

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 773, 774, 778, 843 and 847

RIN 1029-AC08

#### Ownership and Control Settlement Rule

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), propose to amend certain provisions of our December 19, 2000, final ownership and control rule (hereinafter referred to as the 2000 final rule) in order to effectuate a settlement agreement we entered into with the National Mining Association (NMA). Specifically, we propose to amend the provisions of the 2000 final rule pertaining to the definitions of ownership and control; permit eligibility determinations; eligibility for provisionally issued permits; improvidently issued permits; challenges to ownership or control listings or findings; post-permit issuance requirements for regulatory authorities and other actions based on ownership, control, and violation information; providing applicant, operator, and ownership and control information; improvidently issued State permits; and alternative enforcement. This proposed rule does not suspend any of the provisions of the 2000 final rule. The proposed revisions are authorized under the Surface Mining Control and Reclamation Act of 1977, as amended (hereinafter referred to as SMCRA or the Act).

**DATES:** *Written comments:* We will accept written comments on the proposed rule until 5 p.m., Eastern Time, on February 27, 2004.

*Public hearings:* Upon request, we will hold a public hearing on the proposed rule at a date, time, and location to be announced in the **Federal Register** before the hearing. We will accept requests for a public hearing until 5 p.m., Eastern Time, on January 20, 2004. If you wish to attend a hearing, but not speak, you should contact the person identified under **FOR FURTHER INFORMATION CONTACT** before the hearing date to verify that the hearing will be held. If you wish to attend and speak at a hearing, you should follow the procedures under "III. Public Comment Procedures."

**ADDRESSES:** If you wish to provide written comments, you may submit your comments by any one of three methods (see "III. Public Comment Procedures"). We will make comments available for public viewing during regular business hours. You may mail or hand-deliver comments to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 101, 1951 Constitution Avenue, NW., Washington, DC 20240. You may also submit comments electronically to OSM at the following Internet address: [osmrules@osmre.gov](mailto:osmrules@osmre.gov).

If you wish to comment on the information collection aspects of this proposed rule, submit your comments to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via e-mail to [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov) or via facsimile to (202) 395-6566.

You may submit a request for a public hearing orally or in writing to the person and address specified under **FOR FURTHER INFORMATION CONTACT**. We will announce the address, date and time for any hearing in the **Federal Register** before the hearing. If you are disabled and require special accommodation to attend a public hearing, you should contact the person listed under **FOR FURTHER INFORMATION CONTACT**. **FOR FURTHER INFORMATION CONTACT:** Earl D. Bandy, Jr., Office of Surface Mining Reclamation and Enforcement, Appalachian Regional Coordinating Center, Applicant/Violator System Office, 2679 Regency Road, Lexington, Kentucky 40503. Telephone: (859) 260-8424 or (800) 643-9748. E-Mail: [ebandy@osmre.gov](mailto:ebandy@osmre.gov).

#### SUPPLEMENTARY INFORMATION:

##### Table of Contents

- I. Background to the Proposed Rule
- II. Discussion of the Proposed Rule
- III. Public Comment Procedures
- IV. Procedural Determinations

#### I. Background to the Proposed Rule

This proposed rule would amend certain provisions of our 2000 final ownership and control rule published on December 19, 2000 at 65 FR 79582. That rule, which took effect for Federal programs (*i.e.*, SMCRA programs for which OSM is the regulatory authority) on January 18, 2001, primarily addresses ownership or control of surface coal mining operations under section 510(c) of SMCRA. 30 U.S.C. 1260(c). Under section 510(c), a permit applicant is not eligible to receive a permit if the applicant owns or controls any surface coal mining operation that is in violation of SMCRA or other

applicable laws. In addition to implementing section 510(c), the rule also addresses, among other things, permit application information requirements, post-permit issuance information requirements, entry of information into the Applicant/Violator System (AVS), application processing procedures, and alternative enforcement. *See generally* 65 FR 79661-71.

On February 15, 2001, the National Mining Association (NMA) filed a lawsuit in the U.S. District Court for the District of Columbia in which it challenges the 2000 final rule on multiple grounds. *National Mining Ass'n v. Office of Surface Mining*, No. 01-366 (CKK) (D.D.C.). NMA's lawsuit is the latest chapter in litigation concerning ownership and control and related issues. Litigation in this area—involving, at various times, OSM, State regulatory authorities (administering OSM-approved State programs), NMA, and environmental groups—has been contentious and ongoing, virtually uninterrupted, since at least 1988. The 2000 final rule, which we are proposing to revise, replaced a 1997 interim final rule (62 FR 19451), which was partially invalidated by the U.S. Court of Appeals for the District of Columbia Circuit. *National Mining Ass'n v. Department of the Interior*, 177 F.3d 1 (D.C. Cir. 1999) (*NMA v. DOI II*). The interim final rule replaced three sets of predecessor regulations dating back to 1988 and 1989 (53 FR 38868 [1988], 54 FR 8982 [1989], 54 FR 18438 [1989]), which were invalidated by the D.C. Circuit because the court found that one aspect of the rules was inconsistent with section 510(c) of the Act. *National Mining Ass'n v. Department of the Interior*, 105 F.3d 691 (D.C. Cir. 1997) (*NMA v. DOI I*). The preamble to the 2000 final rule contains a detailed discussion of the prior rules and the related litigation. *See generally* 65 FR 79582-84.

This ongoing cycle of litigation has created a great deal of regulatory uncertainty for OSM, State regulatory authorities (administering OSM-approved State programs), the regulated community, and the public in general. Thus, in an effort to introduce regulatory stability and bring the litigation between OSM and NMA to an end, we entered into negotiations with NMA in an attempt to settle NMA's challenge to the 2000 final rule. Ultimately, the parties were able to settle all of the issues presented in NMA's rule challenge. Under the terms of the settlement, we agreed to propose certain regulatory amendments "which are the subject of this proposed rulemaking—in accordance with the

Administrative Procedure Act's standard notice and comment procedures. We did not agree to finalize any of the provisions as proposed. We also agreed to publish—in this proposed rulemaking—certain clarifications to our preamble supporting the 2000 final rule.

We are not obligated, as a result of the settlement agreement, to issue a final rule based on this proposal. We will give due consideration to any public comments received on the proposed rule before deciding whether to issue a final rule and whether to finalize any provisions as proposed. However, we do view this rulemaking effort as an opportunity to ensure that we have the tools we need to enforce SMCRA, clarify ambiguous provisions, and reduce any unnecessary reporting burdens on industry and regulatory authorities. We are hopeful that any final rule flowing from this proposal will introduce a measure of regulatory stability to an area that has been in flux since at least 1988. As stated earlier, this proposed rule does not suspend any of the provisions of the 2000 final rule.

## II. Discussion of the Proposed Rule

In this section, we discuss the proposed regulatory revisions to each section of the Code of Federal Regulations (CFR). The revisions include both those we propose in accordance with our settlement with NMA as well as certain non-substantive modifications that flow logically from the settlement proposals.

At the end of this section, we include certain clarifications to the preamble to our 2000 final rule. Although these aspects of the 2000 preamble did not impose any regulatory requirements, we agreed to publish clarifications as part of our settlement with NMA. Like the corresponding preamble provisions in the 2000 final rule, the clarifications we announce today do not impose regulatory requirements. As such, we are not seeking public comments on these issues, and we do not plan to address these topics again in a final rule.

### 30 CFR 701.5—Definitions

#### Control or Controller

In the 2000 final rule, we defined *control* or *controller* in terms of certain relationships that establish control of a surface coal mining operation. We also provided examples of persons who may be, but are not necessarily, controllers. NMA challenged the definition on multiple grounds, including that the definition is vague, arbitrary and capricious, and contrary to *NMA v. DOI II*. Given the alleged vagueness of the

definition, NMA also objected to the requirement that a permit applicant must list all of its controllers in the permit application.

