

## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

## 30 CFR Parts 701 and 774

RIN 1029-AC49

## Transfer, Assignment, or Sale of Permit Rights

**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 revise our rules for, and related to, the transfer, assignment, or sale of permit rights. This proposed rule effectuates a settlement agreement we entered into with the National Mining Association (NMA) in connection with NMA's judicial challenge to certain provisions of our December 19, 2000, final ownership and control rule (2000 ownership and control rule or 2000 rule). In this proposed rule, we propose to: Revise the regulatory definitions of *transfer*, *assignment*, or *sale of permit rights* and *successor in interest*; revise the regulatory provisions relating to transfer, assignment, or sale of permit rights; and create separate rules for successors in interest. The primary purpose of the proposed rule is to distinguish clearly the circumstances that will constitute a transfer, assignment, or sale of permit rights (requiring a regulatory authority's approval and, at a minimum, a permit revision) or result in a successor in interest (requiring the issuance of a new permit) from those that will only require a permittee to provide information updates. The proposed rule also affords us an opportunity to ensure our rules are consistent with recent legal developments. This proposed rulemaking does not suspend or withdraw any of the provisions of our 2000 ownership and control rule, nor does it affect any of our proposed revisions to the 2000 rule published on December 29, 2003. This proposed rule is authorized under the Surface Mining Control and Reclamation Act of 1977, as amended (SMCRA or the Act).

**DATES:** *Written comments:* We will accept written comments on the proposed rule until 4:30 p.m., eastern time, on March 28, 2005.

*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 4:30 p.m., eastern time, on February 16, 2005. 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 the hearing, you should follow the procedures under "III. Public Comment Procedures."

**ADDRESSES:** You may submit comments, identified by docket number 1029-AC49, by any of the following methods:

- E-mail: [osmregs@osmre.gov](mailto:osmregs@osmre.gov).

Include docket number 1029-AC49 in the subject line of the message.

- Mail/Hand Delivery/Courier: Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252, 1951 Constitution Avenue, NW., Washington, DC 20240.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Docket: You may review the docket (administrative record) for this rulemaking including comments received in response to this proposed rule at the Office of Surface Mining Reclamation and Enforcement, Administrative Record, located in Room 101, 1951 Constitution Avenue, NW., Washington, DC 20240. The Administrative Record office is opened Monday through Friday, excluding holidays from 8 a.m. to 4 p. m. The telephone number is (202) 208-2847.

*Instructions:* All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see "III. Public Comment Procedures?" in the **SUPPLEMENTARY INFORMATION** section of this document.

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 electronic mail, to [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov) or via telefacsimile at (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 Region, 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).

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**I. Background to the Proposed Rule**

On December 21, 1998, we published a proposed rule to revise, among other things, our regulatory definition of *successor in interest* and our regulatory provisions for transfer, assignment, or sale of permit rights. See 63 FR 70580, 70591, 70601. In the 1998 proposed rule, we did not propose to revise our regulatory definition of *transfer*, *assignment*, or *sale of permit rights*. In our 2000 ownership and control rule, 68 FR 75036, which is the final rule based on the 1998 proposal, we explained that, following our analysis of the comments on the proposed revision of the definition of *successor in interest* and the regulatory provisions for transfer, assignment, or sale of permit rights, "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." 65 FR 79605. With specific reference to the regulatory provisions at 30 CFR 774.17, we explained: "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." 65 FR 79642.

After we promulgated the 2000 rule, NMA filed a lawsuit in the U.S. District Court for the District of Columbia, challenging certain provisions of the 2000 rule. *National Mining Association v. Office of Surface Mining, et al.*, No. 01-366 (CKK) (D.D.C.). Although we did not adopt the proposed revisions to our transfer, assignment, or sale rules, NMA argued that we reopened the issue for comment and judicial review. In order

to settle this issue, we agreed to publish a proposed rule concerning transfer, assignment, or sale of permit rights for public notice and comment. More specifically, we agreed to: (1) Propose regulatory revisions clarifying the interplay between, and the applicability of, our transfer, assignment, or sale regulations at 30 CFR 774.17 and the permittee information requirements found at 30 CFR 774.12(c); (2) reconsider the provisions of 30 CFR 774.17 that we addressed in the 1998 proposed rule; and (3) reconsider whether a change in majority shareholder of a permittee or operator is a transfer, assignment, or sale of permit rights requiring approval under 30 CFR 774.17.

In addition, until any new transfer, assignment, or sale rules become effective, we agreed to clarify our implementation of our existing rules, in light of legal developments. On September 9, 2004, we issued System Advisory Memorandum # 23 to effectuate this aspect of the settlement and to memorialize our interim clarification. To obtain a paper copy of System Advisory Memorandum # 23, please contact the person identified under **FOR FURTHER INFORMATION CONTACT** or, for an electronic copy, visit the following Internet address: [www.avos.osmre.gov](http://www.avos.osmre.gov).

