFR 843.12; (ii) a cessation order under 30 CFR 843.11; (iii) a final order, bill, or demand letter pertaining to a delinquent civil penalty assessed under 30 CFR part 845 or 846; (iv) a bill or demand letter pertaining to delinquent reclamation fees owed under 30 CFR part 870; or (v) a notice of bond forfeiture under 30 CFR 800.50 when (A) one or more violations upon which the forfeiture was based have not been abated or corrected; (B) the amount forfeited and collected is insufficient for full reclamation under 30 CFR 800.50(d)(1), the regulatory authority orders reimbursement of the additional reclamation costs, and the person has not complied with the reimbursement order; or (C) the site is covered by an alternative bonding system approved under 30 CFR 800.11(e), that system requires reimbursement of any reclamation costs incurred by the system above those covered by any site-

specific bond, and the person has not complied with the reimbursement requirement or paid any associated penalties.

With respect to notices of bond forfeiture, we recognize that the violation review criteria in the preamble to the previous rule at 54 FR 18440–41, (April 28, 1989) states that OSM and most States would only consider the first situation to be a violation notice. That is, there would have to be an unabated or uncorrected violation underlying a bond forfeiture before a notice of bond forfeiture could be considered a violation or a violation notice. However, the two new conditions under which a notice of bond forfeiture will be considered a violation or violation notice are appropriate because each of these situations involves (1) a failure to comply with requirements of the Act or regulatory program, and (2) a separate notification to the person who forfeited the bond or defaulted on the reclamation obligations.

Several commenters suggested that references to bond forfeitures, State bond pools, and cost of reclamation should be removed from the examples. For the reasons discussed above, we do not find adopting this suggestion to be appropriate. We revised these portions of the definition for clarity.

A commenter said the definition should include permit revocation orders and bond forfeiture notices in situations in which someone other than the permittee or its controllers ultimately abates or corrects the violation. The commenter said that abatement by a third party should not clear those responsible for the violation.

We agree only to the extent that an unabated or uncorrected violation (including unpaid fees or penalties) still exists or that a person has failed to comply with a cost reimbursement order from a regulatory authority. In terms of permit eligibility under section 510(c) of the Act, 30 U.S.C. 1260(c), the critical element is whether some type of violation remains unabated or uncorrected. In this context, the Act provides no basis for making distinctions based on the party completing the reclamation or abating or correcting the violation.

A commenter said that including bond forfeitures in the proposed definition of *violation notice* blurs what constitutes a notice of violation. For the reasons discussed above, we do not agree.

Another commenter argued that “if there is an unanticipated change in circumstances, no ‘violation’ is involved until there has been a refusal or failure

to comply with the notice.” We disagree. The Act does not make the distinction that the commenter advocates. Furthermore, except for reming operations under section 510(e), the Act’s permit eligibility requirements do not distinguish between violations resulting from unanticipated changes in circumstances and violations resulting from other situations.

Several commenters said the proposed definition of *violation notice* was too broad, and that orders, bills or demand letters for penalties and notices of bond forfeiture are already defined and have sanctions for failure to abate. We revised the definition to add more specificity and to restrict SMCRA-related violations to the circumstances under which a person receives the types of notice listed in the second paragraph of the definition.

One commenter agreed that the definition should not include bills or demand letters for delinquent reclamation fees. The commenter stated that OSM sometimes issues these bills and letters in error and that the Act does not mandate that we classify delinquencies as violations. Delinquent payment of reclamation fees is a statutory violation under section 402 of the Act, 30 U.S.C. 1232. Timely payment of reclamation fees and the penalty for delinquent payment is provided for under section 402(e) of the Act, 30 U.S.C. 1232(e). In addition, 30 CFR 773.17(g) establishes payment of reclamation fees owed under 30 CFR part 870 as a condition of permit issuance. We see no reason to treat this type of violation in a manner that differs from the treatment afforded to other violations.

A commenter also said that including unliquidated debt as a “violation notice” without requiring a notice of violation “blurs State obligations and raises potential due process claims regarding notice of the remaining debt and opportunity-to-defend, that are better left avoided.” As discussed at length in the preamble to the previous definition of “violation notice” published on October 28, 1994 (59 FR 54352), we disagree. No due process issues are raised in the definition of *violation* or *violation notice*. Everyone who receives one of the notifications listed in the definition of *violation* has the opportunity to take action to seek administrative or judicial review of the violation at that time.

This final rule demonstrates our enhanced emphasis on accurate and complete information. However, the final definition of *violation* does not include the failure to provide accurate

and complete information, as originally proposed. We address this problem in other ways. For example, we will not grant a permit to an applicant who fails to provide accurate and complete information in an application. The applicant also may be subject to alternative enforcement action under section 518(g) of the Act, 30 U.S.C. 1268(g). In addition, when we discover a failure of this nature after a permit is issued, we may issue a notice of violation or, as appropriate, initiate other actions that may ultimately result in permit suspension or rescission.

#### Violation, Failure or Refusal

We originally proposed to retain the existing definition of *violation, failure or refusal* in § 846.5. We received no comments on this proposal.

In this final rule, for organizational reasons, we are moving the definition of *violation, failure or refusal* from §§ 724.5 and 846.5 to § 701.5 to consolidate our definitions. We are revising the language of the definition to confine its applicability to parts 724 and 846, as it is in the existing rules. We are also making a few non-substantive changes in wording to improve syntax and clarity and to remove redundant verbiage.

#### Willful or Willfully

We proposed to replace the definition of *willful* in §§ 724.5 and 846.5 with a similarly worded definition of “*willful* or *willfully*” in 30 CFR 701.5. The final rule reflects the proposed rule, with the changes discussed below. We are defining “*willful* or *willfully*” to mean “that a person who authorized, ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation acted: (1) intentionally, voluntarily, or consciously; and (2) with intentional disregard or plain indifference to legal requirements.”

We revised the text of the definition for clarity and consistency with the term’s broader applicability under the proposed and final rules. Most significantly, we replaced the phrase “a violation of the Act, or a failure or refusal to comply with the Act,” which could have been interpreted as limiting the scope of the definition to a violation, failure or refusal, as that term is defined in 30 CFR 701.5, with the phrase, “a violation or the failure to abate or correct a violation.” In addition, we replaced the word “individual” with “person.” The Act and our regulations define *person* in a manner that includes both individuals and business entities, as is appropriate in the context in which the Act and regulations employ this

term. See 30 CFR 700.5 and section 701(19) of SMCRA, 30 U.S.C. 1291(19).

Several commenters said that the definition should recognize but not apply to “administrative” violations, which, the commenters said, do not cause environmental harm. One said administrative violations must not be considered “willful” when determining a pattern of violations.

The “willful” standard appears in sections 510(c), 518(e), 518(f), and 521(a)(4) of the Act; 30 U.S.C. 1260(c), 1268(e), 1268(f), and 1271(a)(4). There is nothing in any of these sections that would support a regulatory authority’s use of this criterion to distinguish among violations when applying the “willful” standard. Nor do we perceive the need to make such a distinction among violations of the Act and our regulations.

A commenter objected to the phrase “or any Federal or State law or regulation applicable to surface coal mining operations” in the proposed rule. In this final rule, we replaced the phrase “or any Federal or State law or regulation applicable to surface coal mining operations” with language that refers to a violation or the failure to abate or correct a violation. The context in which the term is used will determine the meaning of “violation” and the scope of the definition.

The same commenter further asserted that the proposed definition is inconsistent with section 518 of SMCRA, 30 U.S.C. 1268, which, according to the commenter, does not encompass every failure or refusal to comply with the Act or any Federal or State law or regulation applicable to surface coal mining operations. We do not agree with the commenter’s characterization of the scope of section 518 of the Act. Furthermore, as discussed above, the Act also uses this term in sections 510(c) and 521(a)(4), 30 U.S.C. 1260(c) and 1271(a)(4). Section 510(c), specifically includes State violations.

#### Willful Violation

We proposed to remove the definition of *willful violation* from §§ 701.5 and 843.5.

A commenter argued that removing “willful violation” would “improperly merge” “willfully” and “willful violation,” which are distinct terms that the Act uses in different contexts. According to the commenter, the “willful” in “willful violation” in section 510(c) of the Act, 30 U.S.C. 1260(c), means that a person “intends the result that actually occurs.”

We agree that context establishes meaning. However, we disagree that

either term is used in a unique manner under SMCRA. As we stated above in the discussion of *willful* or *willfully*, the “willful” standard is employed four times in SMCRA, including section 510(c), 30 U.S.C. 1260(c). The previous definition of “willful violation” is inconsistent with how “willful” is used in sections 518 and 521 of SMCRA, 30 U.S.C. 1268 and 1271. The phrase “willful violation” appears only in section 510(c), where it is one criterion for permanent permit ineligibility.

In section 510(c), “willful” modifies “violation” in the same manner that “demonstrated” modifies “pattern” and “irreparable” modifies “damage.” The violations that would result in a finding of permanent permit ineligibility are not simply violations, they are willful violations. The type of pattern that must be determined is a demonstrated pattern. The damage that must result from the demonstrated pattern of willful violations must be irreparable damage.

We conclude that the previously defined term is now unnecessary. The new definition of “*willful* or *willfully*” includes an element of intent. There is no need to find that a person “intends the result that actually occurs.” Therefore, we are removing *willful violation* from §§ 701.5 and 843.5.

#### B. Section 724.5—Definitions

In this final rule, § 724.5 is removed from our regulations.

We proposed to replace the definitions of *knowingly* and *willfully* in § 724.5 with the definitions of “*knowing* or *knowingly*” and “*willful* or *willfully*” in 30 CFR 701.5. A commenter asked if the change was proposed because of unresolved bond forfeitures under the initial regulatory program. Our proposal had nothing to do with unresolved bond forfeitures. (The initial regulatory program did not require any bonds.) Instead, it arose from a desire to consolidate our definitions in § 701.5 to the extent possible.

The final rule replaces *knowingly* with “*knowing* or *knowingly*” and *willfully* with “*willful* or *willfully*.” As proposed, we are placing the final definitions in § 701.5 after them in § 724.5. In this final rule, we are also moving the definition of *violation*, *failure or refusal* previously in § 724.5 to § 701.5. The net result of these changes is that § 724.5 is removed from our regulations.

#### C. Section 773.5—Definitions

We proposed to either move or remove the definitions from previous § 773.5 and remove this section from our regulations. There were no comments on our proposal, which we

adopted in revised form in this final rule.

We adopted certain definitions from previous § 773.5 in revised form at § 701.5 while removing the definitions of *ownership or control link*, *Federal violation notice*, and *State violation notice*. Section 773.5 remains a part of our regulations since we redesignated previous § 773.12 as § 773.5

#### D. Section 773.10—Information Collection

In this final rule, the provision we adopted from proposed § 773.10 is found at § 773.3.

We proposed to revise the information collection burden for part 773. We reorganized part 773. As a result, previous § 773.10 is redesignated new § 773.3. Final § 773.3 contains the information collection requirements for part 773 and the Office of Management and Budget (OMB) clearance number.

In this final rule, § 773.3(a) is revised to show that the new OMB clearance number for this part is 1029–0115. Section 773.3(b) is revised to adjust the estimated public reporting burden from 34 hours to 36 hours. The estimate represents the average response time. For unchanged provisions in the regulations, our revised estimates are based on updated estimates developed in May 2000 using more current information.

#### Summary of Comments and Adjustments to Burden Estimates

We considered information from the individuals who commented on information collection aspects of the proposed rule. In general, commenters stated that the estimated information collection burden related to the proposed rule was too low. Commenters generally did not mention any specific rule change which was underestimated or any specific number of hours that would alter the OSM estimate.

A commenter stated that the burden hours for part 773 should be 50, instead of 34 hours. To reduce information requirements, we are not adopting some of the proposed changes in this final. We also increased estimates of burden hours for the remaining requirements.

A commenter stated that the time burden in § 773.10 differed from what was proposed in parts 774 and 778 and requested information on how these numbers were derived and a clarification of average reporting burden.

We receive approval from the OMB to collect information based on each “part” in the Code of Federal Regulations (CFR). There is a different burden associated with responding to

each part in the CFR since each requires different types of information from respondents (citizens, coal companies, State and Indian regulatory authorities). We also request approval from OMB based on the *average* burden hours per respondent, not the total burden. The total hours divided by the number of potential respondents equals the average burden hour estimate per respondent. For further information regarding our compliance with the Paperwork Reduction Act and OSM's information collection calculations, please contact OSM's Information Collection Clearance Officer identified under §§ 773.3(b), 774.9(b), and 778.8(b).

A commenter suggested that OSM lacked authority under SMCRA to collect much of the information required in the proposed rule. Our response to this comment relies on the decision in *NMA v. DOI II*. The court spoke directly on this issue saying that the information requirements contained in SMCRA are not exhaustive. So as long as the information required under our regulations is necessary to implement the Act, we are justified in requiring it. As explained elsewhere in this preamble, all of the information we obtain under this final rule is indeed necessary to enforce the Act.

Lastly, some commenters continue to assume that because OSM continues to require certain information, it will necessarily use that information to make permit eligibility determinations on surface coal mining permit applications. The commenters said this would be inconsistent with the court decision.

While we cannot use all of the information we obtain under this rule to make permit eligibility determinations under section 510(c) of the Act, 30 U.S.C. 1260(c), we are expressly required to obtain some of the information under section 507 of the Act, 30 U.S.C. 1257. Other information we obtain is necessary to enforce other aspects of the Act. The information we require will allow us and regulatory authorities to implement the purposes of the Act, including permitting, compliance, and enforcement provisions. As we have said, this is consistent with the decision in *NMA v. DOI II*.

#### *E. Section 773.15—Review of Permit Applications*

In this final rule, the provisions proposed at § 773.15 are found at §§ 773.8 through 773.15 and 774.11(c) through (e).

We proposed to revise certain aspects of previous § 773.15. In the proposed rule, we, among other things: (1) Provided for separate review of the legal

identity, permit, and compliance information provided in applications; (2) separated permit eligibility determinations under section 510(c) of the Act from the application review process; (3) proposed to distinguish among applicants based upon surface coal mining experience and successful environmental compliance criteria; and (4) proposed the use of investigations to ensure compliance with certain statutory and regulatory provisions. The preamble of the proposed rule also provided notice that we would cease providing AVS and OSM recommendations to State regulatory authorities to assist in permitting decisions. *See also* OSM System Advisory Memorandum #20 (discontinuance of AVS and OSM permitting recommendations), a copy of which is in the administrative record for this rulemaking and on our Applicant/Violator System Office Internet home page (Internet address: [www.avs.osmre.gov](http://www.avs.osmre.gov)).

In this final rule, we modified the proposed revisions and reorganized them into smaller sections. As a result, part 773 is entirely reorganized and re-numbered. As part of the reorganization of part 773, some of the previous sections we did not propose for revision are also re-numbered. The new designations for these sections are incorporated in the derivation tables in section IV.B. of this preamble. We also modified certain proposed provisions to comply with the effects of the ruling of the D.C. Circuit in *NMA v. DOI II*; this final rule also conforms to the D.C. Circuit's holding in *NMA v. DOI I*.

As explained previously, in *NMA v. DOI I*, the appeals court held that the clear language of section 510(c), 30 U.S.C. 1260(c), of SMCRA authorizes regulatory authorities to deny a permit only on the basis of violations of "any surface coal mining operation owned or controlled by the applicant." *NMA v. DOI I*, 105 F.3d at 693–94. In contrast, OSM's 1988 ownership and control rule also allowed regulatory authorities to deny a permit on the basis of violations of any person who owned or controlled the applicant. In the IFR, published in 1997, we cured the defect identified by the court of appeals by requiring regulatory authorities to deny permits based on section 510(c) of the Act only when the applicant owned or controlled an operation with a current violation, and not when a person with a current violation owned or controlled the applicant. In § 773.12(a) and (b) of this final rule, we retain the substance of this IFR provision.

In *NMA v. DOI II*, the court of appeals agreed with OSM that section 510(c) of

SMCRA allows OSM to deny permits based on violations cited at operations that the applicant owns or controls, including "limitless downstream violations" at operations indirectly owned or controlled by an applicant through intermediary entities. *Id.* at 4–5. (A further discussion of "direct" versus "indirect" ownership or control appears below, in this section.) In final §§ 773.11, 773.12(a) and 773.12(b), we retain the substance of the existing provision (30 CFR 773.15(b)(1)), and proposed §§ 773.15(b)(3)(i)(A) & (B) and 773.16(a), which allow OSM to deny permits to applicants who are currently in violation and to applicants who—directly or indirectly—own or control operations that are currently in violation. OSM may consider violations at operations which are "limitless[ly] downstream," so long as ownership or control (as defined in final § 701.5) by the applicant is present.

The court agreed with *NMA* that "[f]or violations of an operation that the applicant 'has controlled' but no longer does, \* \* \* the Congress authorized permit-blocking only if there is 'a demonstrated pattern of willful violations'" under section 510(c) of SMCRA. *Id.* at 5. As such, in order to deny a permit under section 510(c) of the Act, the violation must be outstanding (*i.e.*, unabated or uncorrected) and the applicant must own or control the operation with a violation at the time of application. If the ownership or control relationship has been terminated, OSM may not deny a permit (absent a pattern of willful violations), even if the violation remains current. *NMA v. DOI II*, 177 F.3d at 5. However, if a person is himself a violator, severing an ownership or control relationship will not make the person eligible for a permit. OSM may not base permit eligibility on past ownership or control except in instances of a "demonstrated pattern of willful violations of [the] Act of such nature and duration with resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of [the] Act." SMCRA section 510(c). As proposed, §§ 773.15(b)(3)(i)(A) and (B) and 773.16(a) would have allowed permit eligibility determinations to be based on past ownership or control. In final §§ 773.11, 773.12(a) and 773.12(b), we modified the proposed language to clarify that permit eligibility must be based on operations which the applicant or operator currently owns or controls. However, OSM may still consider past ownership or control of operations with violations in determining whether there

is a pattern of willful violations under section 510(c) of the Act and final § 774.11(c), except where constrained by the appeals court's retroactivity holding (discussed below).

On the applicability of the five-year statute of limitations at 28 U.S.C. 2462, the court agreed with OSM that the section 2462 limitations period does not apply to violations when determining permit eligibility under section 510(c) of SMCRA. *Id.* at 7–8. Thus, except where constrained by the appeals court's retroactivity holding (discussed below), OSM may deny permits to applicants who own or control an operation with a current violation, regardless of when the violation first occurred. On this point, since the court of appeals ratified the approach contained in the proposed rule, no modification was necessary in this final rule. Subject to the retroactivity holding, as reflected in final §§ 773.12(a) and (b), final §§ 773.12(a) and (b) allow OSM to deny permits based on violations at operations which the applicant currently owns or controls, regardless of when the violation was first cited.

With regard to retroactivity, the court found that the IFR, at 30 CFR 773.15(b)(1), is impermissibly retroactive to the extent it authorizes permit denials under section 510(c) of the Act based on indirect control in cases where *both* the assumption of indirect control and the violation occurred before November 2, 1988, the effective date of OSM's 1988 ownership and control rule. *NMA v. DOI I*, 177 F.3d at 8–9. The court explained that the 1988 ownership and control rule imposed a “‘new disability,’ permit ineligibility, based on ‘transactions or considerations already past. \* \* \*’” *Id.* at 8.

Specifically, the court held that the IFR is retroactive “insofar as it block[sic] permits based on transactions (violations and control) antedating November 2, 1988, the [1988] ownership and control rule's effective date.” *Id.* Thus, under the court's reasoning, the IFR is retroactive only when *both* “‘transactions’—the violation and the assumption of indirect ownership or control—occurred before November 2, 1988. Indeed, the court explained that the IFR is not retroactive to the extent it allows permit denials when an applicant acquires control of an ongoing (*i.e.*, unabated or uncorrected), pre-rule violation on or after the effective date of the 1988 ownership and control rule. *Id.* at n.12. This is so because one of the relevant transactions—assumption of control—will have occurred on or after November 2, 1988; thus, the applicant would be on notice of the requirements

of the 1988 rule. By this same logic, the IFR also is not retroactive when the assumption of control occurred before November 2, 1988, but the relevant violation occurred or occurs on or after November 2, 1988. At bottom, if *either* of the relevant transactions occurred or occurs on or after November 2, 1988, OSM may continue to deny permits under section 510(c) without running afoul of the court's retroactivity holding.

The court's reasoning turns on the fact that permit denials based on *indirect control*, though reasonable, were first clearly provided for in the 1988 ownership and control rule. *Id.* In this regard, the court explains, the 1988 ownership and control rule imposed a “‘new disability’” and “‘change[d] the legal landscape.’” *Id.* (quotation omitted). However, even under the most restrictive reading of section 510(c), after enactment of SMCRA in 1977, OSM could always deny permits based on violations by the applicant's “‘own, directly [owned or] controlled operations’” (*id.*) (emphasis added); indeed, the statutory language of section 510(c) expressly mandates permit denials in these circumstances.

As such, under the court's ruling, OSM may continue to require permit denials based on an applicant's own violations or *direct* ownership or control of operations with pre-rule violations, even when the applicant acquired ownership or control before promulgation of the 1988 ownership and control rule. For purposes of the final rule we are adopting today, and consistent with the *NMA v. DOI II* decision, an entity directly owns or controls another entity if it owns greater than 50 percent of the entity or actually controls the entity, and there is not an intermediary entity between the two. For example, if company A owns greater than 50 percent of company B, and there is no intermediary entity between the two, company A directly owns company B. If company A owns 50 percent or less of company B, but actually controls company B, and there is no intermediary entity between the two, company A directly controls company B. However, even if there is an intermediary entity, ownership and control will also be deemed direct if there is 100 percent ownership at each level of the corporate chain between two entities. For example, if company A owns 100 percent of company B, and company B owns 100 percent of company C, company A will be deemed to directly own and control company C, its wholly owned subsidiary.

While, in general, it is the presence of an intermediary entity, and not the percentage of ownership, which makes

ownership or control indirect, we are adopting the “‘greater than 50 percent’” threshold because greater than 50 percent ownership will usually confer control. The 50 percent threshold is also consistent with the definition of *own*, *owner*, or *ownership* we are adopting today in final § 701.5 and the position we have taken since 1988 that greater than 50 percent ownership is deemed to constitute ownership or control. See previous § 773.5(a) (this category of deemed ownership or control was not challenged by the National Mining Association). As such, as of the enactment of SMCRA in 1977, an applicant would be on notice that, at a minimum, it could be denied a permit if it owned greater than 50 percent of an entity with a current violation. In the case of wholly owned subsidiaries, any intermediaries will be disregarded since they are subject to total control by the parent company; in this instance, it is clear that the parent company will directly own, and have the ability to directly control, the entity at the bottom of the corporate chain.

Under the court's notice-derived rationale, OSM may also continue to deny permits based on *indirect* ownership or control of an operation with a current violation—even if both of the relevant transactions occurred before November 2, 1988—so long as there was a basis to deny under established law at the time of the assumption of indirect ownership or control or at the time of the violation (whichever is earlier), independent of the provisions of the 1988 ownership or control rule. To the extent that such authority to deny permits based on *indirect* relationships existed before November 2, 1988, the 1988 ownership or control rule cannot be said to have “‘imposed a new disability’” or “‘changed the legal landscape.’” Rather, the applicant would have been on notice that certain relationships to operations with current violations could result in a permit denial.

We modified proposed § 773.15(b)(3)(i)(B) to conform it to the court's retroactivity holding. Final § 773.12(a) and (b) incorporate the substance of the above discussion.

Other modifications to the proposed rule are discussed in connection with our responses to comments received with respect to the relevant proposed provisions.

#### General Comments on Proposed § 773.15

Several commenters, including those who commented on the effects of the *NMA v. DOI II* decision, expressed concern that OSM does not see that an

ineligibility determination based upon "upstream" violations is still possible. The commenters said: (1) The corporate form should not be used to perpetuate a fraud; (2) a corporate charter can be revoked; and (3) the decision in *NMA v. DOI I* specifically indicates how to determine the applicant. Other commenters raised similar concerns.

We agree that the corporate form should not be used to perpetrate a fraud. With respect to revocation of corporate charters, State regulatory authorities already have sufficient authority, under State laws, to seek revocation of corporate charters under appropriate circumstances.

We also agree that regulatory authorities have leeway to identify the true applicant, and to consider the violations of such person under the permit eligibility review of final § 773.12 and section 510(c) of the Act. We chose not to define the phrase "true applicant" at this time because regulatory authorities already have the authority and flexibility to determine the true applicant, based on the particular facts and circumstances of each case.

In *NMA v. DOI I*, the court of appeals explained that, as a general rule, OSM may not deny a permit based on violations of persons who own or control the applicant. However, the court explained: "OSM has leeway in determining who the 'applicant' is. As appellant concedes, OSM has the authority, in instances where there is subterfuge, to pierce the corporate veil in order to identify the real applicant." *NMA v. DOI I*, 105 F.3d at 695. Below, we briefly describe several tools, which exist independently of this rulemaking—State and Federal corporate veil piercing and case law interpreting section 521(c) of SMCRA, 30 U.S.C. 1260(c)—which may assist regulatory authorities in identifying the true applicant.

The court of appeals identified corporate veil piercing as a means of identifying the "true applicant." There are, generally speaking, two bodies of veil-piercing case law: State and Federal. However, the purpose of the State common law veil-piercing mechanism, which is typically employed as a method for imposing personal liability on shareholders of a corporation, does not precisely match the purpose and intent of this rulemaking. In promulgating the permit eligibility provisions of this final rule, we in no way intend to seek to impose personal liability on shareholders, or owners or controllers, for the wrongs or debts of a corporate permittee. Nor do we intend to alter the common law

principles of corporate separateness and limited liability to a greater extent than SMCRA itself provides. Rather, the permit eligibility provisions we adopt today are designed to determine who is eligible to receive a permit under section 510(c) of SMCRA.

Despite the fact that the permit eligibility aspects of this rule do not impose personal liability on individuals for the debts or wrongs of a corporation, the body of State veil-piercing case law may, in certain instances, provide a useful analytical construct to assist regulatory authorities in identifying the true applicant. For example, in instances where State veil-piercing case law would allow the corporate form to be disregarded to impose personal liability on a person, it stands to reason that the person may be the true applicant, such that his violations become relevant to the permit eligibility determination under final § 773.12 and section 510(c) of the Act.

Federal veil-piercing, which serves a broader purpose than the imposition of personal liability for corporate debts or wrongs, is more closely aligned with the purpose of the permit eligibility provisions of this final rule; as such, it provides a better paradigm than State common law veil piercing for identifying the true applicant. Federal veil-piercing case law has developed to the extent that:

The general rule adopted in the federal cases is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." In applying this rule, federal courts will look closely at the purpose of the federal statute [involved] to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine \* \* \*.

*Alman v. Danin*, 801 F.2d 1, 3 (1st Cir. 1986) (quoting *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981); internal citations omitted). Under federal veil-piercing case law, if a person elects the corporate form to evade the requirements of SMCRA, it is in the interests of "public convenience, fairness and equity" to disregard the corporate form and consider the violations of the person, as the true applicant, in making a permit eligibility determination under final § 773.12 and section 510(c) of the Act.

Section 521(c) of SMCRA, 30 U.S.C. 1271(c), like veil piercing, allows for the imposition of personal liability in certain instances. The criteria for determining who is a section 521(c) "agent," as they have developed in the case law, may assist regulatory authorities in their efforts to identify the

true applicant. For example, in the case of *United States v. Dix Fork Coal Co.*, 692 F.2d 436 (6th Cir. 1982), the U.S. Court of Appeals for the Sixth Circuit found an individual directly liable for the violations of a corporation under section 521(c) of SMCRA, 30 U.S.C. 1271(c), which, under specified circumstances, allows the United States to institute a civil action for relief against a permittee or his "agent." In that case, the individual—Wilford Niece—was neither an officer nor director of the corporation (Dix Fork), but was delegated "responsibility [for] ensuring compliance with the Act throughout the mining operation by Dix Fork." *Id.* at 439. Borrowing from the definition of "agent" in the Coal Mine Health and Safety Act, 30 U.S.C. 801 *et seq.*, the court explained:

[A section 521] "agent" includes that person charged with the responsibility for protecting society and the environment from the adverse effects of the surface coal mining operation and particularly charged with effectuating compliance with environmental performance standards during the course of a permittee's mining operation.

*Id.* at 440. In finding Mr. Niece directly liable for Dix Fork's violations, the court explained that:

The intervening corporate structure of Dix Fork is insufficient, given the aggravating circumstances of this case, to shield Wilford Niece from the affirmative obligations necessary to rectify the environmental hazard which would not have manifested but for the assets and decisions of Wilford Niece. \* \* \*

Refusal of the federal forum to implement affirmative obligations on Niece as an agent would permit circumvention of the Act through the establishment of a sham corporation.

*Id.* at 441. Since SMCRA itself disregards the corporate form to impose personal liability on section 521(c) agents for the wrongs of a corporation, it is reasonable to conclude that a section 521(c) agent may be the true applicant, such that his violations should be considered during the permit eligibility review under final § 773.12 and section 510(c) of the Act.

The tools identified above are not intended to be exhaustive. There may well be other mechanisms or procedures available to regulatory authorities to identify the true applicant. In most cases, the nominal applicant (the person whose name appears on the permit application) will also be the true applicant. Certainly, not all owners or controllers of an operation are susceptible to veil piercing or other corporate avoidance mechanisms; as such, not all owners or controllers are true applicants. However, if the regulatory authority has reason to

believe that the nominal applicant is not the true applicant, the regulatory should conduct an investigation to determine the identity of the true applicant. In short, each regulatory authority should consider the totality of circumstances in determining whether the nominal applicant is also the true applicant.

#### Proposed § 773.15(a)(3)

We proposed to add paragraph (a)(3) to the general requirements in previous § 773.15. That provision would have required the regulatory authority to evaluate whether the permit application contained accurate and complete information and allowed the regulatory authority to stop review until any issues as to the accuracy and completeness of information were resolved.

Based upon comments and our further deliberations, we are not adopting proposed § 773.15(a)(3) because it is duplicative. Commenters had varying opinions on the proposed revisions. Some said stopping the review would hasten correction of the information. One said the provision is unnecessary and redundant. This commenter said a regulatory authority already has the obligation to make a written finding for application approval “and is under no obligation to proceed with an incomplete application.” Two commenters expressed their belief that more time and resources would be required to determine that an application is accurate and complete before the review actually begins. Another commenter said that the ownership and control information should be reviewed for administrative completeness then entered into AVS. One commenter said the practice of providing a checklist instead of written findings should be eliminated in the final rule.

We agree, in part, with most of these comments. By our longstanding practice, at least since 1983, a regulatory authority is under no obligation to continue to process an administratively incomplete application. *See, e.g.*, final § 773.6(a)(1) (redesignated from previous § 773.13(a)(1)) and existing § 701.5 (definition of *administratively complete application*). We also included an administrative completeness requirement in final § 773.8(a) of this rule. Further, final §§ 773.8(b) and (c) require the regulatory authority to enter into AVS, and update, the ownership and control and violation information an applicant submits under final §§ 778.11, 778.12(c), and 778.14. Final § 773.15(a), which continues a provision which has also been in place since at least 1983 (*see* previous § 773.15(c)(1)), requires the applicant to affirmatively

demonstrate, and the regulatory authority to find, that the application is accurate and complete before a permit is issued. In this final rule, at § 773.15(a), we made a technical revision to previous § 773.15(c)(1), changing the phrase “complete and accurate” to “accurate and complete,” to match the statutory phrase used in section 510(b)(1) of the Act. Finally, at final § 773.15(n), we added a requirement for the regulatory authority to make a written finding that the applicant is eligible to receive a permit based on the reviews under §§ 773.8 through 773.14 of this final rule. A checklist, without sufficient detail, will not satisfy the written finding requirement of final § 773.15(n).

#### Proposed § 773.15(b)

We proposed to revise certain provisions of previous § 773.15(b). In general, we proposed to:

- Reorganize the section to encompass, among other things, a three-part review of permit application information (*see* proposed §§ 773.15(b)(1) through (3))
- Revise our previous criteria for determining permit eligibility under section 510(c) of the Act (*see* proposed § 773.15(b)(3)(i); *see also* proposed § 773.16)
- Revise the circumstances under which an applicant with an outstanding violation could receive a permit (*see* proposed § 773.15(b)(3)(i)(B) and (C); *see also* proposed § 773.16(b))
- Revise our previous regulations pertaining to patterns of willful violations under section 510(c) of the Act (*see* proposed § 773.15(b)(3)(i)(D) through (F))
- Require regulatory authorities to investigate an applicant’s owners or controllers to determine if they are responsible for outstanding violations and whether alternative enforcement actions are appropriate
- Impose special conditions on permits issued to applicants that did not have at least five years of mining experience or whose owners or controllers had not demonstrated successful environmental compliance (*see* proposed §§ 773.15(b)(2) and (b)(3)(ii)(C))

As explained in more detail below, we reorganized and modified the provisions proposed in § 773.15(b). In this final rule, we:

- Adopted the three-part review of permit application information (*see* final §§ 773.8 through 773.11)
- Consolidated and adopted provisions related to permit eligibility under section 510(c) of the Act (*see* final § 773.12)

- Adopted provisions whereby an applicant with an outstanding violation can receive a “provisionally issued” permit under certain circumstances (*see* final § 773.14, discussed in section VI.F. of this preamble)

- Adopted provisions relating to patterns of willful violations under section 510(c) of the Act (*see* final § 774.11(c) through (e), discussed in section VI.K. of this preamble)

- Did not adopt specific reference to investigations of an applicant’s owners or controllers (though, under final § 774.11(b), if we discover that a person owns or controls an operation with an unabated or uncorrected violation, we will determine whether an enforcement action is appropriate)

- Did not adopt the five-year experience and successful environmental compliance criteria or additional permit conditions based on the applicant’s mining experience and the compliance histories of the applicant’s owners or controllers

#### General Comments on Proposed § 773.15(b)

A commenter said that OSM’s rules should be altered only as necessary to fill the regulatory gap created by *NMA v. DOI I* and should recapture the linkages between permit applicants and their owners and controllers who are responsible for outstanding violations. The commenter said there is ample authority in SMCRA outside of section 510(c) to deny a permit to an applicant where an owner or controller of the applicant is responsible for an outstanding violation.

As mentioned above, this final rule fully complies with the D.C. Circuit’s decision in *NMA v. DOI I*. In light of the fact that the *NMA v. DOI II* decision was issued after our proposed rule was published, modifications were required to conform this final rule to that decision as well. As previously noted, we reopened the comment period for this rulemaking in order to obtain public comments on the effects of the *NMA v. DOI II* decision. Further, rather than merely fill the “gaps” perceived by the commenter, we took the opportunity to improve upon other aspects of our previous regulations. This final rule is in full compliance with the court decisions, and also makes our previous procedures more efficient and effective.

We disagree that we should recapture linkages between applicants and their owners and controllers who are responsible for outstanding violations during the permit eligibility review required under section 510(c) of the Act. The *NMA v. DOI I* decision was clear on the point that we may no longer

routinely consider the violations of an applicant's owners or controllers during the section 510(c) compliance review. Nonetheless, as explained above, regulatory authorities have the authority, in appropriate circumstances, to identify the true applicant.

One commenter said the plain language of SMCRA does not limit permit ineligibility to current ownership or control of operations with violations. Other commenters, including those who commented on the effects of the *NMA v. DOI II* decision, said the final rule should only allow permit denials based on violations at operations which the applicant owns or controls at the time of application. One commenter said the court's ruling affects provisions in addition to the proposed permit eligibility provisions. Finally, a commenter expressed concern that, after the *NMA v. DOI II* decision, a permittee could fraudulently transfer a permit with a violation to a shell or dummy corporation and become permit eligible again.

Under *NMA v. DOI II*, as explained above, we may no longer routinely consider an applicant's past ownership or control of a violation during the permit eligibility review process. We may, however, consider such past ownership or control in determining whether there has been a pattern of willful violations under section 510(c) of the Act and § 774.11(c) of this final rule (which accommodates the appeals court's retroactivity holding). We modified the permit eligibility criteria of final § 773.12 accordingly, and have also modified all other proposed provisions affected by the court's ruling. As to fraudulent transfers to shell or dummy corporations, we are confident that regulatory authorities will not approve such transfers under existing 30 CFR 774.17 or the equivalent State counterparts. Also, as explained above, if a person is himself a violator, severing an ownership or control relationship will not make the person eligible.

A commenter said OSM should delete all "administrative procedures" imposed on itself and on State regulatory authorities—such as the proposed procedures for checking and recording data. The same commenter said OSM should also delete all references to investigations and referrals for prosecution, as well as any references to the review of outstanding violations of any person other than the applicant, persons the applicant owns or controls, or the alter ego of the applicant. The commenter said regulatory authorities do not need regulations for the procedures they will follow to check and record data; rather,

these procedures should be left to policies and directives.

For the most part, we decline to adopt this commenter's suggestions. We do not believe the provisions of this section are so easily dismissed as "administrative procedures." Rather, the procedures we adopt today are integral parts of the regulatory program to implement the provisions of SMCRA. Further, the procedures we adopt today provide necessary guidelines to regulatory authorities as to how to properly meet their responsibilities under these regulations.

We note, as indicated above, that we are not adopting direct reference to investigations in these provisions. The three proposed provisions in part 773 which referenced investigations are discussed more fully below at proposed § 773.15(b)(1)(i)(B).

Finally, a review of other outstanding violations, for example those of the applicant's or permittee's owners and controllers, may have utility outside of the permit eligibility context. For example, a review of the outstanding violations of an applicant's owners and controllers may reveal that enforcement actions are appropriate to remedy the violations. Also, the review under final § 773.11 requires an examination of the operator's compliance history, since an operator's violations may bear on the section 510(c) permit eligibility review under final § 773.12.

A commenter said that the sanctions for failing to identify owners and controllers—potential permit denial and referral for prosecution—are too stringent, in light of the fact that the standards for identifying owners and controllers are, in the commenter's view, ambiguous and uncertain.

It is appropriate to require applicants to disclose their owners and controllers in the first instance, based on the definitions of *own*, *owner*, or *ownership* and *control* or *controller* we are adopting today in final § 701.5. These definitions are sufficiently clear to put applicants on notice of the information which is required in a permit application. We removed the reference to criminal prosecution in these provisions. In most instances, if an applicant fails to provide required permit application information, the applicant simply will not receive a permit. However, there may be instances where prosecution for knowingly withholding or providing false information is warranted under final § 847.11(a)(3).

Several commenters suggested that it would be in the public interest for regulatory authorities to issue press releases to local newspapers when

investigating "AVS violations." They maintain that such press releases would heighten public awareness.

We do not believe that issuing press releases under such circumstances would be in the public interest. Announcing the pendency of an investigation before its conclusion could unfairly attach a stigma to a company or an individual who is ultimately vindicated. It could also compromise the integrity of the investigation. Balancing any advantage to be gained by such press releases against the potential to compromise the rights of the person being investigated or the integrity of the investigation, we conclude that the latter concerns substantially outweigh any perceived benefit. Nonetheless, the results of our investigations—*i.e.*, written findings on ownership and control under final § 774.11(f)(1)—will be entered into AVS. See final § 774.11(f)(2). Also, under final § 773.28(d), the result of any challenge to a finding on ownership or control will be posted on AVS and on OSM's Applicant/Violator System Office Internet home page (Internet address: [www.avs.osmre.gov](http://www.avs.osmre.gov)).

Several commenters asked if there is a penalty for States if they do not use AVS. AVS is a tool we developed specifically to assist States in implementing section 510(c) of the Act. After more than 13 years of successful operation, regulatory authorities now routinely use AVS to implement a variety of provisions under SMCRA. Given the efficiencies gained by using AVS, as opposed to independently and arduously compiling the information contained in AVS, it is highly unlikely that any State would choose to discontinue using AVS. Nonetheless, under our previous regulations, and the regulations we adopt today (see final §§ 773.9, 773.10 and 773.11), State regulatory authorities are required to use AVS during the section 510(c) permit eligibility review process. If they fail to do so, they are subject to OSM's general oversight authority.

One commenter said that AVS "is an essential part of OSM's regulatory program." Another expressed concern that the proposed rule would weaken the effectiveness of AVS. This commenter also said the computer system gives small communities a way to identify corporate officials and investors who fail to abate violations or forfeit performance bonds. We agree that AVS is an essential part of our regulatory program and that it is an equally powerful tool for the public at large and the regulated industry alike. We want to assure the commenter that this rulemaking will not compromise

the integrity of the information contained in AVS in any way.

Two commenters asked how the final rule will affect existing permits. One of the commenters also asked: (1) what will happen to the current data in AVS for controllers; and (2) how will previous ownership or control links or links to violations discovered during bond forfeiture investigations be affected.

The provisions adopted in this final rule will become effective for Federal programs 30 days after the publication date of this final rule, and will apply prospectively. The rule will not affect existing permits, but will apply to Federal permitting as applications are received for new permits, renewals, revisions, transfers, assignments or sales. The rule will become effective in primacy States after we approve amendments to State programs, and will apply in the manner outlined above for Federal programs. This final rule will not affect the existing information shown in AVS, though it will affect how that information is used by regulatory authorities.

#### Proposed § 773.15(b)(1)

We proposed to revise previous § 773.15(b)(1) to provide for a three-part review of the information which applicants must provide under part 778. We adopted a general section to precede the three specific reviews, final § 773.8, and adopted the three specific reviews at final §§ 773.9 through 773.11.

We proposed that the review of an applicant's legal identity information would require an initial determination of whether information disclosed under previous § 778.13 is accurate and complete (proposed (b)(1)). We further proposed that after the preliminary determination, we would update the relevant records in AVS (proposed (b)(1)(i)). If we found that an applicant, operator, owner, controller, principal, or agent had knowingly or willfully concealed information about an owner or controller, we would: inform the applicant of the finding and request full disclosure (proposed (b)(1)(i)(A)), investigate to determine if full disclosure was made (proposed (b)(1)(i)(B)), and, if appropriate, deny the permit (proposed (b)(1)(i)(B)(1)) and refer the finding for prosecution under section 518(g) of the Act, 30 U.S.C. 1268(g), (proposed (b)(1)(i)(B)(2)). We modified the proposed revisions in this final rule. The proposed revisions, as modified, are at §§ 773.8 and 773.9 of this final rule.

We adopted final § 773.8 to provide general requirements which precede the three-part review of permit application

information. At final § 773.8, we changed the proposed phrase "accurate and complete" to "administratively complete," in response to comments, to highlight that the reviews of information are to commence after an application is found to be administratively complete. We recognized that a determination that an application is administratively complete occurs after an application is received but before we determine that the information is accurate and complete, based on a detailed examination of the information the applicant submits. A finding that the information is accurate and complete is part of the written findings required under final § 773.15(a). At final §§ 773.8(b) and (c), we adopted a provision requiring the regulatory authority to enter into AVS, and update, the ownership or control and violation information an applicant submits under final §§ 778.11, 778.12(c), and 778.14.

At final § 773.9, we adopted the proposed review of the applicant's "legal identity information." For clarity, and to match the heading at final § 778.11, we changed the section heading to "Review of applicant, operator, and ownership and control information." The final provision provides that the regulatory authority will rely upon the applicant, operator, and ownership and control information an applicant submits under final § 778.11, information from AVS, and any other available information, to review the applicant's and operator's business structure and ownership and control relationships. This review is required before making a permit eligibility determination under final § 773.12.

A commenter said that proposed § 773.15(b)(1) meant that all information must be found accurate and complete before an application is administratively complete. We modified the final rule language, as indicated, to require the reviews of information under final §§ 773.9 through 773.11 to proceed on the basis of an administratively complete application. See final § 773.8(a). The determination that an application is accurate and complete will come at a later stage of the permit application review process. See final § 773.15(a).

Several commenters asked OSM to clarify: (1) what is to be checked to determine accuracy and completeness; (2) how should States verify information provided in an application and to what depth and detail; and (3) how far above the applicant should ownership and control information be provided.