In order to settle this claim, we agreed to propose removing from the definition of *control* or *controller* at 30 CFR 701.5 the following: all of paragraph (3)—general partner in a partnership; all of paragraph (4)—person who has the ability to commit financial or real property assets; from paragraph (5), the phrase “alone or in concert with others,” the phrase “indirectly or directly,” and the list of examples at paragraphs (5)(i) through (5)(vi). Both parties agreed that if the proposed revisions were finalized, the remaining portion of the definition would still allow the regulatory authority to reach any person or entity with the “ability” to determine the manner in which a surface coal mining operation is conducted. Both parties also agreed that standard could encompass indirect and direct control, as well as control in concert with others, where there is actual ability to control.

While we are proposing to remove from the regulatory text two categories of controllers (general partner in a partnership; person who has the ability to commit financial or real property assets), as well as the list of examples of persons who may be controllers, we stress that, under this proposal, all of these persons may still be controllers. In fact, general partners and persons who can commit assets are almost always controllers. *See, e.g., NMA v. DOI II*, 177 F.3d at 7. However, because these persons are already covered under the “ability to control” standard, we propose to remove them from the regulatory text in order to simplify the definition. Likewise, although we propose to remove the examples of controllers, these persons may still be controllers if they in fact have the ability to control a surface coal mining operation. In our experience implementing section 510(c) of the Act since 1977, the persons identified in the examples are often controllers. Therefore, our discussion of these examples in the preamble to the 2000 final rule remains instructive, though it is important to remember that these examples are not exhaustive. *See* 65 FR 79598–600.

The proposed modification of the definition of *control* or *controller* is coupled with a proposal to remove the requirement to list all controllers in a permit application under current 30 CFR 778.11. Instead, we propose that only the natural person that is expected to have the greatest level of control must be disclosed as a controller. Permit

applicants will continue to be required to include in a permit application the information required to be disclosed under sections 507 and 510(c) of SMCRA. We propose this modification to the permit application information requirements in order to establish a “bright line,” objective standard for both applicants (who must submit certain information in a permit application) and regulatory authorities (who review applications for completeness and compliance with the Act). The “ability to control” standard discussed above gives regulatory authorities flexibility to consider all of the relevant facts, on a case-by-case basis, in determining whether control is present; regulatory authorities also have the leeway to follow control wherever it may exist in a series of business relationships. However, while it is important for regulatory authorities to retain this flexibility and leeway, it is difficult, or impossible, to have an objective information disclosure standard based on this type of definition. By removing the requirement for applicants to list all of their controllers in a permit application, this proposal would greatly reduce any uncertainty or subjectivity associated with the relevant permit information disclosure requirements. In sum, the proposals discussed above would give regulatory authorities the flexibility they need to enforce the Act, while simultaneously making the permit information requirements more objective.

#### Own, Owner, or Ownership

In its judicial challenge, NMA claimed that the definition of *own*, *owner*, or *ownership* at 30 CFR 701.5 in our 2000 final rule is inconsistent with SMCRA, arbitrary and capricious, and contrary to *NMA v. DOI II*. NMA also took issue with the “downstream” reach of the rule, as it pertains to ownership. The term “downstream,” as used by the D.C. Circuit in the *NMA v. DOI I* and *NMA v. DOI II* litigation, refers to surface coal mining operations that are down a corporate (or other business) chain from the applicant. For example, if the applicant has a subsidiary, the subsidiary would be considered “downstream” from the applicant; by contrast, if the applicant has a parent company, the parent company would generally be considered “upstream” from the applicant. NMA's claim pertained to how far downstream the regulatory authority can look when making a permit eligibility determination based on ownership (as distinct from control) of a surface coal mining operation.

In order to settle this claim, we agreed to propose revisions to the definition of *own*, *owner*, or *ownership* at current 30 CFR 701.5 and the provision at current 30 CFR 773.12(a)(2) that governs the downstream reach of the definition. The first revision is to the definition itself. The current definition, at 30 CFR 701.5, includes persons “possessing or controlling in excess of 50 percent of the voting securities or other instruments of ownership of an entity.” This definition could be confusing in that it uses the word “controlling,” which is a separately defined term. In order to remove any potential confusion, we propose to add the term “owning of record” in place of “possessing or controlling.” The term “owning of record” is a variant of “owners of record,” which is found in section 507(b) of the Act. Thus, regulatory authorities and the regulated industry will be familiar with the term and its meaning. This proposed revision would not change the substance of the definition of *own*, *owner*, or *ownership*.

The second proposed revision is at current 30 CFR 773.12(a)(2), which addresses the downstream reach of the rule. In *NMA v. DOI II*, the U.S. Court of Appeals for the Federal Circuit clearly held that we can deny a permit based on limitless “downstream” control relationships. *NMA v. DOI II*, 177 F.3d at 4–5. That is, if the applicant indirectly controls an operation with a violation, through its ownership or control of intermediary entities, it is not eligible for a permit. *Id.* at 5. The operation with a violation can be limitlessly downstream from the applicant. While we believe the court’s logic arguably extends to ownership, the *NMA v. DOI II* decision is not entirely clear on this point.

At present, the 2000 final rule allows us to reach downstream with regard to both ownership and control. Thus, under the current rule, we can deny a permit if the applicant indirectly *owns* an operation in violation of SMCRA or other applicable laws. The operation in violation can be infinitely downstream from the applicant—meaning that ownership of the operation can be indirect, through intermediary entities—as long as there is an uninterrupted chain of ownership between the applicant and the operation. NMA argued that this provision is contrary to the plain meaning of SMCRA and violates principles of corporate law. NMA claimed that ownership of a corporation does not equate to ownership of the corporation’s assets (including mining operations). Thus, according to NMA, we should only be able to block a permit based on

ownership if one of the applicant’s own operations has a violation.

While we do not necessarily agree with NMA’s analysis, in order to settle this claim, we agreed to propose a regulatory revision at 30 CFR 773.12(a), the effect of which would be to limit the reach of permit blocking based on ownership to “one level down” from the applicant. For example, if an applicant *directly* owns an entity with an unabated or uncorrected violation of SMCRA or other applicable laws—meaning there are no intermediary entities between the applicant and the entity with a violation—the applicant would not be eligible for a permit. In other words, the rule would reach one level down from the applicant to the entity the applicant owns. However, if the applicant *indirectly* owns an entity with a violation—meaning that there is at least one intermediary entity between the applicant and the entity with a violation—the applicant would not be ineligible for a permit based on ownership of a violator entity. Of course, the same applicant would be ineligible for a permit if it controlled the violator entity.

While we do not believe this approach is compelled by SMCRA or the decision in *NMA v. DOI II*, it is a reasonable interpretation of the Act. Moreover, as it pertains to control, the rule will continue to reach limitlessly “downstream.” That is, in determining an applicant’s eligibility for a permit, we may continue to consider violations at “downstream” operations, as long as there is control by the applicant. Because we can still deny a permit based on indirect control of an operation with a violation, through intermediary entities, the proposed modification to the downstream reach of *ownership* will not impair our ability to adequately enforce section 510(c) of the Act.

The proposed revision at 30 CFR 773.12(a) that pertains to the downstream reach of the definition of *own*, *owner*, or *ownership* is further discussed below in 30 CFR 773.12.