Our decision to propose new transfer, assignment, or sale and related rules is also driven by other developments. In 1988, we defined the phrases *owned or controlled* and *owns or controls* in terms of certain relationships that were deemed or presumed to constitute ownership or control. 53 FR 38868 (October 3, 1988). For example, under paragraph (a)(1) of the definition, permittees and majority shareholders (as well as certain other persons) were “deemed” to be owners or controllers, while, under paragraph (b), officers, directors, operators, and certain minority shareholders (as well as certain other persons) were “presumed” to be owners or controllers. The rules also provided that the presumptions of ownership or control could be overcome, or rebutted, upon an appropriate showing. Since 1979, we have defined *transfer, assignment, or sale of permit rights*, as it is currently defined, to mean a change in ownership or other effective control over the right to conduct surface coal mining operations. See existing 30 CFR 701.5.

Reading the two provisions in conjunction, some regulatory authorities have concluded that a change of a presumed owner or controller, such as an officer or director, resulted in a change in ownership or other effective

control and, thus, constituted a transfer, assignment, or sale requiring regulatory approval under 30 CFR 774.17, while others have not.

Then, in the 1998 proposed rule, we proposed to eliminate the presumptions of ownership or control. 63 FR 70580, 70604. Thereafter, on May 29, 1999, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in NMA’s challenge to our April 21, 1997 interim final rule (which carried forward the presumptions in the 1988 rule). *National Mining Association v. U.S. Department of the Interior*, 177 F.3d 1 (D.C. Cir. 1999) (NMA v. DOI II). NMA challenged four of our six rebuttable 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)). 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.

In a June 15, 2000 decision in *Peabody Western Coal Co. v. OSM*, No. DV 2000–1–PR, the Department of the Interior’s Office of Hearings and Appeals had occasion to examine the impact of *NMA v. DOI II* on transfer, assignment, or sale issues. In *Peabody Western*, OSM determined that Peabody Western’s change of all of its corporate officers and directors constituted a transfer, assignment, or sale of permit rights under 30 CFR 701.5. The administrative law judge disagreed, explaining that, after *NMA v. DOI II*, OSM cannot presume that an officer or director is a controller and, therefore, a change of an officer or director, or even a change of all officers and directors, cannot, standing alone, automatically constitute a change of “effective control” triggering a transfer, assignment, or sale of permit rights. The administrative law judge also made some other observations that we assigned particular weight in developing this proposed rule. The judge noted that the “other effective control” language is “vague and imprecise” and “discloses no meaningful standard and provides no advance notice to a regulated corporate entity” as to which corporate changes

will constitute a transfer, assignment, or sale. This defect, according to the judge, does not provide “adequate advance notice of the purported regulatory standard” and leaves permittees “to speculate” as to when regulatory approval is required.

In the 2000 rule, we adopted the proposal to eliminate presumptions of control (see 65 FR 79600), adopted separate definitions of “*own, owner, or ownership*” and “*control or controller*” (see 30 CFR 701.5), and added specific requirements for permittees to update their ownership and control and related information upon any change of that information, including the change of an officer, director, or minority shareholder (see 30 CFR 774.12(c)). However, as explained above, we did not revise our definition of *transfer, assignment, or sale of permit rights* (see 30 CFR 701.5), which still includes the “other effective control” language, or the corresponding regulatory requirements. Thus, the existing rule continues to suffer the same flaws identified in *Peabody Western*. Also, the information update requirement at 30 CFR 774.12(c) created some confusion as to whether we had formally decided that a change in an officer, director, minority shareholder, or certain other persons, did *not* constitute a transfer, assignment, or sale of permit rights, but rather required only an information update. We were silent on this point in the preamble to the 2000 rule.

In sum, our settlement with NMA and other developments have caused us to reevaluate and propose revisions to our rules relating to the transfer, assignment, or sale of permit rights. In issuing today’s proposed rule, our overarching objective is to provide greater clarity for both regulatory authorities and the regulated community by creating, to the extent possible, “bright line,” objective standards as to which circumstances will trigger a transfer, assignment, or sale of permit rights, or give rise to a successor in interest, requiring regulatory approval and/or a new permit. We also seek to clarify which changes will require only an information update under 30 CFR 774.12(c).