As indicated above, we changed "accurate and complete" to

"administratively complete." The term "administratively complete application," and the requirement that an applicant must submit an administratively complete application before permit processing begins, have been in place since at least 1983. See previous § 773.13(a)(1) and existing § 701.5 (definition of *administratively complete application*). Under our longstanding practice, as well as under this final rule at § 773.8, an application is administratively complete when the regulatory authority determines that it contains information addressing each application requirement and all information necessary to initiate processing and public review. On the other hand, under final § 773.15(a), a determination of accuracy and completeness will occur before a permitting decision is made and will require written findings by the regulatory authority. This process, too, has been in place since at least 1983. See previous § 773.15(c)(1). When making a finding that an application is accurate and complete, rather than merely determining that information and responses have been provided, the regulatory authority must examine the veracity of submitted information. We leave it to the regulatory authorities to determine how this requirement is best implemented under their programs. However, in making a finding that an application is accurate and complete, a regulatory authority is expected to review all information supplied in the permit application, pertinent information in AVS, and all other reasonably available information. As for the extent of ownership and control information required to be provided for persons "above the applicant," we note that under final § 778.11(c)(5) and (d), an applicant is required to submit the information required by final § 778.11(e) for all persons who own or control the applicant and the operator, according to the definitions of *own*, *owner*, or *ownership* and *control* or *controller* which we adopt today in final § 701.5.

A commenter said review of an applicant's legal identity will lengthen the permit review process and could require additional staff and resources to accomplish the required reviews and investigations.

As indicated above, at final § 773.9, we changed that heading to "Review of applicant, operator, and ownership and control information," to more accurately reflect the nature of the review. Also, we removed direct references to investigations in this section, such that investigations will not be routinely required. Rather, while we fully expect investigations to be conducted when

warranted, investigations as proposed in part 773 are at the discretion of the regulatory authority. This should substantially alleviate the staff burden perceived by the commenter. As to the review of applicant, operator, and ownership and control information under final § 773.9, this final rule, in large part, continues requirements and practices which were previously in effect, and thus should not lengthen the review process or require additional staff and resources.

A commenter asked OSM to explain the term “other reasonably available information.” The commenter said that an application probably contains information more up-to-date than State databases, which are updated only once a year.

In final §§ 773.9 through 773.11, we use the phrase “other available information” instead of the proposed phrase “other reasonably available information.” However, the change was editorial in nature and does not change the scope of information the regulatory must consider. The phrase “other available information” is derived from section 510(c) of SMCRA, which requires regulatory authorities to consider the section 510(c) schedule of information submitted by the applicant, as well as “other information available.” Under final §§ 773.9 through 773.11, we intend that the phrase means information that may be obtained from State and Federal sources—such as AVS—without extraordinary effort. The term also encompasses information supplied to the regulatory authority by the public.

Numerous commenters all said “OSM should require States to validate their information before entry into AVS and should require the States to enter corrections in a timely manner.” Final § 773.15(a) requires regulatory authorities to make a written finding that a permit application is accurate and complete. As explained above, when making a finding of accuracy and completeness, the regulatory authority must examine the veracity of information submitted by the applicant. In doing so, we expect regulatory authorities to consider all reasonably available information, including information already contained in AVS. We also note, however, that most of the information contained in AVS is supplied to regulatory authorities by applicants and permittees, who have the burden of providing accurate and complete information. We also agree that States should enter all data into AVS, including any corrections, in a timely manner.

Several other commenters said “information should be required and entered into AVS at the time of permit application with a notation indicating that it will be updated before permit issuance, and that the information should be updated by the applicant and input at the time of final permit review and issuance.”

We modified several proposed provisions based on our modifications to proposed § 773.15(b)(1). Our modifications accomplish the intent of the commenters. Final § 773.8(b) requires the regulatory authority to enter into AVS permit application information relating to ownership and control and violations. Final § 773.8(c) requires the regulatory authority to update this information in AVS after it verifies any additional information submitted or discovered during a permit application review. Final § 778.9(d) requires an applicant, after permit approval but before permit issuance, to update, correct, or indicate that no change has occurred in the permit application information submitted under final §§ 778.11 through 778.14. Finally, § 773.12(d), which is modified and adopted from proposed § 773.15(e), provides that after a regulatory authority approves a permit, it will not issue the permit until the applicant complies with the information update and certification requirement of final § 778.9(d). After the applicant completes the update and certification, § 778.9(d) requires a regulatory authority, no more than five business days before permit issuance, to again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect the applicant’s permit eligibility.

#### Proposed § 773.15(b)(1)(i)

We proposed to revise previous § 773.15(b) to provide for a finding whether any applicant or operator, or any owner, controller, principal, or agent of an applicant or operator, has knowingly or willfully concealed information about any owner or controller of the proposed operation. We did not adopt this provision in part 773 because it is duplicative of the provisions of final § 847.11(a)(3).

Several commenters asserted that denial of an incomplete application is mandatory when an applicant has not fully complied with, for example, sections 506, 507, 508, and 510 of SMCRA. 30 U.S.C. 1256, 10 U.S.C. 1257, 30 U.S.C. 1258 and 30 U.S.C. 1260. The commenters also said: “To the extent that OSM proposes to make elective the rejection of the application by the agency where it is demonstrated that the

applicant has failed to disclose information, the proposal falls short of the mark.” The commenter noted the applicant is obligated to file accurate and complete information and that “[n]on-disclosure which is intentional or which with reasonable diligence should have been avoided, should be the basis of . . . for referral by the agency for possible criminal prosecution for fraud or violation of the False Claims Act.”

We agree with the commenters’ premise, but not with their conclusion. We agree that an applicant is initially obliged to file an administratively complete application and ultimately bears the burden of demonstrating that the application is accurate and complete. Absent a demonstration by the applicant that the application is accurate and complete, we agree that no permit may be issued by a regulatory authority. However, we disagree that a regulatory authority should immediately proceed to criminal prosecution in all instances of nondisclosure of required information. As mentioned above, the most common outcome for failing to provide accurate and complete information will be permit denial. However, if an applicant knowingly conceals or fails to provide material information, prosecution may be appropriate under final § 847.11(a)(3) and section 518(g), 30 U.S.C. 1268(g), of the Act. See section VI.A.A. of this preamble.

A commenter said that making a finding that persons have knowingly and willfully concealed information from an application could be difficult without extensive administrative and legal research. The commenter also said that “[c]onducting such research within statutory and regulatory time-frames mandated for permit reviews could require staff to spend less time on reviewing the technical, scientific, and regulatory adequacy of proposed operations.”

We expect the occurrence of knowing withholding of information to be relatively rare, and this rule does not require regulatory authorities to conduct an investigation of all applicants to determine whether information has been knowingly withheld. As such, the research to which the commenter refers should not substantially interfere with the regulatory authorities’ other application review obligations. However, under final § 773.15(a), the regulatory authority must find that the information submitted by the applicant is accurate and complete. If a regulatory authority encounters evidence of wrongdoing or misconduct, the regulatory authority is obligated, under

SMCRA, to evaluate the circumstances and to take appropriate action under the Act.

A commenter objected to "the inclusion of operators" in proposed § 773.15(b)(1)(i). The commenter said including operators is both unnecessary and impermissible. The commenter said "[i]f the operator is an agent of a permittee or an applicant, the operator will fall within the SMCRA provisions concerning agents. If not, the operator is outside the scope of SMCRA in this context." In final §§ 773.9 through 773.11, we modified the proposal to clarify that the regulatory authority will review the information the applicant submits under part 778. However, the applicant must provide information about its operator. We expect that the applicant will exercise due diligence to verify the accuracy and completeness of any information it receives from its operator. Ultimately, all of the information an applicant provides, including information pertaining to its operator, must be accurate and complete.

#### Proposed § 773.15(b)(1)(i)(A)

We proposed that following a finding of concealed information, we would inform an applicant or operator in writing of the finding to provide an opportunity to supply the undisclosed information before a permitting decision was made. There were no comments on this provision. We did not adopt this proposed provision because it unnecessarily duplicates existing procedures.

#### Proposed § 773.15(b)(1)(i)(B)

We proposed to provide for investigations as to whether an applicant's or operator's response to a finding of nondisclosure was satisfactory. All comments on proposed § 773.15(b)(1)(i)(B) addressed the proposed use of investigations to determine if an applicant provided full disclosure in response to a regulatory authority's written notification of a finding of less than full disclosure of owners and controllers. All comments on investigations proposed in §§ 773.15(b)(1)(i)(B), (b)(2)(iii), and (b)(3)(ii)(B) will be discussed together here.

#### Investigations

All comments on investigation, except one, variously questioned the reason for including this mechanism in the proposed revisions of previous § 773.15. Some commenters expressed concern that during oversight, OSM and State regulatory authorities would disagree with the conduct and results of

investigations. Several commenters were concerned that additional staff and funding would be required to conduct the investigations. One commenter said that a mandate to investigate the information in every application is burdensome and that a State regulatory authority would, in fact, investigate when there was reason to believe that an application did not contain full disclosure. Some commenters asked about the scope and level of detail necessary to perform an investigation. One commenter said the final rule should clarify that a regulatory authority will conduct an investigation related to these provisions at its discretion. Several commenters expressed support for including investigations in the provisions and suggested that OSM or the State regulatory authority publish notices in local newspapers when an investigation is being conducted in order to increase public participation.

In response to these comments, we did not adopt the three provisions that made direct reference to mandatory investigations during the permit review process. Regulatory authorities already have the authority and discretion to perform an investigation, comprehensive review, examination or evaluation when they have reason to believe information in an application is not accurate or complete, or has been intentionally concealed. However, a regulatory authority's permitting decisions and all actions attendant to such a decision are subject to OSM's general oversight authority. In addition, for reasons explained above, we reject the suggestion to publish notification of a regulatory authority's investigations. Any benefit to be gained by such publication is outweighed by the countervailing concerns relating to the rights of the person being investigated and the integrity of the investigation.

#### Proposed § 773.15(b)(1)(i)(B)(1)

We proposed that, depending upon an applicant's or operator's response under proposed § 773.15(b)(1)(i)(A) and the results of our investigation under proposed § 773.15(b)(1)(i)(B), we "may" deny an application. We did not adopt this proposed provision. We decided that the proposed provision is an unnecessary revision because sufficient provisions already exist supporting the proposition that a regulatory authority is under no affirmative obligation to issue a permit when the application is not accurate and complete.

#### Proposed § 773.15(b)(1)(i)(B)(2)

We proposed that if we found knowing or willful concealment of ownership or control information, we

would refer the finding to the Attorney General or equivalent State office for prosecution under section 518(g) of the Act and proposed § 846.11. We did not adopt this provision because it is duplicative.

Four commenters supported including a regulatory provision for referral for prosecution under section 518(g) of the Act. Three of the commenters said that the threat of being convicted on criminal charges will motivate coal companies to tell the truth in their applications for permits. We agree that it is appropriate to incorporate a regulatory provision implementing section 518(g) in this rulemaking, and have done so at final § 847.11.

#### Proposed § 773.15(b)(2) and (b)(2)(i)

We proposed § 773.15(b)(2) to provide for the review of an applicant's permit history, which comprises the second part of the three-part review of the information required from applicants under part 778. At paragraph (b)(2)(i), we proposed to use AVS and any other available information to review the permit history of the applicant as well as the permit history of any persons with the ability to control the applicant. We intended that the review would determine the extent of mining experience of the applicant and persons who own or control the applicant and whether previous mining was conducted in compliance with applicable requirements. We modified the proposed provisions in this final rule. Within the reorganization of part 773, the section is adopted as final § 773.10. We received no comments specific to proposed § 773.15(b)(2)(i).

Final § 773.10 provides for a review of "permit history." Under final § 773.10(a), the regulatory authority will rely upon the permit history information the applicant submits, information in AVS, and any other available information to review the permit histories of the applicant and the operator. This review is required before a regulatory authority makes a section 510(c) permit eligibility determination under final § 773.12. Under final § 773.10(b) the regulatory authority will also determine whether the applicant, operator, and their owners and controllers have previous mining experience. If none of these persons has prior mining experience, the regulatory authority may conduct an additional review under final § 774.11(f) to determine if someone else controls the mining operation and was not disclosed under § 778.11(c)(5).

## Proposed § 773.15(b)(2)(ii)

At paragraph (b)(2)(ii), we proposed that if an applicant had five or more years mining experience, the applicant would not be subject to additional permit conditions, as proposed at § 773.18, unless a controller of the applicant was linked to an outstanding violation. We specifically invited comments on the five-years experience and successful environmental compliance criteria.

Several commenters supported the five years experience and successful environmental compliance criteria to distinguish among applicants. Two of these commenters said the five-years criterion should be clarified to mean five consecutive years of surface coal mining experience. One commenter said that the experience criterion should be applied only to the applicant, not to the owners and controllers of the applicant. Another commenter said the five-year threshold should be applied only to the applicant, unless an investigation "should prove that someone else is the true applicant." A group of commenters said that past performance can be a predictor of future performance. However, these last commenters also said that the proposal fails to address the core problem, which is how to prevent new permit-related damage by entities who are owned or controlled by violators, given that section 510(c) can no longer be used. These commenters suggested that if the intent of the proposed criteria was to reduce the risk posed by applicants with no mining experience or a history of unsuccessful compliance, perhaps performance bonds could be adjusted to address the increased risk.

Many more commenters opposed the five-years experience criterion. Numerous commenters all said mergers and name changes could create a new entity that would be unfairly subject to the criterion. Two commenters said that applicants identified in proposed § 773.15(b)(2)(ii) as subject to additional permit conditions differ from the persons identified in proposed § 773.18. Another said that existing State laws and regulations are sufficient to effect environmental compliance without additional permit conditions or monitoring. Two commenters asked if OSM relied upon statistical data to develop the five-year criterion. Numerous commenters said the five-year experience criterion is not authorized under the Act. Several commenters asserted that the experience criterion is inconsistent with the ruling in *NMA v. DOI I*. Several commenters said that "all permittees should be

subject to obligations to pay bills on time, to reclaim expeditiously, and to maintain proper compliance records. The agency cannot pick and choose who gets breaks from mandatory obligations."

Another commenter asserted that SMCRA establishes the only permissible criteria for issuing and conditioning a permit to an applicant. In the commenter's view, our proposed criteria are not authorized by the Act. This commenter also said that there are other factors more relevant to an operation's financial and compliance success but even those factors are "not part of the statutory calculus for a decision whether to issue or condition a permit. In any event, the statute directly addresses performance risk by requiring for every surface coal mining operation a reclamation bond payable to the regulatory authority and 'conditioned upon faithful performance of all requirements of the Act.'"

Based on the comments received on this provision and our further deliberations, we are not adopting the proposed five-years experience and successful environmental experience criteria. There are no references to either in the regulatory language of this final rule. However, in final § 773.10(c), if neither the applicant or operator, nor any of their owners or controllers identified under final § 778.11(c)(5), has any previous mining experience, we may conduct an additional review to determine if another person with mining experience owns or controls the operation but was not disclosed under final § 778.11(c)(5). We also note that amendments to the existing bonding regulations, as alluded to by several commenters, may provide an adequate means of reducing the risk posed by applicants or permittees with little or no mining experience. However, bonding is outside the scope of this rulemaking.

## Proposed § 773.15(b)(2)(iii)

All comments received on proposed paragraph (b)(2)(iii) addressed the proposed use of investigations. All comments on the proposed use of investigations have been discussed above at proposed § 773.15(b)(1)(i)(B), the first instance in proposed § 773.15 where the use of investigations was proposed.

## Proposed § 773.15(b)(3)

We proposed to revise § 773.15(b)(3) to provide for the review of an applicant's compliance history, the third part of the review of an application. We modified and adopted this provision at final § 773.11, "Review of permit history." Final § 773.11(a)

requires a regulatory authority to rely upon the compliance, or violation, history information the applicant submits to review the compliance histories of the applicant, operator, and their owners and controllers. Under final § 773.11(b), this review must occur before a regulatory authority makes a section 510(c) permit eligibility determination under final § 773.11(b).

## Proposed § 773.15(b)(3)(i)

We proposed paragraph (b)(3)(i) to provide that a regulatory authority must request a compliance history report from AVS for every application for a new permit, revision, renewal, transfer, assignment, or sale of permit rights. In this final rule, we modified the proposed provision to require regulatory authorities to obtain an AVS report before making a section 510(c) permit eligibility, whenever such a determination is required under our regulations, under final § 773.12.

## General Comments on Proposed § 773.15(b)(3)(i)

Two commenters said the provisions proposed for the review of compliance history are not consistent with section 510(c) of SMCRA. First, they said permit revisions are exempt from a permit eligibility determination under section 510(c). One said that applications for permit renewals are also exempt. This commenter said proposed paragraph (b)(3) should be entirely deleted.

We disagree that permit revisions and renewals are exempt from the requirements of section 510(c). Section 510 refers generally to applications for permits and revisions. It is, therefore, reasonable to conclude that the term "applicant" in section 510(c) encompasses applicants for permits as well as revisions. Moreover, the term "permit" in section 510(c) does not exclude applications for permit revisions or renewals. It is reasonable to conclude that the requirements of section 510(c) apply with equal force not only to applications for new permits, but also to applications for permit revisions and renewals. In sum, while we did not include specific references to revisions, renewals, and transfers in the final rule language, we intend that a regulatory authority may evaluate all permitting actions for eligibility under section 510(c).

## Permitting Recommendations

In the proposed rule, we provided notice that we would cease providing AVS and OSM recommendations to regulatory authorities on pending applications and other actions subject to permit eligibility determinations. We

provided official notice of the termination of permitting recommendations on October 29, 1999. See AVS System Advisory Memorandum #20. In the proposed rule, we explained that the AVS report which regulatory authorities are required to obtain under final § 773.11 (proposed § 773.15(b)(3)(i)) would replace OSM's current policy, which included providing permitting recommendations. After reviewing the comments received on the elimination of permitting recommendations, we will continue the practice of not providing recommendations, under the rationale we articulated in the proposed rule:

In the future, instead of providing permit eligibility recommendations, we would use AVS to provide a variety of reports, including a report on applicants and violations on the operations they own or control, for use by the regulatory authority in reviewing applications and permits. Consistent with the principle of State primacy, regulatory authorities would then perform their own analyses of an applicant's legal identity information, permit history, and compliance history, and make permitting decisions based on their findings without receiving a recommendation from OSM. Our role would be to administer and operate the AVS and maintain the integrity of the system data. The State, subject to OSM oversight reviews, would have full authority in deciding whether to issue a permit.

63 FR 70580, 70593. We do note, however, that even when we were providing recommendations, the State regulatory authorities retained the ultimate authority to render a permitting decision.

Three commenters supported our decision to cease providing permitting recommendations. These commenters said the decision supported State primacy and that States should make their own permitting decisions. We supported the principle of State primacy in the past, and continue to do so, as evidenced by many provisions adopted in this final rule. For example, in addition to eliminating permitting recommendations, we provided that State regulatory authorities are to apply their own ownership and control rules to outstanding violations in other jurisdictions, including Federal violations, when deciding challenges to ownership or control listings and findings (see final §§ 773.25 through 773.28).

Our decision to cease providing permitting recommendations was also based upon the ever-increasing sophistication among State users of AVS. States have fully integrated the use of AVS into their programs. In addition, all information used in AVS data processing has been completely

automated for several years. This has resulted in an exceptionally high degree of accuracy of the information contained in, and the reports generated by, AVS. The need for OSM to routinely check the quality of system outputs has continuously decreased, as has the need for OSM and State collaboration to resolve discrepancies.

Our role in maintaining and managing the computer system will continue. Nonetheless, the above-mentioned factors have brought us to the conclusion that it is appropriate to cease providing permitting recommendations. We remain committed to maintaining the integrity of AVS data and will continue to provide a variety of support services to State and Federal users, as well as to the industry and the general public.

Many commenters opposed or expressed concern regarding our decision to cease providing permitting recommendations. One commenter said that providing AVS and OSM recommendations is consistent with the Congress' view of OSM's role in primacy States. One commenter said: (1) AVS is an OSM system that can only be operated and maintained by OSM; (2) ceasing permitting recommendations will result in second-guessing State decisions during oversight; and (3) "OSM should continue to use the data in its AVS system to provide permit eligibility decisions." Another commenter said that if OSM provides only raw data, some States may ignore violations in other States. Another commenter expressed concern about resolving data discrepancies.

We appreciate these concerns, but decline to reinstate permitting recommendations. Our response to these commenters is largely the same as our previous responses regarding recommendations. We do note that under this final rule, as with the previous rules, States are required to consider all violations, both State and Federal, during the section 510(c) compliance review (unless the violations are subject to one of the exceptions for remining (final § 773.13) or provisionally issued permits (final § 773.14)). If a State fails to consider all violations, it is subject to our general oversight authority. We also note our strong intent not to routinely second guess State permitting decisions; we will use our oversight to respond to egregious situations. So long as State permitting decisions are reasonable under the approved State program, we will not disturb the State decision-making process.

In the area of data discrepancies, the agency with jurisdiction over a violation

is the first place to attempt to resolve any discrepancy. We are always prepared to receive any requests regarding Federal violations and to assist any State should the need arise.

#### Proposed § 773.15(b)(3)(i)(A)

At paragraph (b)(3)(i)(A), we proposed that a permit eligibility determination under section 510(c) would be based upon the compliance history of the applicant and operations owned or controlled by the applicant, unless there was an indication that the history of persons other than the applicant should also be included. Proposed § 773.15(b)(3)(i)(A), as modified, along with proposed § 773.16(a), as modified, is adopted in final § 773.12.

In final § 773.12, we clarified that we will consider an operator's compliance history, when the operator is different than the applicant, during the section 510(c) compliance review. As explained in section VI.A. of this preamble, there is no time when an applicant/permittee does not control its entire surface coal mining operation. As such, the permittee will always control the operator, at least to the extent that the permittee selects, and can ultimately fire, the operator. Since the operator is effectively "downstream" from the applicant/permittee, it is consistent with section 510(c) to consider the operator's compliance history, *i.e.*, whether the operator has any outstanding violations, during the section 510(c) compliance review. While reviewing the operator's compliance history was subsumed in the proposed provision, which would have required regulatory authorities to consider violations at all operations owned or controlled by the applicant, we decided to add specific reference to the operator to avoid any confusion. If we could not consider an operator's violations during the compliance review, operators could create violations at multiple sites and remain in the business by associating with "clean" applicants. The Act cannot be read to support such a result. The provision will also encourage applicants to hire "clean" operators.

A commenter asked that we explain which "other persons" we are referring to in proposed § 773.15(b)(3)(i)(A). The commenter said that without explanation, "the regulations allow far too much leeway to the agency issuing the permit." By "persons other than [the applicant]," we intended to clarify that persons other than applicants for new permits may be subject to a section 510(c) permit eligibility determination. However, we decided that the reference to "other persons" is unnecessary in

final § 773.12 because other rule provisions already provide the circumstances under which a section 510(c) compliance review is required.

One commenter said that “State law governs the analysis for piercing the corporate veil” so that “a Federal rule that attempts to displace State corporate law would be particularly intrusive and unjustified.” This rule does not displace State corporate law to a greater extent than provided for in SMCRA. Further, as explained above, State common law pertaining to piercing the corporate veil is not the exclusive tool to determine the true applicant. It is true that corporations are creatures of State law; however, the corporate form cannot be used to evade the requirements of a Federal statute, such as SMCRA. To the extent that SMCRA is inconsistent with State corporate law principles, federal law prevents the provisions of SMCRA from being subverted by State law.

A commenter asked if the rule would allow for permit denial based only on the applicant’s violations, or would it also allow for denial based on violations indirectly owned or controlled by the applicant. This final rule, like the provisions in the IFR, allows for permit denials based on “limitless downstream violations” at operations which the applicant owns or controls through intermediary persons or entities. This provision was expressly upheld in *NMA v. DOI II*, 177 F.3d at 4–5. Thus, during a section 510(c) compliance review under final § 773.12, we may consider not only the applicant’s own, directly owned or controlled violations, but also violations at operations which the applicant indirectly owns or controls through intermediary persons or entities. This provision is subject to the court’s retroactivity holding, as embodied in final § 773.12(a) and (b).

#### Proposed § 773.15(b)(3)(i)(B)

In paragraph (b)(3)(i)(B), we proposed that if an applicant or any surface coal mining operation owned or controlled by the applicant has an outstanding violation, the application may not be approved unless: (1) the regulatory authority with jurisdiction over the violation approves a properly executed abatement plan or payment schedule; or (2) the violation is being abated or is the subject of a good faith administrative or judicial appeal, contesting the validity of the violation; or (3) the violation is subject to the presumption of NOV abatement under proposed § 773.16(b).

We modified and reorganized the proposed provision. We consolidated all proposed provisions describing permit eligibility into final § 773.12. We moved proposed provisions regarding appeals,

abatement plans, and payment schedules to final § 773.14. Section 773.14 governs the circumstances under which a permit may be provisionally issued, when an applicant or operator has outstanding violations. The adopted provisions of final § 773.14 are described below in the discussion of proposed § 773.16 at section VI.F. of this preamble.

In final § 773.12, we also changed the proposal’s use of the past tense “owned or controlled” to the present tense “own or control” in order to conform the proposed provision to the ruling in *NMA v. DOI II*. In other words, the adopted language clarifies that we may no longer consider unabated or uncorrected violations at operations formerly, but no longer, owned or controlled by the applicant during the section 510(c) compliance review. We may, however, consider past ownership or control in determining if there has been a pattern of willful violations under final § 774.11(c) and section 510(c) of the Act.

Finally, we modified the proposed language to conform to the *NMA v. DOI II* court’s ruling on retroactivity. Under this final rule, we may no longer deny a permit when an applicant assumed indirect ownership or control of an operation before November 2, 1988, and that operation has an outstanding violation which was cited before November 2, 1988, unless there was an established basis, independent from our 1988 ownership or control rule, to deny the permit at the time of the assumption of indirect ownership or control or at the time of violation (whichever is earlier).

A commenter who provided comments on the effect of the *NMA v. DOI II* decision said that under the court’s retroactivity holding, our pre-1988 regulations only pertained to the applicant’s violations. Another commenter said that the court’s ruling “did not prohibit imposition of permit blocks for direct ownership or control of violators whose violations occurred before [November 2, 1988].”

We agree with the latter comment. As explained above, the court found that the previous rule was impermissibly retroactive to the extent it required permit denials based on *indirect* control and transactions which occurred before November 2, 1988. Thus, the rule was not retroactive to the extent it required permit denials based on pre-rule transaction in instances involving *direct* control. Final § 773.12(a)(1) requires permit denial when the applicant directly owns or controls an operation with an unabated or uncorrected violation, regardless of when the

ownership or control was established or when the violation occurred. The distinction between direct and indirect control is discussed more fully above.

A commenter said that proposed § 773.15(b)(3)(i)(B) appears to address an “outstanding violation,” but subparagraphs (B)(2) and (B)(3) appear to address only notices of violation. The commenter is correct that the proposal treated “outstanding violations” and “notices of violation” differently. We proposed to define *outstanding violation* to mean a violation notice that remains unabated or uncorrected beyond the abatement or correction period. As such, a notice of violation for which the abatement period has not expired would not have been an outstanding violation under the proposal. As previously explained, we are not adopting the proposed definition of *outstanding violation*. As such, the phrase “outstanding violation” will continue to have its plain meaning—*i.e.*, a violation that is unabated or uncorrected. Thus, under the final rule, an NOV is an outstanding violation, even if the abatement period has not expired. We also clarify that, under section 510(c) of the Act and our longstanding policy, regulatory authorities must consider notices of violation—and any other outstanding violations—during the section 510(c) compliance review (though the applicant may be eligible for a permit under final §§ 773.13 or 773.14).

Two commenters asked if the phrase “may not approve” in proposed § 773.15(b)(3)(i)(B) means that the regulatory authority has the discretion not to approve an application. The commenters said that if OSM is granting discretion to regulatory authorities in this matter, then it should be made clear in the final rule. In this final rule, denying a permit under § 773.12 is *not* discretionary. If a person is ineligible for a permit under final § 773.12, and does not meet the criteria of §§ 773.13 and 773.14, the regulatory authority must deny the application.

Several commenters opposed the presumption in proposed § 773.15(b)(3)(i)(B) that a violation is being abated “merely because there is an abatement plan.” They said the presumption should be that the violation exists until it is abated, “not merely promised to be abated.” These commenters also opposed the use of appeals to defer a finding of a violation. The commenters asked, “when is a violation final enough to block issuance of a new permit?”

The proposed amendment provided for permit approval if an approved abatement plan or payment schedule is

in place to correct a violation which remains unabated beyond the abatement period, or the violation is subject to a good faith appeal, at the time a permitting decision is made. In our view, the presence of an abatement plan or payment schedule demonstrates a good faith effort to correct a violation. We conclude that this current practice should continue. We also conclude that it is appropriate to provisionally issue a permit when a violation is subject to a *good faith* appeal. However, under final § 773.14(c), if a permittee, operator, or other person fails to comply with an abatement plan or payment schedule, or if a court affirms the existence of a violation properly attributable to the applicant, then a regulatory authority should pursue other means to compel compliance, and must institute procedures to suspend or rescind the provisionally issued permit. See section VI.F. for a detailed discussion of provisionally issued permits.

Proposed § 773.15(b)(3)(i)(C)

At proposed paragraph (b)(3)(i)(C), we proposed that any application approved with outstanding violations must be conditioned under § 773.17(j). Because we are not adopting proposed § 773.17(j), we also are not adopting proposed (b)(3)(i)(C). There were no comments on this proposed provision. Permits which are issued when there are outstanding violations properly attributable to the applicant under section 510(c) must be provisionally issued in accordance with final § 773.14.

Proposed § 773.15(b)(3)(i)(D), (E), and (F)

We preserved the substance of these proposed provisions at final §§ 773.12(c) and 774.11(c) through (e). In proposed subparagraphs (b)(3)(i)(D), (E), and (F), we provided that OSM will serve a preliminary finding of permanent permit ineligibility under 43 CFR 4.1351 when we find that an applicant or operator owned or controlled mining operations with a demonstrated pattern of willful violations of the Act and its implementing regulations, and the violations are of such nature and duration that they result in irreparable damage to the environment so as to indicate an applicant or operator's intent not to comply with the Act or implementing regulations. We further proposed that a person would be able to request a hearing under 43 CFR 4.1350 through 4.1356 with the Office of Hearings and Appeals within 30 days of receiving a preliminary finding under paragraph (3)(i)(D) of this proposed section. If a request for a hearing is filed,

the Office of Hearings and Appeals would give written notice of the hearing to an applicant or operator and issue a decision within 60 days of the filing of the request for a hearing. We further proposed that a person may appeal the decision of the administrative law judge to the Interior Board of Land Appeals under procedures in 43 CFR 4.1271 through 4.1276 within 20 days after receipt of a decision. The provisions were based upon previous § 773.15(b)(3) and were proposed with only minor, non-substantive changes from the previous provisions. As mentioned, we adopted the provisions, without substantive modification, in final §§ 773.12(c) and 774.11(c) through (e).

A commenter asserted that the finding would require an investigation and extensive staff resources. These are not new provisions. The proposed provision at § 773.15(b)(3)(i)(D) and the final provisions at § 774.11(c) through (e) are derived from previous § 773.15(b)(3), which implements the "pattern of willful violations" aspect of section 510(c) of SMCRA. There are no substantive changes from the previous provisions, except that we modified the provision to conform it to the appeals court's retroactivity holding. We note that compliance with the provisions is not discretionary, as they are necessary to implement section 510(c)'s mandate. As such, although an investigation requiring staff resources may be required in certain instances, this result is unavoidable under the Act.

A commenter who provided comments on the effect of the *NMA v. DOI II* decision suggested that the rule require regulatory authorities to evaluate past ownership or control of operations in violation and make a written finding if there is a pattern of willful violations. Consistent with *NMA v. DOI II*, final § 774.11(c) requires regulatory authorities to consider past ownership or control in determining whether there has been a pattern of willful violations under section 510(c). However, we adopted language in final § 774.11(c) to comply with the court of appeals' retroactivity holding. Thus, when determining whether there is a pattern of willful violations, we will only consider ownership and control relationships and violations which would make, or would have made, the applicant ineligible under final § 773.12, which incorporates the substance of the court's retroactivity holding. Final § 774.11(c) also requires regulatory authorities to serve a preliminary finding of permanent permit eligibility if such a pattern exists.

A commenter said the "use of the word 'irreparable' should be replaced

with 'material damage.' Irreparable is not the only damage which should not be tolerated. Property owners have to put up with all kinds of illegal damages because they are not significant enough. Material damage may affect many more properties than irreparable damage." We note that section 510(c) of the Act uses the term "irreparable damage."

Proposed § 773.15(b)(3)(i)(G)

We proposed subparagraph (b)(3)(i)(G) to provide that a person is not eligible for a permit if the person or anyone proposing to engage in or carry out operations on the proposed permit has been barred, disqualified, restrained, enjoined, or otherwise prohibited from mining by a Federal or State or court.

We are not adopting the proposed provision. We decided that there are sufficient existing authorities to allow regulatory authorities to avoid violating court orders or injunctions or aiding and abetting enjoined individuals in violating injunctions. For example, if an owner or controller of an applicant is enjoined by a court from engaging in surface coal mining operations, granting a permit to the applicant may be viewed as violating the injunction. Even if the regulatory authority processing the permit application is not technically bound by the injunction, granting a permit may nonetheless be viewed as aiding and abetting an enjoined individual in violating an injunction. Because the specific terms of an injunction will be outlined in the court's order, the regulatory authority must decide, on a case by case basis, whether the order prevents it from issuing a permit.

Proposed § 773.15(b)(3)(ii)

We proposed subparagraph (b)(3)(ii) to provide for an examination of an applicant's controllers. We proposed to ask for an AVS report to show if an applicant's owners or controllers owned or controlled a surface coal mining operation when a violation notice was issued and if the violation is outstanding. We further proposed to investigate each person and violation to determine whether alternative enforcement action under proposed part 846 is appropriate and to enter into AVS the results of each determination or referral. We further proposed that if an applicant has less than five years experience, or has owners or controllers that are linked to outstanding violations, we would consider the applicant to have insufficient or unsuccessful environmental compliance and, if approved for a permit, subject such applicant to additional permit conditions under proposed § 773.18.

In this final rule, we are not adopting direct references to investigations, the five-years experience criterion, the successful environmental compliance criterion, or additional permit conditions. We adopted the remaining provisions, as modified, at final § 774.11(b). Under final § 774.11(b), if we discover that any person owns or controls an operation with an unabated or uncorrected violation, we will determine if an enforcement action is appropriate under parts 843, 846, or 847. We must enter the results of any enforcement action in AVS. See also the description of final § 774.11(b) in section VI.K. of this preamble.

A commenter said the proposed provision seems to be inconsistent with the ruling in *NMA v. DOI I*, “especially if the applicant is part of a large corporate family where the same individuals hold officer positions in several of the companies.” The commenter suggested that outstanding violations should be considered only if they were issued to the applicant or any operation owned or controlled by the applicant. The commenter further said that “[v]iolations at other operations of an applicant’s parent or sister companies must not be considered if their only connection to the applicant is a common individual officer or “controller.” To do so would have the same result as the previous regulation which denied permits if anyone owning or controlling the applicant had outstanding violations. This concept was disallowed by the court decision in *NMA v. DOI II*.”

The provisions adopted at final § 774.11(b) are unrelated to permit eligibility determinations. Rather, the final regulations at § 774.11 provide that regulatory authorities may determine whether enforcement actions are appropriate under 30 CFR 843.13 and parts 846 and 847, which implement sections 518 and 521 of the Act. The ruling in *NMA v. DOI I* does not alter our statutory authority to pursue enforcement actions under sections 518 and 521.

#### Proposed § 773.15(b)(4)

We proposed to revise previous § 773.15(b)(4) by correcting the date in previous subparagraph (b)(4)(i)(C)(1) to read “September 30, 2004.” In the reorganization of part 773, we moved the provisions in previous paragraph (b)(4) to a separate section, final § 773.13. We adopted the date correction at final § 773.13(a)(2)(i) and also modified and reorganized the prior provisions for increased clarity. The substance of the final provision is unchanged.

#### Final §§ 773.15(a) and (n)

Under the reorganization of part 773 in this final rule, the provisions in previous § 773.15(c) are placed in a separate section. The section appears at final § 773.15. In this final rule, we also adopted two amendments at final § 773.15. In final § 773.15(a), we made a technical revision to previous § 773.15(c)(1), changing the phrase “complete and accurate” to “accurate and complete,” to match the statutory phrase used in section 510(b)(1) of the Act. We added final § 773.15(n) to require a written finding based upon the results of the reviews under §§ 773.8 through 773.14.

#### Proposed § 773.15(e)

We proposed to revise paragraph (e) of previous § 773.15 to require regulatory authorities to obtain an AVS compliance report no more than three days before a permit is issued. Our intent was to ensure, immediately before permit issuance, that no new violations have been cited at operations which the applicant or operator owns or controls since the initial section 510(c) compliance review.

We modified the proposed provision in the final rule. The final provision, at § 773.12(d), provides that after a regulatory authority approves a permit, it will not issue the permit until the applicant complies with the information update and certification requirement of final § 778.9(d). After the applicant completes the update and certification, § 778.9(d) requires a regulatory authority, no more than five business days before permit issuance, to again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect the applicant’s permit eligibility.

We increased the proposed three days to five days in response to comments on the proposed provision. The final compliance history report should be obtained close to the anticipated date of the permitting decision. Five days provides a better opportunity to review the compliance report and resolve any discrepancies that arise before a final permitting decision is made. The purpose of the second compliance history report is to make sure that the applicant and operator, and operations they own or control, continue to be in compliance. If there are compliance problems identified in the second report, or otherwise known, they must be resolved before a permit may be issued. We added the provision requiring the final compliance history report to be obtained after the applicant

complies with the information update and certification requirement of final § 778.9(d) to ensure that the regulatory authority’s permitting decision is based on the most current information.

#### F. Section 773.16—Permit Eligibility Determination

The provisions that we proposed at § 773.16 are found at §§ 773.12 and 773.14 of this final rule.

Under proposed § 773.16, permit eligibility determinations would be based upon the permit and compliance history of the applicant, operations which the applicant currently owns or controls, and operations the applicant owned or controlled in the past. If you were eligible for a permit, proposed § 773.16(a)(1) would have required us to determine whether additional permit conditions should be imposed under § 773.18. Proposed § 773.16(a)(2) required written notice of a finding of ineligibility. That notice also would have contained guidance as to how to challenge a finding on the ability to control the surface coal mining operation. Proposed § 773.16(b) provided for a “presumption of NOV abatement” and set forth criteria for the presumption.

In developing this final rule, we modified the proposed rule based upon the *NMA v. DOI II* decision concerning our previous rules and the comments we received on proposed §§ 773.15 and 773.16. (Section VI.E of this preamble contains a detailed discussion of the court decision.) We did not adopt the proposed provisions pertaining to additional permit conditions. We adopted proposed § 773.16(a) in modified form as final § 773.12. We also adopted proposed §§ 773.15(b)(3)(i)(B) and (C) and 773.16(b) in modified form as final § 773.14 (provisionally issued permits).

#### Final § 773.12—Permit Eligibility Determination

We added § 773.12 to this final rule as a part of the reorganization of part 773. Final § 773.12 contains a modified form of provisions proposed as §§ 773.15(b)(3) and 773.16(a).

Paragraphs (a) and (b). Paragraphs (a) and (b) of final § 773.12 require that the regulatory authority determine whether the applicant is eligible for a permit under section 510(c) of the Act, based upon a review of compliance, permit history, and ownership and control information under 30 CFR 773.9 through 773.11. Specifically, paragraph (a) states that—

Except as provided in §§ 773.13 and 773.14 of this part, you are not eligible for a permit

if we find that any surface coal mining operation that—

(1) You directly own or control has an unabated or uncorrected violation;

(2) You or your operator indirectly own or control, regardless of when the ownership or control began, has an unabated or uncorrected violation cited on or after November 2, 1988; or

(3) You or your operator indirectly own or control has an unabated or uncorrected violation, regardless of the date the violation was cited, and your ownership or control was established on or after November 2, 1988.

The November 2, 1988 cutoff date in paragraphs (a)(2) and (3) reflects the decision in *NMA v. DOI II*, which prohibited us from applying the permit block sanction for actions that occurred before the effective date of our first ownership and control rules. In final paragraph (b), we clarify that the ban on retroactive application does not apply to situations in which there was an established legal basis, independent of authority under section 510(c) of the Act, to deny the permit at the time that the applicant or operator assumed indirect ownership or control or at the time the violation was cited, whichever is earlier.

Except for the addition of paragraph (b) and the November 2, 1988 cutoff date, final § 773.12(a) and (b) do not differ significantly in substance from the corresponding provisions in § 773.15(b)(1) of our previous rule.

*Paragraph (c).* Paragraph (c) of final § 773.12 provides that the regulatory authority may not issue a permit to an applicant if the applicant or operator is permanently ineligible to receive a permit under § 774.11(c). This provision is discussed more fully in sections VI.E. and K. of this preamble.

*Paragraph (d).* Paragraph (d) of final § 773.12 requires that, after approving the application, the regulatory authority refrain from issuing the permit until the applicant complies with the information update and certification requirement of 30 CFR 778.9(d). Paragraph (d) also requires that, after that update, but no more than five business days before permit issuance, the regulatory authority again request a compliance history report from AVS to ensure that the applicant remains eligible for a permit. Except for the addition of the 5-day timeframe, this paragraph is substantively identical to previous § 773.15(e). We added the 5-day limitation to ensure that the final compliance review occurs reasonably close to the date of permit issuance.

*Paragraph (e).* Paragraph (e) of final § 773.12 requires that the regulatory authority send the applicant written notice of any decision finding the applicant ineligible for a permit.

Paragraph (e) further provides that the notice must contain the reason for the ineligibility determination and apprise the applicant of his or her appeal rights under 30 CFR part 775 and 43 CFR 4.1360 through 4.1369. We are adding these provisions to ensure that any adversely affected applicant is aware of the decision, the reasons for the decision, and the steps that must be taken to procure administrative review of the decision.

*Disposition of comments pertaining to the permit eligibility criteria of proposed § 773.16(a).* A commenter said that reference to owners and controllers of the applicant in proposed § 773.16(a)(1) should be deleted. In the permit eligibility criteria at § 773.12 of this final rule, we are not adopting the proposed reference to “owners and controllers of the applicant.” Likewise, we are not adopting the imposition of additional permit conditions based on the compliance history of an applicant’s owners and controllers. As previously explained, at final § 773.12, we limit the permit eligibility review to an examination of whether the applicant and the operator have any outstanding violations or own or control any operations with outstanding violations.

A commenter said that proposed paragraph (a) fails to clearly provide that a permit block under section 510(c) can only occur on the basis of outstanding violations at operations the applicant presently owns or controls. As previously explained, we modified the proposal to conform it to the decision in *NMA v. DOI II*; in the process, we eliminated the commenter’s concern. During the section 510(c) compliance review, we may only consider violations at operations which the applicant or operator presently owns or controls.

A commenter asserted that a parent company which owns or controls a subsidiary does not necessarily own or control the operations of the subsidiary. The commenter said that actual control of the operations is the only circumstance in a parent/subsidiary relationship that should lead to permit ineligibility for the parent company if the subsidiary has an outstanding violation.

We disagree. This argument was advanced and rejected in *NMA v. DOI II*. If the parent company owns or controls the subsidiary under the definitions we adopt today, the parent company, de facto, also owns or controls the subsidiary’s operations. In upholding our previous construction of section 510(c), which, on this point, we import into this final rule, the D.C. Circuit explained that our view is “consistent with, if not mandated by,

the statutory language which, as noted, applies to any violating operations ‘controlled by the applicant,’ not only those directly owned by him. Accordingly, the agency’s construction must be upheld.” *NMA v. DOI II*, 177 F.3d at 5. Thus, in § 773.12 of this final rule, we retained the ability to deny permits based on both direct and indirect ownership or control (including both the exercise of control and the ability to control) of operations with current violations, subject to the court’s retroactivity holding. See also our response to similar comments in sections VI.A. and E. of this preamble.

A commenter said that we correctly state that the appeals court [in *NMA v. DOI I*] found only one aspect of our rules to be flawed. However, the commenter also said that we should not alter other aspects of “a permit block system which has been substantially successful in holding corporations accountable for the damage caused by their contract miners, but instead [should focus] on assuring that the full gamut of regulatory powers are employed to prevent those who have violated State or Federal environmental laws or this Act from obtaining new permits through indirect means.”

As discussed throughout this preamble, we believe that there are sound reasons for the assorted modifications that we are making to the rules implementing the permit block sanction of section 510(c) of the Act. We targeted our outreach efforts to identifying how our rules could be improved in their entirety, not just how our rules should be revised as a result of *NMA v. DOI I*. One of the new rules that we are adopting (part 847) emphasizes use of the alternative enforcement mechanisms provided in sections 518(e), 518(g), and 521(c) of the Act. See section VI.AA. of this preamble.