#### 30 CFR 773.8—General Provisions for Review of Permit Application Information and Entry of Information Into AVS

We propose to revise current 30 CFR 773.8 by removing the phrase “ownership and control” from paragraph (b)(1). The proposed revision at (b)(1) would read: “We will enter into AVS the information you submit under §§ 778.11 and 778.12(c) of this subchapter.” We note that this proposed revision would require regulatory authorities to enter into AVS one piece

of information that they typically have not loaded into the system in the past: the identity of the person(s) responsible for submitting the Coal Reclamation Fee Report (Form OSM–1) and for remitting the reclamation fee payment to OSM. See current 30 CFR 778.11(a)(4). With this one minor exception, this is a non-substantive proposed revision that flows logically from our proposed revision to 30 CFR 778.11, discussed below.

#### 30 CFR 773.9—Review of Applicant, Operator, and Ownership and Control Information

We propose to revise 30 CFR 773.9 by removing the phrase “applicant, operator, and ownership and control” where it occurs in paragraph (a). Revised paragraph (a) would read: “We, the regulatory authority, will rely upon the 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.” This non-substantive proposed revision flows logically from our proposed revision to 30 CFR 778.11, discussed below.

#### 30 CFR 773.10—Review of Permit History

We propose to revise sections 30 CFR 773.10(b) and (c). In paragraph (b), we would remove the phrase “any of your controllers disclosed under §§ 778.11(c)(5) and 778.11(d)” and replace it with the phrase “your designated controller disclosed under § 778.11(d).” Paragraph (b) would then read: “We will also determine if you, your operator, or your designated controller disclosed under § 778.11(d) of this subchapter have previous mining experience.” In paragraph (c), we would remove the language “your controllers, or your operator’s controllers” from the first sentence and replace it with “or your designated controller.” In the second sentence of paragraph (c), we would remove “and was not disclosed under § 778.11(c)(5) of this subchapter.” Paragraph (c) would then read: “If you, your operator, or your designated controller 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.” These proposed revisions flow logically from our proposed revision to 30 CFR 778.11, discussed below.

### 30 CFR 773.12—Permit Eligibility Determinations

As indicated above, under our discussion of the definition of *own*, *owner*, or *ownership*, we also propose to revise 30 CFR 773.12(a), the provision in the 2000 final rule that affects the “downstream” reach of the rule. Specifically, we propose to revise paragraph (a)(2) so that we can no longer deny a permit based on indirect *ownership* of a surface coal mining operation with a violation; but we would retain the right to deny a permit based on indirect *control*. In order to simplify the rule, we also propose to merge paragraphs (a)(2) and (a)(3). The proposed revision to paragraph (a)(2), which would remove references to ownership, would provide that you, a permit applicant, are not eligible for a permit if any surface coal mining operation that “You or your operator indirectly control has an unabated or uncorrected violation and your control was established or the violation was cited after November 2, 1988.” Thus, as explained above, with regard to ownership, we could only look “one level down” from the applicant in making a permit eligibility determination.

We are also proposing to revise 30 CFR 773.12(b). Consistent with the D.C. Circuit’s ruling on retroactivity in *NMA v. DOI II*, 30 CFR 773.12(b) of our 2000 final rule provides that an applicant is eligible to receive a permit, notwithstanding the fact that the applicant or the applicant’s operator indirectly owns or controls an operation with an unabated or uncorrected violation, if both the violation and the assumption of ownership or control occurred before November 2, 1988. However, 30 CFR 773.12(b) also provides that the applicant is *not* eligible to receive a permit under this provision if there “was an established legal basis, independent of authority under section 510(c) of the Act, to deny the permit \* \* \*.” NMA challenged 30 CFR 773.12(b), claiming that if there is an “independent authority” to deny the permit, that authority exists whether or not it is referenced in the regulatory language. According to NMA, the provision is superfluous and potentially confusing. We agree that any “independent authority” exists independent of this regulatory provision. Thus, in order to settle this claim, we propose to remove 30 CFR 773.12(b). Because we propose to remove 30 CFR 773.12(b), we also propose to redesignate paragraphs (c), (d), and (e) as (b), (c), and (d), respectively.

### 30 CFR 773.14—Eligibility for Provisionally Issued Permits

Section 773.14 of our 2000 final rule allows for the issuance of a provisionally issued permit if the applicant meets the criteria under 30 CFR 773.14(b). The promulgated regulatory language uses the word “*may*,” which indicates that the regulatory authority retains discretion to grant a provisionally issued permit, even if the applicant otherwise meets the eligibility criteria at 30 CFR 773.14(b). While our preamble discussion is not explicit on this point, we intended in this context that an applicant *is* eligible to receive a provisionally issued permit under the specified circumstances. *See, e.g.*, 65 FR 79618–19, 79622–24, 79632, 79634–35, and 79638.

In order to reconcile any ambiguity, and to settle a claim brought by NMA, today we propose to amend our rule language at 30 CFR 773.14(b) to clarify that an applicant who meets the 30 CFR 773.14(b) eligibility criteria will be eligible for a provisionally issued permit. We stress that an applicant must also meet all other permit application approval and issuance requirements before receiving a provisionally issued permit and that the provisional permittee must comply with all performance standards. *See generally* 65 FR 79622.

### 30 CFR 773.21—Initial Review and Finding Requirements for Improvidently Issued Permits

Sections 773.21 through 773.23 of our 2000 final rule set forth provisions relating to “improvidently issues permits,” which are, in this context, permits that we should not have issued in the first instance because of the applicant’s ownership or control of a surface coal mining operation with a violation. We propose two substantive revisions to 30 CFR 773.21(c).

The first revision relates to our burden of proof in making a preliminary finding that a permit was improvidently issued. This proposed revision would clarify that a preliminary finding of improvident issuance “must be based on reliable, credible, and substantial evidence and establish a *prima facie* case that [the] permit was improvidently issued.” This proposed revision flows from the related proposed revisions to 30 CFR 773.27(a), which is discussed in more detail below.

We also propose to remove current 30 CFR 773.21(c)(2), which requires us to post notices of our *preliminary* findings of improvident permit issuance at our office closest to the permit area and on

the Internet. This proposed revision is similar to one of our proposed revisions to 30 CFR 843.21; our rationale for removing these and similar posting requirements is set forth more fully under the discussion of 30 CFR 843.21, below.

### 30 CFR 773.22—Notice Requirements for Improvidently Issued Permits

We propose to remove current 30 CFR 773.22(d), which contains similar posting requirements to those found at current 30 CFR 773.21(c)(2), discussed above. Specifically, we propose to remove the requirement to post a notice of *proposed* suspension or rescission at our office closest to the permit area and on the Internet. Our rationale for removing these and similar posting requirements is set forth under the discussion of 30 CFR 843.21, below. Because we propose to remove paragraph (d), we further propose to redesignate current paragraphs (e) through (h) accordingly.

### 30 CFR 773.23—Suspension or Rescission Requirements for Improvidently Issued Permits

We propose to revise the posting requirements contained in current 30 CFR 773.23. Current 30 CFR 773.23(c)(2) requires us to post a *final* notice of permit suspension or rescission (which requires the holder of the improvidently issued permit to cease all surface coal mining operations on the permit) at our office closest to the permit area and on the Internet. As with the proposed revisions to sections 30 CFR 773.21 and 773.22, we propose to remove the requirement to post the final notices on the Internet. However, because this section pertains to *final* findings (as opposed to the *preliminary* and *proposed* findings under sections 30 CFR 773.21 and 773.22, respectively), we propose to retain the requirement to post the final notice at our office closest to the permit area. It is appropriate to post notices of such final actions for public view. Our rationale for revising these and similar posting requirements is set forth more fully under the discussion of 30 CFR 843.21, below.