## II. Discussion of the Proposed Rule

In this section, we discuss our proposed revisions to certain sections of the Code of Federal Regulations (CFR). While the range of regulatory concepts discussed in this proposed rulemaking includes other concepts in our rules, such as ownership, control, permit eligibility, and permittee information requirements, we are only proposing to

revise our regulatory definitions of *transfer, assignment, or sale of permit rights* and *successor in interest*, as well as our rules for transfer, assignment, or sale of permit rights. Directly related to these proposed revisions, we also propose to create new rules for successors in interest.

The regulatory revisions we propose today are based upon our review, deliberations, and reconsideration of issues relating to the transfer, assignment, or sale of permit rights and successors in interest. We analyzed the relevant statutory provisions, including the limited legislative history of those provisions, researched relevant legal decisions, the use of the term “successor in interest” in other regulatory and legal contexts, and previous objections to the current rules, and relied on our considerable expertise and experience in handling transfer, assignment, or sale issues over the years. In addition, we reconsidered the relevant portions of our 1998 proposed rule as well as the relevant portions of the subsequent 2000 final rule. In short, we believe our proposal is consistent with SMCRA’s statutory provisions and relevant legal precedents. We also believe this proposal, if adopted, would meet our objective of creating “bright line,” objective standards for this aspect of our regulatory program. We invite comments on both of these issues.

Following are discussions of our specific proposed changes to the definitions at 30 CFR 701.5 and the rules at 30 CFR 774.17, our proposed creation of new 30 CFR 774.18, and other ministerial changes required as a result of this proposed rulemaking.

#### A. Section 701.5—Definition: Successor in Interest

We propose to revise the regulatory definition of *successor in interest* at 30 CFR 701.5. The current definition of *successor in interest* states: “*Successor in interest* means any person who succeeds to rights granted under a permit, by transfer, assignment, or sale of permit rights.” We propose to revise the definition to read: “*Successor in interest* means a person who follows a permittee, by statutory succession, operation of law, or as a result of a similar, non-substantive change in form, in ownership over the right to conduct surface coal mining operations granted under a permit. Successors in interest will result from a non-commercial, non-substantive event, such as a business name change or an inheritance.” As explained in more detail below, the proposed revision separates the concepts of “successor in interest” and “transfer, assignment, or sale of permit

rights.” Most importantly, the proposal also removes the subjective concept of control (or “effective control”) from the definition of *successor in interest*, but retains the more objective standard of “ownership,” as we defined that term in the 2000 rule.

The starting point of our analysis was the recognition that our current rules merge the concepts of “successor in interest” and “transfer, assignment, or sale of permit rights.” That is, under our current rules, a successor in interest arises as a result of a transfer, assignment, or sale. Upon further reflection and analysis, we determined that the Act, in sections 506(b) (successor in interest) and 511(b) (transfer, assignment, or sale of permit rights), appears to treat these concepts differently and separately. Thus, we are proposing to separate the concept of successor in interest from the concept of transfer, assignment, or sale of permit rights.

In pertinent part, section 506(b) of SMCRA provides that

A successor in interest to a permittee who applies for a new permit within thirty days of succeeding to such interest and who is able to obtain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until such successor’s application is granted or denied.

We believe our proposal to separate the concepts of successor in interest and transfer, assignment, or sale finds support in the Act itself and in its legislative history. First, and most obviously, the concepts are discussed in different sections of the Act: The successor in interest provisions are found under section 506, while the provisions for transfer, assignment, or sale of permit rights are found under section 511. The mere fact that the provisions are in different sections suggests that Congress intended them to have different meanings. This reading of the Act is also supported by the limited legislative history. An unenacted version of SMCRA provided that

All permits issued pursuant to the requirements of this Act shall be issued for a term not to exceed five years and shall be nontransferable: *Provided*, That a successor in interest to a permittee who applies for a new permit within thirty days of succeeding to such interest and who is able to obtain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until such successor’s application is granted or denied.

S.7, 95th Congress, 1st Session, Senate Report No. 95–128 (May 10, 1977).

Thus, this version of the Act that existed just prior to enactment expressly disallowed transfers, but provided that successors in interest who applied for new permits could continue operations under the existing permit until a permitting decision was made. This language suggests a distinction between transfers and situations giving rise to a successor in interest. As enacted, SMCRA section 511(b) allows for the transfer, assignment, or sale of permit rights with regulatory approval. Thus, although Congress ultimately allowed for transfers, it retained separate language providing for successors in interest.

We submit that this same legislative history indicates that Congress intended for more relaxed regulatory requirements for successors in interest. For example, under the specified circumstances, successors in interest are expressly allowed to continue mining under the existing permit, while there is no such express provision for transferees, assignees, and purchasers. The relaxed regulatory scrutiny for a “successor in interest” comports with our understanding that a successor in interest results when the permittee undergoes a change in form only. By contrast, a transfer, assignment, or sale results in a substantive change in the party exercising rights under the permit. It makes sense, in our view, that Congress would provide for less regulatory scrutiny when there is only a change in form.