Several commenters said that OSM apparently believes ownership is irrelevant to permit eligibility determinations, and that eligibility is based only on ownership to the extent it reflects the ability to control. One commenter further said that “[o]wnership itself should be a basis for [a permit eligibility determination], otherwise it insulates individuals that own but purposefully do not control.”

We agree that ownership in and of itself can form the basis for denying a permit. However, we note that both the proposal (see, e.g., proposed §§ 773.15(b)(3) and 773.16(a)) and final § 773.12 properly identify ownership and control as independent bases for permit denials under section 510(c). Thus, under this final rule, if an

applicant owns an operation with a violation, under the definition of “*own, owner, or ownership*” in final § 701.5, he or she will not be eligible for a permit unless he or she qualifies for a provisionally issued permit under final § 773.14). Further, under the challenge procedures we adopt today at final §§ 773.25 through 773.27, an applicant may only successfully challenge a listing or finding that he owns an operation by proving by a preponderance of the evidence that he does not own, or did not own, the relevant operation; in this situation, a demonstration of the lack of control of an operation will be of no avail.

Several commenters said that “OSM should clarify the proper forum and procedures to challenge erroneous permit blocks. The permit applicant should not be punished for improper actions or inactions of regulatory bodies.” We respond to this comment, and similar comments, in section VI.N., *infra*.

We invited comments on the criteria to identify which applicants should be subject to additional permit conditions and what types of conditions should be imposed. 63 FR 70580, 70595. Commenters did not provide comments in the context of proposed § 773.16. Commenters did, however, provide comments in response to this invitation with respect to proposed §§ 773.15 and 773.18. We address those comments in section VI.E. of this preamble.

#### Final § 773.14—Provisionally Issued Permits

We added § 773.14 to this final rule as part of the reorganization of part 773. Final § 773.14 is a modification of provisions in previous § 773.15(b)(1) and (2), proposed §§ 773.15(b)(3)(i)(B) and (C), and proposed § 773.16(b). Instead of using the term “conditionally issued permits” as in the previous and proposed rules, the final rule substitutes the term “provisionally issued permits” to clarify that permits issued under final § 773.14 are not the same as permits issued with conditions under 30 CFR 773.17.

*Paragraph (a).* Paragraph (a) of final § 773.14 explains that this section applies to applicants who own or control a surface coal mining and reclamation operation with either—

(1) A notice of violation issued under § 843.12 or the State regulatory program equivalent for which the abatement period has not yet expired; or

(2) A violation that remains unabated or uncorrected beyond the abatement or correction period.

*Paragraph (b).* Paragraph (b) of final § 773.14 identifies the circumstances

under which a regulatory authority may find an applicant eligible for a permit even though an outstanding violation would otherwise make the applicant ineligible for a permit under 30 CFR 773.12 and section 510(c) of the Act. Specifically, final paragraph (b) states that—

We, the regulatory authority, may find you eligible for a provisionally issued permit if you demonstrate that one or more of the following circumstances exists with respect to all violations listed in paragraph (a) of this section—

(1) For violations meeting the criteria of paragraph (a)(1) of this section, you certify that the violation is being abated to the satisfaction of the regulatory authority with jurisdiction over the violation, and we have no evidence to the contrary.

(2) As applicable, you, your operator, and operations that you or your operator own or control are in compliance with the terms of any abatement plan (or, for delinquent fees or penalties, a payment schedule) approved by the agency with jurisdiction over the violation.

(3) You are pursuing a good faith—

(i) Challenge to all pertinent ownership or control listings or findings under §§ 773.25 through 773.27 of this part; or

(ii) Administrative or judicial appeal of all pertinent ownership or control listings or findings, unless there is an initial judicial decision affirming the listing or finding and that decision remains in force.

(4) The violation is the subject of a good faith administrative or judicial appeal contesting the validity of the violation, unless there is an initial judicial decision affirming the violation and that decision remains in force.

In general, final § 773.14(b) is substantively identical to the corresponding provisions in §§ 773.15(b)(1) and (2). However, there is one significant exception. We added paragraph (b)(3) to the final rule in response to comments that our challenge procedures for ownership and control listings or findings failed to provide due process by way of a pre-deprivation hearing. To address these concerns, and in the interest of equity, the final rule allows issuance of a provisional permit when a person is in the process of challenging an ownership or control listing or finding. Our rules have always included a similar provision for good faith administrative and judicial appeals of the validity of a violation. We see no reason not to extend this opportunity to persons who are pursuing good faith challenges to, or administrative or judicial review of, ownership or control listings or findings.

This paragraph of the final rule will afford additional due process protection to adversely affected applicants while presenting little risk of environmental

harm. The applicant must meet all other permit application approval and issuance requirements before receiving a provisionally issued permit. In addition, the provisional permittee must comply with all performance standards. If he or she fails to do so while pursuing a challenge or appeal of all pertinent ownership or control listings and findings, the regulatory authority must take all appropriate enforcement measures, including issuance of an imminent harm cessation order when applicable.

Furthermore, addition of this provision does not abrogate the permit eligibility provisions of section 510(c) of the Act. It merely delays their implementation until a judicial decision affirms the validity of a violation or an ownership or control listing or finding. An applicant whose challenges and appeals are ultimately unsuccessful will be ineligible to receive a permit from that time forward until the violation causing the ineligibility is corrected or until the applicant ceases to be responsible for that violation.

*Paragraph (c).* Paragraph (c) of final § 773.14 provides that the regulatory authority must immediately initiate procedures under §§ 773.22 and 773.23 to suspend or rescind a provisionally issued permit if—

(1) Violations included in final § 773.14(b)(1) are not abated within the specified abatement period;

(2) The applicant, operator, or operations that the applicant or operator owns or controls do not comply with the terms of an abatement plan or payment schedule mentioned in final § 773.14(b)(2);

(3) In the absence of a request for judicial review, the disposition of a challenge and any subsequent administrative review referenced in final § 773.14(b)(3) or (4) affirms the validity of the violation or the ownership or control listing or finding; or

(4) The initial judicial review decision referenced in final § 773.14(b)(3)(ii) or (4) affirms the validity of the violation or the ownership or control listing or finding.

We added this new paragraph to ensure that regulatory authorities take action to suspend or rescind provisionally issued permits as improvidently issued when the conditions justifying provisional issuance cease to exist. As this rule makes clear, a provisional permittee is not entitled to, nor is there any need for, the initial review and finding requirements of § 773.21 normally applicable to improvidently issued permit proceedings. The initial permit

application review procedures leading to issuance of a provisional permit effectively replace the initial review and finding requirements of § 773.21. Therefore, the final rule requires that the regulatory authority proceed directly to § 773.22 and propose to suspend or revoke the permit.

Under the previous rule at § 773.15(b)(1)(ii), the permittee had 30 days from the date that the initial judicial review decision affirmed the validity of the violation to submit proof that the violation was being corrected to the satisfaction of the agency with jurisdiction over the violation. In contrast, final § 773.14(c) requires that the regulatory authority initiate action to suspend or revoke the permit as imprudently issued if the disposition of challenges or administrative or judicial appeals affirms the violation or ownership or control listing or finding. We made this change to ensure prompt implementation of the section 510(c) permit block sanction once the validity of a violation or ownership or control listing or finding is affirmed on appeal. (The previous rule did not specify what action the regulatory authority must take if the permittee did not submit the required proof within 30 days.) Under § 773.23 of the final rule, the permittee still has ample opportunity to submit proof of corrective action and thus avoid permit suspension or revocation. Final § 773.22(b) requires 60 days notice for a proposed suspension, while final § 773.22(c) requires 120 days notice for a proposed rescission.

#### Disposition of Comments on Presumption of NOV Abatement

In the proposed rule, we provided that the presumption that a notice of violation (NOV) is being corrected—the “presumption of NOV abatement”—was not available to applicants who were subject to additional permit conditions under proposed § 773.18 because their owners or controllers were linked to violations. We invited comments on withholding the presumption of NOV abatement based on this criterion, and also sought suggestions as to other criteria which could be used to withhold the benefit of the presumption. 63 FR 70580, 70593. In this final rule, we are not adopting the “additional permit conditions” of proposed § 773.18. We also decided not to distinguish between applicants who can and cannot obtain the benefit of the presumption of NOV abatement. Rather, all applicants may obtain the benefit of the presumption, provided that they meet the requirements of final § 773.14.

Several commenters argued that the presumption of NOV abatement is

unlawful because it is inconsistent with section 510(c) of SMCRA. The commenters said the law requires submission of proof that an NOV is being corrected to the satisfaction of the regulatory authority or agency with jurisdiction over the violation and that there is no discretion on this point.

We disagree with these commenters. The provisionally issued permit provisions that we adopt at § 773.14 today continue, in substance, our previous use of the presumption and are a reasonable implementation of section 510(c). We extensively explained the basis for the presumption in the preamble to our 1994 AVS Procedures rule. 59 FR 54306, 54322–54324 (October 28, 1994). We continue to rely, in part, on the same rationale for purposes of this rulemaking. In short, based on our experience, we firmly believe that the efficiencies gained by use of the presumption far outweigh any perceived reduction in environmental harm that might result from its elimination.

Further, we note that the certification requirement in final § 773.14(b)(1) satisfies section 510(c)'s proof requirement that an applicant who owns or controls operations that are currently in violation submit “proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation \* \* \*.” An applicant's certification that the violation is in fact being abated, with attendant consequences for failure to comply with the certification, constitutes adequate proof under section 510(c). To that extent, the use of the term “presumption” in connection with this provision is a misnomer; under this final rule, regulatory authorities cannot simply “presume” that an NOV is being abated, but must require the requisite certification before a permit may be provisionally issued.

In NMA's challenge to the AVS Procedures rule, the U.S. District Court for the District of Columbia stated: “The Court finds the “certification of abatement” requirement consistent with SMCRA and a rational way to enforce the Act's requirements.” *National Mining Assoc. v. Babbitt*, 43 Env't Rep. Cas. (BNA) 1097, 1109 (D.D.C. 1996), *appeal docketed*, No. 96–5274 (D.C. Cir.). As the court explained, “certification provides state-of-mind insurance to the regulatory authority by giving it recourse against the applicant who does not correct a NOV.” *Id.* at 1110. Similar recourse is available in final § 773.14(c).

When there is an unabated or uncorrected violation and the abatement or correction period has expired, final § 773.14(b)(2) establishes prerequisites for provisional permit issuance that similarly satisfy the proof requirement. The presence of an approved abatement plan or payment schedule, and confirmation of compliance with the plan or schedule, represents a good faith effort to correct the violation and constitutes more than adequate proof that the violation is being abated. Finally, the criteria §§ 773.14(b)(3) and (4), which allow issuance of a provisional permit when the violation or ownership or control listing or finding is the subject of a good faith challenge or administrative or judicial appeal, have adequate support in the legislative history of section 510(c), as discussed at 44 FR 15024–25 (March 13, 1979).

The National Wildlife Federation and Kentucky Resources Council, Inc. also filed a complaint challenging our 1994 AVS procedures rule. In that action, plaintiffs claimed, among other things, that the presumption of NOV abatement failed to satisfy section 510(c)'s proof requirement. Ultimately, the parties filed a joint motion for voluntary dismissal of the action, based on our agreement to “reopen the issues and regulatory language complained of in this lawsuit for public comment, and to reevaluate the position of the agency with respect to those matters complained of in this case,” including the presumption of NOV abatement. By order of September 15, 1997, the court granted the joint motion. This rulemaking, in conjunction with our 1998 proposed rule, fulfils the commitment we made in the joint motion. We carefully considered all the comments received on our proposal to continue the use of the presumption of NOV abatement. As explained above, we decided to retain the presumption, confident that it is consistent with section 510(c) of the Act. However, we revised the previous rules by providing that we will immediately propose to suspend or revoke a provisionally issued permit under final §§ 773.22 and 773.23 if a person fails to comply with its terms. *See* final § 773.14(c). This change should increase the probability that a notice of violation will be abated.

Three commenters expressed concern over the resources required to monitor the notices of violation issued to permittees with less than five years experience in surface coal mining operations. As explained elsewhere in this preamble, we are not adopting the experience criterion. Therefore, no additional resources will be required to

monitor NOVs issued to permittees with less than five years of experience.

One commenter said that proposed § 773.16(b) would eliminate the presumption of NOV abatement. Final § 773.14 clearly provides that the presumption of NOV abatement is still available.

A commenter said:

An outstanding violation is to be defined as one where the abatement period has expired without corrective action. A portion of the presumption [of NOV abatement] includes an abatement period which has not expired. It is unclear how a regulatory authority can presume the abatement period has not expired when the presumption process is triggered by a violation for which the abatement period has already expired.

The commenter is incorrect that the proposed presumption of NOV abatement is “triggered by a violation for which the abatement period has already expired.” Proposed § 773.16(b)(1)(ii) clearly said, “we may presume an NOV is being corrected to the satisfaction of the agency with jurisdiction over the violation if the abatement period for the notice of violation has not yet expired.” 63 FR 70580, 70619. Indeed, the primary basis for use of the provision is that the abatement period has *not* expired. See proposed § 773.16(b)(1)(ii) and final § 773.14(b)(1). However, we note that final § 773.14(b) also pertains to violations which remain unabated or uncorrected beyond the abatement or correction period. To receive a provisionally issued permit when there is such a violation, a person must be eligible under § 773.14(b)(2) through (4).

A commenter said that if there is no failure-to-abate cessation order, then the abatement period for an NOV has not expired. We disagree. The fact that a failure-to-abate cessation order has not been issued does *not* mean that the abatement period has not expired.

Three commenters expressed support for the presumption of NOV abatement. One said the presumption “is clearly supported by the Act. Section 521(a)(3) expressly sets forth that the NOV will provide ‘a reasonable time’ for the abatement of the violation.” We agree that the presumption is supported by section 510(c) of the Act, but not by section 521(a)(3). Providing a reasonable time for abatement does not mean that the NOV is not a violation when written; nor is it the same thing as presuming a violation is being abated within the time period allotted for abatement. We retained the presumption because it is beneficial to State regulatory authorities and industry, will not likely result in harm

to the environment, and because it is authorized by section 510(c) of the Act.

Two commenters said the presumption of NOV abatement “supports the concept of all violations being entered into AVS, then updated as to [whether they are] abated or not.” The commenters questioned the need for the States to perform, as they see it, duplicate data entry. They said, “[we] really do not think our State is going to deny a permit because the applicant may owe a penalty in another State. This situation would be overridden under today’s AVS recommendation.”

These commenters are mistaken. First, they are incorrect as to the effect of the presumption on violation data in AVS. Use of the NOV presumption is continued from previous regulations. It has not meant, nor does it now mean, that all notices of violation must be entered into AVS. Rather, under final §§ 773.8(b)(2), 773.8(c), and 774.11(a)(2), regulatory authorities must enter into AVS only those violations which are unabated or uncorrected after the abatement or correction period has expired. Second, the commenters are incorrect regarding the effect “a penalty in another State” has on permit eligibility. Unless a person is eligible under final §§ 773.13 or 773.14, final § 773.12 and section 510(c) do not allow issuance of a permit if the applicant owns or controls an operation with a current violation; that violation may be anywhere in the United States. AVS helps to implement this statutory requirement. The recommendation process we previously used would not result in the outcome alleged by these commenters.

Finally, a commenter said that proposed § 773.16(b)(2)(iv) must be deleted because we may not issue a notice of violation for non-payment of abandoned mine land fees or civil penalties. We are not adopting proposed § 773.16(b)(2)(iv). Under this final rule, the presumption of NOV abatement is available for all NOVs, including those written for non-payment of reclamation fees. Under 30 CFR 773.17(g), every permit must contain a condition requiring payment of reclamation fees. Failure to adhere to this permit condition is enforceable under 30 CFR 843.12, which authorizes issuance of an NOV for noncompliance with a permit condition.

#### G. Section 773.17—Permit Conditions

In this final rule, the provisions we adopt from proposed § 773.17 are found at §§ 774.11 and 774.12.

#### Proposed § 773.17(h)

We proposed to revise existing § 773.17(h), which requires permittees to provide or update ownership and control information, or indicate that there is no change in the information, within 30 days of receiving a cessation order issued under § 843.11. The proposed rule would have revised the cross-references in § 773.17(h) to be consistent with the proposed revisions to the application information requirements in proposed § 778.13 and to clarify that the updated application information should be based upon the information provided to the regulatory authority in a permit application. We received no comments on proposed § 773.17(h).

As part of our reorganization of part 773, we are recodifying the provisions in previous and proposed § 773.17(h) in revised form at final § 774.12(a). Section VI.P. of this preamble discusses final § 774.12(a) more fully in the context of proposed § 774.13(e).

#### Proposed § 773.17(i)

This new paragraph would have provided that the regulatory authority would assume that the permittee, the operator, and any other person named in the application as having the ability to determine the manner in which a surface coal mining operation is conducted is a controller. We are not adopting this provision because final § 778.11 already requires disclosure of applicant, operator, and ownership and control information. Therefore, proposed § 773.17(i) is unnecessary.

#### Proposed § 773.17(j)

We proposed to add paragraph (j) to § 773.17 to state that all controllers are jointly and severally responsible for compliance with the terms and conditions of the permit and are subject to the jurisdiction of the Secretary of the Interior. Several commenters opposed proposed § 773.17(j) as lacking sufficient basis in SMCRA. After further evaluation, we agree. Therefore, we are not adopting proposed § 773.17(j).

#### Proposed § 773.17(k)

We proposed to add paragraph (k) to § 773.17 to allow the regulatory authority to identify, at any time, any controller that the permittee did not previously identify to the regulatory authority. We are not adopting proposed § 773.17(k) as a permit condition, but we are adopting it in revised form as a stand-alone provision at final § 774.11(f). Under that final rule, the regulatory authority may identify any owner or controller of an applicant or operator not disclosed in a permit

application. Section VI.K. of this preamble more fully discusses final § 774.11(f) in the context of proposed § 773.22.

Some commenters opposed proposed § 773.17(k) as an unusual determination that sounded like a presumption, did not provide an opportunity to challenge a finding of control, and did not obligate the regulatory authority to provide any explanation of the basis for the determination.

The proposed rule did not involve a presumption. However, in response to the commenters' concerns, we added a requirement in final § 774.11(f) that the regulatory authority make a written finding explaining the basis for the determination. We also added language specifying that a person has the right to challenge the finding under final §§ 773.25 through 773.27. We discuss final § 774.11 more fully in section VI.K. of this preamble in the context of proposed § 773.22.

#### Proposed § 773.17(l)

We proposed to add paragraph (l) to § 773.17 to require permittees and operators to abate or correct any outstanding violation or payment, unless an administrative or judicial decision invalidates the violation. There were no comments on this proposal. However, we are not adopting the proposed rule because part 843 of our existing rules already requires abatement and correction of violations.

#### Proposed § 773.17(m)

We proposed to add paragraph (m) to § 773.17 to state that a permit is subject to any other special permit conditions that the regulatory authority determines to be necessary to ensure compliance with the performance standards and regulations. Commenters opposed this proposed rule as unnecessary. We agree that regulatory authorities already have the inherent authority to impose any necessary conditions when issuing a permit. Therefore, we are not adopting proposed § 773.17(m).

#### H. Section 773.18—Additional Permit Conditions

In this final rule, we are not adopting any of the provisions proposed at § 773.18.

We proposed to add § 773.18 to our regulations to provide for the imposition of additional permit conditions on new permits if the applicant has less than five years experience in surface coal mining operations or if the applicant's controllers have not demonstrated successful environmental compliance. We are not adopting proposed § 773.18 because we found insufficient basis

under SMCRA for treating these applicants in a manner that differs from the treatment afforded to other applicants.

#### I. Section 773.20—Improvidently Issued Permits: General Procedures

In this final rule, the provisions proposed at §§ 773.20 and 773.21 are found at §§ 773.21 through 773.23. In this section of the preamble, we discuss the proposed and final provisions collectively, and do not repeat the discussion in section VI.J. of this preamble. In section VI.J., we will only discuss the comments received on proposed § 773.21.

In 1989, we promulgated regulations to establish procedures and criteria relating to improvidently issued permits. 54 FR 18438 (April 28, 1989). In *NMA v. DOI I*, which was decided in 1997, the D.C. Circuit invalidated the 1989 rule on the narrow grounds that it was centered on the invalidated 1988 ownership or control rule. 105 F.3d at 692, 696. Prior to that ruling, we revised the procedures in 1994. 59 FR 54325 (October 28, 1994). The 1994 rule provisions were upheld in their entirety, though the case is currently on appeal to the D.C. Circuit. *National Mining Assoc. v. Babbitt*, 43 Env't Rep. Cas. (BNA) 1097, 1111–17 (D.D.C. 1996), *appeal docketed*, No. 96–5274 (D.C. Cir.). In our 1997 emergency interim final rule (IFR), which was issued after the *NMA v. DOI I* decision, we cured the defects noted by the court of appeals and repromulgated otherwise substantively identical improvidently issued permits provisions. 62 FR 19450, 19453 (April 21, 1997); previous 30 CFR 773.20 and 773.21.

In our December 21, 1998 proposal, we repropoed previous §§ 773.20 and 773.21 in their entirety, with only minor proposed revisions. 63 FR 70597–98; 70620. The proposed revisions included:

- Adding failure to provide information which would have made the applicant ineligible for a permit to the criteria we use to determine if a permit was improvidently issued (see proposed § 773.20(b)(1)(iii); see also related provisions at proposed §§ 773.20(c)(1)(i), 773.20(c)(1)(ii)(C), 773.21(a)(2), 773.21(a)(5)). As discussed below, we did not adopt these revisions.

- Removing previous § 773.20(c)(1)(ii), which included imposition of a permit condition requiring abatement or correction of a violation as one of the remedial measures a regulatory authority could take relative to an improvidently issued permit. As discussed below, we deleted this provision as proposed.

- Removing previous § 773.20(b)(2), which made the challenge standards at previous § 773.25 applicable to certain improvidently issued permit proceedings. As discussed below, we did not adopt this revision.

After the close of the comment period for the proposed rule, the D.C. Circuit issued its decision relating to the National Mining Associations's challenge to the IFR. *NMA v. DOI II*, 177 F.3d 1 (D.C. Cir. 1999). The court of appeals upheld the improvidently issued permits provisions contained in the IFR, stating as follows:

[T]he IFR rescission and suspension provisions reflect a permissible exercise of OSM's statutory duty, pursuant to section 201(c)(1) of SMCRA, to "order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this chapter or any rules and regulations adopted pursuant thereto." 30 U.S.C. 1211(c). The IIP provisions simply implement the Congress's general directive to authorize suspension and rescission of a permit "for failure to comply with" a specific provision of SMCRA—namely, section 510(c)'s permit eligibility condition.

*Id.* at 9. The court also explained: "In addition, apart from the express authorization in section [201(c)(1)], OSM retains "implied" authority to suspend or rescind improvidently issued permits because of its express authority to deny permits in the first instance." *Id.* (citation omitted).

In this final rule, we adopt the basic approach and substance of the provisions upheld by the court. To the extent the provisions we adopt today correspond to our previous provisions, we continue to rely upon the rationales set forth in the preambles to the prior rulemakings. See 54 FR 18439–62; 59 FR 54325–29; 62 FR 19453. However, based on comments, the *NMA v. DOI II* decision, and further deliberation, we modified the proposal. The most significant modifications from our previous regulations and the proposed rule are enhanced due process and public notice provisions. We also applied plain language principles, reorganized proposed §§ 773.20 and 773.21 into three sections, and eliminated duplicate text. A discussion of the proposed and final provisions follows.

Discussion of Proposed Revisions to Previous §§ 773.20 and 773.21

Proposed §§ 773.20(b)(1)(iii), 773.20(c)(1)(i), 773.20(c)(1)(ii)(C), 773.21(a)(2), and 773.21(a)(5)

As mentioned above, we proposed adding failure to provide information which would have made the applicant ineligible for a permit to the criteria we

use to determine if a permit was improvidently issued. *See* proposed § 773.20(b)(1)(iii). If we found a permit improvidently issued on this basis, we could require the permittee to correct any inaccurate information or provide any incomplete information. *See* proposed § 773.20(c)(1)(i). Under proposed § 773.20(c)(1)(ii)(C), we could suspend the permit until the inaccurate or incomplete information was corrected or provided. Under proposed §§ 773.21(a)(2) and (a)(5), we would not suspend or rescind a permit if the inaccurate or incomplete information was provided or subject to a pending challenge.

We did not adopt these proposed revisions. Under the proposed rule, we intended to allow failure to submit accurate and complete information at the time of application for a permit to form the basis for a finding that a permit was improvidently issued, if disclosure of the information would have made the applicant ineligible to receive a permit.

However, upon further review, we determined that we did not have a sufficient basis to in effect treat failure to supply permit application information as a violation in the absence of any underlying outstanding enforcement action concerning the failure to submit that information. It is an underlying violation, and not a failure to disclose information, which is the ultimate basis for a finding that a permit was improvidently issued.

#### Proposed Withdrawal of Previous § 773.20(c)(1)(ii)

We proposed to remove previous § 773.20(c)(1)(ii), which included imposition of a permit condition requiring abatement or correction of a violation as one of the remedial measures a regulatory authority could take relative to an improvidently issued permit. We deleted this provision as proposed. We concluded it is unnecessary to impose a permit condition to achieve abatement or correction under these provisions. Because this final rule provides ample incentive and opportunity for abatement, coupled with appropriate sanctions if a violation is not abated, adding a permit condition is not necessary.

#### Proposed Withdrawal of Previous § 773.20(b)(2)

We proposed to withdraw previous § 773.20(b)(2), which made the challenge standards of previous § 773.25 applicable to certain improvidently issued permit proceedings. As discussed below, we did not fully adopt the proposed withdrawal. In final

§ 773.21(e), we provide that the ownership or control challenge procedures at final §§ 773.25 through 773.27 apply when a person is challenging an ownership or control finding which leads to a determination that a permit was improvidently issued.

#### Discussion of Final Rule Provisions

Final § 773.21—Initial review and finding requirements for improvidently issued permits.

Under final § 773.21(a), if a regulatory authority has reason to believe a permit was improvidently issued, it must review the circumstances surrounding permit issuance. Assessing the criteria at final §§ 773.21(a) and (b), which are similar to the criteria at previous § 773.20(b), the regulatory authority will make a preliminary finding if it determines that the permit was improvidently issued. The “reason to believe standard” is carried forward from previous § 773.20(a). Under this standard, the regulatory authority is not required to review all of the permits in its jurisdiction on a regular basis for improvident issuance. Rather, § 773.21 will apply if the regulatory authority has some particular reason to believe a permit was improvidently issued. The “reason to believe” standard would encompass credible evidence submitted by citizens which may indicate improvident issuance of a permit.

Section 773.21(b) provides that a permit will only be considered improvidently issued if the circumstances in paragraphs (b)(1) through (3) exist. These provisions are substantively identical to previous §§ 773.20(b)(1)(ii) and (iii) in that a permit will not be considered improvidently issued if the permittee is no longer ineligible for a permit. When a permittee severs its ownership or control relationship, abates or corrects the violation, or otherwise becomes eligible to receive a new permit, it is incongruous to suspend or rescind an existing permit only to issue a new one to the same permittee upon reapplication.

The concept of a “preliminary finding,” as provided for in final § 773.21(a), is new in this rulemaking. Under final § 773.21(c), if the regulatory authority makes a preliminary finding of improvident issuance, it will serve the permittee with written notice of the finding and provide public notice of the decision. Then, under final § 773.21(d), the permittee may challenge the preliminary finding by submitting evidence, within 30 days of receiving the notice, that the permit was not improvidently issued. Together, these

provisions enhance due process and public notice.

Final § 773.21(e) provides that the ownership or control challenge procedures at final §§ 773.25 through 773.27 apply when a challenge to a preliminary finding of improvident issuance involves issues of ownership or control. This provision is modified from previous § 773.20(b)(2). While we proposed to withdraw previous § 773.20(b)(2), we decided that it is important to have uniform challenge procedures for issues of ownership or control. Thus, at final § 773.21(e), we retained the substance of previous § 773.20(b)(2)(ii), in modified form. However, as explained in detail in section VI.M. of this preamble, a person may not use the provisions at §§ 773.25 through 773.27 to challenge the initial existence or status of a violation. Only the regulatory authority, or other agency, with jurisdiction over a violation may resolve issues pertaining to the initial existence or status of a violation. However, under final § 773.21(d), a person may submit evidence that the violation has been abated, or is being abated, to the satisfaction of the regulatory authority, or other agency, with jurisdiction over the violation. Likewise, if the initial existence of a violation has been timely challenged, and the challenger prevailed, evidence of the outcome may be submitted under final § 773.21(d).

#### Final § 773.22—Notice Requirements for Improvidently Issued Permits.

Final § 773.22(a) provides that the regulatory authority will serve a written notice of proposed suspension or rescission on the permittee if: (1) the regulatory authority, after considering any evidence submitted under final § 773.21(d), finds that the permit was improvidently issued or (2) the permit was provisionally issued under final § 773.14(b) and one or more of the conditions in §§ 773.14(c)(1) through (4) exists. This finding differs from the preliminary finding under final § 773.21 in that the permittee will have been given a prior opportunity under final § 773.21(d) to submit evidence that the permit was not improvidently issued. This finding also triggers the notice requirements of final §§ 773.22(b) and (c) and requires the regulatory authority to take action under final § 773.23 (*see* final § 773.22(f)). If, after making a finding that the permit was improvidently issued, the regulatory authority decides to suspend the permit, it must provide the permittee with 60 days notice; if the regulatory authority decides to rescind the permit, it must provide the permittee with 120 days

notice. The provisions of final §§ 773.22(a) through (c) derive from previous § 773.20(c)(2) and the introductory language of previous § 773.21. In order to enhance public notice, we added final § 773.22(d), which requires public posting of the notice of proposed suspension or rescission.

Final § 773.22(e) is derived from previous § 773.20(c)(2). It allows the permittee to request administrative review of a notice of proposed suspension or rescission with the Department of the Interior's Office of Hearings and Appeals (OHA), or its State counterpart, before a permit is suspended or rescinded under final § 773.23. Final paragraph (e) also specifies that a permittee who wishes to appeal a notice must exhaust available administrative remedies. Final § 773.22(f) clarifies that after the permittee is served with a notice of proposed suspension or rescission, the regulatory authority must take action under final § 773.23. Final § 773.22(g) governs service of the notice, and final § 773.22(h) provides that the time periods specified in paragraphs (b) and (c) will remain in effect during the pendency of any appeal, unless the permittee obtains temporary relief under the procedures at 43 CFR 4.1376 or the State regulatory program equivalent. While the time periods are not tolled during the pendency of an appeal, under final § 773.23(b), we will not suspend or rescind a permit until there is a final disposition of any administrative appeals which affirms our finding that the permit was improvidently issued.

#### Final § 773.23—Suspension or Rescission Requirements for Improvidently Issued Permits.

Final § 773.23(a) largely corresponds to previous § 773.21(a). Under final § 773.23(a), subject to the exception in final § 773.23(b), the regulatory authority will suspend or rescind the permit upon expiration of the time specified in final § 773.22(b) or (c), unless the permittee submits evidence, and the regulatory authority finds, that suspension or rescission is no longer warranted under the circumstances enumerated in final §§ 773.23(a)(1) through (6). Paragraphs (a)(1) through (6) are substantively identical to previous §§ 773.21(a)(1) through (4), except that we have modified some of the language and terminology for consistency with plain language principles and other provisions of this final rule. We added paragraph (a)(6) and modified paragraph (a)(4) for consistency with the new eligibility

standards for provisionally issued permits under final § 773.14(b). It is appropriate to forestall suspension or rescission under these circumstances because the permittee would no longer be ineligible to receive a permit under 30 CFR 773.12 or 773.14 and section 510(c) of the Act.

Under final § 773.23(b), if the permittee requests administrative review of a notice of proposed suspension or rescission under final § 773.22(e), we will not suspend or rescind the permit until there is a final administrative disposition which affirms our finding that the permit was improvidently issued. As discussed more fully below, we added this provision in response to comments raising due process concerns.

Final § 773.23(c)(1) is partially new, and partially derived from previous § 773.21(b). When a regulatory authority suspends or rescinds a permit, final § 773.23(c)(1) requires the regulatory authority to issue a written notice to the permittee, requiring the permittee to cease all surface coal mining operations under the permit. Final § 773.23(c)(2) requires the regulatory authority to publicly post the notice. Final § 773.23(d) allows the permittee to request, at its election, either administrative or judicial review of a permit suspension or rescission. The suspension or rescission will remain in effect during the pendency of any administrative or judicial appeals. We added final §§ 773.23(b) through (d) to enhance due process and public notice.

#### Responses to Comments on Proposed Section 773.20

A commenter said that once an abatement or payment plan is entered into, completion of the abatement or payment plan should become a permit condition. The commenter also said that the regulatory authority should stay the rescission of the permit only if an abatement plan is executed and the plan is imposed as a condition on the improvidently issued permit.

As mentioned above, the remedies for an improvidently issued permit will no longer include imposition of a permit condition requiring abatement of the violation. However, if we do not suspend or rescind an improvidently issued permit because the permittee enters into an abatement plan or payment schedule, we may suspend or rescind the permit under final § 773.23 if the abatement plan or payment schedule is not being met to the satisfaction of the agency with jurisdiction over the violation (unless one of the other criteria of § 773.23 precludes suspension or rescission). In

the face of permit suspension or rescission, these final provisions provide ample incentive to permittees to cause violations to be abated or corrected. Permit conditions are unnecessary to achieve this result.

A commenter said that the public should be given explicit rights to request enforcement action against permits that have been improvidently issued and to appeal a decision by the regulatory authority not to take action.

As indicated above, these final provisions enhance the public's notice of decisions by the regulatory authority concerning improvidently issued permits. The final provisions require the regulatory authority to provide public notice at three specific decision points: (1) when the regulatory authority makes a preliminary finding that a permit was improvidently issued (*see* final § 773.21(c)(2)); (2) when the regulatory authority finds that a permit was improvidently issued and serves the permittee with a notice of proposed suspension or rescission (*see* final § 773.22(d)); and (3) when the regulatory authority suspends or rescinds a permit (*see* final § 773.23(c)(2)). Further, under the "reason to believe" standard under in final § 773.21(a), a regulatory authority will receive and consider information from concerned citizens pertaining to improvidently issued permits. Such information, if credible, may well inform a regulatory authority's decision as to whether a permit was improvidently issued. Finally, citizens can continue to assert their interests under the existing provisions at 30 CFR 842.11 and 842.12. The provisions we adopt today provide for ample public notice, and thereby expand the opportunity for public participation under our existing regulations.

The same commenter said that the proposed provisions create an essentially meaningless standard of review to determine if a permit was improvidently issued. According to the commenter, the scope of review to determine whether a permit was improvidently issued is limited to the "violations review criteria" of the regulatory program at the time of permit issuance. The commenter objected to "OSM's deferral" to State regulatory authorities to determine which types of violations would be "the subject of the permit block for improvidently issued permits." The commenter also said that any violation of the Act should be the basis for determining if a permit has been improvidently issued.

We disagree with this characterization of the proposal, but note that we modified the proposed provision to which the commenter objects. In final

§ 773.21(a), we replaced the phrase “violations review criteria” at previous § 773.20. Under final § 773.21(a), a permit will be considered improvidently issued, if, among other things, the permit should not have been issued under the “permit eligibility criteria of the applicable regulations implementing section 510(c) of the Act in effect at the time of permit issuance” because the permittee or operator owned or controlled a surface coal mining operation with an unabated or uncorrected violation. Under the final provision, the regulatory authority must consider all violations, as the term *violation* is defined in final § 701.5. Thus, regulatory authorities do not have discretion to determine which violations may be considered when making a determination whether a permit was improvidently issued.

A commenter expressed concern regarding proposed § 773.20(b)(1)(i). Under the proposed provision, a permit would be considered improvidently issued if there was an outstanding violation under the violations review criteria at the time the permit was issued. The commenter said the proposed provision seemed to conflict with proposed §§ 773.15(b)(3)(i)(B) and (C), which proposed to allow conditional approval of permits when applicants are linked to outstanding violations.

Under this final rule, a permit will only be found to be improvidently issued if, among other things, the permit should not have been issued under the permit eligibility criteria of the regulations implementing section 510(c) of the Act at the time of permit issuance. See final § 773.21(a). Under § 773.12(a) of this final rule, a person who owns or controls an operation with an outstanding violation may nonetheless be eligible for a permit under final § 773.13 or a provisionally issued permit under final § 773.14. Thus, if a person with outstanding violations was eligible for a permit under final §§ 773.13 or 773.14 at the time of permit issuance, a permit will not be considered to be improvidently issued at the time of issuance. However, under final §§ 773.14(c) and 773.22(a)(2), a provisionally issued permit will be considered improvidently issued, and we will initiate suspension or rescission procedures, if one or more of the circumstances in §§ 773.14(c)(1) through (4) exists.

Several commenters expressed concern about OSM oversight of State permitting decisions in the context of improvidently issued permits. Our oversight relative to improvidently issued State permits is governed, in

part, by final § 843.21. Final § 843.21 is fully discussed in section VI.Y. of this preamble. In *NMA v. DOI II*, the court of appeals upheld our ability to suspend or revoke State-issued permits, but found that our previous regulations did not comply with the procedures established under section 521(a)(3) of SMCRA. *NMA v. DOI II*, 177 F.3d at 9. Final § 843.21 is fully consistent with the *NMA v. DOI II* decision.

A commenter said that the provisions should be revised so that the regulatory authority does not suspend or revoke a permit “unless and until a plan for correcting the problem has been attempted but failed.” Other commenters said that a permittee or operator should not be allowed to enter into an abatement plan to forestall a finding of improvident issuance or suspension or rescission of a permit. These commenters said allowing a permittee to forestall suspension or rescission by entering into an abatement plan encourages fraud at the permit application stage because the operator knows if he gets caught, he can later negotiate an abatement plan and mining can continue, without penalty.

Under final § 773.21, if the violation is the subject of an abatement plan or payment schedule that is being met to the satisfaction of the agency with jurisdiction over the violation, the permit will not be considered improvidently issued because the permittee would no longer be ineligible to receive a permit. See final § 773.21(b)(3). Further, under final § 773.23(a)(5), we will not suspend or rescind an improvidently issued permit if, after a finding of improvident issuance under final § 773.22(a), the violation becomes subject to an abatement plan or payment schedule. However, we may proceed to suspension or rescission if the abatement plan or payment schedule fails. The ultimate intent of these provisions is not to suspend or rescind permits, but to accomplish abatement of violations. However, a regulatory authority has no obligation to enter into an abatement plan or payment schedule, especially if it has reason to believe that a person will not comply with the plan or schedule. The discretion lies with the regulatory authority to determine whether the person is acting in good faith. We are confident that regulatory authorities will not encourage or reward fraudulent activity by entering into abatement plans with bad actors, but will instead proceed with suspension or rescission, and use any other enforcement tools available to compel compliance.

A commenter said our proposed improvidently issued permits provisions are “not only unauthorized but are grossly inconsistent with the [Act].” We received this comment before the decision in *NMA v. DOI II*. As explained above, the D.C. Circuit upheld our substantively similar previous rules, holding that they were expressly authorized by section 201(c)(1) of the Act. 177 F.3d at 9. “Apart from the express authorization in section [201(c)(1)],” the court explained, “OSM retains ‘implied’ authority to suspend or rescind improvidently issued permits because of its express authority to deny permits in the first instance.” *Id.* (citation omitted).

Finally, a commenter objected to our reference in proposed § 773.20(b)(3) to “operations” being responsible for violations. The commenter stated that an operation is not a legal entity and therefore cannot be responsible for violations. We have recast the final provisions from responsibility for violations to ownership or control of operations to eliminate confusion. Thus, under this final rule, a permit will only be considered improvidently issued if, among other things, the permittee or the operator continues to own or control the operation with an unabated or uncorrected violation and the violation would cause the permittee to be ineligible under the permit eligibility criteria in our current regulations. See final §§ 773.21(b)(1) and (b)(3). These provisions do not impose personal liability on owners or controllers of permittees or operators.

#### *J. Section 773.21—Improvidently Issued Permits: Rescission Procedures*

In this final rule, the provisions proposed at §§ 773.20 and 773.21 are found at §§ 773.21 through 773.23. In this section of the preamble, we discuss the comments received on proposed § 773.21. We discuss the proposed and final improvidently issued permits provisions, collectively, in section VI.I. of this preamble.

Several commenters asked for an explanation of proposed § 773.21(a)(4), which would provide that a permit would not be suspended or rescinded if the permittee and operations owned or controlled by the permittee are no longer responsible for the violation, penalty, or fee, or the obligation to provide required information. Three commenters asked how the permittee can be responsible for a violation at one point in time and later relieved of that responsibility. One commenter stated:

This implies that if an applicant has successfully transferred, assigned or sold a previously held permit, he/she will no longer

be liable for any violations associated with that former permit. Although we understand that the new permittee to whom the former permit was transferred, assigned or sold is now responsible for any outstanding violations, penalties or fees and for appropriate corrective action, some states prefer to hold the original permittee/violator responsible for those violations, regardless of the new permittee's responsibilities until the matter is adequately resolved.

Another of these commenters stated that the proposed provision seemed to allow for a "liability dump."

We agree with the substance of these comments. If a person severs an ownership or control relationship to an operation with an outstanding violation, but remains directly responsible for the violation, the person is not eligible to receive a new permit. Likewise, if a person is directly responsible for a violation, he or she cannot avoid a finding that a permit was improvidently issued under the criteria of final § 773.21, or forestall suspension or rescission of a permit under final § 773.23, by severing an ownership or control relationship to the operation with the violation. Further, a regulatory authority may take appropriate enforcement action against a person who continues to be directly responsible for a violation under applicable law.

A commenter supported our proposal to remove the words "and reclamation" from previous 30 CFR 773.21(b). In proposed § 773.21(b), we removed this phrase to clarify that after permit suspension or rescission, required reclamation activities must continue. The substance of proposed § 773.21(b) is adopted at final § 773.23(b)(1). Under that section, upon suspension or rescission of a permit, all surface coal mining operations must cease; required reclamation must continue.

A commenter objected to the proposed provisions for permit suspension or rescission. In substance, the commenter stated that the proposal denied due process because it improperly allowed permit suspension or rescission without a prior hearing. The commenter also claimed that the opportunity to request a hearing, as proposed, did not provide due process because the effect of the suspension notice would not be automatically stayed pending appeal and the permit would be automatically suspended after a specified period of time, regardless of whether an appeal was filed. The commenter expressed the view that under *Darby v. Cisneros*, 509 U.S. 137 (1993), exhaustion of administrative remedies is not required under the Administrative Procedure Act if the effect of the suspension or rescission

notice is not stayed pending appeal. The commenter also stated that the temporary relief which may be granted under existing 43 CFR 4.1376 is not an adequate substitute for a pre-deprivation hearing.

The final improvidently issued permits provisions at §§ 773.21 through 773.23 fully comport with due process. As explained above, in section VI.I. of this preamble, the key modifications from the proposed provisions are enhanced due process and public notice. Under final § 773.21, if a permit meets the criteria of paragraphs (a) and (b), the regulatory authority will make a *preliminary finding* that a permit was improvidently issued. The permittee will then have an opportunity to challenge the preliminary finding under final § 773.21(d).

If, after considering any evidence submitted by the permittee, the regulatory authority finds that the permit was in fact improvidently issued, the regulatory authority will issue a written notice of proposed suspension or rescission. See final § 773.22(a). The notice will provide 60 days notice if the regulatory authority decides to suspend the permit, and 120 days notice if the regulatory authority decides to rescind the permit. See final §§ 773.22(b) and (c).

If the permittee wishes to appeal a notice of proposed suspension or rescission, it must first exhaust administrative remedies. See final § 773.22(e). However, in response to the comment pertaining to *Darby*, the decision will not remain in effect while the permittee exhausts administrative remedies. Under final § 773.23(b), if the permittee requests administrative review, we will not suspend or rescind a permit until *after* a permittee exhausts administrative remedies and the administrative body affirms that the permit was improvidently issued. Section 773.23(b) also ensures that the permittee will have a meaningful opportunity for a hearing *before* a permit suspension or rescission.