### 30 CFR 773.26—How to Challenge an Ownership or Control Listing or Finding

Sections 773.25 through 773.28 of our 2000 final rule set forth provisions for challenging ownership or control listing or findings. Generally speaking, an ownership or control *listing* arises when a permit applicant identifies, or “lists,” a person as an owner or controller in a permit application. That information is, in turn, entered into the AVS by the regulatory authority. By contrast, an

ownership or control *finding* under 30 CFR 774.11(f) constitutes a regulatory authority's fact-specific determination that a person owns or controls a surface coal mining operation.

In its judicial challenge to our 2000 final rule, NMA claimed that 30 CFR 773.26(a) is confusing. That section explains how and where a person may challenge an ownership or control listing or finding. NMA claimed that the provision does not clearly delineate the appropriate forum in which to bring a challenge. Also, NMA was concerned that the provision seems to refer only to applicants and permittees, but not other persons who are identified in the AVS as owners or controllers.

Section 773.25 of the 2000 final rule provides that any person listed in a permit application or in the AVS as an owner or controller, or found by a regulatory authority to be an owner or controller, may challenge the listing or finding. As we explained in the preamble, our intent was, in fact, to allow any person listed in a permit application or in the AVS, or found to be an owner or controller, to initiate a challenge at *any* time, regardless of whether there is a pending permit application (or issued permit). See 65 FR 79631. Section 773.26(a) was not intended to limit in any way the universe of persons who may avail themselves of the challenge procedures under 30 CFR 773.25; rather, it merely specifies the procedure and forum in which to challenge an ownership or control listing or finding.

Nonetheless, in order to provide greater clarity and to settle NMA's claim, today we propose to amend our regulations at 30 CFR 773.26(a) to specify more clearly the forum in which to initiate an ownership or control challenge. The proposed revision specifies that challenges pertaining to a pending permit application are to be submitted to the regulatory authority with jurisdiction over the permit application. All other challenges concerning ownership or control of a surface coal mining operation are to be submitted to the regulatory authority with jurisdiction over that surface coal mining operation.

We note that, in meeting its obligations under section 510(c) of the Act and the State counterparts to that provision, each State, when it receives a permit application, must apply its own ownership and control rules to determine whether the applicant owns or controls any surface coal mining operations with violations. See *generally* 65 FR 79637. Further, we stress that an ownership or control decision by one State is not necessarily

binding on any other State. This provision comports with principles of State primacy, and recognizes that not all States will have identical ownership and control rules.

We also propose to add new 30 CFR 773.26(e) in partial satisfaction of our settlement with NMA concerning the relative burdens of proof in ownership or control challenges. This new provision would allow a person who is unsure why he or she is shown in the AVS as an owner or controller of a surface coal mining operation to request an explanation from our AVS Office. The new provision would require us to respond to such a request within 14 days. Our response would be informal and would set forth in simple terms why the person is shown in AVS. In most, if not all, cases, the explanation would be as simple as specifying that the person was found to be an owner or controller under 30 CFR 774.11(f) (of which the person should already be aware due to that section's written notice requirement) or was listed as an owner or controller in a permit application. Understanding the basis for being shown in the AVS will give persons a better sense of the type of evidence they will need to introduce in an ownership or control challenge.

#### *30 CFR 773.27—Burden of Proof for Ownership or Control Challenges*

As mentioned above, our 2000 final rule contains provisions for challenging ownership or control listings or findings. A successful challenger must prove by a preponderance of the evidence that he or she is not, or was not, an owner or controller. In its judicial challenge, NMA argued that the rule should be amended so that we must first demonstrate at least a *prima facie* case so that the challenger can know what evidence he or she must rebut. The preamble to our 2000 final rule already states:

[I]n 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. 65 FR 79640.

Nonetheless, in order to set forth more clearly the relative burdens of the parties, we agreed to propose regulatory revisions to sections 30 CFR 773.27(a) and 774.11(f), as well as a related change to 30 CFR 773.21(c), discussed above. We also agreed to propose a new

30 CFR 773.26(e), discussed above. The proposed revision to 30 CFR 774.11(f), discussed further under the proposed revisions to 30 CFR 774.11, below, clarifies that a regulatory authority's finding of ownership or control must be based on reliable, credible, and substantial evidence and establish a *prima facie* case of ownership or control. The proposed revision to 30 CFR 773.27(a) merely clarifies that a person can challenge either an ownership or control listing or a *prima facie* finding of ownership or control under 30 CFR 774.11(f).

If the challenge concerns a finding of ownership or control, the regulatory authority bears the initial burden of establishing a *prima facie* case of ownership or control based on reliable, credible, and substantial evidence. (In this context, a *prima facie* case is one consisting of sufficient evidence to establish the elements of ownership or control and that would entitle the regulatory authority to prevail unless the evidence is overcome by other evidence.) If the challenge concerns an ownership or control listing, the regulatory authority's initial burden is substantially lower: the regulatory authority must specify only the circumstances of the listing, such as who listed the person, the date of the listing, and in what capacity the person was listed. In either type of challenge, after the regulatory authority meets its initial burden, the burden shifts to the challenger to prove, by a preponderance of the evidence, that he or she does not, or did not, own or control the relevant surface coal mining operation. The challenger bears the ultimate burden of persuasion.

#### *30 CFR 773.28—Written Agency Decision on Challenges to Ownership or Control Listings or Findings*

We propose to revise the posting requirements contained in current 30 CFR 773.28. Current 30 CFR 773.28(d) requires us to post final decisions on ownership and control challenges on the AVS and on the Internet. We propose to remove the requirement to post these decisions on the Internet. However, because this section pertains to final decisions on ownership or control challenges, we propose to retain the requirement to post these decision on the AVS. Because these final findings may have permit eligibility consequences, it is appropriate to make such findings publicly available by posting them on the AVS. Our rationale for revising these and similar posting requirements is set forth more fully under the discussion of 30 CFR 843.21, below.

*30 CFR 774.11—Post-permit Issuance Requirements for Regulatory Authorities and Other Actions Based on Ownership, Control, and Violation Information*

We propose several revisions to 30 CFR 774.11 of our 2000 final rule, which contains, among other things, requirements for regulatory authorities after a permit is issued. The first proposed revision is to current 30 CFR 774.11(a)(3), which requires the regulatory authority to enter into AVS all “[c]hanges of ownership or control within 30 days after receiving notice of a change.” We propose to revise 30 CFR 774.11(a)(3) by removing “Changes of ownership or control” and replacing it with “Changes to information initially required to be provided by the applicant under 30 CFR 778.11.” This proposed change flows from the proposed revision to 30 CFR 778.11, discussed under 30 CFR 701.5 (definition of *control* or *controller*), above, and under 30 CFR 778.11, below.

The second proposed revision is to current 30 CFR 774.11(e). Under the specified circumstances, 30 CFR 774.11(c) of our 2000 final rule requires us to make a preliminary finding of permanent permit ineligibility. Section 30 CFR 774.11(d) provides for administrative review of the preliminary finding. Section 30 CFR 774.11(e), as promulgated, reads as follows: “We must enter the results of the finding and any hearing into AVS.” Confusion has arisen as to whether a preliminary finding must be entered into AVS before administrative resolution.

To settle a claim brought by NMA, we today clarify that a finding of permanent permit ineligibility may only be entered into AVS if it is affirmed on administrative review or if the person subject to the finding does not seek administrative review and the time for seeking administrative review has expired. We propose to revise 30 CFR 774.11(e) to effectuate this clarification. At paragraph (e), we propose to create a subheading “Entry into AVS.” Revised paragraph (e)(1) would then read, “If you do not request a hearing, and the time for seeking a hearing has expired, we will enter our finding into AVS.” Revised paragraph (e)(2) would read, “If you request a hearing, we will enter our finding into AVS only if that finding is upheld by the Office of Hearings and Appeals.”