Finally, if a permit is ultimately suspended or rescinded under final § 773.23, the permittee may seek administrative or judicial review. See final § 773.23(d). In response to the comment pertaining to *Darby*, we decided not to require permittees to exhaust administrative remedies before seeking judicial review of a permit suspension or rescission. Thus, the permit suspension or rescission will remain in effect during the pendency of any appeals. Together, the foregoing provisions provide ample due process to permittees by way of meaningful

opportunities for pre- and post-suspension or rescission hearings.

#### K. Section 773.22—Identifying Entities Responsible for Violations

In this final rule, the provisions we adopt from proposed § 773.22 are found at §§ 774.11 and 847.2.

We proposed to revise and redesignate previous § 773.22 and add a new § 773.22, which would have required regulatory authorities to identify entities responsible for violations, enter and maintain that information in AVS, and consider taking alternative enforcement action when appropriate.

We are not adopting § 773.22 as it was proposed. Instead, we have incorporated a revised version of proposed § 773.22(b), (c), and (d) into new § 774.11. Final § 774.11 has its origins in provisions that we proposed at §§ 773.15(b)(3)(i)(D), (E) and (F), (b)(3)(ii); 773.17(k); 773.22(b), (c), and (d); and 774.13(e). From proposed § 773.22, it incorporates the timely entry and update of violation information in AVS (proposed §§ 773.22(b) and (c)) and the use of alternative enforcement actions to compel the abatement or correction of violations (proposed § 773.22(d)).

Proposed § 773.22(d) would have also provided that the existence of a performance bond cannot be used as the sole basis for a determination that alternative enforcement action is not warranted. We are adopting this provision as final § 847.2(b). We received one comment on proposed § 773.22(d), which we discuss in Part VI.A.A. of this preamble in connection with final § 847.2(b).

We are not adopting the introductory statement in proposed § 773.22, which provided that a person who owns or controls a surface coal mining operation has an affirmative duty to comply with the Act, the regulatory program, and any approved permit, because it does not add any meaningful value to our existing regulations. We are also not adopting proposed §§ 773.22(a) and (b) insofar as we proposed to determine the identity of persons responsible for outstanding violations and to designate in AVS owners, controllers, principals, and agents as persons we could compel to abate or correct a violation. We determined that we have insufficient basis under SMCRA to automatically ascribe personal liability or responsibility to persons listed in an application for a permit, including owners and controllers.

**Final § 774.11—Post-Permit Issuance Information Requirements for Regulatory Authorities and Other Actions Based on Ownership, Control, and Violation Information**

Final § 774.11(a) provides that, for purposes of future permit eligibility determinations and enforcement actions, the regulatory authority must enter into AVS: (1) Permit records within 30 days after a permit is issued or a subsequent change to a permit is made; (2) unabated or uncorrected violations within 30 days after the abatement or correction period for the violation expires; (3) changes of ownership and control within 30 days after a regulatory authority receives notice of a change; and (4) changes in violation status within 30 days after abatement, correction, or termination of a violation, or a decision from an administrative or judicial tribunal. Under final § 774.11(a), regulatory authorities must update and maintain these records in AVS. Final § 774.11(a), which codifies the use and maintenance of AVS, is based upon provisions proposed at §§ 773.22(b), (c), 774.13(e), and 774.14(e). An accurate and complete nationwide database such as AVS is critical to effective and efficient implementation of the permit block sanction of section 510(c) of the Act.

Final § 774.11(b) provides that if, at any time, the regulatory authority discovers a person who owns or controls a surface coal mining operation for which there is an unabated or uncorrected violation, the regulatory authority will determine whether alternative enforcement action is appropriate under part 843, 846 or 847. Final § 774.11(b) further requires that a regulatory authority must enter the results of each enforcement action, including administrative and judicial review decisions, into AVS. Final § 774.11(b) is derived from proposed §§ 773.15(b)(3)(ii) and 773.22(d). This provision emphasizes a regulatory authority's continued obligation to use all available enforcement mechanisms to compel the abatement or correction of unabated and uncorrected violations.

Final § 774.11(c) requires that a regulatory authority serve a preliminary finding of permanent permit ineligibility under section 510(c) of the Act, 30 U.S.C. 1260(c), on an applicant or operator if the applicant or operator: (1) controls or has controlled mining operations with a demonstrated pattern of willful violations under section 510(c) of the Act and (2) the violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate the

applicant's or operator's intent not to comply with the Act, its implementing regulations, the regulatory program, or permit. Final § 774.11(c) further requires that, in making a finding of permanent permit ineligibility, the regulatory authority will only consider control relationships and violations which would make, or would have made, an applicant or operator ineligible for a permit under final §§ 773.12(a) and (b). This provision is consistent with *NMA v. DOI II*.

Consistent with section 510(c) of the Act, final § 774.11(d) provides for a hearing under 43 CFR 4.1350 through 4.1356 on a preliminary finding of permanent permit ineligibility. Final § 774.11(d) is based upon proposed § 773.15(b)(3)(i)(E) and (F) and previous § 773.15(b)(3). Final § 774.11(d) is modified from the proposed rule in that we decided not to unnecessarily reiterate the OHA appeals procedures.

Final § 774.11(e) requires that the regulatory authority enter the results of a finding of permanent permit ineligibility and any hearing on such a finding into AVS.

Final § 774.11(f) provides that the regulatory authority may identify a person who owns or controls an entire surface coal mining operation or any relevant portion or aspect of such operation at any time. Final § 774.11(f) enables regulatory authorities to discover owners or controllers of an operation that the applicant has failed to list in an application as required under final §§ 778.11(c)(5) and (d). As explained elsewhere in this preamble, ownership or control of an applicant, permittee, or operator is tantamount to owning or controlling the operation, or relevant portion or aspect of the operation.

In addition, final § 774.11(f) provides that when a regulatory authority identifies such a person, the regulatory authority will: (1) issue a written finding describing the nature and extent of ownership or control; (2) enter the results of the finding into AVS; and (3) require the person to disclose his or her identity under § 778.11(c)(5) and certify as a controller under § 778.11(d), if appropriate. Final § 774.11(f) is based upon proposed § 773.17(k). We are adopting final § 774.11(f) to enable a regulatory authority to identify any owner or controller of an applicant, permittee, or operator that has not been disclosed under the requirements under final § 778.11(c)(5) and (d) to disclose owners and controllers in a permit application.

Final § 774.11(f) is modified from proposed § 773.17(k) to be consistent with the application information

requirements at final § 778.11(c)(5) where an owner or controller may be listed in an application as owning or controlling a portion or aspect of a proposed surface coal mining operation. As we indicate below in this preamble in the discussion of final § 778.11(c)(5), it is important that an applicant have the ability to disclose in an application those owners and controllers that own or control only a portion or aspect of a proposed surface coal mining operation as well as the entire proposed operation. In implementing final § 774.11(f), this means a regulatory authority may identify a previously undisclosed owner or controller that owns or controls only a portion or aspect of a surface coal mining operation.

Final § 774.11(f) is also modified from proposed § 773.17(k) to require that the results of any finding made under the provision be entered into AVS.

Paragraph (g) provides that any person whom a regulatory authority finds to be an owner or controller under final § 774.11(f) may challenge the finding using the provisions of final §§ 773.25, 773.26 and 773.27, which provide the procedures for challenging an ownership or control listing or finding.

**Comments on Proposed § 773.22**

Commenters on proposed § 773.22 opposed mandatory investigations, holding individuals responsible for the violations of corporate permittee, the elimination of permitting recommendations, designating specific persons as those responsible for correcting violations, and use of the term "agent." Commenters opposing proposed § 773.22 expressed the same concerns regarding proposed §§ 773.15, 773.17, 773.24, 773.25, and 778.5. These comments are addressed in sections VI.A., VI.E., VI.G., VI.M., and VI.N. of this preamble.

**L. Section 773.23—Review of Ownership or Control and Violation Information**

We proposed to remove previous § 773.23 from our regulations, based on our conclusion that it was centered on ownership or control links and based on presumptions of control between applicants and operations with violations. We received no comments on our proposal to remove these provisions. Since our final rule does not incorporate either presumptions of ownership or control or links to violations based upon presumptions of ownership or control, we are removing previous § 773.23 as proposed. However, under final §§ 773.8 through 773.11, a regulatory authority must review all applicant, operator, and

ownership and control information; permit history information; and compliance history (violation) information before making a permit eligibility determination under final § 773.12.

In reorganizing part 773 in this final rule, we have used the section number “773.23” for other purposes.

*M. Section 773.24—Procedures for Challenging a Finding on the Ability To Control a Surface Coal Mining Operation*

In this final rule, the provisions we adopt from proposed §§ 773.24 and 773.25 are found at §§ 773.25 through 773.28.

We proposed to revise previous § 773.24 to provide for challenges to a finding on the ability to control a surface coal mining operation. We modified this section from the proposed rule. We reorganized two sections, proposed as §§ 773.24 and 773.25, into four sections in this final rule and modified the provisions based on comments. The provisions are adopted at final §§ 773.25 through 773.28. A description of these final provisions follows, including discussion of the modifications from the proposed rule. Discussion of these final provisions will not be repeated in the discussion of comments received on proposed § 773.25 in section VI.N. of this preamble.

**§ 773.25 Who may challenge ownership or control listings and findings**

Section 773.25 provides that any person listed in a permit application or in the Applicant/Violator System (AVS) as an owner or controller, or found to be an owner or controller under §§ 773.21 or 774.11(f), of an entire surface coal mining operation, or any portion or aspect thereof, may challenge the listing or finding under §§ 773.26 and 773.27. Any applicant or permittee affected by an ownership or control listing also may initiate such a challenge. This section is modified from proposed § 773.24(a). We modified the proposed provision in this final rule by adding that any person listed in AVS may challenge such listing, regardless of whether there is a pending permit application. This modification is consistent with § 773.24(a) of our previous regulations. We also clarified that permit applicants and permittees affected by ownership or control decisions also may initiate ownership or control challenges. We decided that a person listed as or found to be an owner or controller may use these procedures at any time. This modification will

enhance due process by allowing additional opportunities for challenges. Consistent with the modification to § 773.11(c)(5), which allows for identification of controllers of specific portions or aspects of an operation, and in response to comments, we decided to allow persons to challenge their ownership or control of portions or aspects of an entire surface coal mining operation. Finally, in order to enhance due process, we are not adopting the requirement that a challenge must occur before certification under § 773.11(d). This will allow persons who certify as to their ownership or control of an operation to in effect “de-certify” if they can demonstrate that circumstances have changed so that they no longer own or control the operation.

**Final § 773.26 How To Challenge an Ownership or Control Listing or Finding**

Final § 773.26(a) is modified from proposed § 773.24(b). Proposed § 773.24(b) provided that ownership or control challenges were to be made to the agency with jurisdiction over existing violations. This meant that if there were multiple existing violations in different jurisdictions (State or Federal), the challenger had to initiate separate challenges in each jurisdiction. In response to comments, we modified final § 773.26(a) to provide that in order to challenge an ownership or control listing or finding, a challenger must submit a written explanation of the basis for the challenge, along with any evidence or explanatory materials, to the regulatory authority with jurisdiction over a pending permit application or permit, rather than to the agency with jurisdiction over an existing violation. This modification will greatly simplify the provisions by allowing ownership and control challenges to proceed in one forum.

Final § 773.26(b) is modified from proposed § 773.24(d) and provides that the provisions of final §§ 773.27 and 773.28 apply only to challenges to ownership or control listings or findings. We simplified the provision by clarifying that the procedures are limited to challenges to ownership or control listings or findings; no person may use these provisions to challenge any other liability or responsibility under any other provision of the Act or its implementing regulations.

Final § 773.26(c) provides that when the challenge concerns a violation under the jurisdiction of a different regulatory authority, the regulatory authority with jurisdiction over the permit application or permit must consult the regulatory authority with jurisdiction over the violation and the AVS Office to obtain

additional information. We added paragraph (c) to complement final § 773.26(a). Since the regulatory authority with jurisdiction over a pending permit application or an issued permit will be deciding ownership or control challenges, it is likely that the regulatory authority will not have access to all information regarding violations in other jurisdictions. As such, it is important for the regulatory authority deciding the challenge to consult with these other jurisdictions to obtain necessary background information on violations in order to make an informed decision on a challenge.

Final § 773.26(d) provides that a State regulatory authority with responsibility for deciding an ownership or control challenge may request an investigation by OSM’s AVS Office. Like final § 773.26(c), we added this provision to assist State regulatory authorities in deciding challenges. This provision is especially relevant when a State regulatory authority does not have adequate access to the pertinent information. Under this provision, a State regulatory authority may ask us for assistance, by way of investigation, whenever it believes that it does not have adequate information to render an informed decision on a challenge. However, the ultimate responsibility to decide the challenge and issue a written decision rests with the State regulatory authority.

**Final § 773.27 Burden of Proof for Ownership or Control Challenges**

Final § 773.27(a) provides that when a listing or finding of ownership or control of a surface coal mining operation is challenged, the challenger must prove, by a preponderance of the evidence, that the challenger does not, or did not, own or control that operation. Paragraph (a) is modified from proposed § 773.25(c)(2). At paragraphs (a)(1) and (a)(2) of final § 773.27, we provide that a person may challenge current or past ownership or control. Challenging past ownership or control may be relevant when a challenger is contesting a finding that a permit was improvidently issued under final § 773.21(b). For clarity, in this final rule, we organized the provisions for burden of proof, called evidentiary standards in the proposed rule, into a separate section. We retained the “preponderance of the evidence” standard in this final rule.

Final § 773.27(b) provides that a challenger must meet its burden of proof by presenting reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority deciding the challenge.

Paragraph (b) is modified from proposed § 773.25(c)(3). We added to the provision that any evidence or supporting materials presented in connection with the challenge will become part of the permit file, an investigation file, or another public file. This addition is in response to comments that we should expand the public's access to decisions made under these provisions. The addition is also consistent with existing regulations regarding the availability of records. If the challenger requests, we will hold as confidential any information which is not required to be made available to the public under §§ 840.14 or 842.16, as applicable.

Final § 773.27(c) provides some examples of materials a challenger may submit in an effort to satisfy the requirements of paragraph (b). Paragraph (c) is adopted from proposed § 773.25(c)(3)(i). Subparagraph (c)(1) is slightly modified from proposed § 773.25(c)(3)(i)(A). Subparagraph (c)(2) is adopted as proposed in § 773.25(c)(3)(i)(B). Subparagraph (c)(3) is adopted as proposed in § 773.25(c)(3)(i)(C). Subparagraph (c)(4) is adopted from proposed § 773.25(c)(3)(i)(D). There are no substantive changes between final paragraph (c) and the proposed provision.

We did not adopt proposed § 773.25(c)(3)(ii) because it is unnecessary. This proposed provision stated that evidence and supporting material presented before any administrative or judicial tribunal reviewing a decision by a regulatory authority may include any evidence admissible under the rules of such tribunal. We removed this provision because the rules of the tribunal will set forth the evidence that the tribunal may receive; as such, the proposed provision was superfluous.

#### Final § 773.28 Written Agency Decision on Challenges to Ownership or Control Listings or Findings

Final § 773.28(a) provides that the regulatory authority deciding the challenge will review and investigate any evidence or information a challenger submits under § 773.27 and issue a written decision within 60 days of receipt of the challenge. Paragraph (a) also requires the written decision to state whether the challenger owns or controls the relevant surface coal mining operation, or owned or controlled that operation, during the relevant time period. For clarification and simplification, and to avoid redundancy, we merged proposed §§ 773.25(a), 773.25(b)(1) through (3)

and 773.25(c)(1), as well as the first sentence of proposed § 773.24(c)(1), and incorporated them into final § 773.28(a). The regulatory authority referenced in final § 773.28(a) is the agency which will decide the challenge in accordance with final § 773.26(a).

Paragraph (b) of final § 773.28 provides that the regulatory authority will promptly provide the challenger with a copy of the decision by either certified mail or any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure, or the equivalent State regulatory program counterparts. Paragraph (b) is adopted from the notification procedures in the second sentence of proposed § 773.24(c)(1) and the first sentence of proposed § 773.24(c)(2). In response to comments, we removed the requirement that the regulatory authority directly notify regulatory authorities with an interest in the challenge; the proposed requirement was too subjective, and regulatory authorities will receive ample notice through AVS and our AVS Office's Internet home page (Internet address: [www.avos.osmre.gov](http://www.avos.osmre.gov)).

Paragraph (c) of final § 773.28 provides that service of the decision on a challenger is complete upon delivery and is not incomplete if delivery is refused. Paragraph (c) is adopted from the second sentence in proposed § 773.24(c)(2).

Paragraph (d) of final § 773.28 provides that the regulatory authority will post all decisions made under this section on AVS and on the AVS Office Internet home page (Internet address: [www.avos.osmre.gov](http://www.avos.osmre.gov)). This provision is added to the final rule in response to comments that we should expand the public's access to decisions made under these provisions. Public notice of a decision, and the availability of the records supporting the decision, adopted in final § 773.27(b), are the appropriate places to expand such accessibility. Public posting of the decisions will also accomplish notice to regulatory authorities.

Paragraph (e) of final § 773.28 provides that any person who receives a written decision—i.e., the challenger—and who wishes to appeal that decision, must exhaust administrative remedies under the procedures at 43 CFR 4.1380 through 4.1387, or the equivalent State regulatory program counterparts, before seeking judicial review. For clarity and simplification, we modified paragraph (e) from proposed § 773.24(c)(3), and added specific mention of the requirement to exhaust administrative

remedies. Also, we are not adopting the proposed provision which would allow “any person who is or may be adversely affected” by a decision to appeal the decision. As explained below, there are ample public participation provisions in our other regulations.

Finally, paragraph (f) of final § 773.28 provides that, following a written decision by the regulatory authority responsible for deciding the challenge, or any decision by a reviewing administrative or judicial tribunal, the regulatory authority will review the information in AVS to determine if it is consistent with the decision. Paragraph (f) further provides that if the information in AVS is not consistent with the decision, the regulatory authority will promptly revise the information in AVS to reflect the decision. Paragraph (f) is adopted from proposed § 773.25(d) and the second sentence of proposed § 773.24(c)(1).

We are not adopting proposed § 773.25(b)(4) because it is unnecessary. Proposed § 773.25(b)(4) provided that the agency with jurisdiction over a violation will determine whether the violation has been abated or corrected. While this statement is correct, it is not necessary to include it in the regulatory language pertaining to ownership or control challenges. While this final rule makes clear that the regulatory authority responsible for deciding an ownership or control challenge will apply its ownership or control rules to violations both inside and outside its jurisdiction, only the agency with jurisdiction over a violation can properly make decisions regarding the initial existence or current status of the violation.

In response to comments, we are also not adopting the last sentence of proposed § 773.24(c)(3), which would have provided that our written decision would remain in effect during the pendency of an appeal, unless the challenger obtained temporary relief. Instead, as explained in greater detail in section VI.F. of this preamble, we are allowing applicants to obtain provisional permits during the pendency of ownership or control challenges and appeals. *See* final § 773.14. Thus, our ownership or control findings are in effect stayed or inoperative while a challenger exhausts administrative remedies and during the pendency of any subsequent judicial review. Allowing provisional permits under these circumstances enhances due process.

#### General Comments on Proposed § 773.24

One commenter said the procedures for challenging an ownership or control

listing or finding, or alternately our proposed revisions to the existing challenge procedures, are not needed. This commenter did not offer a reason for the objection. The challenge procedures, in general, are definitely needed for several reasons, but most importantly to afford due process to the regulated industry. Furthermore, the specific revisions we adopted in this final rule are necessary in light of the fact that the nature of the challenges has changed from rebuttals of presumptions of ownership or control to challenges to listings and agency findings of actual, rather than presumed, ownership or control.

In contrast, another commenter expressed support for the intent of due process behind the proposed challenge provisions. We agree with the comment and underscore that it is critically important that persons either disclosed as an owner or controller, or later found by a regulatory authority to be an owner or controller, have the opportunity to challenge such a listing or finding.

A commenter said the provisions proposed in § 773.24 unlawfully preclude persons from challenging the underlying violation to which they are linked and for which they will be held responsible. Expressing a contrary view, another commenter stated that a challenge to an ownership or control link should not include a challenge to the underlying fact of the violation.

In this final rule, we removed the ability to challenge directly both the current status of a violation (i.e., whether the violation has been abated, is in the process of being abated, etc.) and the initial existence or validity of a violation (i.e., whether a violation existed at the time it was cited) in the context of ownership or control challenges. Only the regulatory authority, or other agency, with jurisdiction over a violation can make determinations regarding the initial existence or current status of a violation. Of course, if a person is challenging an ownership or control listing or finding because he or she is ineligible for a permit under section 510(c) of the Act, 30 U.S.C. 1260(c), and final § 773.12—i.e., he or she owns or controls an operation with a current violation—the person may submit evidence from the regulatory authority, or other agency, with jurisdiction over the violation that the violation never existed in the first instance or has been abated or corrected. If a person can demonstrate, in this manner, that he or she does not own or control an operation with a current violation, he or she would become eligible for a permit under section 510(c) and final § 773.12.

We removed the ability to challenge the existence of a violation at the time it was cited because there is a prime regulatory interest in finality of agency actions. Allowing the initial existence of a violation to be challenged at any time, in an open-ended process, is neither required by law nor desirable. For example, if a challenge to the existence of a violation is raised years after the fact, it might be difficult, if not impossible, for an agency to obtain all pertinent evidence relating to the violation at the time it was cited. Witnesses might be unlocatable, or even deceased, or their memories may have understandably faded; documentary evidence might be lost or destroyed; and evidence of “on the ground” violations might be lost due to the passage of time and changes in physical conditions.

Furthermore, if the existence of a violation has been litigated to conclusion by an affected party, or the right to challenge the existence of a violation has been waived, we see no reason to provide for additional challenges covering the same subject matter. It is not necessary to allow persons who failed to exercise a prior opportunity to challenge the existence of the violation to initiate such a challenge in the context of an ownership or control challenge. Our existing regulations provide that a person issued a Federal notice of violation or cessation order, “or a person having an interest which is or may be adversely affected by the issuance, modification, vacation or termination of a notice or order, may request review of that action \* \* \* within 30 days after receiving notice of the action.” 30 CFR 843.16 (emphasis added). If ownership or control consequences attach or may attach to a person as a result of the issuance of a notice of violation or cessation order, that person “is or may be adversely affected by the issuance,” such that they would have the right, and it would be incumbent on them, to challenge the issuance under the available procedures. If the persons affected by the issuance of a notice of violation do not initiate a challenge, or fail to obtain a favorable decision on such a challenge, then it is fair to assume that the violation did in fact exist when cited.

Likewise, in the event that someone initiating an ownership or control challenge did not have the opportunity to challenge the underlying existence of the violation, the persons legally responsible for the violation will have had ample opportunity and sufficient motivation to challenge the violation if they believe it was improperly cited. If

the persons who are legally responsible for the violation do not initiate a challenge, or fail to obtain a favorable decision on such a challenge, then it is fair to state that the violation did in fact exist when cited.

In sum, we emphasize that the ownership or control challenges provided for in this final rule do not exist so that a person may challenge anew the initial existence of a violation. At the same time, the rights of owners and controllers are well protected by the ability to challenge an ownership or control listing or finding under the procedures we adopt today.

A commenter said the final rule should make clear that the documents submitted by a person initiating a challenge and relied upon by regulatory authorities for their decisions are public records and should be made a part of the permit file. We agree with the commenter that documents submitted to challenge an ownership or control listing or finding should normally be considered public records and, as such, should be readily available for public review. Based on this comment, we added the requirement in final § 773.27(b) that any materials presented in connection with a challenge will become part of the permit file, an investigation file, or another public file. However, the location and manner in which the records are retained is at the discretion of the regulatory authority, as identified in final § 773.26(a). We also added a provision allowing a challenger to request that any confidential information not be placed in a public file. We will hold as confidential any information which is not required to be made available to the public under §§ 840.14 or 842.16, as applicable.

A commenter said proposed § 773.24 confuses responsibility for liability and for permit blocking. To paraphrase, the commenter states that the proposed rule assumes that any owner or controller is the alter ego of the applicant and therefore liable for the applicant's violations. In the commenter's view, holding owners or controllers liable for a violation negates the need for “an elaborate scheme of permit blocking.” We disagree with the commenter for at least two reasons. First, neither the proposed rule nor the rule adopted today presumes that an owner or controller is the alter ego of the applicant or a permittee, though an owner or controller may in fact, in the circumstances of a given case, be an alter ego. And, while an owner or controller may, in certain circumstances, be personally liable for the violations of an operation under sections 518 and 521 of the Act, 30

U.S.C. 1268 and 30 U.S.C. 1271, neither the challenge procedures, nor any other provision of the final rule adopted today, gives rise to such an assumption. If a person is found to be personally liable for a violation under the Act, that person has ample opportunity to challenge that finding outside of the ownership or control challenge procedures. The pertinent parts of this final rule establish when a person owns or controls the relevant surface coal mining operation, as contemplated by section 510(c) of the Act; the challenge procedures afford due process by allowing a person to challenge an ownership or control listing or finding. Second, this final rule does not create an “elaborate permit-blocking scheme.” Rather, this rule implements section 510(c) of the Act in a manner fully consistent with the *NMA v. DOI I* and *NMA v. DOI II* decisions.

Two commenters asked how a person is notified of a regulatory authority’s initial determination that they have the ability to control. A person found to be an owner or controller will be notified by the regulatory authority making the finding. In this final rule, we modified the proposed provision to clarify that the regulatory authority must make a written finding of ownership or control. See final § 774.11(f); see also final § 773.22(a). The regulatory authority will then notify the person subject to the finding of the determination.

A commenter said the challenge provisions are unlawful because they fail to provide due process, by way of an opportunity for hearing or appeal, “prior to the imposition of sanctions including permit blocks and conditions based on the [ownership or control] finding, or before the inclusion of the finding or determination in the AVS.”

We disagree that the proposed ownership or control challenge procedures would deny due process, for largely the same reasons explained in the preamble to OSM’s Applicant/Violator System Procedures rule (AVS Procedures rule). 59 FR 54306, 54312–16 (1994). The AVS Procedures rule, which contained predecessor ownership or control challenge procedures, was upheld in court against all due process challenges, including an argument similar to the one advanced by the commenter. *National Mining Assoc. v. Babbitt*, 43 Env’t Rep. Cas. (BNA) 1097, 1111–17 (D.D.C. 1996), *appeal docketed*, No. 96–5274 (D.C. Cir). To the extent relevant, we continue to rely on the due process discussion set forth in the preamble to the AVS Procedures rule in support of this rulemaking.

Nonetheless, we modified the final rule to address the commenter’s

concerns. Most significantly, as explained in greater detail in section VI.F. of this preamble, we decided to allow issuance of a provisional permit when a person is challenging or appealing an ownership or control listing or finding. Under final § 773.14, an applicant who owns or controls an operation with a violation may be eligible for a provisional permit if it is challenging or appealing all pertinent ownership or control listings or findings. However, if an ownership or control listing or finding is ultimately upheld in favor of the regulatory authority, the provisionally issued permit will be considered improvidently issued, and the regulatory authority must initiate suspension or rescission procedures under final §§ 773.22 and 773.23. See final § 773.14(c). Thus, under the procedures we adopt today, any negative consequence, or “sanction,” flowing from an ownership or control listing or finding—*i.e.*, a permit block or permit suspension or rescission—will only arise *after* an applicant has had a full and meaningful opportunity to challenge the listing or finding both administratively and judicially. It is also important to emphasize that a person may initiate an ownership or control challenge *at any time*. See final § 773.25.

While our modification allowing for provisional permits is alone sufficient to address the due process concerns expressed by the commenter, we note that there are numerous other provisions in this final rule and our existing rules, including provisions which are available before a permit denial, which safeguard the interests of applicants. First, section 513(b) of the Act, 30 U.S.C. 1263(b), allows any person having an interest which is or may be adversely affected by a proposed application to file written objections and seek an informal conference before a permitting decision. Second, under final § 773.25, any person listed or found as an owner or controller, or any applicant affected by such listing or finding, may challenge an ownership or control listing or finding at any time, including before a permitting decision (if the listing or finding occurs before a permitting decision). Third, existing 43 CFR 4.1380 provides for review of OSM’s written ownership and control decisions by OHA. Under the OHA procedures at 43 CFR 4.1386, a party may seek temporary relief from OSM’s decision upon a showing that, among other things, the petitioner is likely to prevail on the merits of the claim. Finally, if the ownership or control

finding results in a permit denial, existing 30 CFR part 775 allows the “the applicant, permittee, or any person with an interest which is or may be adversely affected” to seek administrative, and ultimately judicial, review of the permitting decision. Given that applicants may now receive provisional permits while they are appealing ownership or control listings or findings, coupled with the ample recourse an applicant has, both before and after a permitting decision, the risk of an erroneous permit denial is virtually nonexistent.

We do note that under this final rule, we will continue to enter ownership or control findings promptly into AVS. See final § 774.11(f)(2). When OSM makes a finding that someone who is not listed in the permit application, or subsequently identified by the permittee, is an owner or controller of the operation, there is a strong governmental and public interest in listing that information in AVS as soon as possible so it may be of use to the various regulatory authorities in carrying out their permitting responsibilities under section 510(c) of the Act. Section 510(c), among other things, prevents violators from receiving new permits so that they will not be able to cause environmental harm at new sites. If OSM or a State regulatory authority had to wait until after a challenge or hearing, and a potentially lengthy appeal to the court of last resort, to list the information in AVS, another regulatory authority may issue a permit to a person who is not entitled to receive one under section 510(c). At a minimum, the permitting authority must have access to the most current and complete information when it makes its permitting decision. The most efficient way to achieve that result is to enter ownership or control findings promptly into AVS.

However, since an applicant may now receive a provisional permit during the pendency of a merits challenge or appeal, there will not be any “sanction” or negative consequence flowing from the entry of the finding into AVS unless and until the finding is ultimately upheld. If a finding entered into AVS is ultimately upheld, then any negative consequences will be due to the conduct of the person found to be an owner or controller, or the conduct of operations the person owns or controls. On the other hand, allowance of a provisional permit ensures that there will not be a “sanction” to a person subject to an erroneous finding of ownership or control.

We also take this opportunity to emphasize that AVS is an informational

database, which contains, among other things, information pertaining to *all* owners and controllers of all applicants and all permittees, regardless of whether there are outstanding violations. Thus, the mere entry of an ownership or control relationship into AVS is not punitive and may not have any adverse consequences. For example, if a person is identified in AVS as an owner or controller of an operation, there is no adverse permitting consequence unless that operation has a current violation. Even then, under this rule, an applicant will be eligible for a provisional permit if it challenges, in good faith, its ownership or control of the operation.

Each regulatory authority uses the information in AVS, along with other reasonably available information, to determine permit eligibility under its own ownership and control rules. OSM's interest is in maintaining the integrity of the information in the system—both in terms of accuracy and completeness—so that OSM and the States may make informed and appropriate permitting decisions, consistent with final § 773.12 and section 510(c) of the Act. So long as the information is accurate and complete, any negative consequences flowing from being listed in AVS will not be created by OSM, but by the person owning or controlling an operation with an outstanding violation and/or the person who created the violation. In short, it is a person's conduct, and not identification in AVS, which creates any adverse consequences.

In sum, the procedures we adopt today, in conjunction with existing procedures, strike the appropriate balance between due process and OSM's and the public's interest in prompt entry of ownership and control information into AVS.

Several commenters expressed their concerns regarding citizens' participation under these provisions. One commenter said the public should be afforded the same rights of review regarding OSM's ownership and control decisions as exist generally for permit decisions. Another commenter said that we should not weaken citizens' participation in AVS matters. Another said there is a lack of public notice concerning any challenge to a finding of the ability to control and a lack of ability to participate, by comment or intervention, in such proceedings. According to the commenter, this lack of notice and public involvement is inconsistent with the Act.

The rule we adopt today increases the opportunity for public participation in ownership or control challenges, particularly through enhanced notice of

ownership or control decisions. We expressly adopted additional notice procedures so that the public will be informed of all written decisions concerning ownership or control challenges. See final § 773.28(d). Further, all records supporting an ownership or control decision, excluding any confidential information, will be made available to the public under final § 773.27(b).

Of course, citizens can pursue other avenues of redress if they believe the ownership or control challenge procedures are insufficient to protect their interests. Indeed, the rule we adopt today does nothing to disturb the public's role in the permitting process under 30 CFR 773.13 and 30 CFR part 775, including the ability of persons who have an interest which is or may be adversely affected to raise ownership or control issues during the permitting process and to request a hearing on the reasons for a permitting decision. Additional provisions pertaining to public participation and access to records are found at existing 30 CFR 842.11, 842.12, and 842.16 and final § 843.21. For example, if a person disagrees with an ownership or control finding, he can request a Federal inspection of any relevant permit under 30 CFR 842.12. If OSM denies an inspection request, the person may seek review under 30 CFR 842.15, and may ultimately appeal to OHA under 43 CFR part 4.

Also, as mentioned previously, AVS is available to the public to increase public access to ownership or control information in the system. AVS software is provided free of charge and can be ordered from the AVS Office in Lexington, Kentucky, by calling, toll-free, 1-800-643-9748. The software can also be downloaded from the AVS Office's Internet home page on the Internet (Internet address: <http://www.avs.osmre.gov>).

It should also be noted that section 510(c) of the Act, 30 U.S.C. 1260(c), itself requires regulatory authorities to consider "other information available" when determining whether a permit may be granted based on ownership or control considerations. If the public supplies information to the regulatory authority with jurisdiction over an application, the regulatory authority must consider it as "available information" in making a permitting decision.

In short, OSM recognizes the Act's requirements for public participation in the permitting process, including ownership or control matters. The rule we adopt today, in conjunction with existing procedures, will provide more

immediate, wider, and economical access to persons with an interest in ownership or control challenges. Together, notice of a decision, access to the records underlying that decision, and our existing public participation procedures provide an appropriate measure of public participation in ownership or control challenges.

We also note that the National Wildlife Federation and Kentucky Resources Council, Inc., filed a complaint challenging our 1994 AVS Procedures rule. In that action, plaintiffs claimed, among other things, that the 1994 provisions did not provide for adequate public participation and notice relative to ownership or control determinations. Ultimately, the parties filed a joint motion for voluntary dismissal of the action, based on our agreement to "reopen the issues and regulatory language complained of in this lawsuit for public comment, and to reevaluate the position of the agency with respect to those matters complained of in this case," including the role of the public in ownership and control determinations. By order of September 15, 1997, the court granted the joint motion. In this rulemaking, we fulfilled the commitment we made in the joint motion by reopening the issues complained of in the lawsuit, and reevaluating our position relative to those issues. We carefully considered all the comments received on our proposed ownership or control challenge procedures. As explained above, in this final rule, we expand public access to written decisions concerning ownership or control challenges, and provide for public access to the records underlying such decisions. In terms of our ownership or control challenge procedures, these provisions represent an appropriate level of public participation and notice, given the ample public participation provisions which exist in our other regulations.

One commenter said that there is a lack of clarity regarding the right to challenge ownership or control when a regulatory authority's finding of control is necessitated by the applicant's nondisclosure of required permit application information. Any challenge, this commenter explained, should occur in the context of a civil or criminal prosecution for fraud under section 518 of the Act. We disagree that a regulatory authority should immediately initiate civil proceedings or proceed to criminal prosecution in all instances of nondisclosure of required information, from the most benign to the most egregious. However, we fully intend to pursue these actions when they are warranted.

Another commenter said that the refocusing of the challenge to whether the person has the current ability to control is inappropriate. The question, according to the commenter, is whether the applicant owned or controlled other operations which have current violations, not whether the current ability to control continues. After the *NMA v. DOI II* decision, we may no longer deny a permit to an applicant who has relinquished its ownership or control of an operation with a still-existing violation. *NMA v. DOI II*, 177 F.3d at 5. The court did hold, however, that OSM may continue to deny permits based on an applicant's past ownership or control of an operation with a violation (whether or not abated) when determining whether there is "a demonstrated pattern of willful violations" under section 510(c) of the Act. *Id.* Absent the requisite "pattern of willful violations," the court held that a permit denial based on past ownership or control "contravenes the statute and cannot be upheld." *Id.*

#### Proposed § 773.24(a)

Proposed § 773.24(a) addressed who may challenge a finding on the ability to control a surface coal mining operation. 63 FR 70580, 70621.

A commenter said that it is not clear that a permit applicant can challenge a listing under the proposed provisions. We did not intend to exclude applicants or permittees from being able to challenge an ownership or control listing or finding. See 63 FR 70599. We modified the language in this final rule to clarify that an applicant or permittee who is affected by an ownership or control listing or finding may indeed challenge the listing or finding in accordance with these final challenge procedures. See final § 773.25(c). However, if an applicant or permittee is initiating a challenge with regard to an ownership or control relationship initially disclosed by the applicant or permittee, we do not expect the challenge to be premised on the argument that the person listed by the applicant or permittee was not an owner or controller in the first instance. An applicant or permittee, having identified a person as an owner or controller, should not prevail in a challenge by claiming the person was not an owner or controller at the time the information was submitted to the regulatory authority. Rather, a challenge initiated by an applicant or permittee, concerning a listing made by the applicant or permittee, should be limited to changed circumstances, like the fact that the person listed by the applicant or permittee as an owner or controller has

relinquished ownership or control of the operation.

Several commenters submitted comments pertaining to the timing of ownership or control challenges and the consequences of certifying under proposed § 778.13(m) or being found to be an owner or controller after permit issuance. Under proposed § 773.24(a), an ownership or control challenge had to be initiated "before certification under [proposed] § 778.13(m)." Proposed § 778.13(m) would have required all owners or controllers to certify as to their ability to control the operation.

Another commenter, without explanation, suggested that we remove the "before certification" requirement. One commenter pointed out that if a regulatory authority made a finding of ownership or control after certification, the person subject to the finding could not challenge the finding since it would have occurred after certification.

Another commenter opined that if a person "fails to challenge the listing [by an applicant or regulatory authority] \* \* \* prior to issuance of the permit, the person is forever deemed to be [an] owner/controller." This same commenter noted that if a person was listed or found to be an owner or controller after permit issuance, the person would "be placed in jeopardy through no action of his own, but merely by the action of others (applicant or [regulatory authority]) without there ever being any burden of proof [borne] by the applicant or [regulatory authority]."

Another commenter said that there could be lengthy delays in permit issuance if a person chose to challenge a listing or finding before permit issuance; on the other hand, if the person did not challenge before permit issuance, they would waive their right to do so at a later time. Finally, a commenter stated that the proposed rule required all listed owners or controllers to challenge their ownership or control before permit issuance or else they would all have to certify. The commenter also stated that requiring successful challenges and/or certification by all owners or controllers before permit issuance would be particularly burdensome to large corporations with many owners or controllers. As such, the commenter suggested we delete the provision in its entirety.

These comments were all well-taken. In this final rule, we are not adopting the "before certification" language in final § 773.25. As such, any person either listed as or found to be an owner or controller may challenge such listing

or finding at any time, either before, or after, permit issuance. The adopted provision will reduce perceived delays in permit issuance, since a challenge can be initiated after permit issuance.

Removal of the "before certification" requirement also alleviates the concern that a person may "be placed in jeopardy through no action of his own \* \* \* without there ever being any burden of proof [borne] by the applicant or [regulatory authority]." We note that both regulatory authorities and applicants do bear a burden of proof. If a regulatory authority makes a finding of ownership or control, it bears the initial burden of demonstrating ownership or control; only then does the burden shift to the challenger to prove by a preponderance of the evidence that he or she does not or did not own or control the operation. (The burden of proof is discussed in more detail in section VI.N. of this preamble.) As to being listed as an owner or controller, we note that the applicant has the burden to provide accurate and complete information in a permit application. Despite these burdens of proof, there is obviously a possibility that a person will be erroneously listed or found as an owner or controller. However, any perceived jeopardy can be eliminated by a successful challenge; in fact, these challenge procedures were developed largely for this reason.

Finally, since we modified the certification requirement at final § 778.11(d) to require certification by only one individual, and have modified the challenge procedures to allow for challenges at any time, including after permit issuance, we removed the perceived burden for large corporations. While corporations must still list all of their owners or controllers under final § 778.11(c)(5), only one controller must certify under final § 778.11(d), and any listed owner or controller may initiate a challenge after permit issuance.

Another commenter alluded to the timing issue, but in a slightly different context. This commenter raised the concern that after permit issuance, a person who controls a small portion of an operation (and is therefore listed as a controller), but has no control over areas where a violation occurs, would not be able to use the challenge procedures. The commenter said "the only avenue of appeal would be the administrative court system."

As stated above, we addressed the commenter's concern about being able to challenge after permit issuance by removing the "before certification" language. In response to this comment, we also modified final § 773.25(a) to allow a person to challenge their ability

to control a specific portion or aspect of an operation. For example, under the commenter's hypothetical, the controller of a small portion of an operation could initiate a challenge and attempt to prove that he does not or did not control another aspect of the operation. We also modified final § 778.11(c)(5) to allow applicants to identify the particular portion or aspect of the operation owned or controlled by each owner or controller.

#### Proposed § 773.24(b)

Proposed § 773.24(b) addressed how to challenge a finding on the ability to control a surface coal mining operation. 63 FR 70621.

A commenter said the proposal conflicts with the allocation of authority under SMCRA by balkanizing the process whereby a person will have to seek determinations in different State and Federal forums for the same questions related to a finding or decision on control.

We agree that the proposal dispersed the challenge procedures. For example, under the proposal, if an applicant was applying for a permit in State X, but was not eligible for a permit based on ownership or control of operations with violations in States Y and Z, he would have to initiate challenges in States Y and Z (to the agencies with jurisdiction over the violations). We modified the procedures in final § 773.26(a) to provide that in order to challenge an ownership or control listing or finding, a challenger must submit a written explanation of the basis for the challenge to the regulatory authority with jurisdiction over a pending permit application or permit, rather than to the agency with jurisdiction over an existing violation. As explained above, this modification will greatly simplify the provisions by allowing ownership and control procedures to proceed in one forum. The regulatory authority hearing the challenge will apply its own ownership and control rules in deciding the challenge, subject only to OSM's general oversight authority. Consistent with the concept of State primacy, it is appropriate for the regulatory authority with jurisdiction over an application or permit to decide ownership or control challenges, since that regulatory authority has the greatest interest in whether or not mining should commence or continue within its jurisdiction. However, when a regulatory authority is deciding a challenge which involves questions pertaining to violations in other jurisdictions, it is important for that regulatory authority to consult and coordinate with the regulatory authority

with jurisdiction over the violation and our AVS Office; we require such consultation in final § 773.26(c).

At the same time, we must stress that a regulatory authority deciding an ownership or control challenge has *no* authority to make determinations relating to the initial existence or current status of a violation, or a person's responsibility for a violation, in another jurisdiction. Rather, all questions as to the existence or status of the violation must be addressed to the regulatory authority, or other agency, with jurisdiction over the violation, providing the challenger is not foreclosed from initiating such a challenge under the applicable regulations. As such, if a challenger has violations in different jurisdictions which are affecting his permit eligibility, and wishes to contest the initial existence or status of those violations, and is not foreclosed from doing so, he must do so with the regulatory authorities, or other agencies, with jurisdiction over the violations; this is consistent with the concept of State primacy embodied in the Act. It is also consistent with section 510(c) of the Act, which requires a permit applicant to prove that any violation it owns or controls has "been corrected \* \* \* to the satisfaction of the regulatory authority \* \* \* which has jurisdiction over such violation."

In sum, the procedure we are adopting today enhances State primacy by allowing each regulatory authority to apply its own ownership or control rules when deciding ownership or control challenges pertaining to applications and permits within its jurisdiction. The rule also underscores that each regulatory authority is properly responsible for deciding issues pertaining to the existence or status of a violation within its jurisdiction and ultimately permit eligibility.

#### Proposed § 773.24(c)

Proposed § 773.24(c) addressed the written decision, service, and appeals procedures under the provisions for challenge a listing or finding of ownership or control. 63 FR 70580, 70621.

Proposed § 773.24(c)(1) would have required the regulatory authority issuing a written decision on an ownership or control challenge to notify the challenger and "any regulatory authorities" with an interest in the challenge. A commenter said OSM should clarify the term "regulatory authorities," as used in proposed § 773.24(c)(1), to mean only "SMCRA regulatory authorities." Four commenters asked OSM to clarify how

a regulatory authority discovers and notifies all regulatory authorities with an interest in the challenge. One asked if "regulatory authorities with an interest in the challenge" includes "air and water authorities" and at what point in the permitting process must the decision and notification occur.

At the outset, we note that the term "regulatory authority" is defined in the Act, at section 701(22), to include only regulatory authorities administering SMCRA. As such, the term regulatory authorities in § 773.24(c)(1) encompassed only SMCRA regulatory authorities, and not "air and water authorities." However, these comments are largely moot because, as explained above, we modified the notification requirements such that the regulatory authority does not have to directly notify regulatory authorities with an interest in an ownership or control challenge. The proposed requirement was too subjective. Both SMCRA and non-SMCRA regulatory authorities, as well as the general public, will receive ample notice of ownership or control decisions through the posting of those decisions on AVS and our AVS Office's Internet home page under final § 773.28(d). This modification will eliminate any concerns about identifying and notifying interested regulatory authorities.

Finally, we note that a decision does not necessarily occur during the permitting process, though a regulatory authority may receive an ownership or control challenge during the permitting process. The written decision requirement for ownership or control challenges is not triggered by the permitting process, but by receipt of a challenge under these provisions. Notification to the challenger, and posting of the decision on AVS and the Internet, must occur after the written decision, in accordance with the provisions we adopt today.

Two commenters, concerned about potential delays in the permitting process, said there should be a time limit for issuing a written decision under the ownership or control challenge provisions. One of the commenters suggested 30 days, while the other said 15 days is adequate to make a decision.

While in the past we elected not to set a time limit for regulatory authorities to decide ownership or control challenges (see 59 FR 54306, 54332-33), we modified the proposal to require regulatory authorities to decide ownership or control challenges within 60 days of receipt of a challenge and any evidence submitted by the challenger. See final § 773.28(a). Our experience

since the promulgation of similar ownership or control challenge procedures in 1994, and the fact that OSM and State regulatory authorities have become increasingly sophisticated in processing these challenges, leads us to conclude that the imposition of a 60 day time limit is practical.

Another commenter objected to there being no time limits for the agency to reach a decision at the "ALJ or IBLA levels." To the extent the commenter meant to refer to the lack of a time limit for a written decision in the proposed ownership or control challenge procedures, our response is as above. If the commenter truly meant to refer to OHA's regulations, no response is necessary, as those provisions are not at issue in this rulemaking. We note, however, that OHA's provisions for review of written ownership or control decisions do in fact contain specific time limits for filing of requests for review, answers or responsive motions, hearings, and decisions. 43 CFR 4.1380 through 4.1387.

A commenter said that the OHA appeal procedures referenced in proposed paragraph (c)(3)—43 CFR 4.1380 through 4.1387—were not designed to address what the commenter calls "expanded control findings" and thus, do not apply. The commenter also said that the OHA procedures are woefully inadequate to provide due process.

We disagree. The referenced OHA procedures, captioned "Review of Office of Surface Mining Written Decisions Concerning Ownership and Control," are broad enough to encompass appeals of written ownership or control decisions under this final rule. While some of the terminology in the OHA provisions does not precisely match the terminology in this final rule, the substance of the OHA appeals procedures readily accommodates the review of ownership or control decisions contemplated by these final challenge procedures. Nonetheless, in light of this rulemaking, OHA is currently determining whether or not it will be necessary to modify its procedural rules. The existing OHA procedures are more than adequate in the interim, and will in fact apply until such time as they are revised or replaced.

As to the commenter's other concern about the OHA provisions—that they do not provide due process—no response is necessary, as those provisions are not at issue in this rulemaking. We note, however, that the OHA provisions, coupled with the provisions of this final rule, afford ample due process to the regulated industry.

The same commenter, citing *Darby v. Cisneros*, 509 U.S. 137 (1993) and *Coteau Properties Co. v. Babbitt*, 53 F.3d 1466 (8th Cir. 1995), said that we cannot "require exhaustion of administrative remedies unless the effect of the [ownership or control] finding or decision is automatically stayed pending appeal."

Under this final rule, ownership or control findings are in effect stayed while a challenger exhausts administrative, as well as judicial, remedies. This is so because an applicant may receive a provisional permit under final § 773.14 during the pendency of an ownership or control challenge under final §§ 773.25 through 773.27, or any subsequent administrative or judicial appeal. See final § 773.14(b)(3). Thus, the potential effect of an ownership or control finding—*i.e.*, permit blocking under section 510(c)—is stayed while a challenger pursues both administrative and judicial remedies. As such, we can properly require exhaustion of administrative remedies before a challenger seeks judicial review. We have added a mandatory exhaustion requirement to final § 773.28(e).

Proposed § 773.24(d)

Proposed § 773.24(d) addressed the limitations under these provisions. 63 FR 70580, 70621. We did not receive any comments on this proposed provision. We slightly modified the proposed provision, in final § 773.26(b), to provide that no person may use these provisions to challenge their liability or responsibility under any other provision of the Act or its implementing regulations; in the proposal, we only referenced liability for reclamation fees assessed under Title IV of SMCRA. This modification is appropriate in order to emphasize that these procedures apply only to ownership or control challenges, and may not be used as a secondary source to challenge liability or responsibility under the other provisions of SMCRA or its implementing regulations.

*N. Section 773.25—Standards for Challenging a Finding or Decision on the Ability To Control a Surface Coal Mining Operation*

In this final rule, the provisions proposed at §§ 773.24 and 773.25 are found at §§ 773.25 through 773.28.

We proposed to revise previous § 773.25 to provide standards for challenging a finding or decision on ownership of or the ability to control a surface coal mining operation. 63 FR 70580, 70600. We modified proposed § 773.25 in this final rule. The details of

the modifications are set forth in the discussion of proposed § 773.24, in preceding section VI.M. of this preamble. Section VI.M. includes a discussion of the final ownership or control challenge provisions at §§ 773.25 through 773.28.

General Comments on Proposed § 773.25

A commenter found the provisions "puzzling." The commenter questioned why we need a rebuttal mechanism if regulatory authorities are no longer allowed to make presumptions of control. The commenter asked, if all controllers certify as to their ability to control, then "how can they back-pedal and decide later that they don't?"

First, the challenge procedures we adopt today are not, strictly speaking, a rebuttal mechanism. Despite the fact that OSM can no longer rely on presumptions to make a *prima facie* case of ownership or control, we may still, at any time, make findings of ownership or control under §§ 774.11(f) and 773.21. Thus, while the challenge provisions are no longer centered on presumptions of ownership or control, it remains important for any owner or controller to be able to challenge an ownership or control listing or finding. Should a person disagree with a regulatory authority finding that the person owns or controls a surface coal mining operation, then the person should have the right to challenge that finding.

Further, as stated in section VI.M., above, we modified the certification requirement at final § 778.11(d) to require certification by only one individual; thus, not all owners or controllers will have knowingly certified to their status. Still, applicants must list all of their owners or controllers under § 778.11(c). Thus, persons will be listed as an owners or controllers in a permit application, even though they are not required to certify. Under these circumstances, it is important to allow these persons to initiate challenges. On the other hand, if a person has certified as to control of an operation, or the applicant is initiating a challenge with regard to a listing made by the applicant in a permit application, we expect that any challenge will involve changed circumstances, and will not contest the validity of the certification or listing in the first instance. In other words, a person or applicant, having knowingly certified or made a listing, should not be able to "back-pedal," as the commenter put it, and claim that the certification or listing was incorrect in the first instance. At the same time, it is

desirable to create a mechanism whereby a person or applicant can attempt to demonstrate that circumstances have changed since the certification or listing, such that a person is no longer an owner or controller of the operation.

Another commenter said the proposed regulation fails to provide meaningful standards for contesting an ownership or control finding, and that the proposed evidentiary standards are not substitutes for concrete standards for how one can successfully prove an error in a regulatory authority's finding.

We disagree. When OSM makes a finding on ownership or control, the written decision will contain an explanation of the basis for the finding. In bringing a challenge, there is really only one meaningful standard: A person bears the burden of proving by a preponderance of evidence, that he does not, or did not, own or control the relevant surface coal mining operation, under the ownership or control definitions we adopt today at final § 701.5. These definitions are sufficiently clear to allow for a meaningful challenge. The proof provided by the challenger should address the specific items in the finding with which the person takes issue. By not limiting the challenge to "concrete" criteria, the challenger is given substantial leeway to present any and all evidence which may be germane to the challenge. At the same time, regulatory authorities are not faced with having to reverse a listing or finding when a challenger meets a technical standard, but there are nonetheless indicia of ownership or control. This approach allows challengers to present, and regulatory authorities to consider, all the pertinent facts of each case, including the peculiar operating structure of a given entity. Further, providing "concrete" standards would mean attempting to anticipate every circumstance that would precipitate a challenge; this is not feasible. Finally, we also note that our 1994 AVS Procedures rule, which did not contain detailed standards for rebutting presumptions of ownership or control, was upheld in court against a challenge which was similar to this comment. *National Mining Assoc. v. Babbitt*, 43 Env't Rep. Cas. (BNA) 1097, 1115-16 (D.D.C. 1996), *appeal docketed*, No. 96-5274 (D.C. Cir).

#### Proposed § 773.25(a)

We proposed paragraph (a) to state when the challenge standards apply. 63 FR 70580, 70621. We did not receive comments on this proposed provision. However, we are not adopting proposed

§ 773.25(a) because it would be a duplicate regulatory provision. Applicability is addressed at final § 773.25.

#### Proposed § 773.25(b)

As proposed, paragraph (b) described which regulatory authorities are responsible for deciding ownership or control challenges. 63 FR 70580, 70621. As explained above, in section VI.M. of this preamble, we modified this provision in this final rule by incorporating it into final § 773.26, which, in conjunction with final § 773.28, identifies the regulatory authorities responsible for deciding ownership or control challenges.

A commenter said that it is inconceivable that there will be inconsistent determinations made regarding ownership or control if there are both Federal and State violations. The commenter asserted that ownership or control decisions can only be made by the agency with the application before it and that the decision on abatement of a violation is the only appropriate decision for another agency (when another agency issued the violation).

We agree. As we explained in detail in the discussion of proposed § 773.24(b) in section VI.M., above, under this final rule, the regulatory authority with jurisdiction over a pending permit application or permit will apply its ownership and control rules to all outstanding violations, if any. Only a regulatory authority, or other agency, with jurisdiction over a violation will decide issues pertaining to the initial existence or status of the violation. Nonetheless, there is still potential for inconsistent decisions among different regulatory authorities, since regulatory authorities likely will not have identical ownership and control regulations. To the extent there are inconsistent ownership or control decisions based on the same violations, such a result is consistent with the primacy scheme established by SMCRA itself.

Three commenters questioned proposed § 773.25(b)(3), which provided that the regulatory authority which processed the permit application or which issued the permit will decide challenges not associated with violations. The commenters asked what administrative or judicial venues are available to an applicant to resolve disagreements if the information supplied by one regulatory authority to another is wrong and the incorrect information results in a permit denial. The commenters also stated that OSM should require regulatory authorities to

validate their information before entry into AVS, specify the administrative and judicial venues in which erroneous permit blocks can be challenged, and specify that application review can continue during the pendency of ownership or control appeals.

We note that we incorporated proposed § 773.25(b)(3) into final § 773.26(a), such that the regulatory authority with jurisdiction over an application or permit will now decide all ownership and control challenges, regardless of the existence or non-existence of a violation. The challenge procedures we adopt today are designed to resolve questions of ownership or control. Questions as to the correctness of any other information contained in AVS, such as information required to be submitted in permit applications or information pertaining to the existence or status of violations, should be addressed to the regulatory authority which was responsible for entering that information into AVS. An applicant may or may not have recourse depending on whether the time to challenge such information has lapsed under the applicable regulations. However, we are confident, and our experience bears out, that in the case of truly incorrect information, such as information inaccurately loaded into AVS, regulatory authorities which loaded the information will work with the applicant and other persons to see that the information is corrected. Regulatory provisions are not necessary to accomplish this goal.

Likewise, additional regulatory language is not needed to require regulatory authorities to validate information before loading it into AVS. First, much of the information in AVS originates with applicants themselves, under our permit application information requirements; applicants are required to provide accurate and complete information. Further, under final § 773.15(a), regulatory authorities are required to find that an application is accurate and complete. Finally, there is ample opportunity to challenge other data in AVS, such as ownership or control findings, under existing rules and the rules we adopt today.

As to the appropriate administrative or judicial venues in which to challenge "erroneous permit blocks," the rule we adopt today, at final § 773.26(a), clearly identifies how and to whom to submit challenges regarding ownership or control listings and findings. Further, if an ownership or control finding results in a permit denial, existing 30 CFR part 775 provides for administrative and judicial review of the permitting decision. The appropriate forums in

which to initiate such challenges are identified in the regulations.

Finally, it is not necessary to provide rule language specifying that application review can continue during the pendency of ownership or control appeals. There is nothing in our regulations which suggests that application review must be suspended during the pendency of ownership or control appeals. As such, we expect that regulatory authorities will continue to process applications while appeals are pending, unless there is an independent provision of law which requires application review to be put on hold.

#### Proposed § 773.25(c)

We proposed paragraph (c) to provide for the evidentiary standards in the challenge procedures. 63 FR 70580, 70621. In this final rule, parts of proposed § 773.25(c) have been adopted in final § 773.27. Proposed § 773.25(c)(1) has been modified and incorporated into final § 773.28. Proposed § 773.25(c)(2) is modified and adopted at final § 773.27(a). Proposed § 773.25(c)(3) is modified and adopted at final § 773.27(b). Proposed § 773.25(c)(3)(i) is modified and adopted at final § 773.27(c). As explained in the discussion of final § 773.27(c), in section VI.M. of this preamble, we are not adopting proposed § 773.25(c)(3)(ii) because it is unnecessary.

We received numerous comments on the proposed rule's burden of proof allocation for ownership or control challenges. In this final rule, as in the proposal, the ultimate burden of proof in ownership or control challenges is on the challenger, rather than the regulatory authority.

Two commenters approved of the proposed burden of proof allocation. In substance, the commenters said it was appropriate that the burden of proof is on the person challenging a regulatory finding and the preponderance of the evidence standard is appropriate.

One commenter said the regulatory authority, not the challenger, should bear the ultimate burden of proof. Another said that the burden of proof in ownership or control challenges should always lie with the regulatory authority, especially since under the proposed rule, in the commenter's view, "to find that an individual is a controller is to also find that he is responsible for misdeeds committed by the mining company."

Two commenters said it was inappropriate to place a preponderance of the evidence standard on the challenger, while the agency does not have to make a *prima facie* showing of ownership or control. Similarly, another

commenter stated that there is never any burden of proof borne by the regulatory authority.

Two commenters, citing *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 278–281 (1994), said the Administrative Procedure Act (APA) governs the burden of proof for these procedures, and places the ultimate burden of persuasion on the regulatory authority. One said the proposal, violates the APA's allocation of the burden of proof. The APA places the burden of proof (both the burden of going forward with proof and the ultimate burden of persuasion) on the proponent of the rule, i.e., the finding, made by the regulatory authority.

Since the above-identified comments all pertain to the challenger's burden of proof, as well as the regulatory authority's burden of proof, we will address all burden of proof comments together.

First, we want to remove any confusion about the determination which is required by a regulatory authority when it makes an ownership or control finding. Under final § 774.11(f), the regulatory authority must make a written finding of ownership or control. Although the preamble to the proposed rule indicated that the regulatory authority does not have to make a *prima facie* determination, we meant the regulatory authority no longer has to make a *prima facie* determination with regard to rebuttable presumptions, since the proposed rule did not employ the rebuttable presumption mechanism. However, we want to make clear that in making a finding under final § 774.11(f), the regulatory authority must indeed make a *prima facie* determination of ownership and control, based on the evidence available to the regulatory authority. In making a *prima facie* determination, the finding should include evidence of facts which demonstrate that the person subject to the finding meets the definition of *own, owner, or ownership or control or controller* in § 701.5 of this final rule.

As to the applicability of the APA, and the import of the Supreme Court's decision in *Greenwich Collieries*, we begin with the threshold observation that the burden of proof in formal adjudications under the APA does not constrain OSM's informal adjudications, such as the challenges provided for in this final rule. Secondly, even if the APA applies to informal adjudications, SMCRA itself expressly exempts ownership or control challenges from the APA's burden of proof provisions. Finally, even if the APA's burden of proof provisions are applicable to these

final challenge procedures, the burden shifting mechanism we adopt today is consistent with the APA and *Greenwich Collieries*.

Section 556(d) of the APA provides, in pertinent part: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d) (emphasis added). SMCRA provides otherwise, and thus exempts ownership or control challenges from the APA's burden of proof requirements. Section 510(a) of SMCRA, 30 U.S.C. 1260(a), provides that "[t]he applicant for a permit, or revision of a permit, shall have the burden of establishing that his application is in compliance with all the requirements of the applicable State or Federal program," including section 510(c) of SMCRA. Similarly, under section 510(b), the applicant bears the ultimate burden of proving compliance with all requirements of SMCRA, including section 510(c), and of State and Federal programs. See also *National Mining Assoc. v. Babbitt*, 43 Env't Rep. Cas. at 1108. Finally, section 510(c) prohibits permit issuance until the applicant proves that there are no outstanding violations at operations owned or controlled by the applicant, or that any violations are in the process of being corrected. See also *id.* (We also note that section 510(c) is silent as to how an applicant may prove that he does not own or control a surface coal mining operation; the burden of proof allocation in this final rule is a reasonable construction of the statute, and appropriately implements section 510(c).) These sections clearly establish that the ultimate burden of proof in ownership or control challenges is properly borne by a permit applicant. Also, the burden of proof we adopt today appropriately applies to both applicant and non-applicant challengers, since the primary purpose of ownership or control findings, and therefore challenges, is to evaluate both present and future eligibility for permits. See, e.g., *National Mining Assoc. v. Babbitt*, 43 Env't Rep. Cas. at 1108.

*Greenwich Collieries* clarified that "burden of proof" means the ultimate "burden of persuasion." 512 U.S. at 276. Under the procedures we adopt today, OSM bears the burden of going forward with evidence to establish ownership or control (i.e., OSM must make a *prima facie* determination). The burden then shifts to the challenger to prove, by a preponderance of the evidence, that he does not, or did not, own or control the relevant surface coal mining operation. If OSM does not match that evidence, the challenger will prevail. The ultimate

burden of persuasion is properly borne by the applicant because SMCRA requires as much, but also because the challenger is most likely to be in possession of evidence to counter the regulatory authority's *prima facie* case. Under these circumstances, it is appropriate to require the challenger to produce the evidence which it has access to in attempting to rebut OSM's *prima facie* finding. This burden shifting mechanism is fully consistent with both the APA and *Greenwich Collieries*. We also note that a similar burden of proof allocation, contained in our 1994 AVS Procedures rule, was upheld against industry challenge after the decision in *Greenwich Collieries*. See *National Mining Assoc. v. Babbitt*, 43 Env't Rep. Cas. at 1108–09.

A commenter said that the lack of a reference in the challenge procedures to the “standards” for determining who is an owner or controller suggests that the “standards” elsewhere in the proposed rule are rebuttable presumptions which may be challenged. We disagree. The only issue in an ownership or control challenge is whether or not the challenger owns or controls, or owned or controlled, the relevant surface coal mining operation under the definitions of *own*, *owner*, or *ownership or control* or controller contained in § 701.5 of this final rule.

A commenter said the provision regarding submission of opinions of counsel as evidence in ownership or control challenges should be stricken. The commenter said that it is obvious that an attorney would be willing to sign statements supporting the cause of his client and that a statement “simply saying that this person is or is not a controller is not worthy evidence.” We retained this provision, first adopted in the 1994 AVS Procedures rule, because it has continued efficacy. In this final rule, we rely upon the rationale for the opinion of counsel provision as stated in the 1994 rule. See 59 FR 54306, 54342–43.

#### Proposed § 773.25(d)

We proposed § 773.25(d) to require regulatory authorities to update AVS, as necessary, upon an agency determination pertaining to ownership or control or the issuance of a decision by a reviewing tribunal. 63 FR 70580, 70621. We did not receive comments on this proposed provision. We slightly modified the proposed provision and adopted it at final § 773.28(f).

#### O. Section 774.10—Information Collection

In this final rule, the provision proposed as § 774.10 is found at § 774.9.

We proposed to revise the information collection burden for part 774. We are redesignating § 774.10 as new § 774.9 which contains the information collection requirements for part 774 and the Office of Management and Budget (OMB) clearance number. For our response to comments on general information collection, see the discussion under proposed § 773.10 which appears in section VI.D. of this preamble.

In this final rule, § 774.9(a) is revised to show the new OMB clearance number for this part is 1029–0116. The provision under § 774.9(b) is revised to adjust the estimated public reporting burden from 32 hours to 8 hours. The estimate represents the average response time. The reduction in burden is predominantly due to a calculation error on the provisions in the proposed rule. The proposed rule inadvertently provided the total burden hours for each response, as if respondents were always to prepare a permit revision, permit renewal, a transfer, assignment or sale of permit rights all at the same time, not the average burden per respondent to complete the requirements of part 774. In addition, new §§ 774.11 and 774.12 are added in this final rule. Section 774.11 requires regulatory authorities to identify entities responsible for violations, maintain information in AVS, and take enforcement actions based upon ownership, control, and violation information. Section 774.11 is based on provisions proposed in §§ 773.15, 773.22, and 774.13. Section 774.12 requires permittees to provide new or updated information to regulatory authorities. Section 774.12 is based on provisions proposed in §§ 773.17 and 774.13. The estimate represents the average response time.

#### Summary of Comments and Adjustments to Burden Estimates

We considered information from the individuals who commented on information collection aspects of the proposed rule. In general, commenters stated that the estimated information collection burden related to the proposed rule was too low. Commenters generally did not mention any specific rule change which was underestimated or any specific number of hours that would alter the OSM estimate.

A commenter stated that the burden hours for part 774 should be 50, instead of 32 hours. We compared the commenter's estimate with other data collected from industry sources and found them inconsistent. In performing the comparison, we took into account the addition of new §§ 774.11 and

774.12. As such, we did not accept the comment.

#### P. Section 774.13—Permit Revisions

In this final rule, the provision we adopt from proposed § 774.13(e) is found at § 774.12(c).

We proposed to add paragraph (e) to existing 30 CFR 774.13 to require a permittee to report to the regulatory authority any change of an owner or controller where the officer, owner, or other controller is not identified in the current permit and is not subject to the certification requirements for owners and controllers under proposed § 778.13(m). A change of an officer, owner, or other controller meeting these criteria would have to be reported within 60 days of the change and approved as a permit revision.

We are not adopting the proposal to add paragraph (e) to § 774.13. Instead, we added new § 774.12, which is also based upon the ownership and control information update requirements of proposed § 773.17(h).

#### Final § 774.12—Post-permit Issuance Information Requirements for Permittees

Final § 774.12(a) provides that, within 30 days after the issuance of a cessation order under § 843.11, or its State regulatory program equivalent, a permittee must provide or update all the information required under § 778.11. Final § 774.12(b) provides that a permittee does not have to submit this information if a court of competent jurisdiction grants a stay of the cessation order and the stay remains in effect. These provisions of the final rule are substantively identical to previous § 773.17(h).

Final § 774.12(c) provides that, within 60 days of any addition, departure, or change in position of any person identified in the permit application as an owner or controller of the applicant or operator under final §§ 778.11(c) or (d), the permittee must provide the information required under final § 778.11(e). That information includes, for each owner or controller, the person's name, address, and telephone number; the person's position title, relationship to the applicant, percentage of ownership, and location in the organizational structure; and the date the person began functioning in the relevant position. Final § 774.12(c) is based upon proposed § 774.13(e). Requiring timely updates of this information will enable the regulatory authority to make more accurate and timely permit eligibility determinations under section 510(c) of the Act.

## Disposition of Comments on Proposed § 774.13(e)

A commenter said proposed § 774.13(e) is unnecessary because there is no reason to report changes of individuals unless they are the alter ego of the applicant. We disagree. Maintaining the accuracy and completeness of ownership and control information for existing permits is critical to making accurate permit eligibility decisions under section 510(c) of the Act.

Several commenters said that the proposed rule would impose a tremendous burden because it would require reporting of changes in surface and mineral owners for the permit and adjacent areas. The commenters asserted that it is unnecessary to notify a regulatory authority of those changes if the persons involved do not control the manner in which mining and reclamation operations are conducted. As noted above, we are not adopting the rule as proposed. Final § 774.12 does not require any reporting of changes in surface or mineral ownership unless that change alters the ownership or control status of the persons involved.

Commenters suggested that we should only require updates of ownership and control information either annually or at the time of mid-term permit review (every two and a half years). We decline to adopt the commenters' suggestions because the recommended update intervals are too infrequent for maintenance of the reasonably accurate and complete database needed to ensure accurate section 510(c) permit eligibility determinations.

One commenter claimed that a permittee may not learn of an ownership change until a long time after it occurs. We believe that permittees will always either be aware of, or be in a position to be aware of, changes in ownership or control at the time that the change occurs.

One commenter opposed categorizing these information updates as permit revisions. The final rule does not classify these updates as permit revisions.

Commenters asked if a permittee's failure to comply with the 60-day reporting requirement would require a notice of violation. Since this rule applies only to permits that have already been issued, failure to comply would subject to the permittee to enforcement action under part 843 of our rules. We have no basis for distinguishing between a failure to comply with this reporting requirement and a failure to comply with any other

reporting requirement applicable to permittees, such as water monitoring.

Several commenters requested clarification as to who would be subject to proposed § 774.13(e) and whether proposed § 774.17 would include changes in certified officers and directors. Both the proposed and final rules clearly place the responsibility for submitting the information updates on the permittee. Final § 774.12 requires reporting of all changes in owners and controllers.

A commenter asked under what circumstances and authority regulatory authorities could investigate reported and unreported changes. The commenter said the ability of States to thoroughly investigate multi-State entities is limited and that States would likely have to rely on assistance from the AVS Office.

A regulatory authority may investigate any circumstance, including changes of ownership or control information, at any time the regulatory authority believes the circumstances warrant. The AVS Office has assisted, and will continue to assist, State regulatory authorities with investigations at a variety of levels.

*Q. Section 774.17—Transfer, Assignment, or Sale of Permit Rights*

We proposed to revise the provisions for the transfer, assignment, or sale of permit rights in § 774.17 to distinguish between those instances when a new permit would be required and those instances requiring only approval of a change to existing permit information. We also proposed to revise the definition of *successor in interest*.

We are not adopting the proposed revisions to § 774.17. Because of the numerous comments we received on the proposed revisions, we decided to further study issues and considerations regarding the transfer, assignment, or sale of permit rights.

*R. Section 778.5—Definitions*

As proposed, § 778.5 would have included definitions and examples of ownership and control. Instead of creating this new section, we are adopting revised versions of the proposed definitions in final § 701.5. The definitions in the final rule also incorporate revised versions of the proposed examples. See the discussion of "*own, owner, or ownership*" and "*control or controller*" in section VI.A. of this preamble.

*S. Section 778.10—Information Collection*

In this final rule, the section we adopt from proposed § 778.10 is found at § 778.8.

We proposed to revise the information collection burden for part 778. We are redesignating previous § 778.10 as new § 778.8 which contains the information collection requirements for part 778 and the Office of Management and Budget (OMB) clearance number.

In this final rule, § 778.8(a) is revised to show the new OMB clearance number for this part is 1029-0117. The provision under § 778.8(b) is revised to adjust the estimated public reporting burden from 48 hours to 27 hours. The revision is the result of reductions in use and in programmatic changes. The estimate represents the average response time.

*Summary of Comments and Adjustments to Burden Estimates*

We considered information from the individuals who commented on information collection aspects of the proposed rule. In general, commenters stated that the estimated information collection burden related to the proposed rule was too low. Commenters generally did not mention any specific rule change which was underestimated or any specific number of hours that would alter the OSM estimate.

A commenter stated that the burden hours should be 600 hours, instead of 25 hours, for part 778. We compared the commenter's estimate with other data collected from industry sources and found them too inconsistent to use in the estimate. While we might otherwise be inclined to incorporate an estimate larger than the one published in the proposed rule, we have not in this instance because the discrepancy is so large. As such, the comment was not accepted. Instead, the estimated burden hours in this final rule remain approximately the same as proposed.

*T. Section 778.13—Legal Identity and Identification of Interests*

The regulations we adopt from proposed § 778.13 are found at §§ 778.9, 778.11, 778.12, and 778.13. We proposed to revise previous § 778.13 to emphasize the importance of full disclosure of ownership and control information.

We originally adopted regulations on this subject in §§ 778.13 and 778.14 of our 1979 rules, which we substantially revised in 1989. See 44 FR 15021 (March 13, 1979) and 54 FR 8982 (March 2, 1989). In *NMA v. DOI*, the U.S. Court of Appeals for the D.C.

Circuit invalidated the 1989 permit information rule, including §§ 778.13 and 778.14, on the narrow grounds that it was centered on the invalidated 1988 ownership or control rule. 105 F.3d at 692, 696. In our 1997 IFR, which we adopted in response to the *NMA v. DOI I* decision, we cured the defects noted by the Court and repromulgated §§ 778.13 and 778.14 in a form that contained few other substantive changes from the 1989 rule. See 62 FR 19450, 19453–54 (April 21, 1997).

The National Mining Association challenged the IFR, arguing it was *ultra vires* because it required submission of permit application information not expressly required under sections 507(b) and 510(c) of the Act. The U.S. Court of Appeals upheld the permit information requirements in the IFR, stating:

This court has already held, however, 'that the Act's explicit listings of information required of permit applicants [in sections 507 and 508] are not exhaustive, and do not preclude the Secretary from requiring the states to secure additional information needed to ensure compliance with the Act.' *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514 (D.C. Cir.) (en banc), cert. denied, 454 U.S. 822, 102 S.Ct. 106, 70 L.Ed.2d 93 (1981). Because section 510 is by its terms no more exhaustive than sections 507 and 508, we conclude the Secretary may require schedule information not specifically listed in any of the cited provisions of the Act.

*NMA v. DOI II*, 177 F.3d 1, 9 (D.C. Cir. 1999).

The information submission requirements in this final rule are similar to the requirements previously upheld by the Court of Appeals. To the extent that the provisions we adopt today correspond to provisions in our previous rules, we continue to rely upon the rationales set forth in the preambles to the prior rulemakings. See 44 FR 15021–25 (March 13, 1979); 54 FR 8982–90 (March 2, 1989); 59 FR 54347–49 (October 28, 1994); 62 FR 19452–54 (April 21, 1997).

#### Summary of Rule Changes

The regulations we are adopting today differ from both the previous and proposed regulations in that the final regulations reflect greater use of plain language principles and clarify that the identity, ownership and control, and permit history information requirements pertinent to a permit applicant or permittee also apply to an operator.

The most significant new provisions of this final rule: (1) Require that the natural person who will have the greatest level of effective control over the entire proposed surface coal mining operation certify as to his or her ability to control the proposed operation; (2)

allow applicants to identify the specific portion(s) or aspect(s) of an operation that their owners and controllers own or control; (3) allow an applicant having other active permits to use AVS to provide required permit application information if the applicant certifies that all of the relevant part of the information already in AVS is accurate, complete, and up-to-date; and (4) allow a regulatory authority to establish a central file for permittees with multiple permits to eliminate duplicate information in permit files.

#### Final § 778.9 Certifying and Updating Existing Permit Application Information

This new section includes two provisions intended to reduce the paperwork and information collection burden on applicants and regulatory authorities. Originally proposed as § 778.13(o), final § 778.9(a) allows permit applicants to (1) certify that existing information in AVS is accurate and complete and (2) include the certification in an application instead of submitting duplicate information separately for each new application. Final § 778.9(c), which we proposed as § 778.13(p), allows regulatory authorities to establish a central file for an applicant instead of keeping duplicate information for each application and permit.

Final § 778.9(b) requires permit applicants to swear or affirm that the information provided in an application is accurate and complete. We are adding this provision in response to comments to emphasize the importance of disclosure of accurate and complete application information.

Final § 778.9(d) consolidates the requirements of previous §§ 778.13(k) and 778.14(d) without making any substantive changes to the previous rules. Section 778.9(d) specifies that, after an application is approved but before a permit is issued, an applicant must update, correct, or indicate that no change has occurred in the information provided under final §§ 778.9 and 778.11 through 778.14. Final §§ 778.11 through 778.14 contain applicant identity, operator identity, ownership and control, permit history, property interest, and violation information requirements.

#### Final § 778.11 Providing Applicant, Operator, and Ownership and Control Information

We moved those portions of previous and proposed § 778.13 that pertain to the identity of the applicant, operator, owners, controllers, and other persons with a role in the proposed surface coal mining operation to new § 778.11.

Except for the changes noted above under the heading "Summary of Rules Changes" and the modifications discussed below, final § 778.11 is substantively identical to previous §§ 778.13(a), (b), and (c).

The proposed rule would have replaced the provisions in previous § 778.13 for voluntary submission of social security numbers and mandatory submission of employer identification numbers with a requirement for submission of taxpayer identification numbers. Commenters objected to the proposed requirement as burdensome and challenged its legality. In response, §§ 778.11 and 778.12 of this final rule require taxpayer identification numbers only for permit applicants, permittees, and operators. Thus, this final rule is consistent with 31 U.S.C. 7701(c), which requires that applicants for a Federal permit, recipients of a Federal permit, and persons who owe fees to a Federal agency furnish their taxpayer identification numbers.

Final § 778.11(c)(5) is a new provision that allows an applicant to identify which of its owners or controllers own or control only a portion or aspect of the proposed surface coal mining operation. We made this change because some of an applicant's owners and controllers may have responsibilities only for distinct portions or aspects of an operation. However, if an applicant elects to identify owners and controllers that only own or control a portion or aspect of a proposed operation, the applicant must account for ownership and control of all portions or aspects of the proposed operation in the application. In addition, when an owner or controller ceases to own or control a portion or aspect of an operation, the permittee must update the permit within 60 days of the change to identify the replacement owner or controller. See final § 774.12(c).

Final § 778.11(d) is a new provision. It requires that the natural person with the greatest level of effective control over the entire proposed surface coal mining operation certify, under oath, that he or she controls the proposed operation. Proposed as § 778.13(m), the certification requirement would have extended to all of an applicant's owners and controllers. However, in response to comments and upon further deliberation, the final rule applies the certification requirement only to the natural person with the greatest level of effective control over the entire proposed surface coal mining operation.

We are not adopting the portion of proposed § 778.13(m) that would require owners and controllers to certify that they would be under the

jurisdiction of the Secretary for compliance purposes. A certification of this nature cannot and would not expand jurisdiction beyond the limits already established by the Act and regulatory program. Therefore, it is unnecessary.

We also are not adopting the portion of proposed § 778.13(m) that would have extended the information disclosure requirements of final § 778.11 to “all other persons who will engage in or carry out surface coal mining operations as an owner or controller on the permit.” Since final § 778.11(c)(5) already requires disclosure of information concerning persons who own or control either an applicant or an operator, the proposed rule is unnecessary. The definitions of “*own, owner, and ownership*” and “*control or controller*” in final § 701.5 will suffice to identify those persons subject to the application information disclosure requirements of § 778.11.

We are also not adopting in part 778 the portion of proposed § 778.13(c)(1)(iii) that would have required, in part, that a permittee submit the date of departure of an owner or controller whenever a cessation order was issued. Proposed § 778.13(c)(1)(iii) was substantively identical to previous § 778.13(c)(3). Instead, the final rule incorporates the requirement for a permittee to provide the date of departure for an owner or controller into new § 774.12(a), which contains information update requirements for permittees.

#### Final § 778.12 Providing Permit History Information

We are adding new § 778.12 to require the disclosure of the mining and permit history of an applicant, operator, and certain other persons with a role in the proposed surface coal mining operation. Final § 778.12 is substantively identical to previous §§ 778.13(d) through (f), with the exception of the changes previously noted above under the heading “Summary of Rule Changes” and the modifications discussed below.

Proposed § 778.13(e) would have required that an applicant provide all names under which the partners or principal shareholders of the applicant and operator operate or previously operated a surface coal mining and reclamation operation in the United States within the five years preceding the date of application. We are adopting a revised version of this proposed rule as final § 778.12(a). To increase consistency with section 507(b)(4) of the Act, 30 U.S.C. 1257(b), we are extending this requirement to the applicant and replacing the term “surface coal mining

and reclamation operation” with “surface coal mining operation.” Like the final rule, the Act applies this requirement to the applicant, and it does not require information concerning reclamation operations. We are extending this requirement to the operator and the operator’s partners or principal shareholders for internal consistency with other regulations. Hence, this final rule requires that an applicant must provide all names under which the applicant, the operator, the applicant’s partners or principal shareholders, and the operator’s partners or principal shareholders operate or previously operated a surface coal mining operation in the United States within the five-year period preceding the date of the application.

Final § 778.12(a) also differs from previous § 778.13(d) in that, like section 507(b)(4) of the Act, it requires only a list of names under which these persons operate or previously operated a surface coal mining operation. The final rule does not include the permit identification information that the previous rule required. As discussed below, we will require permit identification information only for those surface coal mining operations specified in final § 778.12(c).

Proposed § 778.13(g) would have required detailed permit history information about permits for surface coal mining operations held by the applicant or the operator during the five years preceding the date of the application. The corresponding provisions of previous § 778.13(d) and (f) required detailed permit history information for all surface coal mining operations either: (1) currently owned or controlled by the applicant (previous § 778.13(f)), or (2) currently or previously owned or controlled by the applicant or the applicant’s partners or principal shareholders within the five years preceding the date of the application (previous § 778.13(d)). After evaluating the comments received, we are adopting a middle course to ensure that we receive sufficient information to make an informed permit eligibility decision under section 510(c) of the Act while otherwise minimizing information collection burdens on permit applicants. Accordingly, § 778.12(c) of the final rule requires detailed permit history information for all surface coal mining operations that the applicant or operator: (1) currently owns or controls, or (2) owned or controlled during the five-year period preceding the date of application. For the same reason, we also decided to retain the substance of previous § 778.13(f)(2), which the proposed rule

would have eliminated. We are codifying this provision as final § 778.12(c)(5). Like previous § 778.13(f)(2), final § 778.12(c)(5) requires that the permit history of each operation include the permittee’s and operator’s relationship to the operation, including the percentage of ownership and location in the organizational structure.

As we proposed, we are eliminating the requirement in previous § 778.13(f)(1) for submission of the date each MSHA identification number was issued. In our experience, this information has no practical value in implementing SMCRA.

#### Final § 778.13 Providing Property Interest Information

This section of the final rule requires the disclosure of mineral and surface ownership information for the proposed permit and adjacent areas. Final § 778.13 is derived from proposed §§ 778.13(h) through (k) and is substantively identical to the property interest information requirements in previous §§ 778.13(g) through (j).

#### Proposed § 778.13(n) Is Not Adopted

Proposed § 778.13(n) would have required that an applicant submit the information required under proposed §§ 778.13 and 778.14 in any format we prescribe. We are not adopting this provision because existing § 777.11(a)(3) already requires an applicant to submit all permit application information in any format that the regulatory authority prescribes. We see no purpose in duplicating this requirement in part 778. We also see no need for a counterpart to previous § 778.13(l), which, to facilitate data entry into AVS, required that an applicant submit the information required under proposed §§ 778.13 and 778.14 in any format that OSM prescribed. Section 773.8 of this final rule adds a new requirement that the regulatory authority enter all application data into AVS. Hence, there is no longer a need for a rule specifying that application information be submitted in an OSM-prescribed format. As the agency responsible for data entry, the regulatory authority should have the flexibility to prescribe whatever format it deems appropriate.

#### General Comments on Proposed § 778.13

One commenter expressed support for continuing to require disclosure of the persons who own or control an applicant and other information in the permit application process. However, the commenter also expressed concern that the proposed rule weakens

responsibility for providing accurate and complete information. We disagree. Nothing in the proposed rule altered the requirement of previous § 773.15(c)(1), now final § 773.15(a), that an application be complete and accurate. However, to provide additional assurance, we have added § 778.9(b), which requires that applicants swear or affirm that the information in a permit application is accurate and complete. In addition, under part 847 of this final rule, if a regulatory authority determines that an applicant has intentionally omitted information from an application, that person may be prosecuted under section 518(g) of the Act, 30 U.S.C. 1268(g), for knowingly making a false statement or a knowing failure to provide required information. See final § 847.11(a)(3).

A commenter asked whether a contract operator who is also the applicant is subject to information disclosure requirements. All applicants are subject to the same information disclosure requirements under part 778.

One commenter encouraged us to continue to require "upstream" information. The final rule does so, partly because section 507(b) of the Act mandates collection of most of this information, and partly because regulatory authorities use this information for other purposes under the Act, including alternative enforcement and future permit eligibility determinations should an owner or controller of a permittee later become an applicant.

Another commenter argued that the information requirements of proposed §§ 778.13 and 778.14 vastly exceed the information Congress authorized the agency to collect in sections 507 and 510(c) of the Act. We acknowledge that our rules require more information than is expressly required under the statutory provisions cited by the commenter. However, under section 201(c)(2) of the Act, we have the authority to adopt "such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." We are not limited to the specific permit application requirements of section 507 and 510(c) of the Act. See *NMA v. DOI II*, 177 F.3d at 9. The information required by our final rule will assist us in determining permit eligibility under section 510(c) of the Act, which prohibits issuance of a permit to any person who owns or controls an operation with an outstanding violation. There is no limitation on the scope of that prohibition, even though section 510(c) only requires a schedule of violation notices received during the previous 3 years. We also need the

information in our final rule to assist us in evaluating the accuracy and completeness of other permit applications, and, when appropriate, identifying the persons that may be subject to alternative enforcement actions. For example, we need identifying information about persons who own or control the applicant or operator to verify the applicant's statement under section 507(b)(5) of the Act as to "whether the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant" has ever forfeited a mining bond or had a mining permit suspended or revoked within the 5-year period preceding the date of application.

One commenter asserted that the proposed rule disregarded the purposes of the Act's permit application information requirements. We disagree. Section 102(d) of SMCRA states that the purposes of the Act is to "establish a nationwide program to protect society and the environment from adverse effects of surface coal mining operations." Collecting the information needed to implement the permit block sanction of section 510(c) and pursue alternative enforcement is fully consistent with this purpose.

A commenter expressed concern about the liability of a person who prepares or signs an application. Except as specifically provided in § 847.11(a)(3) of this rule or another provision of our existing regulations or the Act, we are not ascribing any form of liability to anyone who prepares or signs an application.

The commenter also expressed concern about the liability of persons erroneously listed in an application as owners or controllers. Any person listed as an owner or controller in an application may challenge that listing under final §§ 773.25, 773.26, and 773.27.

One commenter noted that *NMA v. DOI II* (177 F.3d at 5) allows us to consider past ownership and control of operations with violations when determining a pattern of willful violations under section 510(c) of the Act, 30 U.S.C. 1260(c). To facilitate this determination, the commenter suggested that the final rule require submission of information on past ownership or control relationships.

We are not adopting the commenter's suggestion. Under final § 773.8(b) and (c), a regulatory authority must enter and update ownership and control information and violation information provided in permit applications into AVS. We retain this information in AVS as application history and, once a

permit is issued, as permit history. Because regulatory authorities have been entering this information for over a decade, the AVS data base, combined with new information submitted in a permit application, should enable a regulatory authority to determine past ownership or control relationships when necessary.

Another commenter suggested that, based on the retroactivity holding in *NMA v. DOI II*, we should revise our information disclosure regulations to require applicants to report ownership or control relationships and violations with reference to whether the relationships and violations occurred before or after November 2, 1988, the effective date of the October 3, 1988, "ownership and control" rule. We see no need to make the suggested change. Final §§ 778.11(e) and 778.14(c) require that an applicant provide dates associated with ownership or control relationships and violations. AVS contains an historical record of these dates. Hence, regulatory authorities will have the information needed to make permit eligibility determinations using whatever cutoff date applies.

A commenter stated that because *NMA v. DOI II* invalidated our previous rule's presumption of ownership or control for officers and directors, we should only require information for presidents, not for other officers and directors. We disagree. Under section 507(b)(1) and (4) of the Act, 30 U.S.C. 1257(b)(1) and (4), each permit application must include information about officers, directors and principal shareholders. In addition, the court's invalidation of the previous presumption does not mean that officers and directors are never owners or controllers. Furthermore, a regulatory authority may need this information to determine ownership or control relationships and eligibility for alternative enforcement actions under parts 843, 846, and 847 of our rules or the State program equivalents.