The next proposed revision relates to a regulatory authority’s finding of ownership or control. As explained above, under the discussion of the burden of proof provisions in 30 CFR 773.27, we propose to revise 30 CFR 774.11(f) to clarify that a regulatory

authority’s written finding of ownership or control must be based on reliable, credible, and substantial evidence and establish a *prima facie* case of ownership or control. The written finding requirement is found at current 774.11(f)(1); we propose to incorporate the requirement into revised 30 CFR 774.11(f). In the preamble to our 2000 final rule, we already explained that a finding of ownership or control must be based on a *prima facie* determination of ownership or control (65 FR 79640); the proposed revision makes this requirement explicit. The proposed revision would add the requirement that a finding of ownership or control must be based on reliable, credible, and substantial evidence.

Another proposed revision to 30 CFR 774.11 concerns NMA’s claim that our 2000 final rule denies a person the right to challenge a decision to “link” it by ownership or control to a violation before the link is entered into AVS, which is an “automated information system of applicant, permittee, operator, violation and related data OSM maintains to assist in implementing the Act.” 30 CFR 701.5. In order to settle this claim, we agreed to propose a new paragraph (g) at 30 CFR 774.11 and related regulatory revisions.

The new paragraph (g) would provide that after we make a finding of ownership or control under 30 CFR 774.11(f), and before we enter the finding into AVS, we will allow the person subject to the finding 30 days in which to submit information tending to demonstrate a lack of ownership or control. After reviewing any information submitted, if we are persuaded that the person is not an owner or controller, we will serve the person with a written notice to that effect; if we still find the person to be an owner or controller, we will enter the finding into AVS and require the person to satisfy the requirements of 30 CFR 778.11(d), if appropriate. The latter two requirements—entry of the decision into AVS and compliance with 30 CFR 778.11(d)—are found, in substance, at 30 CFR 774.11(f)(2) and (f)(3); we propose to incorporate them into proposed sections 30 CFR 774.11(g)(1) and (g)(2). The process envisioned in proposed paragraph (g) will be informal and non-adjudicatory.

Finally, we propose to add new paragraph (h). This new paragraph would provide that we do not need to make a finding of ownership or control before entering into AVS the information that permit applicants are required to disclose under sections 30 CFR 778.11(b) and (c). For example, if we find that an applicant failed to

disclose the operator in a permit application, we can enter the operator into AVS without making a finding of ownership or control. This is so because the applicant is required to identify the operator under section 507(b)(1) of the Act, 30 U.S.C. 1257(b)(1), and under 30 CFR 778.11(b)(3). However, proposed paragraph (h) would also make clear that the *mere listing* of a person in the AVS pursuant to 30 CFR 778.11(b) or (c) does not create a presumption or constitute a determination that such person owns or controls a surface coal mining operation. Of course, some of the persons required to be disclosed under sections 30 CFR 778.11(b) and (c) *will* be owners or controllers, but that is because they meet the definition of *own*, *owner*, or *ownership* or *control* or *controller* at 30 CFR 701.5, not because they are listed in AVS. We propose to make non-substantive revisions to current paragraph (g) and redesignate that provision as paragraph (i).

*30 CFR 778.11—Providing Applicant, Operator, and Ownership and Control Information*

We are proposing several revisions in 30 CFR 778.11. First, we propose to remove the term “ownership and control” from the heading of the section. Thus, the heading for 30 CFR 778.11 would be revised to read “Providing applicant and operator information.” We are proposing this revision largely because we are also proposing to remove current 30 CFR 778.11(c)(5), which requires an applicant to disclose all of its owners and controllers in a permit application (*see* discussions under 30 CFR 701.5, definition of *control* or *controller*, and below). As a result of this change, together with the proposed revisions discussed below, revised 30 CFR 778.11 would comport more closely with certain of the permit information requirements contained in section 507(b) of the Act. 30 U.S.C. 1257(b). While some of the persons identified in revised 30 CFR 778.11 will in fact be owners or controllers, we believe the broad term “applicant and operator information” more aptly describes the range of information an applicant would be required to disclose under revised 30 CFR 778.11.

Current 30 CFR 778.11(a)(1) requires an applicant to identify whether it and its operator are “corporations, partnerships, sole proprietorships, or other business entities.” We propose to add “associations” to this list of business entities to conform the provision more closely to section 507(b)(4) of the Act. Similarly, an applicant must provide certain information for the persons identified in

30 CFR 778.11(c). We propose to add “partner” to this list of persons. We also propose to redesignate current 30 CFR 778.11(c)(4) as 30 CFR 778.11(c)(5) and revise it to read “Person who owns 10 percent or more of the applicant or the operator.” These changes likewise comport with section 507(b)(4) of the Act.

As we explain under the discussion of 30 CFR 701.5, above, in conjunction with revising the definition of *control* or *controller*, we propose to remove the requirement at 30 CFR 778.11(c)(5), which requires an applicant to identify all of its owners or controllers in a permit application. We propose this revision because we believe it is important to establish “bright line,” objective permit information requirements. Since we propose to retain a definition of control that vests regulatory authorities with discretion to make fact-specific findings of control on a case-by-case basis, it is difficult, or impossible, to have an objective reporting requirement based on that definition. Even though we propose to remove this reporting requirement, we are confident that the disclosure requirements at sections 507(b) and 510(c) of the Act will give regulatory authorities all the information they need to enforce section 510(c). Further, we note that this information is not required to be disclosed under the Act. We have submitted a request to the Office of Management and Budget that modifies the information collection requirements for Part 778 to reflect this proposed change.

Finally, in litigation concerning our 2000 final rule, NMA challenged 30 CFR 778.11(d). This section provides that “[t]he 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.” NMA challenged the provision on procedural and substantive grounds, claiming, among other things, that it is vague and raises self-incrimination concerns. In order to settle this claim, we propose to revise the regulatory language at 30 CFR 778.11(d) to clarify the applicability and scope of the provision.

Particularly, we are proposing that a permit applicant must designate the natural person expected to have the greatest level of control over the entire proposed surface coal mining operation. That person would, in turn, sign the permit application, thereby acknowledging the designation. The proposed amendment would also clarify that a designation will not, by itself, be sufficient evidence on which to base the

imposition of an individual civil penalty under sections 30 CFR 724.12 or 846.12 or an alternative enforcement action under sections 30 CFR 847.11 or 847.16. However, if the operation that the designated person controls has an unabated or uncorrected violation, the designated person would not be eligible to receive a permit under 30 CFR 773.12 or section 510(c) of SMCRA, unless he successfully challenges his control of the operation under sections 30 CFR 773.25 through 773.28. *See, e.g.*, 65 FR 79631 (explaining that even persons who must currently certify as to their control can, in effect, “de-certify” if they can demonstrate changed circumstances).

#### *30 CFR 843.21—Procedures for Improvidently Issued State Permits*

Section 843.21 of our 2000 final rule revised the procedures governing State permits that have been improvidently issued based on ownership or control relationships. This section provides for direct Federal enforcement, including notices of violation and cessation orders, if a State fails to take appropriate action. NMA objected to a provision that requires Internet posting of our initial notice that we have reason to believe a State permit may have been improvidently issued. In order to settle this claim, we agreed to propose a regulatory revision at paragraph (a), but we did not agree to remove the Internet posting requirement. The revision at paragraph (a) would provide that the initial notice must be based upon reliable and credible information. Since a finding of improvident issuance can have potentially serious ramifications, it is only fair that the initial notice be based on reliable and credible information.