One commenter stated that the proposed rules improperly confused the terms "owner" and "controller" with the person carrying out the mining operation. According to the commenter, under the *NMA v. DOI* decision, the obligations of these two entities should be kept separate. We disagree. The court did not address this issue. However, as discussed elsewhere in this preamble, we are not adopting proposed § 778.13(b)(5), which would have specifically required information about any person "who will engage in or carry out surface coal mining operations as an owner or controller on the permit." We have also eliminated the "engage in or

carry out” terminology from the certification requirements of final § 778.11(d), which we proposed as § 778.13(m). These modifications should eliminate any confusion. The operative principle is whether a person meets the criteria in the ownership and control definitions in § 701.5 of this rule.

Comments on Proposed § 778.13(b)

Numerous commenters objected to the requirement in proposed § 778.13(b) for disclosure of taxpayer identification numbers, especially when that number is a social security number. One commenter stated that the preamble to the proposed rule incorrectly characterized 31 U.S.C. 7701 as providing a basis for this requirement. Several commenters urged us to require that social security numbers be kept confidential, both for privacy reasons and because State regulatory authorities would have a difficult time convincing people to divulge their social security numbers on an application that is open to public inspection and review. Another commenter said the Social Security Administration does not allow social security numbers to be used for this purpose.

We disagree with the commenters’ assertions that we lack the authority to require submission of taxpayer identification or social security numbers. The Debt Collection Improvement Act of 1996 revised 31 U.S.C. 7701 to read—

Sec. 7701. Taxpayer Identifying Number

(a) In this section—

\* \* \* \* \*

(2) “taxpayer identifying number” means the identifying number required under section 6109 of the Internal Revenue Code of 1986 (26 U.S.C. 6109).

\* \* \* \* \*

(c)(1) The head of each Federal agency shall require each person doing business with that agency to furnish to that agency such person’s taxpayer identifying number.

(2) For purposes of this subsection, a person shall be considered to be doing business with a Federal agency if the person is—

\* \* \* \* \*

(B) an applicant for, or recipient of, a Federal license, permit, right-of-way, grant, or benefit payment administered by the agency or insurance administered by the agency;

\* \* \* \* \*

(D) assessed a fine, fee, royalty or penalty by the agency; \* \* \*

Persons who apply for or receive permits for which we are the regulatory authority lie within the scope of 31 U.S.C. 7701(c)(2)(B) because those permits are Federal permits. Furthermore, under 30 CFR 773.17(g),

all SMCRA permittees have an obligation to ensure payment of the Federal reclamation fees required under 30 CFR part 870. Therefore, all permit applicants and permittees under both State and Federal regulatory programs approved under SMCRA lie within the scope of 31 U.S.C. 7701(c)(2)(D). Operators of coal mining operations lie within the scope of 31 U.S.C. 7701(c)(2)(D) because section 402 of SMCRA and 30 CFR part 870 provide that those operators have an obligation to pay Federal reclamation fees. Hence, operators, permit applicants, and permittees for surface coal mining operations under both State and Federal regulatory programs under SMCRA are subject to 31 U.S.C. 7701(c)(1), which requires submission of a taxpayer identifying number. To ensure consistency with 31 U.S.C. 7701(c), we have modified final §§ 778.11 and 778.12 to provide that the application need only include taxpayer identification numbers for permit applicants, permittees, and operators.

The Internal Revenue Code specifies that “the identifying number of an individual (or his estate) shall be such individual’s social security account number.” 26 U.S.C. 6109(a). See also 26 U.S.C. 6109(d), which restates this requirement. As noted in the preamble of the proposed rule, a taxpayer identification number means an employer identification number for businesses and a social security number for individuals. 63 FR 70605–06, December 21, 1998.

With respect to privacy concerns, we note that, under the previous rules, many individuals voluntarily supplied their social security numbers to regulatory authorities to ensure that they would not be confused with other individuals who have the same name. In addition, when we made on-line access to AVS available to the general public, we modified the system to ensure that only regulatory authorities are able to view social security numbers when accessing AVS via the Internet.

Several commenters requested clarification on how to address “foreigners who serve as directors of U.S. companies who may not have social security numbers.” One commenter asked if social security numbers for individual owners or controllers are required if the application includes an employer identification number for the company. As discussed above, the final rule requires taxpayer identification numbers only for the applicant or permittee and the operator, not individual directors, owners, or controllers.

Another commenter stated that the proposed rule confuses operations, which are not legal entities, with the legal entities which conduct them. Specifically, the commenter noted that the entity conducting a mining operation would have a taxpayer identification number, but the operation itself would not. We acknowledge that the wording of both the previous and proposed provisions was ambiguous. The final rule at § 778.12(c)(2) eliminates this ambiguity by clearly specifying that the application must include the taxpayer identification numbers for the permittee and operator.

Comments on Proposed § 778.13(c)

One commenter opposed requiring the same information from both applicants and their owners and controllers. The commenter asserted that identification of the owners and controllers of an applicant is sufficient to determine permit eligibility should the current applicant have an unabated violation. As previously discussed, we use the application information concerning owners and controllers for purposes other than determining permit eligibility under §§ 773.12 through 773.14 of this rule and section 510(c) of the Act.

One commenter suggested that proposed § 778.13(c)(1)(iii) be revised to require that a person’s date of departure be included at the time the application is submitted, instead of only when a cessation order is issued. We are not adopting this suggestion because the departure would not have occurred at the time of permit application. However, we are adopting a new provision at § 774.12(c) to require that additions, departures, or changes in the position of any person identified in § 778.11(c) be reported to the appropriate regulatory authority within 60 days of the change. Routine updates, including departure dates, may be reported as soon as a change occurs.

Proposed § 778.13(c)(2) would have limited the information required from publicly traded corporations. One commenter supported the proposed provision. Other commenters opposed any reduction in the information required from publicly held corporations because this information would allow for a more thorough review. After further analysis, we are not adopting the proposed rule because we could not find sufficient support in the Act for differential treatment of publicly traded corporations. Under the final rule, corporate applicants are subject to the same information disclosure requirements regardless of

whether the corporation is privately held or publicly traded.

One commenter noted that the list of persons for whom information must be submitted in a permit application differs from the list of persons in the proposed ownership and control definitions. We did not intend these lists to be identical. Section 507(b)(4) of the Act, 30 U.S.C. 1257(b)(4), requires permit application information concerning certain persons even if they are not owners or controllers under our final definitions of "own, owner, or ownership" and "control or controller."

Another commenter asked why proposed § 778.13(c)(3)(v) required identification of entities that own between 10 and 50 percent of the stock of a corporation since these stockholders are not necessarily owners or controllers. Like the previous and proposed rules, final § 778.11(c)(4) includes this requirement because section 507(b)(4) of SMCRA, 30 U.S.C. 1257(b)(4), mandates the collection of this information.

Numerous commenters said that we should revise proposed § 778.13(c)(3)(v) to limit its scope to persons who directly own the applicant itself, rather than including persons farther upstream, such as a person who owns the owner of the applicant. We are not adopting this suggestion. The ownership information we require under § 778.11(c)(4), the final rule's counterpart to the proposed provision, may be useful, for example, in assessing permit application accuracy and completeness, in identifying persons subject to the permanent permit block sanction under section 510(c) of the Act, or other enforcement actions, and future permit eligibility determinations.

Several commenters suggested that the final rule should include a dilution formula to determine the percentage of ownership for "upstream" owners and minimize the information collection burden by restricting reporting requirements to persons who actually own 10 percent or more of the applicant after application of the formula. We asked for input on the dilution formula concept during the public outreach preceding the development of our proposed rule. Since we received little support for this concept, we did not propose a formula. The commenters presented no new arguments in favor of this concept. Therefore, we are not adopting their suggestion. Final § 778.11(c)(4) requires information concerning all persons who own 10 to 50 percent of an applicant. If a person owns an entity, that person also owns all entities owned by the first entity.

One commenter opposed "any effort to restrict responsibility for owners of operations to [those who have] more than 10 percent ownership." Ten percent ownership is the information reporting threshold established by section 507(b)(4) of the Act. However, if a person owning less than 10 percent of an entity is nonetheless a controller of that entity under the definition of "control or controller" in final § 701.5, final § 778.11 requires that an applicant report information pertaining to that person as well.

#### Comments on Proposed § 778.13(d)

Proposed § 778.13(d) would have provided that an applicant need not report the identity of any corporate owner not licensed to do business in any State or territory of the United States. One commenter expressed support for the proposed provision on the basis that it would eliminate unnecessary information in AVS. The commenter also asked if these entities would be removed from AVS once a final rule is adopted, and if not, would they be considered in permit eligibility determinations. After further analysis, we are not adopting the proposed rule because the Act provides little if any support for excluding this information. In addition, adopting the proposed exclusion would compromise the accuracy and completeness of information in AVS.

#### Comments on Proposed § 778.13(g)

One commenter expressed support for eliminating the requirement to provide the date of issuance for the MSHA identification number. We are eliminating this requirement as proposed.

#### Comments on Proposed § 778.13(h) and (i)

Two commenters requested that the timeframes in proposed § 778.13(h) and (i) be extended from 30 to 90 days because of the extensive research needed to document the name and address of each legal or equitable owner of record within and adjacent to the proposed permit area. Since neither the previous regulations nor the proposed rules contained any timeframes for preparation of a permit application, we are not adopting this suggestion.

#### Comments on Proposed § 778.13(m)

Proposed § 778.13(m) would have required that, before permit approval, the persons who will engage in or carry out surface coal mining operations as owners or controllers of the proposed operation must certify that they have the ability to control the operation and that

they are under the jurisdiction of the Secretary for the purposes of compliance with the terms and conditions of the permit and the requirements of the regulatory program.

Numerous commenters opposed this proposal, especially its application to all owners and controllers. In response to these comments, § 778.11(d) of this final rule requires only that the natural person with the greatest level of effective control over the entire proposed surface coal mining operation submit a certification in the application, under oath, that he or she controls the proposed operation. Identifying this person is of greater value than requiring that all owners and controllers certify as to their ability to control the proposed surface coal mining operation. Every surface coal mining operation should have one individual who is responsible for everything that occurs with respect to that operation. We anticipate that this individual normally will be the president of the applicant or a person who holds an equivalent office. However, depending on the circumstances, the individual may be someone else.

Many commenters also opposed proposed § 778.13(m) because it appeared to ascribe personal liability for compliance to the person providing the certification. One commenter expressed concern that the certification would serve as a personal guarantee of the permittee's obligations. The commenter questioned the legal basis for demanding such a guarantee as a prerequisite for permit issuance. Another commenter argued that the certification provision improperly assigned the responsibilities of the applicant or permittee to the owner or controller.

We are not adopting that part of proposed § 778.13(m) that would have required owners and controllers to certify that they were subject to the jurisdiction of the Secretary of the Interior. This portion of the proposed rule was related to proposed § 773.17(j), which would have assigned joint and several liability for compliance to all owners and controllers and made them subject to the Secretary's jurisdiction. However, as discussed elsewhere in this preamble, we decided not to adopt that provision. Therefore, the final rule does not ascribe any personal liability to the person who provides the certification. That person's liability is limited to whatever liability the person already has under other provisions of law or regulation, such as the individual civil penalty provisions of 30 CFR part 846 and corporate and common law governing personal liability for the

applicant's actions or inaction. We acknowledge that certification cannot expand the Secretary's jurisdiction beyond the limits established by the Act.

Several commenters argued that the certification should be required at the time that a violation occurs, rather than at the time of application for a permit. We disagree. A regulatory authority needs this information at the time of application so that it is readily available when a violation occurs. Applicants are generally more willing to identify owners and controllers than are permittees in violation.

One commenter found the certification provision confusing because, according to the commenter, proposed §§ 773.17(i), 773.22, and 773.25 use the terms "owner" and "controller" in an inconsistent manner and establish three different standards of ownership and control, in addition to the definitions of those terms proposed at § 778.5. We disagree with the commenter's characterization of the proposed rule (and, by extension, this final rule). In § 701.5 of this final rule, we define "own, owner, or ownership" and "control or controller." These definitions establish the standards for ownership and control that apply throughout relevant portions of the final rule, even as similar definitions of similar terms applied throughout relevant portions of the proposed rule. We find no inconsistencies in the use of these terms in our rules nor do our rules differ in terms of the standards for ownership and control.

Commenters asserted that the final rule must include a provision for decertification to ensure that a certified controller who leaves an operation would not remain subject to the permit block sanction for violations associated with an operation over which he or she no longer has control. We see no need to add the requested provision. Under final § 774.12(c), a permittee must update the permit within 60 days of the date that the person certified under final § 778.11(d) leaves or changes positions. And under final § 774.11(a), the regulatory authority must enter the updated information into AVS within 30 days of the date that the permittee submits it. These provisions should adequately address the situation about which the commenter expressed concern. Further, any owner or controller, including a certifying controller, may use the challenge procedures at final §§ 773.25 through 773.27 to challenge any ownership or control listing or finding which they believe to be in error.

Several commenters expressed concern that certification would lead to penalties for "honest mistakes, innocent omissions, and possibly even deliberate actions that have absolutely no impact on the environment." This comment overlooks the fact that, under the permit eligibility provisions of section 510(c) of the Act, the operative question is whether those mistakes, omissions, or deliberate actions resulted in a violation that has not been abated or corrected or is not in the process of being abated or corrected. The reasons for those violations do not matter in this context.

One commenter stated that there is no need for certification if all officers are deemed controllers. Neither the proposed nor the final rules classify all officers as deemed controllers. Instead, they list officers as an example of persons who may be controllers depending upon the extent to which they direct or influence the operation. See the definition of "control or controller" in § 701.5 of this final rule.

A commenter stated that the certification requirement causes uncertainty "when linking the applicant to the outstanding violations of its controllers." We disagree. This rulemaking is consistent with the *NMA v. DOI* decision in that the unabated or uncorrected violations of the owners and controllers of an applicant in no way obstruct the applicant's ability to obtain a permit. The certification requirement for the natural person with the greatest level of effective control over the entire proposed surface coal mining operation is an application information requirement. It is independent of the determination of permit eligibility for an applicant.

#### Comments on Proposed § 778.13(o)

Several commenters supported adoption of proposed § 778.13(o), which provided that a permit applicant may certify that information already in AVS is accurate and complete, either in whole or in part, instead of resubmitting the information for each new application. The commenters said the provision would reduce the burden on both the applicant and the regulatory authority. For this reason, we are adopting the proposed provision as final § 778.9(a) in this rule.

One commenter objected to proposed § 778.13(o) on the basis that it shifted the responsibility for submitting accurate and complete information from the applicant to the regulatory authority. We disagree. Both the proposed and final rules clearly provide that the applicant must certify that the information in AVS is accurate and complete.

The same commenter also argued that paper records are needed to facilitate public review. Again, we disagree. The public has access to AVS, so the lack of paper records should not foreclose the opportunity for the public to review electronic records or to obtain printouts of those records.

Another commenter suggested that, in the case of a corporate applicant, one official should be able to certify that AVS information is accurate and complete. The proposed and final rules do not differentiate between corporate and other applicants. In both cases, the rules require that an applicant certify that the information in AVS is accurate and complete. If corporate bylaws allow one official to provide this certification for the corporation, then only that official's certification is required with respect to AVS information.

#### Comments on Proposed § 778.13(p)

Numerous commenters supported adoption of proposed § 778.13(p), which provided that regulatory authorities may establish a central file to house identity information instead of keeping duplicate information in each application or permit file. We are adopting the proposed provision as final § 778.9 in this rule.

One commenter suggested that the applicant should be responsible for creating a central file and submitting it to the regulatory authority for review and approval. The commenter said that after this approval an applicant would no longer be required to submit the same information with each application. In keeping with the principles of State primacy, both the proposed and final rules allow the regulatory authority to decide whether and how to establish a central file. We do not see any merit in restricting regulatory authority flexibility by mandating a particular method in this final rule. However, creation of a central file does not relieve an applicant of the responsibility, as a part of each application, to either certify that the information in AVS is accurate and complete or update that information as needed, as required by § 778.9(a) of this final rule.

Another commenter expressed concern that State regulatory authorities are not as diligent as the AVS Office when it comes to maintaining the accuracy of the records in their systems. The commenter stated that industry must not be held responsible for information in State files that is not as current as the information in AVS. This comment lies beyond the scope of this rulemaking. In taking actions under this final rule, we will rely upon the most

current and accurate information available.

#### *U. Section 778.14—Violation Information*

The regulations we adopt from proposed § 778.14 are found at final § 778.14.

At the beginning of section VI.T. of this preamble, we provide a summary of the history of—and, in part, the rationale for—the provisions described in §§ 778.9, 778.11, 778.12, and 778.13 of this final rule. That discussion also applies to the provisions we are adopting in final § 778.14.

The permit application information requirements at proposed § 778.14 appear in modified form in final § 778.14, with the exception of proposed § 778.14(d), which we are adopting as final § 778.9(d). In general, the final rule differs from both the previous and proposed rules in that this final rule reflects greater use of plain language principles and clarifies that the violation and other information requirements of § 778.14 pertinent to a permit applicant also apply to the operator of a proposed surface coal mining operation.

#### Changes From Previous § 778.14

In addition to the general changes described above, final § 778.14 differs substantively from previous § 778.14 in the following respects.

- In final § 778.14(a)(2), we are limiting the reporting of past bond forfeitures to those that occurred in the five-year period preceding the date of submission of the application. Section 507(b)(5) of the Act, 30 U.S.C. 1257(b)(5), requires this information only for that period and we see no compelling reason to require data from prior years as part of this rule.

- In final § 778.14(b)(1), we are eliminating the requirement at previous § 778.14(b)(1) to submit dates of permit issuance. Providing the permit number and the name of the regulatory authority that issued the permit is sufficient to identify permits that have been suspended or revoked or for which a bond has been forfeited.

- In final § 778.14(c)(1), as proposed, we are eliminating the requirement for submission of the date an MSHA identification number was issued. We find this information to be of no practical value for SMCRA implementation purposes.

- In final § 778.14(c)(2), we are adding a requirement for submission of the identification number for each violation notice. The previous rule implied this requirement, but, because of the importance of the violation notice

identification number for tracking purposes, we decided to include an express requirement in the final rule.

- In final § 778.14(c)(8), we are no longer requiring that applicants submit information about the actions being taken to abate all violations listed under paragraph (c). Instead, we are limiting this requirement to violations not covered by the certification provision of paragraph (c)(7). That paragraph, like previous paragraph (c), allows an applicant to certify that, for violations included in notices of violation issued under § 843.12 or a State program equivalent, the violation is being abated to the satisfaction of the agency with jurisdiction over the violation, provided that the abatement period has not expired. There is no reason to require a description of corrective actions for violations covered by the certification since, in the absence of information to the contrary, the certification alone satisfies the eligibility requirements for a provisionally issued permit, as specified in § 773.14(b) of this final rule.

These changes are necessary or appropriate to improve consistency with the Act or other regulations or to respond to commenters' concerns about both the adequacy and extent of the information required under this section.

With the exception of the items discussed above and in this paragraph, final § 778.14 is identical, in substance, to previous § 778.14. New § 778.9(d) consolidates the procedurally identical requirements of previous § 778.13(k) and § 778.14(d) (proposed as §§ 778.13(l) and 778.14(d), respectively) without making any substantive changes to those provisions. As we also indicate above in section VI.T. of this preamble, final § 778.9(d) specifies that, after an application is approved but before a permit is issued, an applicant must update, correct, or certify that no change has occurred in the information previously submitted under §§ 778.9 and 778.11 through 778.14.

The proposed rule would have eliminated the requirement that an applicant certify that violations are in the process of being abated. We are not adopting the proposed change. Final § 778.14(c)(8) retains the certification requirement because of its utility in determining whether an applicant, may be eligible for a provisionally issued permit under final § 773.14(b).

#### Comments on Proposed § 778.14

Commenters asserted that we have authority to collect only the information specified in sections 507(b)(5) and 510(c) of the Act, 30 U.S.C. 1257(b)(5) and 30 U.S.C. 1260(c). Specifically, commenters stated that we must limit

the scope of § 778.14(c) to include only violations at operations owned or controlled by the permit applicant and then only if the violation notices were received during the three-year period preceding the date of application, since that is the only information that section 510(c) requires. We disagree. As discussed at length in the preamble to the 1989 version of the rule, we have ample authority under other provisions of the Act to adopt these regulations. See 54 FR 8986–87, March 2, 1989. Section 201(c)(2) authorizes the Secretary to “promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act.” Section 517(b)(1)(E) requires that a permittee “provide such other information relative to surface coal mining and reclamation operations as the regulatory authority deems reasonable and necessary.” In *In re: Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 527 (D.C. Cir. 1981), the U.S. Court of Appeals held that the Act's explicit listings of permit information were not exhaustive and did not preclude the Secretary from requiring additional information needed to ensure compliance with the Act. The court held that both sections 201(c)(2) and 501(b) of the Act provide adequate authority for the Secretary to require submission of additional information. The court referenced and reaffirmed that holding in *NMA v. DOI II*, 177 F.3d at 9. Because the section 510(c) permit block sanction applies on the basis of all outstanding violations, not just violations incurred during the 3-year period preceding the date of application, we need the additional information we require in § 778.14 to assist in making permit eligibility determinations. We also need this information to evaluate application accuracy and completeness.

A commenter said that proposed § 778.14(c) violates the holding in *NMA v. DOI II* by requiring submission of violation information for operations the applicant no longer owns or controls. In this final rule, we are not adopting that part of proposed § 778.14(c) that would have required information concerning outstanding violation notices received for any surface coal mining operation that the applicant owned or controlled. In this final rule, the requirement applies only to unabated or uncorrected violation notices received in connection with surface coal mining and reclamation operations that the applicant or operator owns or controls at the time an application is submitted. However, section 510(c) of SMCRA expressly requires applicants to list all

violation notices received during the three-year period preceding the date of an application. This requirement, which we are adopting as part of final § 778.14(c), must be met regardless of whether the applicant still owns or controls the operations that incurred those violations.

Several commenters argued that the information requirements in §§ 778.14(a) and (b) concerning permit suspensions and revocations and bond forfeitures from persons under common control with the applicant are inconsistent with *NMA v. DOI*. The commenters are mistaken. Nothing in the cited court decision prohibits collection of this information. Section 507(b)(5) of SMCRA, 30 U.S.C. 1257(b)(5), expressly requires submission of "a brief explanation of the facts involved" for permit suspensions and revocations and bond forfeitures experienced by "the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant." Our regulations appropriately flesh out this statutory requirement by requiring only the information relevant to identifying the circumstances of a permit suspension, revocation, or bond forfeiture and their bearing on permit eligibility.

Several commenters claimed that the proposed rule was flawed because it failed to address the requirement in section 510(c) of SMCRA to disclose violations of other environmental protection laws relating to air or water quality. Commenters also stated that noncompliance with this requirement is widespread, that inaccurate and incomplete disclosure of this information by applicants is the rule rather than the exception, that we have failed to enforce this provision for the past 22 years, and that we have failed to execute interagency agreements concerning the loading, listing, and cross-referencing of violations of State and Federal air and water laws by surface coal mining operations. The commenters said disclosure of air and water quality violations should be a part of "other information available to the regulatory authority" and that OSM and States should investigate the disclosure of this information by permit applicants.

We disagree that the proposed rule did not address these types of violations. Both proposed and final § 778.14(c) require a list of all violation notices received by an applicant during the three-year period preceding submission of an application as well as a list of all unabated or uncorrected violation notices incurred by operations the applicant or its operator own or

control as of the date of application. Both our previous regulation (§ 773.5) and this final rule (§ 701.5) define "violation notice" as including these types of violations. With respect to enforcement, we acknowledge that we have not been successful in negotiating a formal agreement on a national basis with other agencies such as the Environmental Protection Agency (EPA). However, we do enter air and water quality violations into AVS when we receive this information from appropriate agencies. For example, EPA's Region III, which has responsibility for compliance with the Clean Water Act in the major coal mining States of northern Appalachia, has provided selected violation information to us for the past three years.

The same commenters suggested that we define the phrase "other information available" as used in section 510(c) of the Act to include any violations of air or water quality laws related to mining operations owned or controlled by the applicant. The commenters also stated that regulatory authorities should contact Federal and State agencies in other States to determine compliance with air and water quality laws; that we should require State regulatory authorities to maintain data in AVS of all violations of air or water quality laws related to mining operations; that we should maintain a current database in AVS for violations incurred under Federally approved State air and water quality programs; and that each permitting agency should be required to withhold permit issuance pending a demonstration of compliance with air and water quality protection requirements, as required under section 510(c) of the Act.

To the extent that reliable information readily available to the regulatory authority indicates that the applicant is in violation of air or water quality requirements, we agree that section 510(c) of the Act requires that the permit be withheld. However, this obligation is limited to violations meeting our definition of violation in § 701.5 of this rule; i.e., the agency with jurisdiction over air or water quality must have provided the offending party with written notification of the failure to comply. This limitation is consistent with the reference in section 510(c) to "notices of violation \* \* \* incurred by the applicant." Section 510(c) requires use of both the violation schedule submitted with the application and "other information available to the regulatory authority" to determine permit eligibility. We decline to adopt the commenters' suggestions regarding

application of the "other information available" phrase because we do interpret that phrase as requiring only that regulatory authorities use all reliable information readily available to them in a useable form. It does not mean that they must actively seek out all potential sources of information concerning air and water quality violations. Furthermore, we have no control over the availability of air and water quality violation information, which, in our experience, other agencies may be reluctant to provide, either at all or in the form and detail needed for accurate permit eligibility determinations under section 510(c). As discussed above, although we have not been successful in negotiating national agreements for AVS data entry, we do have an arrangement with EPA Region III whereby we enter air and water quality violation information into AVS when EPA determines that it is appropriate to do so. States are free to negotiate separate information exchange agreements with other agencies, and we encourage them to do so.

In any case, under section 510(c) of the Act and this final rule, the applicant has the responsibility to include all violations of air or water quality laws and regulations in the violation schedule submitted with the application. The regulatory authority must consider the information in the schedule when making permit eligibility determinations.

Several commenters expressed support for the proposed elimination of the provision in § 778.14(c) that requires the applicant to certify that any violation in a notice of violation for which the abatement period has not expired is being corrected to the satisfaction of the agency with jurisdiction over the violation. Upon further analysis, we decided to retain the certification requirement, which appears in § 778.14(c)(8) of this final rule. In the absence of evidence to the contrary, an applicant's certification that a violation is being abated satisfies the requirement of section 510(c) that an applicant submit proof that a violation "has been or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation." Hence, certification is a useful tool in determining whether an applicant may be eligible for a provisionally issued permit under final § 773.14(b).

A commenter suggested that violation information required from applicants should also include all outstanding violation notices for any entity who owns or controls the applicant and who

is owned or controlled by the applicant or its owners and controllers. The commenter stated that, while some of this information cannot be used to determine permit eligibility, it could be used for other enforcement purposes. We decline to adopt the commenter's suggestion. Our final rule closely resembles the information requirements of sections 507(b)(5) and 510(c) of the Act, 30 U.S.C. 1257(b)(5) and 1260(c), respectively, with the addition of a requirement to provide information concerning all unabated or uncorrected violation notices received in connection with any operation that the applicant or its operator owns or controls. The latter information is the most relevant for determining permit eligibility under section 510(c) of the Act. We do not believe that there is sufficient justification for requiring the additional information sought by the commenter simply because it might be useful for unspecified "other enforcement purposes."

Several commenters said that the controller of a violation should mean the person who did not abate the violation, not the person who created it. We disagree. The person who caused, or was initially cited for, the violation and any persons who subsequently had the authority to correct the violation are collectively responsible for abating or correcting the violation, unless otherwise provided for by the Act, its implementing regulations, or established principles of business law.

Several commenters asserted that the language in proposed § 778.14(c) is not consistent with section 507(b)(5) of SMCRA. The primary statutory authority for the previous, proposed and final versions of § 778.14(c) is a combination of sections 201(c)(2) and 510(c) of the Act. Section 507(b)(5) of the Act is the primary statutory basis only for paragraphs (a) and (b) of § 778.14.

A few commenters suggested that listing cessation orders should be required, since a cessation order suspends all or part of the operation of the permit. Both proposed and final § 778.14(c) require the reporting of all violation notices, which we define in § 701.5 as including cessation orders.

Some commenters asserted that the rule should require reporting of violation notices received by entities in common control with the applicant. We disagree. The "under common control" provision applies only to information requirements under section 507(b)(5) of the Act, 30 U.S.C. 1257(b)(5). Since section 507(b)(5) does not require reporting of violation notices received by the persons to whom it applies, the

corresponding regulations in final §§ 778.14(a) and (b) also do not include this requirement.

The same commenters asserted that the information required in § 778.14 should include both abated and unabated violations. Final § 778.14(c) requires a list of all violation notices, both abated and unabated, that an applicant or operator received within the three-year period preceding the date of application. We based this requirement on section 510(c) of the Act, which includes a similar provision regarding the applicant. To meet this requirement, an applicant must disclose the abated and unabated violations which it and its operator received in the three-year period preceding the date of an application.

#### V. Section 842.11—Federal Inspections and Monitoring

We are not adopting proposed § 842.11.

We originally proposed to revise 30 CFR 842.11(e)(3)(i) because we believed the provision was inconsistent with the D.C. Circuit's decision in *NMA v. DOI I*. However, a closer examination found no inconsistency. The existing rule does not preclude applicants from receiving permits based on the violations of their owners or controllers. Rather, it precludes owners and controllers, when they apply for a permit of their own, from receiving that permit if there are unabated or uncorrected violations at operations they own or control.

A commenter suggested that we should make a corresponding change to a similar provision in 30 CFR 840.11(g)(3)(i), which applies to States. (Part 842 governs only Federal inspections and monitoring.) This suggestion is now moot since we are not adopting the proposed rule.

#### W. Section 843.5—Definitions

We proposed to remove § 843.5 from our regulations. Section 843.5 contained two definitions, *unwarranted failure to comply* and *willful violation*. We proposed to move the definition of *unwarranted failure to comply* from § 843.5 to § 846.5. In addition, we proposed to remove the definition of *willful violation* from §§ 843.5 and 701.5 because we found the definition of *willful violation* to be unnecessary in light of our proposed definition of "willful or willfully."

We received no comments on the proposed removal of § 843.5. However, since the final rule uses the term *unwarranted failure to comply* only in § 843.13, there is no longer any need to move the definition of *unwarranted failure to comply* from § 843.5. As a

result, the final rule retains both § 843.5 and the existing definition of *unwarranted failure to comply*.

As proposed, we are removing the definition of *willful violation* from §§ 843.5 and 701.5 because it is no longer necessary in light of our newly adopted definition of "willful or willfully" in § 701.5. Under the final rule, a "willful violation" will be an act or omission that meets the definitions of "willful or willfully" and *violation* in § 701.5. Section VI.A. of this preamble discusses the comments that we received on the removal of *willful violation*.

#### X. Section 843.11—Cessation Orders

Previous 30 CFR 843.11(g) required that, within 60 days of issuance of a cessation order, we notify all persons identified as owners or controllers under other specified provisions of our rules. We proposed to revise that rule to make the cross-references consistent with proposed §§ 773.17 and 778.13 and to remove the requirement to notify the persons involved that they had been identified as an owner or controller. Under the proposed rule, we would be required only to notify them that a cessation order had been issued. We received no comments on this proposed rule.

We are adopting the proposed rule in revised form. Final § 843.11(g) provides that, within 60 days after issuing a cessation order, we will notify the permittee, the operator, and any person who has been listed or identified by the applicant, permittee, or OSM as an owner or controller of the operation. The final rule replaces the previous and proposed cross-references concerning identification of owners or controllers with a cross-reference to the ownership and control definitions in final § 701.5. We are making this change because the cross-references in the previous and proposed rules included only persons identified as owners or controllers by the permittee. However, the rules that we are adopting today establish procedures by which the regulatory authority also may identify and list persons as owners or controllers. See final § 774.11(f). Therefore, for consistency with that rule, we are replacing the previous and proposed cross-references with a requirement to notify all persons who are identified as owners or controllers, regardless of whether they were listed by an applicant in an application, subsequently disclosed by the permittee, or identified by the regulatory authority as an owner or controller of the applicant or permittee.

*Y. Section 843.21—Procedures for Improvidently Issued State Permits*

Background

We proposed minor amendments to paragraphs (d) and (e) of 30 CFR 843.21, which sets forth our procedures for taking Federal enforcement action concerning improvidently issued State permits. Although we did not propose any substantive changes to paragraphs (a), (b), (c), and (f) of the previous rule, we included them in the proposed rule to provide opportunity for public comment on the complete process. See 63 FR 70580, 70608.

After the proposal was published, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *NMA v. DOI II*. In that decision, the court upheld our ability to take remedial action relative to improvidently issued State permits, but found that our previous regulations “impinge on the ‘primacy’ afforded states under SMCRA insofar as they authorize OSM to take remedial action against operators holding valid state mining permits without complying with the procedural requirements set out in section 521(a) of SMCRA, 30 U.S.C. § 1271(a).” *NMA v. DOI II*, 177 F.3d at 9. Specifically, the court ruled that, absent imminent danger or harm under section 521(a)(2) of SMCRA, we must use the “specific procedures in section 521(a)(3) of SMCRA” when we seek “to revoke a permit issued by the state under its state plan.” *Id.* at 9–10. We modified the proposed rule to conform to the court’s decision.

Section 521(a)(3) of the Act requires the Secretary to take enforcement action if, on the basis of a Federal inspection, “the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act.” When taking enforcement action under this section, the Secretary must issue a notice of violation to the permittee or the permittee’s agent fixing a reasonable time for abatement of the violation and provide opportunity for a public hearing. Section 521(a)(3) further provides for issuance of a cessation order if the permittee fails to abate the violation within the time originally fixed or subsequently extended.

Because section 521(a)(3) specifies that we may only take enforcement action on the basis of a Federal inspection, one commenter argued that the final rule also must be consistent with section 521(a)(1) of the Act, which establishes the conditions under which we may conduct a Federal inspection in a State with primacy. We agree.

Therefore, we have revised the rule to adopt the commenter’s recommendation, with the modifications needed to adapt those requirements and procedures to situations that involve improvidently issued permits.

Section 521(a)(1) of SMCRA provides that when the Secretary, on the basis of any information available to him, including receipt of information from any person, has reason to believe that any person is in violation of any requirement of the Act or any permit condition required by the Act, the Secretary must notify the State regulatory authority in the State in which the violation exists and provide the State ten days to take appropriate action to cause the violation to be corrected or to show good cause for not taking appropriate action. If the State fails to take appropriate action or show good cause within ten days, the Secretary must immediately order a Federal inspection unless the information available to the Secretary is a result of a previous Federal inspection. When a Federal inspection under section 521(a)(1) results from information provided to the Secretary by any person, the Secretary must notify the person when the inspection will take place and allow the person to accompany the inspector during the inspection.

Our final rule includes inspection provisions and procedures analogous to those in section 521(a)(1) of the Act and enforcement provisions and procedures analogous to those in section 521(a)(3) of the Act. Final § 843.21(a) requires that we provide the State regulatory authority with a ten-day notice when we have reason to believe that a State permit has been improvidently issued. Final § 843.21(b) clarifies the conditions under which we will consider a State response to a ten-day notice appropriate. Final § 843.21(c) requires that we notify the State and the permittee if we determine that a State response is not appropriate and that a Federal inspection is thus necessary. Final § 843.21(d) requires that we conduct a Federal inspection when a State response is not appropriate. It also requires that, on the basis of that inspection and other available information, we make a written finding as to whether the permit was improvidently issued. Final § 843.21(e)(1) requires that we issue a notice of violation if we find that the permit has been improvidently issued. Final § 843.21(e)(2) requires that we issue a cessation order if the notice of violation is not abated in a timely fashion. In both cases we must provide

opportunity for a public hearing on the notice or order. Final § 843.21(f) sets forth the circumstances under which we may terminate or vacate a notice of violation or cessation order.

Final Paragraph (a): Initial Notice

Under final § 843.21(a)(1), we will issue an initial notice to the State regulatory authority, if, on the basis of any information available to us, including information submitted by any person, we have reason to believe a State-issued permit was improvidently issued, and the State has failed to take appropriate action. The initial notice will state in writing the reasons for our belief that the permit was improvidently issued and will request the State to take appropriate action under paragraph (b) of the final rule within 10 days. We will serve the notice on the State regulatory authority, the permittee, and any person providing information under paragraph (a). In response to comments advocating greater public notice and participation, we added paragraph (a)(2) to the final rule. Under that paragraph, we will also provide notice to the public by posting the initial notice at our office closest to the permit area and on the AVS Office Internet home page.

Final Paragraph (b): State Response

Final § 843.21(b) requires a State to respond to an initial notice under paragraph (a) within 10 days and to demonstrate in writing that: (1) the permit was not improvidently issued under § 773.21 or the State regulatory program equivalent; (2) the State is in compliance with the State regulatory program equivalents of final §§ 773.21 through 773.23; or (3) the State has good cause for not complying with the State regulatory program equivalents of §§ 773.21 through 773.23. Under final paragraph (b)(2), the State need not have completed action to suspend or rescind an improvidently issued permit as long as the State has initiated and is pursuing proceedings consistent with §§ 773.21 through 773.23.

“Good cause” under final paragraph (b)(3) does not include the lack of State program equivalents of §§ 773.21 through 773.23. A State without counterpart regulations retains implied authority to take remedial action on an improvidently issued State permit because of its express authority to deny permits in the first instance. See, e.g., *NMA v. DOI II*, 177 F.3d at 9. Hence, this rule properly allows OSM to take remedial action when a State regulatory authority does not take action with respect to an improvidently issued State permit.

**Paragraph (c): Notice of Federal Inspection**

Under final § 843.21(c), if we find that the State has failed to make the demonstration required under paragraph (b), we must initiate a Federal inspection under paragraph (d) to determine if the permit was improvidently issued under the criteria of § 773.21 or the State regulatory program equivalent. We also must: (1) Issue a notice to the State regulatory authority and the permittee stating in writing the reasons for our finding and stating our intention to initiate a Federal inspection; (2) notify any person who provided information under paragraph (a) that leads to a Federal inspection that he or she may accompany the inspector on any inspection of the minesite; and (3) post the notice at our office closest to the permit area and on the AVS Office Internet home page.

**Paragraph (d): Federal Inspection and Written Finding**

Under final § 843.21(d), no less than 10 days and no more than 30 days after providing notice under paragraph (c), we will conduct an inspection and make a written finding as to whether the State permit was improvidently issued. In making that finding, we will evaluate all available information, including information submitted by the State, the permittee, or any other person. The timeframes in this paragraph are intended to allow for submission and receipt of information in response to the notice provided under paragraph (c) and investigation of complex ownership and control relationships while still ensuring that inspections and findings are made in a reasonably prompt fashion. The Federal inspection required under this paragraph will not always involve an on-the-ground inspection of either the permit at issue or the minesite with which the violation is associated because some violations, such as unpaid reclamation fees or civil penalties, do not constitute on-the-ground violations. Thus, in many instances, the inspection will consist of an examination of ownership or control relationships and review of relevant records, files, papers and the like.

To ensure that the public has the opportunity to review the finding, paragraph (d) of the final rule requires that we post the finding at our office closest to the permit area and on the AVS Office Internet home page. In addition, if we find that the permit was improvidently issued, the rule requires that we issue a notice to the State and the permittee stating in writing the reasons for our finding.

**Final Paragraph (e): Federal Enforcement**

If we find that a State permit was improvidently issued under paragraph (d), we must initiate Federal enforcement under paragraph (e). Under final § 843.21(e)(1), we must issue a notice of violation (NOV) to the permittee or the permittee's agent consistent with § 843.12(b), which contains format and content requirements for Federal notices of violation. Among other things, the notice must be in writing and must specify a reasonable time for abatement. Final § 843.21(e)(1) also provides opportunity for a public hearing under existing §§ 843.15 and 843.16 upon issuance of an NOV.

If an NOV is not remedied within the abatement period, final § 843.21(e)(2) requires us to issue a cessation order (CO) consistent with § 843.11(c), which contains format and content requirements for cessation orders. Among other things, under that rule, the order must be in writing and must specify the nature of the condition, practice or violation that resulted in issuance of the order. Final § 843.21(e)(2) also provides opportunity for a public hearing under §§ 843.15 and 843.16 upon issuance of a CO. In addition, 43 CFR 4.1160, *et seq.*, allows a permittee or any person having an interest which is or may be adversely affected by a notice of violation or cessation order issued under authority of section 521(a)(3) to seek review of the notice and order, including a public hearing.

The previous rule required only that we take unspecified "appropriate remedial action," which, the rule stated, could include issuance of an NOV ceasing mining by a specified date. However, in *NMA v. DOI II*, the court held that our remedial action must be consistent with section 521(a)(3) of the Act. Therefore, like that section of the Act, the final rule requires issuance of an NOV, followed by issuance of a failure-to-abate CO if the NOV is not abated in a timely fashion.

**Final Paragraph (f): Remedies to Notice of Violation or Cessation Order**

Final paragraph (f) establishes conditions under which we may vacate or terminate an NOV or CO issued under paragraph (e). Except as discussed below, it is substantively identical to previous 30 CFR 843.21(e), although we have modified some of the language and terminology for consistency with plain language principles and other provisions of this final rule. There are two significant

changes from the previous rule. First, since final § 843.21(e) now provides for the issuance of failure-to-abate cessation orders as well as notices of violation, final § 843.21(f) applies to those orders, not just to NOVs as in the previous rule. Second, we have added paragraph (f)(2)(v) and modified paragraph (f)(2)(iii) for consistency with the new eligibility standards for provisionally issued permits under final § 773.14(b).

**Final Paragraph (g): No Civil Penalty**

Final paragraph (g) is substantively identical to previous 30 CFR 843.21(f).

**Provisions of Proposed Rule That We Did Not Adopt**

We did not adopt the provisions of proposed §§ 843.21(d)(3) and (e)(2) pertaining to the submission of accurate and complete information. Under the proposed rule, we intended to allow failure to submit accurate and complete information at the time of application for a permit to form the basis for a finding that a permit was improvidently issued (and the subsequent issuance of an NOV), if disclosure of the information would have made the applicant ineligible to receive a permit.

However, upon further review, we determined that we have insufficient basis to classify the failure to supply permit application information as a violation in the absence of any underlying outstanding enforcement action concerning the failure to submit that information. Therefore, we are not adopting the proposed revisions.

**Disposition of Comments**

Several commenters said that proposed § 843.21(d)(3) was unnecessary. That provision described instances when we would not take remedial action relative to an improvidently issued State permit. Under the proposal, we would not take remedial action if: (1) Any violation, penalty, or fee was abated or paid; (2) an abatement plan or payment schedule was entered into; (3) all inaccurate or incomplete information questions were resolved; or (4) the permittee and the operator, and all operations owned or controlled by the permittee and the operator, were no longer responsible for the violation, penalty, fee, or information. See proposed §§ 843.21(d)(3)(i) through (iv). The commenters objected to our failure to state in the preamble why remedial action would not be taken under the four conditions specified in proposed § 843.21(d)(3)(i) through (iv). They also stated that the conditions "open the door for delaying and negotiating compliance" and appear to violate "the

Act's requirement that enforcement action be taken immediately on all violations, regardless of whether the operator violated the rules on environmental standards, ownership or control information, or bonding."

After considering these comments, we are not adopting the proposed rules to which the commenters object. Under the final rule, if a State fails to adequately respond to our initial notice within ten days, we must initiate a Federal inspection. If we ultimately find that the permit was improvidently issued, we must undertake Federal enforcement under final § 843.21(e), including the issuance of an NOV and, when appropriate, a failure-to-abate CO. However, under final § 843.21(f)(2), we will terminate an NOV or CO if: (1) The violation has been abated or corrected; (2) the permittee or the operator no longer owns or controls the relevant operation; (3) the violation is the subject of a good faith administrative or judicial appeal; (4) the violation is the subject of an abatement plan or payment schedule; or (5) the permittee is pursuing a good faith challenge or appeal of relevant ownership or control listings or findings. Also, under final § 843.21(f)(1), we will vacate an NOV or CO if it resulted from an erroneous conclusion under § 843.21. Termination or vacation of an NOV or CO under these circumstances is appropriate because, even if the underlying violation remains uncorrected, the permittee would no longer be ineligible to receive a permit under section 510(c) of the Act.

A commenter noted that proposed §§ 843.21(d)(3)(iv) and (e)(2)(iii) both contain the phrase "no longer responsible for the violation." The commenter asked how an entity can be responsible for a violation at a particular point in time and later be relieved of responsibility. The commenter suggested that an entity, and its owners and controllers at the time the violation occurred, continue to be held responsible until the violation is abated without regard to who may later own or control the entity.