Upon further consideration, we propose to remove all Internet posting requirements found in the 2000 final rule. These Internet posting requirements can be found at current sections 30 CFR 773.21(c)(2), 773.22(d), 773.23(c)(2), 773.28(d), 843.21(a)(2), 843.21(c)(2), and 843.21(d). We also propose to remove the requirement to post certain *preliminary* decisions “at our office closest to the permit area.” These posting requirements are found at current sections 30 CFR 773.21(c)(2), 773.22(d), 843.21(a)(2), and 843.21(c)(2). We propose to retain the requirement to post certain *final* decisions at our office closest to the permit area (or, in one instance, on AVS). These final decision posting requirements are found at proposed sections 30 CFR 773.23(c)(2), 773.28(d), and 843.21(d).

Our inclusion of the Internet posting requirements in the first instance was

primarily based on comments that we should expand the public’s access to our decisions. *See, e.g.*, 65 FR 79632. While public access to final decisions remains important, we have come to believe that the various Internet posting requirements in the 2000 final rule could be unduly burdensome to regulatory authorities, especially when public notice of final decisions can be accomplished by the less burdensome, conventional method of posting them at our office closest to the permit area. Further, regulatory authorities are already required to enter much of the relevant information into AVS, which is available to the public. Posting *preliminary* findings by any method could likewise become unduly burdensome; further, posting of preliminary findings is of questionable value to the public. For these reasons, we propose to remove all Internet and *preliminary* finding posting requirements, but retain public posting of our final decisions. In terms of information collection burdens on regulatory authorities, we note that we have not yet required the States to implement these posting requirements. Thus, because we propose to eliminate an information collection that never took effect for the States, there is no net change to the information collection burden.

#### *30 CFR 847.11—Criminal Penalties*

#### *30 CFR 847.16—Civil Actions for Relief*

During the course of litigation over our 2000 final rule, NMA claimed that certain of the rule’s “alternative enforcement” provisions unlawfully abrogate State prosecutorial discretion by making it mandatory for States to seek criminal penalties or institute civil actions for relief upon the occurrence of certain specified conditions. *See* sections 30 CFR 847.11 (criminal penalties), 847.16 (civil actions for relief), and 847.2(c) (requiring State regulatory programs to include criminal penalty and civil action provisions that are no less stringent than the Federal requirements). Upon further reflection, we agree that the regulatory authority—Federal or State—should retain the discretion to evaluate the severity of a violation and ultimately to determine whether referral for alternative enforcement is warranted. As such, and in order to settle NMA’s claim, we propose to amend our regulations at sections 30 CFR 847.11 and 847.16 to remove the mandatory nature of referrals for alternative enforcement. We propose to accomplish this by changing the word “will” to “may” in the operative provisions to underscore that

a regulatory authority “may,” but is not obligated to, refer a particular matter for alternative enforcement.

### Clarifications to the Preamble to Our 2000 Final Ownership and Control Rule

As explained above, as part of our settlement with NMA, we agreed to publish certain clarifications to the preamble supporting our 2000 final rule. Like the corresponding preamble provisions in our 2000 final rule, the clarifications we announce today do not impose regulatory requirements. As such, we are not seeking public comments on these issues, and we do not plan to address these topics again in a final rule.

1. In *NMA v. DOI I*, the court of appeals explained that, as a general rule, we may not deny a permit based on violations of persons who own or control the applicant (so-called “upstream” owners and controllers). However, the court explained: “OSM has leeway in determining who the applicant is. As [NMA] 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. Thus, the court held, “once OSM has determined that it has the true applicant before it, OSM’s power is constrained by the specific statutory language of section 510(c)—only those violations of operations owned or controlled by the applicant are relevant.” *Id.*

At 65 FR 79609 through 79611 of the preamble of our 2000 final ownership and control rule, there is substantial discussion of the “true applicant” concept and a related discussion of corporate veil-piercing. In that portion of the 2000 final rule’s preamble, our intent was to explain why we chose not to define the term “true applicant,” as well as to identify a non-exclusive list of theories that may be available to a regulatory authority in attempting to ascertain the identity of the true applicant. This general preamble language was not intended to impose any regulatory requirement on regulatory authorities.

Nonetheless, confusion has arisen as to whether we are directing State regulatory authorities, via preamble language, to use any of the identified theories to identify the true applicant. To settle a claim brought by NMA in its judicial challenge to our 2000 final rule, we today clarify that we are not directing State regulatory authorities to use any of the three identified tools, or any other particular means, in ascertaining whether the nominal permit applicant is also the true

applicant. Should a State attempt to pierce a corporate veil or otherwise ascertain the identity of the true applicant, it is for the State to decide which legal authorities it can and will advance. Ultimately, however, each permitting authority—whether State or Federal—must be satisfied that it indeed has the “true applicant before it.” *NMA v. DOI I*, 105 F.3d at 695. As we stated in the preamble of the 2000 final rule:

In most cases, the nominal applicant (the person whose name appears on the permit application) will also be the true applicant. \* \* \* However, if the regulatory authority has reason to believe that the nominal applicant is not the true applicant, the regulatory [authority] 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. 65 FR 79610–11.

2. Section 773.12 of our 2000 final rule requires regulatory authorities to determine whether permit applicants are eligible to receive a permit under section 510(c) of SMCRA, based on certain ownership or control relationships. At 65 FR page 79616 of the preamble, in response to public comments, we explained that permit revisions and renewals are not necessarily exempt from the requirements of section 510(c) of SMCRA. Specifically, we stated that regulatory authorities may evaluate all permitting actions, including revisions and renewals, for eligibility under section 510(c). Confusion has arisen as to whether we are directing States to conduct a section 510(c) permit eligibility review for permit revisions and renewals.

To settle a claim brought by NMA, today we clarify that we are not requiring States to conduct such a review for permit renewals and revisions other than transfers, assignments, or sales of permit rights under 30 CFR 774.17. However, in our view, States retain the discretion to require section 510(c) reviews for any revision or renewal. Nonetheless, we do not believe a section 510(c) review is necessarily warranted when a regulatory authority orders a revision under 30 CFR 774.10. In that circumstance, we believe that it would make little sense to conduct a section 510(c) review if such a review would preclude the permittee from correcting the problem that resulted in issuance of the revision order. Other than the clarification we announce today, the 2000 final rule’s preamble discussion on this topic, including the legal rationale supporting our position, remains in force.

### III. Public Comment Procedures

*Electronic or Written Comments:* If you submit written comments, they should be specific, confined to issues pertinent to the proposed rule, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on a final rule will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

Except for comments provided in an electronic format, you should submit three copies of your comments if practicable. We will not consider anonymous comments. Comments received after the close of the comment period (*see DATES*) or at locations other than those listed above (*see ADDRESSES*) will not be considered or included in the Administrative Record.

*Availability of Comments:* Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours at the OSM Administrative Record Room (*see ADDRESSES*). Individual respondents may request that we withhold their home address from the rulemaking record. We will honor this request to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent’s identity, to the extent allowed by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

*Public hearings:* We will hold a public hearing on the proposed rule upon request only. The time, date, and address for any hearing will be announced in the **Federal Register** at least 7 days prior to the hearing.

Any person interested in participating in a hearing should inform Mr. Earl Bandy (*see FOR FURTHER INFORMATION CONTACT*), either orally or in writing by 5 p.m., Eastern time, on January 20, 2004. If no one has contacted Mr. Bandy to express an interest in participating in a hearing by that date, a hearing will not be held. If only one person expresses an interest, a public meeting rather than a



hearing may be held, with the results included in the Administrative Record.