As explained above, we did not adopt the provision proposed at § 843.21(d)(3)(iv). However, we adopted a similar provision at final paragraph (f)(2)(ii), which is substantively identical to the corresponding provision in previous § 843.21(d). Final § 843.21(f)(2)(ii) is consistent with both *NMA v. DOI II* and our longstanding practice. See, e.g., 54 FR 18438, 18456–57 (April 28, 1989). Under *NMA v. DOI II*, we may no longer deny a permit based on past ownership or control of an operation with an unabated violation. Therefore, when a permittee

severs an ownership or control relationship and thus becomes eligible to receive a new permit, it would be incongruous to cease operations on an existing permit only to issue a new one to the same permittee for the same operation upon reapplication.

Therefore, under final § 843.21(f)(2)(ii), if a person no longer owns or controls the relevant operation with a violation and is not directly responsible for the violation, we will terminate an NOV or CO issued under final § 843.21(e).

With reference to proposed § 843.21(e), the same commenter asked if a violation should be vacated rather than terminated if an operator can demonstrate a lack of current responsibility for a violation, penalty, or fee. In this final rule, as in the proposal, we continue our long-held distinction between vacation and termination. Under final § 843.21(f)(1), we will vacate an NOV or CO if we cited the violation in error. Technically, a vacated violation never existed. Under final § 843.21(f)(2), we will terminate an NOV or CO whenever one of the circumstances in (f)(2)(i) through (v) exists. In other words, we will terminate an NOV or CO issued under § 843.21(e) when the permittee is once again eligible to receive a permit under 30 CFR 773.12 or 773.14 and section 510(c) of the Act.

Two commenters said the word "may" in proposed § 843.21(d)(2) should be changed to "shall" to clarify that enforcement action is mandatory. Final § 843.21(e) provides that we must take enforcement action if we find that a permit was improvidently issued under final paragraph (d).

A commenter said that our remedial actions should not be limited to issuance of an NOV that ceases mining. Proposed § 843.21(d)(2) would not have done so. However, final § 843.21(e) clarifies that our remedial actions under this section are indeed limited to the issuance of an NOV and, as appropriate, a failure-to-abate CO. In *NMA v. DOI II*, the court held that our authority to take remedial action on improvidently issued State permits derives from section 521(a)(3) of SMCRA. That paragraph of the Act authorizes only the two types of enforcement actions identified in our final rule.

A commenter said that the proposed amendments to § 843.21 violate section 521 of SMCRA because operating under an improvidently issued permit is a violation of the Act. The commenter asserted that SMCRA "allows but one response by a State to a finding that a permit was unlawfully issued—the commencement of an enforcement action under section 521 of [SMCRA]."

SMCRA does not mention improvidently issued permits. However, in *NMA v. DOI II*, the court upheld our authority to take enforcement action on improvidently issued State permits provided we adhere to the requirements of section 521(a)(3) of the Act. The final rule is fully consistent with that section of the Act. If a State fails to adequately respond to a ten-day notice issued under final § 843.21(a), and if we subsequently find under final § 843.21(d) that a State permit was improvidently issued, we will take the appropriate enforcement actions under final § 843.21(e).

A commenter expressed disappointment that the proposed regulations would allow us to issue notices of violation whenever we disagree with a State's response to a ten-day notice. The commenter said the provision was unnecessary because the States have demonstrated an ability to properly administer their programs and determine what permittees need to do to achieve compliance. We concur that, in general, States have administered their programs in a responsible manner. However, that fact does not mean that we should not have a remedy for the occasional aberration or a future lapse in State performance.

The commenter also said that § 843.21, along with §§ 773.20 and 773.21, "conflict with specific terms of the Act's carefully defined enforcement structure, with fundamental notions of due process and finality, with Congress' provision for State primacy in the regulation of surface coal mining and reclamation, and with the law disfavoring retroactive regulations." In substance, this commenter questioned our authority to take enforcement actions concerning improvidently issued State permits.

In *NMA v. DOI II*, the U.S. Court of Appeals expressly upheld our authority to take remedial action for improvidently issued State permits under the express authority of section 201 of the Act, as long as we do so in accordance with the specific procedures of section 521. *Id.* at 9–10. This final rule fully complies with that decision.

#### *Z. Section 843.24—Oversight of State Permitting Decisions With Respect to Ownership or Control or the Status of Violations*

We proposed to remove previous § 843.24 from our regulations. Previous § 843.24 provided for the oversight of State permitting decisions with respect to ownership or control or the status of violations. In this final rule, we are removing previous § 843.24.

A commenter said the absence of previous § 843.24 would result in oversight teams needing more guidance on ownership and control issues. Another commenter said that OSM cannot rely upon § 843.21 to satisfy the oversight obligations under previous § 843.24(b).

We determined that final § 843.21, coupled with general oversight procedures, are sufficient to allow us to satisfy our oversight obligations with regard to improvidently issued State permits. Performance agreements between OSM and State regulatory authorities will address any concerns in the actual oversight procedures. The comments on this section did not persuade us to change our proposal to remove § 843.24 from our regulations.

#### *AA. Part 846—Alternative Enforcement*

The provisions we adopt from proposed part 846 are found in final part 847.

We proposed to revise part 846 by adding provisions to provide regulatory codification of certain statutory enforcement provisions that we refer to as alternative enforcement actions.

In this final rule, we are not adopting part 846 as it was proposed. Instead, we will retain the existing provisions in 30 CFR 843.13 for the suspension or revocation of permits for a pattern of violations and the existing provisions in part 846 for individual civil penalties. In addition, we are adopting part 847 to provide for criminal penalties and civil actions for relief under the authority of sections 518(e), 518(f), and 521(c) of Act, 30 U.S.C. 1268(e) and (f) and 1271(c). The final provisions largely track the statutory provisions they implement. We will take these actions when primary enforcement mechanisms do not result in the abatement of a violation.

Final § 847.1 states that part 847 governs the use of measures provided in sections 518(e), 518(g), and 521(c) of the Act for criminal penalties and civil actions to compel compliance with provisions of the Act.

Final § 847.2 provides that: (1) Whenever a court of competent jurisdiction enters a judgment against or convicts a person under these provisions, we will update AVS to reflect the judgment or conviction; (2) the existence of a performance bond or bond forfeiture cannot be used as the sole basis for determining that an alternative enforcement action is unwarranted; (3) each State regulatory program must contain provisions for civil actions and criminal penalties that are no less stringent than those in part 847 and include the same or similar

procedural requirements; and (4) nothing in this part eliminates or limits any additional enforcement rights or procedures available under Federal or State law.

The provision concerning performance bonds and bond forfeitures is derived from proposed § 773.22(d). A commenter objected to that proposed rule, which would have provided, in part, that the existence of a performance bond cannot be used as the sole basis for a regulatory authority's determination that alternative enforcement action is not warranted. The commenter asserted that in some situations, the existence of the bond is, in fact, the sole basis for determining that alternative enforcement action is not warranted and that OSM should be sensitive to actual practice and procedure at the State level. We disagree. Bond forfeiture is not an enforcement action. In addition, bond forfeiture proceeds may be insufficient to reclaim the site or correct all violations. In these situations, the alternative enforcement actions described in part 847 may assist in achieving complete reclamation and full compliance.

Final § 847.11 implements the criminal penalty provisions of sections 518(e) and 518(g) of the Act. It provides that a regulatory authority will request pursuit of criminal penalties under sections 518(e) and 518(g) of the Act against any person who: (1) Willfully and knowingly violates a permit condition; (2) willfully and knowingly fails or refuses to comply with any order issued under section 521 or 526 of the Act, or any order incorporated into a final decision issued by the Secretary, except for those specifically excluded under section 518(e) of the Act; or (3) knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the regulatory program or any order or decision issued by the Secretary under the Act. In final § 847.11(a), we modified proposed § 846.11(a) to more closely track sections 518(e) and 518(g) of the Act. We are not adopting proposed § 846.11(c), which merely reiterated the penalties specified in sections 518(e) and (g) of the Act, 30 U.S.C. 1268(e) and (g), and is thus unnecessary since final § 847.11 already contains a reference to those provisions of the Act.

Final § 847.16 implements the civil action provisions at section 521(c) of the Act. Final § 847.16(a) requires that, under section 521(c) of the Act, 30 U.S.C. 1271(c), the regulatory authority

request the Attorney General to institute a civil action for relief whenever a permittee or an agent of the permittee meets the criteria specified in final §§ 847.16(a)(1) through (a)(6). Final § 847.16(a) is derived from proposed § 846.16(a).

Final § 847.16(a)(1) requires that a regulatory authority request the Attorney General to institute a civil action for relief whenever a permittee or an agent of the permittee violates or fails or refuses to comply with any order or decision issued by the regulatory authority. Final § 847.11(a)(1) is derived from proposed § 846.16(a)(1)(i).

Final § 847.16(a)(2) requires that a regulatory authority request the Attorney General to institute a civil action for relief whenever a permittee or an agent of the permittee interferes with, hinders, or delays the regulatory authority in carrying out the provisions of the Act or its implementing regulations. Final § 847.16(a)(2) is derived from proposed § 846.16(a)(1)(ii).

Final § 847.16(a)(3) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to admit the regulatory authority's authorized representative onto the site of a surface coal mining and reclamation operation. Final § 847.16(a)(3) is derived from proposed § 846.16(a)(1)(iii).

Final § 847.16(a)(4) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to allow authorized representatives to inspect a surface coal mining and reclamation operation. Final § 847.16(a)(4) is derived from proposed § 846.16(a)(1)(iv).

Final § 847.16(a)(5) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to furnish any information or report that the regulatory authority requests under the Act or regulatory program. Final § 847.16(a)(5) is derived from proposed § 846.16(a)(1)(v).

Final § 847.16(a)(6) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to allow access to, or copying of, those records that the regulatory authority determine necessary to carry out the provisions of the Act and its implementing regulations. Final § 847.16(a)(6) is derived from proposed § 846.16(a)(1)(vi).

Final § 847.16(b) provides that a civil action for relief includes a permanent or

temporary injunction, restraining order, or any other appropriate order by a district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which a permittee has its principal office. Final § 847.16(b) is derived from proposed § 846.16(a)(2).

Final § 847.16(c) provides that temporary restraining orders will be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended. Final § 847.16(c) is derived from proposed § 846.16(b).

Final § 847.16(d) provides that any relief the court grants to enforce an order under final § 847.16(b) will continue in effect until completion or final termination of all proceedings for review of that order under the Act or its implementing regulations unless, beforehand, the district court granting such relief sets aside or modifies the order. Final § 847.16(d) is derived from proposed § 846.16(c).

#### General Comments on Proposed Part 846

A commenter said that, as recently as 1988, OSM expressly disavowed any connection between the ownership and control provisions in section 510(c) of the Act and the Act's enforcement provisions. The commenter said that in the 1988 individual civil penalty rule, the agency stated that the ownership or control rule does not inform the scope or circumstances of liability for a corporate officer, director, or agent under SMCRA. The commenter further claimed that the proposed rule imposes a responsibility on officers, directors, or agents to know all the facts arising in day-to-day operations.

This final rule does not purport any connection between the permit eligibility provision in section 510(c) of SMCRA and any enforcement provision, including those we call alternative enforcement. While an individual may incur a personal liability or sanction under the enforcement provisions in sections 518 and 521 of the Act, the permit eligibility requirement under section 510(c), and our definitions of ownership and control, do not impose any such personal liability. Further, this final rule does not impose any responsibility on any individual to know all of the facts arising from day-to-day operations. However, as we said in the 1988 individual civil penalty rule, any individual should exercise reasonable care in his or her position to acquire knowledge of the functions attendant to his or her position. 53 FR 3666 (February 8, 1988).

Several commenters asked us to clarify when alternative enforcement

action is not warranted. Sections 847.11 and 847.16 of the final rule identify those circumstances under which the regulatory authority must seek criminal penalties or civil actions for relief. Otherwise, the regulatory authority must make a determination on a case-specific basis.

A commenter asserted that the language in the Act for criminal sanctions and civil actions for relief is sufficient without repeating the provisions in the regulations. We do not agree. Final §§ 847.11 and 847.16 flesh out the statutory requirements. Incorporation of the statutory sanctions into our regulations also emphasizes their availability.

A commenter said that section 518 of SMCRA expressly limits enforcement to permittees and that the proposed rule improperly attempts to punish operators, who are not permittees. The commenter is mistaken. Section 518(e) applies to "any person," while section 518(g) applies to "whoever" knowingly takes or fails to take certain actions.

A commenter said that the proposed rule ignores the existing mandate to employ alternative enforcement actions. There is no such mandate, except in the context of 30 CFR 845.15(b)(2), which applies only to certain cessation orders and is not germane to this rulemaking. Furthermore, the final rule does require the use of certain alternative enforcement actions in specified circumstances.

A commenter suggested the term "alternative enforcement" should be changed to "additional enforcement" to clarify that the provisions involve additional steps a regulatory authority may take to make a violator comply with the Act.

We do not believe adopting the commenter's suggestion is necessary. Alternative enforcement actions are, in fact, additional enforcement mechanisms authorized under the Act to compel compliance with the Act when primary enforcement mechanisms do not result in the abatement or correction of a violation. We have used the term "alternative enforcement" in this manner since the early days of the regulatory program without creating confusion. The same commenter expressed concern that States sometimes use alternative enforcement instead of "regular enforcement." We stress that the provisions for alternative enforcement are to be used, as appropriate, in conjunction with what the commenter calls "regular enforcement."

#### Specific Comments on Proposed Part 846

Following are descriptions of the proposed provisions, how the proposed provisions are disposed of in this final rule, and how we addressed the comments we received on them.

##### § 846.1—Scope

We proposed to revise the scope of part 846 to conform to the proposed provisions for alternative enforcement. Since we did not adopt the revisions proposed in part 846, we also did not adopt the proposal to revise the scope at § 846.1. We received no comments on the proposed revision.

##### § 846.5—Definitions

*Unwarranted failure to comply.* We proposed to revise the definition of *unwarranted failure to comply* and move the definition from § 843.5 to § 846.5. Since we are not revising existing § 843.13, the existing definition for *unwarranted failure to comply* remains unchanged at 30 CFR 843.5.

*Violation, failure, or refusal.* We proposed to retain the existing definition of *violation, failure, or refusal* in part 846. As part of our effort to consolidate definitions, we are instead moving the definition of *violation, failure, or refusal* in modified form to § 701.5.

##### Proposed § 846.11—Criminal Penalties

We proposed to add new regulations to provide for criminal penalties under the authority of sections 518(e) and 518(g) of the Act. We proposed to incorporate these provisions in part 846. In this final rule, we are adopting provisions for criminal penalties at § 847.11.

A commenter asserted that the proposed rule would give both OSM and primacy States the option of not pursuing criminal conviction for false statements, including those in permit applications, and the option of not penalizing mine operators who do not abate violations.

The final rule does not provide the regulatory authority with the option not to pursue abatement or correction of a violation. Furthermore, under final § 847.11(c), a regulatory authority must request that the Attorney General pursue criminal penalties against any person who knowingly makes a false statement, representation, or certification, or who knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the regulatory program or any order or decision issued by the Secretary under

the Act. However, the Attorney General has prosecutorial discretion in deciding whether to act on those requests. We have no authority under SMCRA to limit that discretion.

A commenter claimed the proposed provisions for criminal penalties improperly merged paragraphs (e), (f), and (g) of section 518 into one regulatory provision. Final § 847.11 implements only sections 518(e) and (g) of SMCRA. Neither SMCRA nor any other law prohibits us from addressing these sections of the Act in the same section of our regulations. The regulations implementing section 518(f) of SMCRA, 30 U.S.C. 1268(f), appear in 30 CFR part 846.

Commenters said the proposed § 846.11 included persons not mentioned in the statute. Section 518(e) of the Act applies to “any person” without limitation. Nonetheless, because of our desire to more closely conform to the language of the Act, we are not adopting proposed § 846.11(b), which would have more specifically identified the persons subject to criminal penalties.

Several commenters cited proposed § 846.11 as proof that “verbs other than ‘shall’ ” negate the mandatory enforcement provisions of SMCRA. Another commenter said that section 518(g) of the Act requires us to pursue criminal conviction of persons making false statements and that the word “may” makes this enforcement requirement optional. The commenters have misinterpreted the meaning of “shall” in section 518(e) and (g) of SMCRA. As used in those sections, “shall” does not require enforcement, it only specifies the punishment that applies upon conviction.

Final § 847.11 requires that the regulatory authority refer all cases meeting the criteria of section 518(e) and (g) to the Attorney General, who has the discretion to determine whether to act upon the referral.

Several commenters said we should not use the proposed criminal sanctions to “go after” certified controllers under proposed § 778.13(m). In substance, these commenters suggest that persons certified as controllers under proposed § 778.13(m), which appears in revised form in § 778.11(d) of the final rule, should not be targeted for pursuit of criminal penalties. We do not anticipate that certified controllers will be singled out for criminal prosecution. Each case will be decided on its own merits.

#### Proposed § 846.12—Individual Civil Penalties

We proposed to revise the existing provisions for individual civil penalties

and incorporate them into a section of alternative enforcement provisions within part 846. We are not adopting the proposed revisions to part 846 in this final rule. Therefore, the existing provisions for individual civil penalties in part 846 remain unchanged.

#### Proposed § 846.14—Suspension or Revocation of Permits: Pattern of Violations

We proposed to revise § 843.13, which implements section 521(a)(4) of the Act by providing for the suspension or revocation of permits for a pattern of violations, and move it to § 846.14. The proposed rule would have eliminated the restrictions on how a pattern of violations is determined.

Commenters opposed the proposed revisions to existing § 843.13 because the revisions would have expanded the circumstances under which the regulatory authority could issue a show cause order. The commenters also said that violations counted for pattern purposes should be limited to violations that occurred at individual mining operations; that is, they should be permit-specific as in the existing regulations. The commenters also opposed allowing consideration of a controller’s compliance history at prior operations to establish a pattern of violations.

We have concluded that revision of the rules governing suspension or revocation of permits for a pattern of violations requires further study. Therefore, we are not adopting proposed § 846.14. Existing § 843.13 remains unchanged.

#### Proposed § 846.15—Suspension or Revocation of Permits: Failure To Comply With a Permit Condition

This proposed rule would have authorized suspension or revocation of permits for failure to comply with a permit condition imposed under proposed § 773.18.

Some commenters supported proposed § 846.15, asserting that suspension or revocation of permits is a powerful but seldom used enforcement tool. They also claimed that the proposed rule would clarify that suspension or revocation of a permit may be used for failure to comply with any permit condition, not just those that are related to ownership and control. Other commenters opposed proposed § 846.15, especially the circumstances that would prompt a regulatory authority to issue a show cause order for failure to comply with a permit condition.

As discussed in sections VI.E. and VI.H. of this preamble, we are not

adopting the permit conditions in proposed § 773.18. Furthermore, we see no need to initiate permit suspension or revocation proceedings for an isolated failure to comply with a permit condition. Therefore, we are not adopting proposed § 846.15.

#### Proposed § 846.16—Civil Actions for Relief

We proposed to add a new § 846.16 to allow regulatory authorities to pursue civil actions for relief under the authority of section 521(c) of the Act. We are adopting the proposed rule in modified form at final § 847.16. We are not adopting the provision that would have specified the scope of persons subject to civil actions. Instead, final § 847.16(a) limits the scope of this rule to the permittee or the permittee’s agent. We made this change so that the final rule conforms to the scope of section 521(c) of the Act.

Several commenters said they supported the use of section 521(c) of SMCRA to pursue injunctions against persons acting in concert with entities linked to outstanding violations. Other commenters argued that the proposed rule improperly applied to persons not mentioned in the statute. Since section 521(c) applies only to the “permittee or his agent,” final § 847.16(a) applies only to these persons. We are not adopting the more expansive provisions in proposed § 846.16.

A commenter asserted that proposed § 846.16(a)(1)(v) did not match its preamble description. The commenter said the authority under which the information would be requested is more limited in the preamble discussion. Proposed § 846.16(a)(1)(v) stated that refusal to furnish any information or report requested by a regulatory authority is cause to pursue a civil action for relief. 63 FR 70627. The preamble discussion of proposed § 846.16(a)(1)(v) indicated that refusal to furnish any information or report requested by a regulatory authority under the provisions of the Act or its implementing regulations is cause to pursue a civil action for relief. 64 FR 70614. The difference to which the commenter refers appears to be that information requested under the Act and its implementing regulations is more limiting than any information requested by a regulatory authority. Since section 521(c)(E) applies to a permittee or agent who “refuses to furnish any information or report requested by the Secretary in furtherance of this Act,” we have revised final § 847.16(a)(5) to apply only to refusals to furnish any information or report that the regulatory authority

requests “under the Act or regulatory program.”

A commenter said proposed § 846.16(a)(1)(vi) is inconsistent with the existing regulations at 30 CFR 840.12(b) and 842.13(a)(2), which, the commenter claimed, authorize right of access by State and Federal regulatory authorities. We find no inconsistency among these rules. Final § 847.16(a)(6) provides a means of enforcing the record access requirement of §§ 840.12(b) and 842.13(a)(2) when the permittee refuses to grant access otherwise, *i.e.*, when standard enforcement mechanisms fail.

A commenter claimed that section 521(c)(F) of the Act applies only to those records required to be maintained under SMCRA. Section 521(c)(F) applies to “such records as the Secretary determines necessary in carrying out the provisions of this Act.” Because the Act authorizes the adoption of State and Federal regulatory programs, the phrase “the provisions of this Act” necessarily includes regulations adopted pursuant to the Act. Therefore, final § 847.16(a)(6) applies to all records that the regulatory authority determines to be “necessary to carry out the provisions of the Act and its implementing regulations.”

Several commenters asked who the “we” is in proposed § 846.16. Final § 847.16(a) clarifies that “we” means the regulatory authority.

A commenter suggested that “will” should be changed to “may” in proposed § 846.16(a). The commenter said “will” makes the provision a mandatory action, while “may” is more permissive. We are not adopting the recommended change. The circumstances that precipitate a civil action for relief are very specific in the Act. If a regulatory authority encounters one of these circumstances, final § 847.16(a) requires that the regulatory authority refer the case to the Attorney General.

#### *BB. Miscellaneous Cross-References*

As a result of certain revisions and redesignations in this final rule, it was necessary to change cross-references appearing in a number of sections which we did not otherwise change in substantive fashion. For example, we changed the cross-reference in 30 CFR 874.16 from “§ 773.15(b)(1)” to “§§ 773.12, 773.13, and 773.14” to reflect the fact that this rule revises previous § 773.15(b)(1). The amendatory language in this final rule identifies these cross-reference changes.

#### **VII. What Effect Will This Rule Have in Federal Program States and on Indian Lands?**

Through cross-referencing in the respective regulatory programs, this final rule applies to all lands in States with Federal regulatory programs. States with Federal regulatory programs include Arizona, California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. These programs are codified at 30 CFR parts 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively.

#### **VIII. How Will This Rule Affect State Programs?**

We will evaluate State regulatory programs approved under 30 CFR part 732 and section 503 of the Act to determine whether any changes in these programs are necessary to maintain consistency with Federal requirements. If we determine that a State program provision needs to be amended as a result of these revisions to the Federal rules, we will notify the State in accordance with 30 CFR 732.17(d).

Section 505(a) of the Act, 30 U.S.C. 1255(a), and 30 CFR 730.11(a) provide that SMCRA and Federal regulations adopted under SMCRA do not supersede any State law or regulation unless that law or regulation is inconsistent with the Act or the Federal regulations adopted under the Act. Section 505(b) of the Act and 30 CFR 730.11(b) provide that we may not construe existing State laws and regulations, or State laws and regulations adopted in the future, as inconsistent with SMCRA or the Federal regulations if these State laws and regulations either provide for more stringent land use and environmental controls and regulations or have no counterpart in the Act or the Federal regulations.

Under 30 CFR 732.15(a), State programs must provide for the State to carry out the provisions of, and meet the purposes of, the Act and its implementing regulations. In addition, that rule requires that State laws and regulations be in accordance with the provisions of the Act and consistent with the Federal regulations. As defined in 30 CFR 730.5, “consistent with” and “in accordance with” mean that the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act. The definition also provides that these terms mean that the State laws and regulations are no less effective than the Federal

regulations in meeting the requirements of the Act. Under 30 CFR 732.17(e)(1), we may require a State program amendment if, as a result of changes in SMCRA or the Federal regulations, the approved State program no longer meets the requirements of SMCRA or the Federal regulations.

Among other things, this rule provides that State regulatory authorities must: (1) use the AVS in determining permit eligibility; (2) enter application, permit, and State violation information into AVS; (3) update and maintain permit and violation information in AVS; and (4) evaluate unabated and uncorrected violations to determine if alternative enforcement actions should be taken to compel the abatement or correction of such violations.

Several commenters said that the proposed rule would enhance and expand State roles. They thanked us for our confidence in the States’ decision-making ability. Other commenters said that the rule would tax State resources and that our oversight of permitting decisions and State administrative procedures will likely increase. These commenters said that the rule would require additional personnel, computer hardware, and legal resources to support information collection, tracking and analysis, investigation, alternative enforcement, and permit eligibility determinations. Several commenters said that OSM should be ready to supplement State funding and/or provide technical assistance.

We recognize that these regulations will result in some changes in how we and the States operate. We agree there could be additional demands on Federal and State resources. As States adopt counterparts to our regulatory changes, we will provide them with technical assistance in implementing these changes, if requested. In the interim, we plan to hold various events to discuss the effects of this rulemaking. We also plan to update the various directives, policy statements, manuals, and other guidance documents, as necessary, and make them available to State regulators.

A commenter said that environmental groups could sue States like they sued OSM in the 1970s and ’80s and that States want to avoid that possibility. The commenter expressed concern that the requirements that apply to regulatory authorities under the final rule might prompt allegations of a failure to comply with mandated duties. We have no reason to anticipate that these rules will generate citizen suits against the States. While these rules place some new requirements on regulatory authorities, they largely

codify long-standing practices in most States. However, section 520 of the Act does authorize such suits if the State regulatory authority fails to perform any nondiscretionary duty under the Act.

Commenters asked what will become of the AVS Users Guide and the System Advisory Memoranda. We will continue to rely upon and maintain the AVS Users Guide, System Advisory Memoranda, and other similar documents.

**IX. Procedural Determinations**

*A. Executive Order 12866: Regulatory Planning and Review*

This document is a significant rule and has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

a. This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This rule does raise legal or policy issues that have been the subject of extensive litigation.

A cost benefit analysis prepared by OSM indicates that overall the final rule will decrease the administrative cost burden to the coal industry to comply with the new regulations because the majority of applicants will be able to certify that the information currently in AVS is accurate. The final rule will change requirements to allow applicants to reduce certain reporting burdens by making use of OSM's automated AVS to provide ownership, control, and other information that is common to all permit applications submitted by a company. OSM estimates that 75

percent of new permit applicants will be able to take advantage of this change in procedures. The estimated cost savings to the coal industry is approximately \$397,000 per year. Estimates also indicated that administrative costs to the Federal government will increase by approximately \$10,000 per year and to the State governments by a total of \$434,000 per year. The analysis is on file in the OSM administrative record for this rulemaking.

Two commenters claimed that the proposed rule qualifies as a significant rule under Executive Order 12866 because it raises novel legal and policy issues and, therefore, should be reviewed by OMB. As stated above, the final rule is considered significant and has been reviewed by OMB under Executive Order 12866.

*B. Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This determination is based on the findings that the regulatory additions in the rule will not significantly change costs to industry or to Federal, State, or local governments. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

Under the regulations of the Small Business Administration (SBA) at 13 CFR 121.201, the size standard for a small business in coal mining is 500 or fewer employees. OSM neither collects nor maintains data on the number of employees a coal operator and its affiliates may have. Data available to OSM from another Federal agency indicated that out of approximately 4,000 coal mining operations, all but 11 may qualify as a small business under

the SBA regulations. Since nearly all would qualify as a small business, the analysis of the impacts of the rule on the entire coal mining industry is in effect a determination of the impacts the rule would have on small entities.

OSM determined the impact of the final rule based on the estimated administrative costs potentially incurred by the coal industry in association with fulfilling the requirement to gather, organize, report and review the information required at the time of a permit application according to 30 CFR Parts 773, 774 and 778. The cost estimates are derived from the information collection clearance package submitted by OSM to OMB for the final regulation. While other costs may be incurred by the industry, OSM believes that these labor costs are the primary source of the costs of compliance with the final rule. For analytical purposes, OSM estimates of the number of applicants/respondents are based on data collected by OSM for the 1999 evaluation year.

OSM estimates that overall the final rule will decrease the administrative cost burden to the industry to comply with the new regulations because a majority of applicants per year will be allowed to certify that the information currently in AVS is accurate. The number of applicants subject to the new regulations range in number from 310 per year for new permits to approximately 4000 per year for all permits, permit revisions, permit renewals, and transfers, assignments and sales of permit rights. The final rule will change requirements to allow applicants to reduce certain reporting burdens by making use of OSM's automated AVS to provide ownership, control, and other information that is common to all permit applications submitted by a company. OSM estimates that 75 percent of permit applicants will be able to take advantage of this change in procedures.

ESTIMATED CHANGE TO INDUSTRY COSTS UNDER FINAL RULE

Status quo prior to final regulation	Status quo prior to final regulation		Final regulation	
	Cost per applicant	Cost to industry	Cost per applicant	Cost to industry
30 CFR part				
773 .....	\$280	\$36,250	\$280	\$36,250
774 .....	1,020	1,693,200	960	1,462,800
778 .....	1,460	394,640	1,290	227,760
Total .....	2,760	2,124,090	2,530	1,726,810
Net change .....	final rule compared to status quo (\$397,280)			

One commenter stated that the proposed rule did not fully comply with the Regulatory Flexibility Act. The commenter said that OSM provided no facts to substantiate its statement that the rule will not have a significant economic impact on a substantial number of small entities or significantly change costs to the industry, Federal, State, or local governments as required by section 605(b) of the Regulatory Flexibility Act. The commenter also said that the rule would subject small entities to unlawful permit conditions and the threat of losing their permits and that OSM should solicit comments from small entities on how the proposal will affect them, as required by section 609 of the Regulatory Flexibility Act.

OSM disagrees. The proposed rule was issued in compliance with the requirements of section 605(b) of the Regulatory Flexibility Act. The proposed rule contained the certification required by section 605(b) and a statement providing the basis for the certification. A more detailed statement is included above and a cost benefit analysis is on file in the OSM administrative record for this rulemaking. With regard to the requirements of section 609 of the Regulatory Flexibility Act that small entities have an opportunity to participate in the rulemaking, section 609 applies only to rules that will have a significant economic impact on a substantial number of small entities. This rule does not have such an effect. Nevertheless, OSM took several steps to insure public participation by all that might be affected by the rule, both directly and indirectly through their national trade association. OSM held outreach meetings with industry prior to publishing the proposed rule in the **Federal Register**, published a proposed rule in the **Federal Register** with a public comment period that with extensions lasted over four months, issued a press release, made the proposed rule available on the Internet, and met with representatives from the coal industry during the public comment period.

#### *C. Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons stated above, this rule:

- a. Does not have an annual effect on the economy of \$100 million or more.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because the rule

does not impose major new requirements on the coal mining industry or consumers.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises for the reasons stated above.

#### *D. Unfunded Mandates Reform Act of 1995*

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531, *et seq.*) is not required.

#### *E. Executive Order 12630: Takings*

In accordance with Executive Order 12630, the rule does not have significant takings implications. This determination is based on the fact that the rule will not have an impact on the use or value of private property and so, does not result in significant costs to the government.

#### *F. Executive Order 13132: Federalism*

This rule does not have Federalism implications. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

One commenter objected to OSM's statement that the rule did not have Federalism implications within the meaning of Executive Order 13132. OSM has again reviewed Executive Order 13132 and the provisions of SMCRA and concluded that the rule does not have Federalism implications within the meaning of Executive Order 13132. The provisions of SMCRA delineate the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." States are not required to regulate surface coal mining and reclamation operations under SMCRA, but they may do so if they wish and if they meet certain requirements. SMCRA also provides for Federal funding of 50 percent of the cost of administering State regulatory programs approved

under SMCRA. Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA. Further, section 505 of SMCRA specifically provides for the preemption of State laws and regulations that are inconsistent with the provisions of SMCRA.

#### *G. Executive Order 12988: Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule (1) does not unduly burden the judicial system and (2) meets the requirements of sections 3(a) and 3(b)(2) of the order. Additional remarks follow concerning individual elements of the Executive Order:

1. What is the preemptive effect, if any, to be given to the regulation?

This regulation will have the same preemptive effect as other standards adopted pursuant to SMCRA. To retain primacy, States have to adopt and apply standards for their regulatory programs that are no less effective than those set forth in OSM's regulations. Any State law that is inconsistent with or that would preclude implementation of the proposed regulation would be subject to preemption under SMCRA section 505 and implementing regulations at 30 CFR 730.11. To the extent that the proposed regulation would result in preemption of State law, the provisions of SMCRA are intended to preclude inconsistent State laws and regulations. This approach is established in SMCRA, and has been judicially affirmed. See *Hodel versus Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).

2. What is the effect on existing Federal law or regulation, if any, including all provisions repealed or modified?

This rule modifies the implementation of SMCRA as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the Federal regulatory provisions that are affected by this rule.

3. Does the rule provide a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction?

The standards established by this rule are as clear and certain as practicable,

given the complexity of topics covered and the mandates of SMCRA.

4. What is the retroactive effect, if any, to be given to the regulation?

This rule is not intended to have retroactive effect.

5. Are administrative proceedings required before parties may file suit in court? Which proceedings apply? Is the exhaustion of administrative remedies required?

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, 30 U.S.C. 1276(a). Prior to any judicial challenges to the application of the rule, however, administrative proceedings must be exhausted, unless specified otherwise. See final 30 CFR 773.23(d). In situations involving OSM application of the rule, applicable administrative proceedings may be found in 43 CFR part 4. In situations involving state regulatory authority application of the provisions equivalent to those contained in this rule, applicable administrative procedures are set forth in the particular state program.

6. Does the rule define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items?

Terms which are important to the understanding of this rule are defined in the rule or set forth in 30 CFR 700.5 and 701.5.

7. Does the rule address other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget, that are determined to be in accordance with the purposes of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

#### H. Paperwork Reduction Act

Under the Paperwork Reduction Act, agencies may not conduct or sponsor a collection of information unless the collection displays a currently valid OMB control number. Also, no person must respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control number. Therefore, in accordance with 44 U.S.C. 3501 *et seq.*, we submitted the information collection and recordkeeping requirements of 30 CFR Parts 773, 774, and 778 to OMB for

review and approval. OMB subsequently approved the collection activities and assigned them OMB control numbers 1029-0115, 1029-0116, and 1029-0117, which appear in §§ 773.3, 774.9, and 778.8, respectively.

To obtain a copy of our information collection clearance authority, explanatory information and related forms, contact John A. Trelease, OSM's Information Collection Clearance Officer, at (202) 208-2783 or by e-mail at [jtreleas@osmre.gov](mailto:jtreleas@osmre.gov).

One commenter stated that the proposed rule violated the Paperwork Reduction Act by requiring the collection of information not specifically required by SMCRA. OSM disagrees. Section 507(b) lists some of the information required in a permit application and states that the application shall include, "among other things," 17 enumerated items. The use of the phrase "among other things" clearly indicates that the list in section 507(b) was not intended to be all inclusive. Further, many of the information collection requirements contained in the rule have been previously litigated and the courts have held that the listing of information required of permit applicants in the Act is not exhaustive and does not preclude the Secretary from requiring the States to secure additional information needed to insure compliance with the Act.

#### I. National Environmental Policy Act of 1969 and Record of Decision

OSM has prepared an environmental assessment (EA) for this rule and has made a finding that it would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. section 4332(2)(C). The EA and finding of no significant impact are on file in the OSM Administrative Record for this rule.

#### List of Subjects

##### 30 CFR Part 701

Law enforcement, Surface mining, Underground mining.

##### 30 CFR Part 724

Administrative practice and procedure, Penalties, Surface mining, Underground mining.

##### 30 CFR Part 750

Indian-lands, Reporting and recordkeeping requirements, Surface mining.

##### 30 CFR Part 773

Administrative practice and procedure, Reporting and record

keeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 774

Reporting and record keeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 775

Administrative practice and procedure, Surface mining, Underground mining.

##### 30 CFR Part 778

Reporting and record keeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 785

Reporting and record keeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 795

Grant programs-natural resources, Reporting and record keeping requirements, Small business, Surface mining, Technical assistance, Underground mining.

##### 30 CFR Part 817

Environmental protection, Reporting and record keeping requirements, Surface mining.

##### 30 CFR Part 840

Intergovernmental relations, Reporting and record keeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 842

Law enforcement, Surface mining, Underground mining.

##### 30 CFR Part 843

Administrative practice and procedure, Law enforcement, Reporting and record keeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 846

Administrative practice and procedure, Penalties, Surface mining, Underground mining.

##### 30 CFR Part 847

Administrative practice and procedure, Law enforcement, Penalties, Surface mining, Underground mining.

##### 30 CFR Part 874

Indian-lands, Surface mining, Underground mining.

##### 30 CFR Part 875

Indian-lands, Surface mining, Underground mining.

30 CFR Part 903

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 905

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 910

Environmental protection, Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 912

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 921

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 922

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 933

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 937

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 939

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 941

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 942

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR part 947

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 25, 2000.

Sylvia V. Baca,

Assistant Secretary, Land and Minerals Management.

For the reasons discussed in the preamble, the Office of Surface Mining amends 30 CFR chapter VII as follows.

**PART 701—PERMANENT REGULATORY PROGRAM**

1. Revise the authority citation for part 701 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Amend § 701.5 as follows:

a. Remove the definition of *Willful violation*.

b. In the definition of *Unanticipated event or condition* revise the reference from “§ 773.15” to read “§ 773.13.”

c. Add the following definitions in alphabetical order to read as set forth below:

**§ 701.5 Definitions.**

\* \* \* \* \*

*Applicant/Violator System or AVS* means an automated information system of applicant, permittee, operator, violation and related data OSM maintains to assist in implementing the Act.

\* \* \* \* \*

*Control or controller*, when used in parts 773, 774, and 778 and § 843.21 of this chapter, refers to or means—

- (1) A permittee of a surface coal mining operation;
- (2) An operator of a surface coal mining operation;
- (3) A general partner in a partnership;
- (4) A person who has the ability to, directly or indirectly, commit the financial or real property assets or working resources of an applicant, a permittee, or an operator; or
- (5) Any other person who has the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted. Examples of persons who may, but do not necessarily, meet this criterion include—

(i) The president, an officer, a director (or a person performing functions similar to a director), or an agent of an entity;

(ii) A partner in a partnership, or a participant, member, or manager of a limited liability company;

(iii) A person who owns between 10 and 50 percent of the voting securities or other forms of ownership of an entity, depending upon the relative percentage of ownership compared to the percentage of ownership by other persons, whether a person is the greatest single owner, or whether there is an opposing voting bloc of greater ownership;

(iv) An entity with officers or directors in common with another entity, depending upon the extent of overlap;

(v) A person who owns or controls the coal mined or to be mined by another person through lease, assignment, or other agreement and who also has the right to receive or direct delivery of the coal after mining; and

(vi) A person who contributes capital or other working resources under conditions that allow that person to substantially influence the manner in which a surface coal mining operation

is or will be conducted. Relevant contributions of capital or working resources include, but are not limited to—

(A) Providing mining equipment in exchange for the coal to be extracted;

(B) Providing the capital necessary to conduct a surface coal mining operation when that person also directs the disposition of the coal; or

(C) Personally guaranteeing the reclamation bond in anticipation of a future profit or loss from a surface coal mining operation.

\* \* \* \* \*

*Knowing or knowingly* means that a person who authorized, ordered, or carried out an act or omission knew or had reason to know that the act or omission would result in either a violation or a failure to abate or correct a violation.

\* \* \* \* \*

*Own, owner, or ownership*, as used in parts 773, 774, and 778 and § 843.21 of this chapter (except when used in the context of ownership of real property), means being a sole proprietor or possessing or controlling in excess of 50 percent of the voting securities or other instruments of ownership of an entity.

\* \* \* \* \*

*Violation*, when used in the context of the permit application information or permit eligibility requirements of sections 507 and 510(c) of the Act and related regulations, means—

(1) A failure to comply with an applicable provision of a Federal or State law or regulation pertaining to air or water environmental protection, as evidenced by a written notification from a governmental entity to the responsible person; or

(2) A noncompliance for which OSM has provided one or more of the following types of notice or a State regulatory authority has provided equivalent notice under corresponding provisions of a State regulatory program—

(i) A notice of violation under § 843.12 of this chapter.

(ii) A cessation order under § 843.11 of this chapter.

(iii) A final order, bill, or demand letter pertaining to a delinquent civil penalty assessed under part 845 or 846 of this chapter.

(iv) A bill or demand letter pertaining to delinquent reclamation fees owed under part 870 of this chapter.

(v) A notice of bond forfeiture under § 800.50 of this chapter when—

(A) One or more violations upon which the forfeiture was based have not been abated or corrected;

(B) The amount forfeited and collected is insufficient for full

reclamation under § 800.50(d)(1) of this chapter, the regulatory authority orders reimbursement for additional reclamation costs, and the person has not complied with the reimbursement order; or

(C) The site is covered by an alternative bonding system approved under § 800.11(e) of this chapter, that system requires reimbursement of any reclamation costs incurred by the system above those covered by any site-specific bond, and the person has not complied with the reimbursement requirement and paid any associated penalties.

*Violation, failure or refusal*, for purposes of parts 724 and 846 of this chapter, means—

(1) A failure to comply with a condition of a Federally-issued permit or of any other permit that OSM is directly enforcing under section 502 or 521 of the Act or the regulations implementing those sections; or

(2) A failure or refusal to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under section 518(b) or section 703 of the Act.

*Violation notice* means any written notification from a regulatory authority or other governmental entity, as specified in the definition of *violation* in this section.

\* \* \* \* \*

*Willful or willfully* means that a person who authorized, ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation acted—

(1) Intentionally, voluntarily, or consciously; and

(2) With intentional disregard or plain indifference to legal requirements.

**§ 701.11 [Amended]**

3. Revise the reference in the second sentence of § 701.11(a) from “30 CFR 773.11(b)” to read “§ 773.4(b) of this chapter.”

**PART 724—INDIVIDUAL CIVIL PENALTIES**

4. Revise the authority citation for part 724 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 724.5 [Removed]**

5. Remove § 724.5.

**PART 750—REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON INDIAN LANDS**

6. Revise the authority citation for part 750 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

7. Revise § 750.12(c)(2)(ii) to read as follows:

**§ 750.12 Permit applications.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(ii) Sections 773.4, 773.15(c), 777.17;

\* \* \* \* \*

**PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING**

8. Revise the authority citation for part 773 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*, 16 U.S.C. 470 *et seq.*, 16 U.S.C. 661 *et seq.*, 16 U.S.C. 703 *et seq.*, 16 U.S.C. 668a *et seq.*, 16 U.S.C. 469 *et seq.*, and 16 U.S.C. 1531 *et seq.*

9. Remove the following sections and paragraphs:

- a. § 773.5
- b. § 773.15(a) introductory heading
- c. § 773.15(b)
- d. § 773.15(c)(1)
- e. § 773.15(e)
- f. § 773.17(h)
- g. § 773.20
- h. § 773.24

10. Redesignate sections and paragraphs as indicated in the following table:

Section	is redesignated as...
773.10 .....	773.3
773.11 .....	773.4
773.12 .....	773.5
773.13 .....	773.6
773.15, section heading.	773.7
773.15(a)(1) .....	773.7(a)
773.15(a)(2) .....	773.7(b)
773.15(c) .....	773.15
773.15(c)(2) .....	773.15(b)
773.15(c)(3) .....	773.15(c)
773.15(c)(3)(i) .....	773.15(c)(1)
773.15(c)(3)(ii) .....	773.15(c)(2)
773.15(c)(4) .....	773.15(d)
773.15(c)(5) .....	773.15(e)
773.15(c)(6) .....	773.15(f)
773.15(c)(7) .....	773.15(g)
773.15(c)(8) .....	773.15(h)
773.15(c)(9) .....	773.15(i)
773.15(c)(10) .....	773.15(j)
773.15(c)(11) .....	773.15(k)
773.15(c)(12) .....	773.15(l)
773.15(c)(13) .....	773.15(m)
773.15(d) .....	773.16

11. Revise § 773.3 to reads as follows:

**§ 773.3 Information collection.**

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Regulatory authorities will use this information in processing surface coal mining permit applications. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB clearance number for this part is 1029–0115.