The public hearing will continue on the specified date until all persons scheduled to speak have been heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after all persons scheduled to speak and persons present in the audience who wish to speak have been heard. To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her testimony.

**Public meeting:** If there is only limited interest in a hearing at a particular location, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with us to discuss the proposed rule may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All meetings will be open to the public and, if possible, notice of the meetings will be posted at the appropriate locations listed under **ADDRESSES**. A written summary of each public meeting will be made a part of the administrative record of this rulemaking.

#### IV. Procedural Determinations

##### *Executive Order 12866—Regulatory Planning and Review*

This document is not a significant rule and is not subject to review by the Office of Management and Budget 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. The revisions to the provisions governing the section 510(c) review required by SMCRA and related provisions will not have an adverse economic impact on the coal industry or State regulatory authorities. It may in fact reduce expenses for the coal industry and States by reducing the reporting and posting requirements contained in our existing regulations.

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 of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This rule does not raise novel legal or policy issues.

##### *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.*). As previously stated, the revisions to the existing provisions may reduce the cost of doing business for the regulated industry and State regulatory authorities. Further, 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.

##### *Small Business Regulatory Enforcement Fairness Act*

For the reasons previously stated, this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- Does not have an annual effect on the economy of \$100 million or more.
- Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- 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.

##### *Unfunded Mandates*

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, Tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) is not required.

##### *Executive Order 12630—Takings*

In accordance with Executive Order 12630, the rule does not have significant takings implications. The revisions being proposed are procedural in nature and do not affect the use or value of private property.

##### *Executive Order 12988—Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

##### *Executive Order 13132—Federalism*

In accordance with Executive Order 13132, the rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment for the reasons discussed above.

##### *Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the proposed revisions pertaining to section 510(c) reviews required by SMCRA and related provisions would not have substantial direct effects on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

##### *Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not considered a significant energy action under Executive Order 13211. The revisions to the provisions governing the section 510(c) review required by SMCRA and related provisions would not have a significant effect on the supply, distribution, or use of energy.

##### *Paperwork Reduction Act*

In accordance with 44 U.S.C. 3507(d), OSM has submitted the information collection and recordkeeping requirements of 30 CFR part 778 to the Office of Management and Budget (OMB) for review and approval.

##### 30 CFR Part 778

**Title:** Permit Applications—Minimum Requirements for Legal, Financial, Compliance, and Related Information—30 CFR 778.

**OMB Control Number:** 1029-XXX3.

**Summary:** Sections 507(b) and 510(c) of Pub. L. 95-87 provide that applicants for permits to engage in or carry out surface coal mining operations must submit certain information to the regulatory authority in a permit application. The required disclosures include information about the applicant's legal identity, business structure and business relationships, permit and violation histories, and related information. This information is used to ensure all legal, financial and compliance requirements are satisfied prior to issuance or denial of a permit.

**Bureau Form Number:** None.

**Frequency of Collection:** Once.

Description of Respondents: 301 Surface coal mining permit applicants and 24 State regulatory authorities.

Total Annual Responses: 2,388.

INFORMATION COLLECTION FOR 30 CFR PART 778

| Section             | Respondents | Responses    | Hours per response | Total hours  |
|---------------------|-------------|--------------|--------------------|--------------|
| 778.9 .....         | 301         | 888          | 1.15               | 1,024        |
| 778.11 .....        | 301         | 376          | 1.4                | 526          |
| 778.12 .....        | 301         | 75           | 2.4                | 180          |
| 778.13 .....        | 301         | 75           | 2.4                | 180          |
| 778.14 .....        | 301         | 45           | 2.6                | 120          |
| 778.15 .....        | 324         | 324          | 5.6                | 1,806        |
| 778.16 .....        | 213         | 213          | 8                  | 1,710        |
| 778.17 .....        | 324         | 324          | 2.8                | 903          |
| 778.22 .....        | 68          | 68           | 2                  | 135          |
| <b>Totals</b> ..... | <b>301</b>  | <b>2,388</b> | <b>2.75</b>        | <b>6,584</b> |

Total Annual Burden Hours: 6,584.

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of OSM and State regulatory authorities, including whether the information will have practical utility;

(b) The accuracy of OSM's estimate of the burden of the proposed collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of collection on the respondents.

Under the Paperwork Reduction Act, OSM must obtain OMB approval of all information and recordkeeping requirements. No person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control (clearance) number. This number appears in section 778.8 of 30 CFR part 778. To obtain a copy of OSM's information collection clearance requests, explanatory information, and related forms, contact John A. Trelease at (202) 208-2783 or by e-mail at [jtreleas@osmre.gov](mailto:jtreleas@osmre.gov).

By law, OMB must respond to OSM's request for approval within 60 days of publication of this proposed rule, but may respond as soon as 30 days after publication. Therefore, to ensure consideration by OMB, you must send comments regarding these burden estimates or any other aspect of these information collection and recordkeeping requirements by January 28, 2004, to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via e-mail to [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov), or via facsimile to (202) 395-6566. Also, please send a copy of your comments to

John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave, NW., Room 210—SIB, Washington, DC 20240, or electronically to [jtreleas@osmre.gov](mailto:jtreleas@osmre.gov).

*National Environmental Policy Act*

OSM has reviewed this rule and determined that it is categorically excluded from the National Environmental Policy Act process in accordance with the Departmental Manual 516 DM 2, Appendix 1.10.

*How Will This Rule Affect State and Indian Programs?*

Following publication of a final rule, we will evaluate the State and Indian programs approved under section 503 of SMCRA to determine any changes in those programs that may be necessary. When we determine that a particular State program provision should be amended, the particular State will be notified in accordance with the provisions of 30 CFR 732.17. On the basis of the proposed rule, we have made a preliminary determination that State program revisions will be required.

*Clarity of This Regulation*

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc. aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more

(but shorter) sections (a "section" appears in bold type and is preceded by the symbol "\$" and a numbered heading; for example, § 773.14)? (5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed rule? (6) What else could we do to make the proposed rule easier to understand? Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

**List of Subjects**

*30 CFR Part 701*

Law enforcement, Surface mining, Underground mining.

*30 CFR Part 773*

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

*30 CFR Part 774*

Reporting and recordkeeping requirements, Surface mining, Underground mining.

*30 CFR Part 778*

Reporting and recordkeeping requirements, Surface mining, Underground mining.

*30 CFR Part 843*

Administrative practice and procedure, Law enforcement, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 847

Administrative practice and procedure, Penalties, Surface mining, Underground mining.

Dated: December 19, 2003.

Patricia E. Morrison,

Acting Assistant Secretary, Land and Minerals Management.

For the reasons given in the preamble, OSM proposes to amend 30 CFR Parts 701, 773, 774, 778, 843, and 847 as set forth below:

PART 701—PERMANENT REGULATORY PROGRAM

1. The authority citation for part 701 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq.

2. Amend § 701.5 as follows:

a. Revise the definition of control or controller.

b. Revise the definition of own, owner, or ownership.

The revised definitions read as follows.

§ 701.5 Definitions.

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; or

(3) Any other person who has the ability to determine the manner in which a surface coal mining operation is conducted.

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 owning of record in excess of 50 percent of the voting securities or other instruments of ownership of an entity.

PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

3. The authority citation for part 773 continues 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.

4. In § 773.8, revise paragraph (b)(1) to read as follows:

§ 773.8 General provisions for review of permit application information and entry of information into AVS.

(b) \* \* \*

(1) The information you submit under §§ 778.11 and 778.12(c) of this subchapter.

5. In § 773.9, revise paragraph (a) to read as follows:

§ 773.9 Review of applicant, operator, and ownership and control information.

(a) We, the regulatory authority, will rely upon the 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.