(b) We estimate that the public reporting burden for this part will average 36 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 210, 1951 Constitution Avenue, NW, Washington, DC 20240. Please refer to OMB Control Number 1029–0115 in any correspondence.

**§ 773.6 [Amended]**

12. Revise the reference in newly designated § 773.5(a)(3)(ii) from “§ 773.12” to read “§ 773.5.”

13. Add new §§ 773.8, 773.9, 773.10, 773.11, 773.12, 773.13, 773.14, and paragraphs 773.15(a) and 773.15(n) to read as follows:

**§ 773.8 General provisions for review of permit application information and entry of information into AVS.**

(a) Based on an administratively complete application, we, the regulatory authority, must undertake the reviews required under §§ 773.9 through 773.11 of this part.

(b) We will enter into AVS—

(1) The ownership and control information you submit under §§ 778.11 and 778.12(c) of this subchapter.

(2) The information you submit under § 778.14 of this subchapter pertaining to violations which are unabated or uncorrected after the abatement or correction period has expired.

(c) We must update the information referred to in paragraph (b) of this section in AVS upon our verification of any additional information submitted or discovered during our permit application review.

**§ 773.9 Review of applicant, operator, and ownership and control information.**

(a) We, the regulatory authority, will rely upon the applicant, operator, and ownership and control information that you, the applicant, submit under § 778.11 of this subchapter, information from AVS, and any other available information, to review your and your operator's business structure and ownership or control relationships.

(b) We must conduct the review required under paragraph (a) of this section before making a permit eligibility determination under § 773.12 of this part.

**§ 773.10 Review of permit history.**

(a) We, the regulatory authority, will rely upon the permit history information you, the applicant, submit under § 778.12 of this subchapter, information from AVS, and any other available information to review your and your operator's permit histories. We must conduct this review before making a permit eligibility determination under § 773.12 of this part.

(b) We will also determine if you, your operator, or any of your controllers disclosed under §§ 778.11(c)(5) and 778.11(d) of this subchapter have previous mining experience.

(c) If you, your operator, your controllers, or your operator's controllers do not have any previous mining experience, we may conduct additional reviews under § 774.11(f) of this subchapter. The purpose of this review will be to determine if someone else with mining experience controls the mining operation and was not disclosed under § 778.11(c)(5) of this subchapter.

**§ 773.11 Review of compliance history.**

(a) We, the regulatory authority, will rely upon the violation information supplied by you, the applicant, under § 778.14 of this subchapter, a report from AVS, and any other available information to review histories of compliance with the Act or the applicable State regulatory program, and any other applicable air or water quality laws, for—

- (1) You;
- (2) Your operator;
- (3) Operations you own or control; and
- (4) Operations your operator owns or controls.

(b) We must conduct the review required under paragraph (a) of this section before making a permit eligibility determination under § 773.12 of this part.

**§ 773.12 Permit eligibility determination.**

Based on the reviews required under §§ 773.9 through 773.11 of this part, we, the regulatory authority, will determine whether you, the applicant, are eligible for a permit under section 510(c) of the Act.

(a) Except as provided in §§ 773.13 and 773.14 of this part, you are not eligible for a permit if we find that any surface coal mining operation that—

(1) You directly own or control has an unabated or uncorrected violation;

(2) You or your operator indirectly own or control, regardless of when the ownership or control began, has an unabated or uncorrected violation cited on or after November 2, 1988; or

(3) You or your operator indirectly own or control has an unabated or uncorrected violation, regardless of the date the violation was cited, and your ownership or control was established on or after November 2, 1988.

(b) You are eligible to receive a permit under section 510(c) of the Act if any surface coal mining operation you or your operator indirectly own or control has an unabated or uncorrected violation and both the violation and your assumption of ownership or control occurred before November 2, 1988. However, you are not eligible to receive a permit if there was an established legal basis, independent of authority under section 510(c) of the Act, to deny the permit at the time you or your operator assumed indirect ownership or control or at the time the violation was cited, whichever is earlier.

(c) We will not issue you a permit if you or your operator are permanently ineligible to receive a permit under § 774.11(c) of this subchapter.

(d) After we approve your permit under § 773.15 of this part, we will not issue the permit until you comply with the information update and certification requirement of § 778.9(d) of this subchapter. After you complete that requirement, we will again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect your permit eligibility under paragraphs (a) and (b) of this section. We will request this report no more than five business days before permit issuance under § 773.19 of this part.

(e) If you are ineligible for a permit under this section, we will send you written notification of our decision. The notice will tell you why you are ineligible and include notice of your appeal rights under part 775 of this subchapter and 43 CFR 4.1360 through 4.1369.

**§ 773.13 Unanticipated events or conditions at remining sites.**

(a) You, the applicant, are eligible for a permit under § 773.12 if an unabated violation—

(1) Occurred after October 24, 1992; and

(2) Resulted from an unanticipated event or condition at a surface coal mining and reclamation operation on lands that are eligible for remining under a permit that was—

- (i) Issued before September 30, 2004, including subsequent renewals; and
- (ii) Held by the person applying for the new permit.

(b) For permits issued under § 785.25 of this subchapter, an event or condition is presumed to be unanticipated for the purpose of this section if it—

- (1) Arose after permit issuance;
- (2) Was related to prior mining; and
- (3) Was not identified in the permit application.

**§ 773.14 Eligibility for provisionally issued permits.**

(a) This section applies to you if you are an applicant who owns or controls a surface coal mining and reclamation operation with—

(1) A notice of violation issued under § 843.12 of this chapter or the State regulatory program equivalent for which the abatement period has not yet expired; or

(2) A violation that is unabated or uncorrected beyond the abatement or correction period.

(b) We, the regulatory authority, may find you eligible for a provisionally issued permit if you demonstrate that one or more of the following circumstances exists with respect to all violations listed in paragraph (a) of this section—

(1) For violations meeting the criteria of paragraph (a)(1) of this section, you certify that the violation is being abated to the satisfaction of the regulatory authority with jurisdiction over the violation, and we have no evidence to the contrary.

(2) As applicable, you, your operator, and operations that you or your operator own or control are in compliance with the terms of any abatement plan (or, for delinquent fees or penalties, a payment schedule) approved by the agency with jurisdiction over the violation.

(3) You are pursuing a good faith—

(i) Challenge to all pertinent ownership or control listings or findings under §§ 773.25 through 773.27 of this part; or

(ii) Administrative or judicial appeal of all pertinent ownership or control listings or findings, unless there is an initial judicial decision affirming the

listing or finding and that decision remains in force.

(4) The violation is the subject of a good faith administrative or judicial appeal contesting the validity of the violation, unless there is an initial judicial decision affirming the violation and that decision remains in force.

(c) We will consider a provisionally issued permit to be improvidently issued, and we must immediately initiate procedures under §§ 773.22 and 773.23 of this part to suspend or rescind that permit, if—

(1) Violations included in paragraph (b)(1) of this section are not abated within the specified abatement period;

(2) You, your operator, or operations that you or your operator own or control do not comply with the terms of an abatement plan or payment schedule mentioned in paragraph (b)(2) of this section;

(3) In the absence of a request for judicial review, the disposition of a challenge and any subsequent administrative review referenced in paragraph (b)(3) or (4) of this section affirms the validity of the violation or the ownership or control listing or finding; or

(4) The initial judicial review decision referenced in paragraph (b)(3)(ii) or (4) of this section affirms the validity of the violation or the ownership or control listing or finding.

**§ 773.15 Written findings for permit application approval.**

\* \* \* \* \*

(a) The application is accurate and complete and the applicant has complied with all requirements of the Act and the regulatory program.

\* \* \* \* \*

(n) The applicant is eligible to receive a permit, based on the reviews under §§ 773.7 through 773.14 of this part.

14. Revise §§ 773.21 through 773.23 to read as follows:

**§ 773.21 Initial review and finding requirements for improvidently issued permits.**

(a) If we, the regulatory authority, have reason to believe that we improvidently issued a permit to you, the permittee, we must review the circumstances under which the permit was issued. We will make a preliminary finding that your permit was improvidently issued if, under the permit eligibility criteria of the applicable regulations implementing section 510(c) of the Act in effect at the time of permit issuance, your permit should not have been issued because you or your operator owned or controlled a surface coal mining and

reclamation operation with an unabated or uncorrected violation.

(b) We will make a finding under paragraph (a) of this section only if you or your operator—

(1) Continue to own or control the operation with the unabated or uncorrected violation;

(2) The violation remains unabated or uncorrected; and

(3) The violation would cause you to be ineligible under the permit eligibility criteria in our current regulations.

(c) When we make a preliminary finding under paragraph (a) of this section, we must—

(1) Serve you with a written notice of the preliminary finding; and

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: <http://www.avs.osmre.gov>).

(d) Within 30 days of receiving a notice under paragraph (c) of this section, you may challenge the preliminary finding by providing us with evidence as to why the permit was not improvidently issued under the criteria in paragraphs (a) and (b) of this section.

(e) The provisions of §§ 773.25 through 773.27 of this part apply when a challenge under paragraph (d) of this section concerns a preliminary finding under paragraphs (a) and (b)(1) of this section that you or your operator currently own or control, or owned or controlled, a surface coal mining operation.

**§ 773.22 Notice requirements for improvidently issued permits.**

(a) We, the regulatory authority, must serve you, the permittee, with a written notice of proposed suspension or rescission, together with a statement of the reasons for the proposed suspension or rescission, if—

(1) After considering any evidence submitted under § 773.21(d) of this part, we find that a permit was improvidently issued under the criteria in paragraphs (a) and (b) of § 773.21 of this part; or

(2) Your permit was provisionally issued under § 773.14(b) of this part and one or more of the conditions in §§ 773.14(c)(1) through (4) exists.

(b) If we propose to suspend your permit, we will provide 60 days notice.

(c) If we propose to rescind your permit, we will provide 120 days notice.

(d) We will also post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: <http://www.avs.osmre.gov>).

(e) If you wish to appeal the notice, you must exhaust administrative remedies under the procedures at 43

CFR 4.1370 through 4.1377 (when OSM is the regulatory authority) or under the State regulatory program equivalent (when a State is the regulatory authority).

(f) After we serve you with a notice of proposed suspension or rescission under this section, we will take action under § 773.23 of this part.

(g) The regulations for service at § 843.14 of this chapter, or the State regulatory program equivalent, will govern service under this section.

(h) The times specified in paragraphs (b) and (c) of this section will apply unless you obtain temporary relief under the procedures at 43 CFR 4.1376 or the State regulatory program equivalent.

**§ 773.23 Suspension or rescission requirements for improvidently issued permits.**

(a) Except as provided in paragraph (b) of this section, we, the regulatory authority, must suspend or rescind your permit upon expiration of the time specified in § 773.22(b) or (c) of this part unless you submit evidence and we find that—

(1) The violation has been abated or corrected to the satisfaction of the agency with jurisdiction over the violation;

(2) You or your operator no longer own or control the relevant operation;

(3) Our finding for suspension or rescission was in error;

(4) The violation is the subject of a good faith administrative or judicial appeal (unless there is an initial judicial decision affirming the violation, and that decision remains in force);

(5) The violation is the subject of an abatement plan or payment schedule that is being met to the satisfaction of the agency with jurisdiction over the violation; or

(6) You are pursuing a good faith challenge or administrative or judicial appeal of the relevant ownership or control listing or finding (unless there is an initial judicial decision affirming the listing or finding, and that decision remains in force).

(b) If you have requested administrative review of a notice of proposed suspension or rescission under § 773.22(e) of this part, we will not suspend or rescind your permit unless and until the Office of Hearings and Appeals or its State counterpart affirms our finding that your permit was improvidently issued.

(c) When we suspend or rescind your permit under this section, we must—

(1) Issue you a written notice requiring you to cease all surface coal mining operations under the permit; and

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: <http://www.avs.osmre.gov>).

(d) If we suspend or rescind your permit under this section, you may request administrative review of the notice under the procedures at 43 CFR 4.1370 through 4.1377 (when OSM is the regulatory authority) or under the State regulatory program equivalent (when a State is the regulatory authority). Alternatively, you may seek judicial review of the notice.

15. Revise § 773.25 and add §§ 773.26 through 773.28 to read as follows:

**§ 773.25 Who may challenge ownership or control listings and findings.**

You may challenge a listing or finding of ownership or control using the provisions under §§ 773.26 and 773.27 of this part if you are—

(a) Listed in a permit application or in AVS as an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof;

(b) Found to be an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof, under §§ 773.21 or 774.11(f) of this subchapter; or

(c) An applicant or permittee affected by an ownership or control listing or finding.

**§ 773.26 How to challenge an ownership or control listing or finding.**

This section applies to you if you challenge an ownership or control listing or finding.

(a) To challenge an ownership or control listing or finding, you must submit a written explanation of the basis for the challenge, along with any evidence or explanatory materials you wish to provide under § 773.27(b) of this part, to the regulatory authority, as identified in the following table.

If the challenge concerns a . . .	Then you must submit a written explanation to . . .
(1) Pending Federal permit application or Federally issued permit .....	OSM. the State regulatory authority with jurisdiction over the application or permit.
(2) Pending State permit application or State-issued permit .....	

(b) The provisions of this section and of §§ 773.27 and 773.28 of this part apply only to challenges to ownership or control listings or findings. You may not use these provisions to challenge your liability or responsibility under any other provision of the Act or its implementing regulations.

(c) When the challenge concerns a violation under the jurisdiction of a different regulatory authority, the regulatory authority with jurisdiction over the permit application or permit must consult the regulatory authority with jurisdiction over the violation and the AVS Office to obtain additional information.

(d) A regulatory authority responsible for deciding a challenge under paragraph (a) of this section may request an investigation by the AVS Office.

**§ 773.27 Burden of proof for ownership or control challenges.**

This section applies to you if you challenge an ownership or control listing or finding.

(a) When you challenge a listing or finding of ownership or control of a surface coal mining operation, you must prove by a preponderance of the evidence that you either—

(1) Do not own or control the entire operation or relevant portion or aspect thereof; or

(2) Did not own or control the entire operation or relevant portion or aspect thereof during the relevant time period.

(b) In meeting your burden of proof, you must present reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority. The materials presented in connection with your challenge will become part of the permit file, an

investigation file, or another public file. If you request, we will hold as confidential any information you submit under this paragraph which is not required to be made available to the public under § 842.16 of this chapter (when OSM is the regulatory authority) or under § 840.14 of this chapter (when a State is the regulatory authority).

(c) Materials you may submit in response to the requirements of paragraph (b) of this section include, but are not limited to—

(1) Notarized affidavits containing specific facts concerning the duties that you performed for the relevant operation, the beginning and ending dates of your ownership or control of the operation, and the nature and details of any transaction creating or severing your ownership or control of the operation.

(2) Certified copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records.

(3) Certified copies of documents filed with or issued by any State, municipal, or Federal governmental agency.

(4) An opinion of counsel, when supported by—

(i) Evidentiary materials;

(ii) A statement by counsel that he or she is qualified to render the opinion; and

(iii) A statement that counsel has personally and diligently investigated the facts of the matter.

**§ 773.28 Written agency decision on challenges to ownership or control listings or findings.**

(a) Within 60 days of receipt of your challenge under § 773.26(a) of this part,

we, the regulatory authority identified under § 773.26(a) of this part, will review and investigate the evidence and explanatory materials you submit and any other reasonably available information bearing on your challenge and issue a written decision. Our decision must state whether you own or control the relevant surface coal mining operation, or owned or controlled the operation, during the relevant time period.

(b) We will promptly provide you with a copy of our decision by either—

(1) Certified mail, return receipt requested; or

(2) Any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure, or its State regulatory program counterparts.

(c) Service of the decision on you is complete upon delivery and is not incomplete if you refuse to accept delivery.

(d) We will post all decisions made under this section on AVS and on the AVS Office Internet home page (Internet address: <http://www.avs.osmre.gov>).

(e) Any person who receives a written decision under this section, and who wishes to appeal that decision, must exhaust administrative remedies under the procedures at 43 CFR 4.1380 through 4.1387 or, when a State is the regulatory authority, the State regulatory program counterparts, before seeking judicial review.

(f) Following our written decision or any decision by a reviewing administrative or judicial tribunal, we must review the information in AVS to determine if it is consistent with the decision. If it is not, we must promptly

revise the information in AVS to reflect the decision.

16. Revise the heading for part 774 to read as follows:

**PART 774—REVISION; RENEWAL; TRANSFER, ASSIGNMENT, OR SALE OF PERMIT RIGHTS; POST-PERMIT ISSUANCE REQUIREMENTS; AND OTHER ACTIONS BASED ON OWNERSHIP, CONTROL, AND VIOLATION INFORMATION**

17. Revise the authority citation for part 774 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

18. Redesignate sections as indicated in the following table:

Section	is redesignated as . . .
774.10 .....	774.9
774.11 .....	774.10

19. Revise § 774.1 to read as follows:

**§ 774.1 Scope and purpose.**

This part provides requirements for revision; renewal; transfer, assignment, or sale of permit rights; entering and updating information in AVS following

the issuance of a permit; post-permit issuance requirements for regulatory authorities and permittees; and other actions based on ownership, control, and violation information.

20. Revise newly redesignated § 774.9 to read as follows:

**§ 774.9 Information collection.**

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Regulatory authorities will use this information to: (1) Determine if the applicant meets the requirements for revision; renewal; transfer, assignment, or sale of permit rights;

(2) Enter and update information in AVS following the issuance of a permit; and

(3) Fulfill post-permit issuance requirements and other obligations based on ownership, control, and violation information. Persons must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB clearance number for this part is 1029-0116.

(b) We estimate that the public reporting burden for this part will average 8 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 210, 1951 Constitution Avenue, NW, Washington, DC 20240. Please refer to OMB Control Number 1029-0116 in any correspondence.

21. Add new § 774.11 to read as follows:

**§ 774.11 Post-permit issuance requirements for regulatory authorities and other actions based on ownership, control, and violation information.**

(a) For the purposes of future permit eligibility determinations and enforcement actions, we, the regulatory authority, must enter into AVS the data shown in the following table—

We must enter into AVS all . . .	within 30 days after . . .
(1) Permit records .....	the permit is issued or subsequent changes made.
(2) Unabated or uncorrected violations .....	the abatement or correction period for a violation expires.
(3) Changes of ownership or control .....	receiving notice of a change.
(4) Changes in violation status .....	abatement, correction, or termination of a violation, or a decision from an administrative or judicial tribunal.

(b) If, at any time, we discover that any person owns or controls an operation with an unabated or uncorrected violation, we will determine whether enforcement action is appropriate under part 843, 846 or 847 of this chapter. We must enter the results of each enforcement action, including administrative and judicial decisions, into AVS.

(c) We must serve a preliminary finding of permanent permit ineligibility under section 510(c) of the Act on you, an applicant or operator, if the criteria in paragraphs (c)(1) and (c)(2) are met. In making a finding under this paragraph, we will only consider control relationships and violations which would make, or would have made, you ineligible for a permit under §§ 773.12(a) and (b) of this subchapter. We must make a preliminary finding of permanent permit ineligibility if we find that—

(1) You control or have controlled surface coal mining and reclamation operations with a demonstrated pattern

of willful violations under section 510(c) of the Act; and

(2) The violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate your intent not to comply with the Act, its implementing regulations, the regulatory program, or your permit.

(d) You may request a hearing on a preliminary finding of permanent permit ineligibility under 43 CFR 4.1350 through 4.1356.

(e) We must enter the results of the finding and any hearing into AVS.

(f) At any time, we may identify any other person who owns or controls an entire operation or any relevant portion or aspect thereof. If we identify such a person, we must—

(1) Issue a written finding to the person and the applicant or permittee describing the nature and extent of ownership or control; and

(2) Enter our finding under paragraph (f)(1) of this section into AVS; and

(3) Require the person to—

(i) Disclose their identity under § 778.11(c)(5) of this subchapter; and  
(ii) Certify they are a controller under § 778.11(d) of this subchapter, if appropriate.

(g) A person we identify under paragraph (f)(1) of this section may challenge the finding using the provisions of §§ 773.25, 773.26 and 773.27 of this subchapter.

22. Add § 774.12 to read as follows:

**§ 774.12 Post-permit issuance information requirements for permittees.**

(a) Within 30 days after the issuance of a cessation order under § 843.11 of this chapter, or its State regulatory program equivalent, you, the permittee, must provide or update all the information required under § 778.11 of this subchapter.

(b) You do not have to submit information under paragraph (a) of this section if a court of competent jurisdiction grants a stay of the cessation order and the stay remains in effect.

(c) Within 60 days of any addition, departure, or change in position of any

person identified in § 778.11(c) or (d) of this subchapter, you must provide—

- (1) The information required under § 778.11(e) of this subchapter; and
- (2) The date of any departure.

**§ 774.13 [Amended]**

- 23. Amend § 774.13 as follows:
  - a. Revise the reference in the first sentence § 774.13(b)(2) from “§§ 773.13” to read “§§ 773.6.”
  - b. Revise the reference in § 774.13(c) from “§ 773.15(c)” to read “§ 773.15.”

**§ 774.15 [Amended]**

24. Revise the reference in § 774.15(b)(3) from “§§ 773.13” to read “§§ 773.6.”

**§ 774.17 [Amended]**

25. Revise the reference in § 774.17(d)(1) from “§ 773.15(b) and (c)” to read “§§ 773.12 and 773.15.”

**PART 775—ADMINISTRATIVE AND JUDICIAL REVIEW OF DECISIONS**

26. The authority citation for part 775 continues to read as follows:

*Authority:* 30 U.S.C. 1201 *et seq.*

**§ 775.11 [Amended]**

27. Revise the reference in the third sentence of § 775.11(b)(1) from “§ 773.13(c)” to read “§ 773.6(c).”

**PART 778—PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION**

28. Revise the authority citation for part 778 to read as follows:

*Authority:* 30 U.S.C. 1201 *et seq.*

29. Redesignate § 778.10 as § 778.8 and revise it to read as follows:

**§ 778.8 Information collection.**

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Section 507(b) of the Act provides that persons applying for a permit to conduct surface coal mining operations must submit to the regulatory authority certain information regarding the applicant and affiliated entities, their compliance status and history, property ownership and other property rights, violation information, right of entry, liability insurance, the status of unsuitability claims, and proof of publication of a newspaper notice. The regulatory authority uses this information to ensure that all legal, financial and compliance requirements are satisfied before issuance of a permit. Persons seeking to conduct surface coal mining operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection

of information unless it displays a currently valid OMB control number. The OMB clearance number for this part is 1029–0117.

(b) We estimate that the public reporting and record keeping burden for this part averages 27 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection and record keeping requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, NW, Washington, DC 20240. Please refer to OMB Control Number 1029–0117 in any correspondence.

30. Add § 778.9 to read as follows:

**§ 778.9 Certifying and updating existing permit application information.**

In this section, “you” means the applicant and “we” or “us” means the regulatory authority.

(a) If you have previously applied for a permit and the required information is already in AVS, then you may update the information as shown in the following table.

If . . .	then you . . .
(1) All or part of the information already in AVS is accurate and complete.	may certify to us by swearing or affirming, under oath and in writing, that the relevant information in AVS is accurate, complete, and up to date.
(2) Part of the information in AVS is missing or incorrect .....	must submit to us the necessary information or corrections and swear or affirm, under oath and in writing, that the information you submit is accurate and complete.
(3) You can neither certify that the data in AVS is accurate and complete nor make needed corrections.	must include in your permit application the information required under this part.

(b) You must swear or affirm, under oath and in writing, that all information you provide in an application is accurate and complete.

(c) We may establish a central file to house your identity information, rather than place duplicate information in each of your permit application files. We will make the information available to the public upon request.

(d) After we approve an application, but before we issue a permit, you must update, correct, or indicate that no change has occurred in the information previously submitted under this section and §§ 778.11 through 778.14 of this part.

31. Add § 778.11 to read as follows:

**§ 778.11 Providing applicant, operator, and ownership and control information.**

- (a) You, the applicant, must provide in the permit application—
  - (1) A statement indicating whether you and your operator are corporations, partnerships, sole proprietorships, or other business entities;
  - (2) Taxpayer identification numbers for you and your operator.
- (b) You must provide the name, address, and telephone number for—
  - (1) The applicant.
  - (2) Your resident agent who will accept service of process.
  - (3) Any operator, if different from the applicant.
  - (4) Person(s) responsible for submitting the Coal Reclamation Fee

Report (Form OSM–1) and for remitting the reclamation fee payment to OSM.

- (c) For you and your operator, you must provide the information required by paragraph (e) of this section for every—
  - (1) Officer.
  - (2) Director.
  - (3) Person performing a function similar to a director.
  - (4) Person who owns 10 to 50 percent of the applicant or the operator.
  - (5) Person who owns or controls the applicant and person who owns or controls the operator. For each owner or controller who does not own or control an entire surface coal mining operation, you may list the portion or aspect of the

operation which that person owns or controls.

(d) The natural person with the greatest level of effective control over the entire proposed surface coal mining operation must submit a certification, under oath, that he or she controls the proposed surface coal mining operation.

(e) You must provide the following information for each person listed in paragraphs (c) and (d) of this section—

(1) The person's name, address, and telephone number.

(2) The person's position title and relationship to you, including percentage of ownership and location in the organizational structure.

(3) The date the person began functioning in that position.

32. Add § 778.12 to read as follows:

**§ 778.12 Providing permit history information.**

(a) You, the applicant, must provide a list of all names under which you, your operator, your partners or principal shareholders, and your operator's partners or principal shareholders operate or previously operated a surface coal mining operation in the United States within the five-year period preceding the date of submission of the application.

(b) For you and your operator, you must provide a list of any pending permit applications for surface coal mining operations filed in the United States. The list must identify each application by its application number and jurisdiction, or by other identifying information when necessary.

(c) For any surface coal mining operations that you or your operator owned or controlled within the five-year period preceding the date of submission of the application, and for any surface coal mining operation you or your operator own or control on that date, you must provide the—

(1) Permittee's and operator's name and address;

(2) Permittee's and operator's taxpayer identification numbers;

(3) Federal or State permit number and corresponding MSHA number;

(4) Regulatory authority with jurisdiction over the permit; and

(5) Permittee's and operator's relationship to the operation, including percentage of ownership and location in the organizational structure.

33. Revise § 778.13 to read as follows:

**§ 778.13 Providing property interest information.**

You, the applicant, must provide in the permit application all of the following information for the property to be mined—

(a) The name and address of—

(1) Each legal or equitable owner(s) of record of the surface and mineral.

(2) The holder(s) of record of any leasehold interest.

(3) Any purchaser(s) of record under a real estate contract.

(b) The name and address of each owner of record of all property (surface and subsurface) contiguous to any part of the proposed permit area.

(c) A statement of all interests, options, or pending bids you hold or have made for lands contiguous to the proposed permit area. If you request in writing, we will hold as confidential, under § 773.6(d)(3)(ii) of this chapter, any information you are required to submit under this paragraph which is not on public file under State law.

(d) The Mine Safety and Health Administration (MSHA) numbers for all structures that require MSHA approval.

34. Revise § 778.14 to read as follows:

**§ 778.14 Providing violation information.**

(a) You, the applicant, must state, in your permit application, whether you, your operator, or any subsidiary, affiliate, or entity which you or your operator own or control or which is under common control with you or your operator, has—

(1) Had a Federal or State permit for surface coal mining operations suspended or revoked during the five-year period preceding the date of submission of the application; or

(2) Forfeited a performance bond or similar security deposited in lieu of bond in connection with surface coal mining and reclamation operations during the five-year period preceding the date of submission of the application.

(b) For each suspension, revocation, or forfeiture identified under paragraph (a), you must provide a brief explanation of the facts involved, including the—

(1) Permit number.

(2) Date of suspension, revocation, or forfeiture, and, when applicable, the amount of bond or similar security forfeited.

(3) Regulatory authority that suspended or revoked the permit or forfeited the bond and the stated reasons for the action.

(4) Current status of the permit, bond, or similar security involved.

(5) Date, location, type, and current status of any administrative or judicial proceedings concerning the suspension, revocation, or forfeiture.

(c) A list of all violation notices you or your operator received for any surface coal mining and reclamation operation during the three-year period preceding

the date of submission of the application. In addition you must submit a list of all unabated or uncorrected violation notices incurred in connection with any surface coal mining and reclamation operation that you or your operator own or control on that date. For each violation notice reported, you must include the following information, when applicable—

(1) The permit number and associated MSHA number.

(2) The issue date, identification number, and current status of the violation notice.

(3) The name of the person to whom the violation notice was issued,

(4) The name of the regulatory authority or agency that issued the violation notice.

(5) A brief description of the violation alleged in the notice.

(6) The date, location, type, and current status of any administrative or judicial proceedings concerning the violation notice.

(7) If the abatement period for a violation in a notice of violation issued under § 843.12 of this chapter, or its State regulatory program equivalent, has not expired, certification that the violation is being abated or corrected to the satisfaction of the agency with jurisdiction over the violation.

(8) For all violations not covered by paragraph (c)(7) of this section, the actions taken to abate or correct the violation.

**§ 778.21 [Amended]**

35. Revise the reference in § 778.21 from “§ 773.13(a)(1)” to read “§ 773.6(a)(1).”

**PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING**

36. Revise the authority citation for part 785 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 785.13 [Amended]**

37. Revise the reference in § 785.13(c) from “§ 773.13” to read “773.6” and the reference in the second sentence of § 785.13(h) from “§ 773.13” to read “§ 773.6.”

**§ 785.21 [Amended]**

38. Revise the reference in the introductory text of § 785.21(e) from “773.11” to read “773.4.”

**§ 785.25 [Amended]**

39. Revise the reference in the first sentence of § 785.25(a) from “§ 773.15(b)(4)” to read “§ 773.13.”

**PART 795—PERMANENT REGULATORY PROGRAM—SMALL OPERATOR ASSISTANCE PROGRAM**

40. Revise the authority citation for part 795 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 795.9 [Amended]**

41. Revise the reference in the first sentence of § 795.9(d) from “§ 773.13(d)” to read “§ 773.6(d).”

**PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES**

42. Revise the authority citation for part 817 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 817.121 [Amended]**

43. Revise the reference in the last sentence of § 817.121(g) from “§ 773.13(d)” to read “§ 773.6(d).”

**PART 840—STATE REGULATORY AUTHORITY: INSPECTION AND ENFORCEMENT**

44. Revise the authority citation for part 840 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*, unless otherwise noted.

**§ 840.14 [Amended]**

45. Revise the reference in § 840.14(b)(2) from “773.13(d)” to read “773.6(d).”

**PART 842—FEDERAL INSPECTIONS AND MONITORING**

46. Revise the authority citation for part 842 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 842.16 [Amended]**

47. Revise the reference in § 842.16(a)(2) from “§ 773.13(d)” to read “§ 773.6(d).”

**PART 843—FEDERAL ENFORCEMENT**

48. Revise the authority citation for part 843 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 843.5 [Amended]**

49. In § 843.5, remove the definition of *Willful violation*.

50. Revise § 843.11(g) to read as follows:

**§ 843.11 Cessation orders.**

\* \* \* \* \*

(g) Within 60 days after issuing a cessation order, OSM will notify in writing the permittee, the operator, and

any person who has been listed or identified by the applicant, permittee, or OSM as an owner or controller of the operation, as defined in § 701.5 of this chapter.

\* \* \* \* \*

51. Revise § 843.21 to read as follows:

**§ 843.21 Procedures for improvidently issued State permits.**

(a) *Initial notice.* If we, OSM, on the basis of any information available to us, including information submitted by any person, have reason to believe that a State-issued permit meets the criteria for an improvidently issued permit under § 773.21 of this chapter, or the State regulatory program equivalent, and the State has failed to take appropriate action on the permit under the State regulatory program equivalents of §§ 773.21 through 773.23 of this chapter, we must—

(1) Issue a notice, by certified mail, to the State, to you, the permittee, and to any person providing information under paragraph (a) of this section. The notice will state in writing the reasons for our belief that your permit was improvidently issued. The notice also will request the State to take appropriate action, as specified in paragraph (b) of this section, within 10 days.

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: <http://www.avs.osmre.gov>).

(b) *State response.* Within 10 days after receiving notice under paragraph (a) of this section, the State must demonstrate to us in writing that either—

(1) The permit does not meet the criteria of § 773.21 of this chapter or the State regulatory program equivalent;

(2) The State is in compliance with the State regulatory program equivalents of §§ 773.21 through 773.23 of this chapter; or

(3) The State has good cause for not complying with the State regulatory program equivalents of §§ 773.21 through 773.23 of this chapter. For purposes of this section, good cause has the same meaning as in § 842.11(b)(1)(ii)(B)(4) of this chapter, except that good cause does not include the lack of State program equivalents of §§ 773.21 through 773.23 of this chapter.

(c) *Notice of Federal inspection.* If we find that the State has failed to make the demonstration required by paragraph (b) of this section, we must initiate a Federal inspection under paragraph (d) of this section to determine if your permit was improvidently issued under the criteria in § 773.21 of this chapter or

the State regulatory program equivalent. We must also—

(1) Issue a notice to you and the State by certified mail. The notice will state in writing the reasons for our finding under this section and our intention to initiate a Federal inspection.

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: <http://www.avs.osmre.gov>).

(3) Notify any person who provides information under paragraph (a) of this section that leads to a Federal inspection that he or she may accompany the inspector on any inspection of the minesite.

(d) *Federal inspection and written finding.* No less than 10 days but no more than 30 days after providing notice under paragraph (c) of this section, we will conduct an inspection and make a written finding as to whether your permit was improvidently issued under the criteria in § 773.21 of this chapter. In making that finding, we will consider all available information, including information submitted by you, the State, or any other person. We will post that finding at our office closest to the permit area and on the AVS Office Internet home page (Internet address: <http://www.avs.osmre.gov>). If we find that your permit was improvidently issued, we must issue a notice to you and the State by certified mail. The notice will state in writing the reasons for our finding under this section.

(e) *Federal enforcement.* If we find that your permit was improvidently issued under paragraph (d) of this section, we must—

(1) Issue a notice of violation to you or your agent consistent with § 843.12(b) of this part and provide opportunity for a public hearing under §§ 843.15 and 843.16.

(2) Issue a cessation order to you or your agent consistent with § 843.11(c), if a notice of violation issued under paragraph (e)(1) is not remedied under paragraph (f) of this section within the abatement period, and provide opportunity for a public hearing under §§ 843.15 and 843.16.

(f) *Remedies to notice of violation or cessation order.* Upon receipt of information from any person concerning a notice of violation or cessation order issued under paragraph (e) of this section, we will review the information and—

(1) Vacate the notice or order if it resulted from an erroneous conclusion under this section; or

(2) Terminate the notice or order if—  
(i) The violation has been abated or corrected to the satisfaction of the

agency with jurisdiction over the violation;

(ii) You or your operator no longer own or control the relevant operation;

(iii) The violation is the subject of a good faith administrative or judicial appeal (unless there is an initial judicial decision affirming the violation, and that decision remains in force);

(iv) The violation is the subject of an abatement plan or payment schedule that is being met to the satisfaction of the agency with jurisdiction over the violation; or

(v) You are pursuing a good faith challenge or administrative or judicial appeal of the relevant ownership or control listing or finding (unless there is an initial judicial decision affirming the listing or finding, and that decision remains in force).

(g) *No civil penalty.* We will not assess a civil penalty for a notice of violation issued under this section.

#### § 843.24 [Removed]

52. Remove § 843.24.

### PART 846—INDIVIDUAL CIVIL PENALTIES

53. Revise the authority citation to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

#### § 846.5 [Removed]

54. Remove § 846.5.

55. Add part 847 to read as follows:

### PART 847—ALTERNATIVE ENFORCEMENT

Sec.

847.1 Scope.

847.2 General provisions.

847.11 Criminal penalties.

847.16 Civil actions for relief.

**Authority:** 30 U.S.C. 1201 *et seq.*

#### § 847.1 Scope.

This part governs the use of measures provided in sections 518(e), 518(g) and 521(c) of the Act for criminal penalties and civil actions to compel compliance with provisions of the Act.

#### § 847.2 General provisions.

(a) Whenever a court of competent jurisdiction enters a judgment against or convicts a person under these provisions, we must update AVS to reflect the judgment or conviction.

(b) The existence of a performance bond or bond forfeiture cannot be used as the sole basis for determining that an alternative enforcement action is unwarranted.

(c) Each State regulatory program must include provisions for civil actions and criminal penalties that are no less

stringent than those in this part and include the same or similar procedural requirements.

(d) Nothing in this part eliminates or limits any additional enforcement rights or procedures available under Federal or State law.

#### § 847.11 Criminal penalties.

Under sections 518(e) and (g) of the Act, we, the regulatory authority, will request the Attorney General to pursue criminal penalties against any person who—

(a) Willfully and knowingly violates a condition of the permit;

(b) Willfully and knowingly fails or refuses to comply with—

(1) Any order issued under section 521 or 526 of the Act; or

(2) Any order incorporated into a final decision issued by the Secretary under the Act (except for those orders specifically excluded under section 518(e) of the Act); or

(c) Knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the regulatory program or any order or decision issued by the Secretary under the Act.

#### § 847.16 Civil actions for relief.

(a) Under section 521(c) of the Act, we, the regulatory authority, will request the Attorney General to institute a civil action for relief whenever you, the permittee, or your agent—

(1) Violate or fail or refuse to comply with any order or decision that we issue under the Act or regulatory program;

(2) Interfere with, hinder, or delay us in carrying out the provisions of the Act or its implementing regulations;

(3) Refuse to admit our authorized representatives onto the site of a surface coal mining and reclamation operation;

(4) Refuse to allow our authorized representatives to inspect a surface coal mining and reclamation operation;

(5) Refuse to furnish any information or report that we request under the Act or regulatory program; or

(6) Refuse to allow access to, or copying of, those records that we determine necessary to carry out the provisions of the Act and its implementing regulations.

(b) A civil action for relief includes a permanent or temporary injunction, restraining order, or any other appropriate order by a district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which you have your principal office.

(c) Temporary restraining orders will be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended.

(d) Any relief the court grants to enforce an order under paragraph (b) of this section will continue in effect until completion or final termination of all proceedings for review of that order under the Act or its implementing regulations unless, beforehand, the district court granting the relief sets aside or modifies the order.

### PART 874—GENERAL RECLAMATION REQUIREMENTS

56. Revise the authority citation for part 874 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

57. Revise § 874.16 to read as follows:

#### § 874.16 Contractor eligibility.

To receive AML funds, every successful bidder for an AML contract must be eligible under §§ 773.12, 773.13, and 773.14 of this chapter at the time of contract award to receive a permit or provisionally issued permit to conduct surface coal mining operations.

### PART 875—NONCOAL RECLAMATION

58. Revise the authority citation for part 875 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

59. Revise § 875.20 to read as follows:

#### § 875.20 Contractor eligibility.

To receive AML funds for noncoal reclamation, every successful bidder for an AML contract must be eligible under §§ 773.12, 773.13, and 773.14 of this chapter at the time of contract award to receive a permit or provisionally issued permit to conduct surface coal mining operations.

### PART 903—ARIZONA

60. The authority citation for part 903 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

#### § 903.773 [Amended]

61. Revise the reference in the second sentence of § 903.773(d)(3) from “§ 773.13(a)(1)” to read “§ 773.6(a)(1).”

62. Revise the reference in § 903.773(g) introductory text from “§ 773.13(d)” to read “§ 773.6(d).”

63. Revise the reference in § 903.773(g)(1) from “§ 773.13(a)(1)” to read “§ 773.6(a)(1).”

64. Revise the reference in § 903.773(g)(2) from “§ 773.13(a)(1)” to read “§ 773.6(a)(1).”

**§ 903.774 [Amended]**

65. Revise the reference in the first sentence of § 903.774(c) from “§ 773.13(b) and (c)” to read “§ 773.6(b) and (c).”

66. Revise the reference in § 903.774(f)(2) from “§ 773.13(a)(3)” to read “§ 773.6(a)(3).”

**PART 905—CALIFORNIA**

67. Revise the authority citation for part 905 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 905.773 [Amended]**

68. Revise the reference in § 905.773(d)(3) from “§ 773.13” to read “§ 773.6.”

69. Revise the reference in the first sentence of § 905.773(f) from “§ 773.13(c)” to read “§ 773.6(c).”

70. Revise the reference in § 905.773(g) from “§ 773.13(d)” to read “§ 773.6(d).”

**§ 905.774 [Amended]**

71. Revise the reference in the second sentence of § 905.774(b) from “773.13(b) and (c)” to read “773.6(b) and (c).”

72. Revise the reference in § 905.774(e) from “§ 773.13(a)(3)” to read “§ 773.6(a)(3).”

**PART 910—GEORGIA**

73. Revise the authority citation for part 910 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 910.773 [Amended]**

74. Revise the reference in § 910.773(b)(4) from “§ 773.13” to read “§ 773.6.”

**§ 910.774 [Amended]**

75. Revise the reference in § 910.774(b)(1) from “§§ 773.13” to read “§§ 773.6.”

**PART 912—IDAHO**

76. Revise the authority citation for part 912 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 912.773 [Amended]**

77. Revise the reference in § 912.773(b)(4) from “§ 773.13” to read “§ 773.6.”

**§ 912.774 [Amended]**

78. Revise the reference in § 912.774(b)(1) from “§§ 773.13” to read “§§ 773.6.”

**PART 921—MASSACHUSETTS**

79. Revise the authority citation for part 921 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 921.773 [Amended]**

80. Revise the reference in § 921.773(b)(4) from “§ 773.13” to read “§ 773.6.”

**§ 921.774 [Amended]**

81. Revise the reference in § 921.774(b)(1) from “§§ 773.13” to read “§§ 773.6.”

**PART 922—MICHIGAN**

82. Revise the authority citation for part 922 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 922.773 [Amended]**

83. Revise the reference in § 922.773(b)(4) from “§ 773.13” to read “§ 773.6.”

**§ 922.774 [Amended]**

84. Revise the reference in § 922.774(b)(1) from “§§ 773.13” to read “§§ 773.6.”

**PART 933—NORTH CAROLINA**

85. Revise the authority citation for part 933 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 933.773 [Amended]**

86. Revise the reference in § 933.773(b)(4) from “§ 773.13” to read “§ 773.6.”

**§ 933.774 [Amended]**

87. Revise the reference in § 933.774(b)(1) from “§§ 773.13” to read “§§ 773.6.”

**PART 937—OREGON**

88. Revise the authority citation for part 937 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 937.773 [Amended]**

89. Revise the reference in § 937.773(b)(4) from “§ 773.13” to read “§ 773.6.”

**§ 937.774 [Amended]**

90. Revise the reference in § 937.774(b)(1) from “§§ 773.13” to read “§§ 773.6.”

**PART 939—RHODE ISLAND**

91. Revise the authority citation for part 939 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 939.773 [Amended]**

92. Revise the reference in § 939.773(b)(4) from “§ 773.13” to read “§ 773.6.”

**§ 939.774 [Amended]**

93. Revise the reference in § 939.774(b)(1) from “§§ 773.13” to read “§§ 773.6.”

**PART 941—SOUTH DAKOTA**

94. Revise the authority citation for part 941 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 941.773 [Amended]**

95. Revise the reference in § 941.773(b)(4) from “§ 773.13” to read “§ 773.6.”

**§ 941.774 [Amended]**

96. Revise the reference in § 941.774(b)(1) from “§§ 773.13” to read “§§ 773.6.”

**PART 942—TENNESSEE**

97. Revise the authority citation for part 942 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 942.773 [Amended]**

98. Revise the reference in § 942.773(b)(4) from “§ 773.13” to read “§ 773.6.”

99. Revise the reference in the introductory paragraph of § 942.733(d) from “§ 773.11(d)(2)” to read “§ 773.5(d)(2).”

**§ 942.774 [Amended]**

100. Revise the reference in the first sentence of § 942.774(c) from “§ 773.13” to read “§§ 773.6.”

**PART 947—WASHINGTON**

101. Revise the authority citation for part 947 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§ 947.773 [Amended]**

102. Revise the reference in § 947.773(b)(4) from “§ 773.13” to read “§ 773.6.”

**§ 947.774 [Amended]**

103. Revise the reference in the first sentence of § 947.774(b)(1) from “§§ 773.13” to read “§§ 773.6.”

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