6. In § 773.10, revise paragraphs (b) and (c) to read as follows:

§ 773.10 Review of permit history.

(b) We will also determine if you, your operator, or your designated controller disclosed under § 778.11(d) of this subchapter have previous mining experience.

(c) If you, your operator, or your designated controller 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.

7. In § 773.12, revise paragraphs (a)(1) and (a)(2), remove paragraphs (a)(3) and (b), and redesignate paragraphs (c), (d) and (e) as paragraphs (b), (c), and (d), respectively, to read as follows:

§ 773.12 Permit eligibility determination.

(1) You directly own or control has an unabated or uncorrected violation; or (2) You or your operator indirectly control has an unabated or uncorrected violation and your control was established or the violation was cited after November 2, 1988.

8. In § 773.14, revise paragraph (b) introductory text to read as follows:

§ 773.14 Eligibility for provisionally issued permits.

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

9. In § 773.21, revise paragraph (c) to read as follows:

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

(c) When we make a preliminary finding under paragraph (a) of this section, we must serve you with a written notice of the preliminary finding, which must be based on reliable, credible, and substantial evidence and establish a prima facie case that your permit was improvidently issued.

10. Amend § 773.22 by removing paragraph (d) and redesignating paragraphs (e), (f), (g) and (h) as (d), (e) (f), and (g), respectively.

11. In § 773.23, revise paragraph (c)(2) to read as follows:

§ 773.23 Suspension or rescission requirements for improvidently issued permits.

(2) Post the notice at our office closest to the permit area.

12. In § 773.26, revise the table in paragraph (a) and add paragraph (e) to read as follows:

§ 773.26 How to challenge an ownership or control listing or finding.

Table with 2 columns: Challenge concern, then you must submit a written explanation to. Rows include pending State or Federal permit application, and ownership/control of surface coal mining operation.

(e) At any time, you, a person listed in AVS as an owner or controller of a surface coal mining operation, may request an explanation from the AVS Office as to the reason you are shown in AVS in an ownership or control capacity. Within 14 days of your request, the AVS Office will provide a response describing why you are listed in AVS.

13. In § 773.27, revise paragraph (a) to read as follows:

§ 773.27 Burden of proof for ownership or control challenges.

(a) When you challenge a listing of ownership or control or a *prima facie* finding of ownership or control made under § 774.11(f) of this subchapter, you must prove by a preponderance of the evidence that you either—

- (1) Do not own or control the entire surface coal mining operation or relevant portion or aspect thereof; or
- (2) Did not own or control the entire surface coal mining operation or relevant portion or aspect thereof during the relevant time period.

\* \* \* \* \*

14. In § 773.28, revise paragraph (d) to read as follows:

**§ 773.28 Written agency decision on challenges to ownership or control listings or findings.**

\* \* \* \* \*

(d) We will post all decisions made under this section on AVS.

\* \* \* \* \*

**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**

15. The authority citation for part 774 continues to read as follows:

*Authority:* 30 U.S.C. 1201 *et seq.*

16. In § 774.11, revise paragraphs (a)(3), (e), (f), redesignate paragraph (g) as paragraph (i), add new paragraphs (g) and (h), and revise newly designated paragraph (i) to read as follows:

**§ 774.11 Post-permit issuance requirements for regulatory authorities and other actions based on ownership, control, and violation information.**

(a) \* \* \*

|                                  |                            |
|----------------------------------|----------------------------|
| We must enter into AVS all . . . | within 30 days after . . . |
|----------------------------------|----------------------------|

|  |                               |
|--|-------------------------------|
| (3) Changes to information initially required to be provided by the applicant under 30 CFR 778.11. | receiving notice of a change. |
|--|-------------------------------|

\* \* \* \* \*

(e) *Entry into AVS.* (1) If you do not request a hearing, and the time for seeking a hearing has expired, we will enter our finding into AVS.

(2) If you request a hearing, we will enter our finding into AVS only if that finding is upheld by the Office of Hearings and Appeals.

(f) At any time, we may identify any person who owns or controls an entire operation or any relevant portion or aspect thereof. If we identify such a person, we must issue a written finding to the person and the applicant or permittee describing the nature and extent of ownership or control; our written finding must be based on reliable, credible, and substantial evidence and establish a *prima facie* case of ownership or control.

(g) After we issue a written finding under paragraph (f) of this section, we will allow you, the person subject to the finding, 30 days in which to submit any information tending to demonstrate your lack of ownership or control. If, after reviewing any information you submit, we are persuaded that you are not an owner or controller, we will serve you a written notice to that effect. If, after reviewing any information you submit, we still find that you are an owner or controller or if you do not submit any information within the 30-day period, we must—

- (1) Enter our finding under paragraph (f) of this section into AVS; and
- (2) Require you to satisfy the requirements of § 778.11(d) of this subchapter, if appropriate.

(h) We need not make a finding as provided for under paragraph (f) of this section before entering into AVS the information required to be disclosed under §§ 778.11(b) and (c) of this subchapter; however, the mere listing of a person in the AVS pursuant to § 778.11(b) or (c) does not create a presumption or constitute a determination that such person owns or controls a surface coal mining operation.

(i) If we identify you as an owner or controller under paragraph (f) of this section, you may challenge the finding using the provisions of §§ 773.25, 773.26 and 773.27 of this subchapter.

**PART 778—PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION**

17. The authority citation for part 778 continues to read as follows:

*Authority:* 30 U.S.C. 1201 *et seq.*

18. In § 778.11, revise the section heading and paragraphs (a)(1), (c)(2), (c)(3), (c)(4), (c)(5) and (d) to read as follows:

**§ 778.11 Providing applicant and operator information.**

(a) \* \* \*

(1) A statement indicating whether you and your operator are corporations, partnerships, associations, sole

proprietorships, or other business entities;

\* \* \* \* \*

(c) \* \* \*

(2) Partner.

(3) Director.

(4) Person performing a function similar to a director.

(5) Person who owns 10 percent or more of the applicant or the operator.

(d) In the permit application, you must designate the natural person expected to have the greatest level of control over the entire proposed surface coal mining operation. That person must also sign the permit application, acknowledging the designation. Such designation will not, by itself, be sufficient evidence on which to base the imposition of an individual civil penalty under §§ 724.12 or 846.12 or an alternative enforcement action under §§ 847.11 or 847.16 of this chapter.

\* \* \* \* \*

**PART 843—FEDERAL ENFORCEMENT**

19. The authority citation for part 843 continues to read as follows:

*Authority:* 30 U.S.C. 1201 *et seq.*

20. In § 843.21, revise paragraphs (a) and (d), remove paragraph (c)(2), redesignate paragraph (c)(3) as paragraph (c)(2), to read as follows:

**§ 843.21 Procedures for improvidently issued State permits.**

(a) *Initial notice.* If we, OSM, on the basis of any reliable and credible information available to us, including any such 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 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 the appropriate action, as specified in paragraph (b) of this section, within 10 days.

\* \* \* \* \*

(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. 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.

\* \* \* \* \*

**PART 847—ALTERNATIVE ENFORCEMENT**

21. The authority citation for part 847 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

22. In § 847.11, revise the introductory text to read as follows:

**§ 847.11 Criminal penalties.**

Under sections 518(e) and (g) of the Act, we, the regulatory authority, may request the Attorney General to pursue

criminal penalties against any person who—

\* \* \* \* \*

23. In § 847.16, revise paragraph (a) introductory text to read as follows:

**§ 847.16 Civil actions for relief.**

(a) Under section 521(c) of the Act, we, the regulatory authority, may request the Attorney General to institute a civil action for relief whenever you, the permittee, or your agent—

\* \* \* \* \*

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