Our conclusion that a successor in interest scenario involves a non-substantive change in form is based on our research of State and Federal definitions of the term and rules applying the term “successor in interest”; State and Federal case law where the term “successor in interest” was relevant to the subject matter of the case; and the traditional legal definition of “successor in interest.” In our research, we found that “successor in interest” is consistently used to describe a non-substantive, statutory event. That is to say, we have found that a successor in interest is the result of an operation of law or other non-commercial event, in the sense that the successor does not acquire an ownership interest in exchange for goods, services, or monetary or other consideration. The two most often cited events that result in a successor in interest are: (1) Inheritance, upon the death of another person, and (2) a change of the name of an entity—such as through a corporate reorganization—where all other legal rights and obligations are unchanged. Indeed, the case law we examined consistently found a successor in

interest to be a business entity that evolves from a previous entity where, apparently, all other legal attributes of the successor entity remained the same. In addition, *Black's Law Dictionary* (6th ed. 1990) explains:

In order to be a "successor in interest," a party must continue to retain the same rights as original owner without change in ownership and *there must be change in form only and not in substance*, and transferee is not a "successor in interest." In cases of corporations, the term ordinarily indicates statutory succession as, for instance, when corporation changes its name but retains same property.

(Emphasis added.) See also *Holland v. Williams Mt. Coal Co.*, 256 F.3d 819, 821–22 (D.C. Cir. 2001) (referring to the *Black's* definition as the "standard corporate law definition"). In *Holland*, the U.S. Court of Appeals for the District of Columbia Circuit also explained that "[a] party simply acquiring property of a firm in an arm's length transaction, and taking up its business activity, does not become the selling firm's "successor in interest." *Id.* at 822. Thus, under the generally accepted legal definition of "successor in interest," it appears that a change of ownership is considered non-substantive when the new owner retains the same rights as the original owner and the new owner continues to hold the same ownership interests as the original owner. See, e.g., *Holland*, 256 F.3d at 822 (a successor in interest "is a successor to the *wealth* of the predecessor, typically through a corporate reorganization") (emphasis in original). With the exception of labor and employment law, in no instance in our research did we find a successor in interest in the context of a commercial transaction resulting in a change of ownership in exchange for goods, services, or monetary or other consideration. Rather, the legal definition and other applications of the term suggest events that seemingly exclude commercial transactions.

Under SMCRA, a successor in interest appears to be subject to the same requirements as any other applicant for a new permit. However, a successor in interest would have an expectation of privilege not accorded to other applicants for a new permit because the Act explicitly allows mining to continue under the existing mining and reclamation plan while the successor's application is under review. This expectation of privilege or minimal regulatory scrutiny only occurs when there is a change in form only—as in the successor in interest scenario—when the circumstances do not require further review. We feel this interpretation and application of "successor in interest" is

consistent with the State and other Federal uses that we examined. While a successor in interest has an expectation to continue the surface coal mining operation under the existing permit, the successor must also apply for a new permit because the preceding person who held the permit no longer exists, whether that "person" was a natural person or a business entity.

A transfer, assignment, or sale of permit rights under section 511(c) of SMCRA, by contrast, appears to differ substantially from the successor in interest scenario in that a transfer, assignment, or sale represents a substantive change in the permittee or operator that would require regulatory approval and a new permit or a permit revision, presumably before mining can commence or resume. Thus, a transferee, assignee, or purchaser does not have the same expectation of privilege as a successor in interest. Also, because there is a substantive change in the permittee or operator, the conditions under which the substantively different party should be allowed to mine may be materially different than the conditions for the previous permittee. Arguably, continued mining under the existing permit is not appropriate and, at a minimum, the existing permit should be revised to reflect the change in circumstances before mining is resumed.

In the case of a transfer or sale of a permit to a new entity, the new entity generally will be seeking regulatory approval to assume the title of permittee. In contrast, in the case of a transfer or sale of an entity holding a permit, the name of the permittee may not change but the principle owner of the permittee may change. The situation is somewhat different for an assignment under 511(b) of SMCRA. We are proposing that a rational view of an assignment is a change in the designated operator, when other than the permittee. In such cases, the permittee stays the same but the approved mining entity changes through the authorized assignment of permit rights to a designated operator. We believe that in all these cases, the regulatory authority must determine if the entity that would be authorized to mine as a result of the transfer, assignment or sale of permit rights is eligible to conduct mining and reclamation operations. Thus, entities seeking to exercise permit rights acquired through transfer, assignment, or sale do not have the same expectation of privilege as a successor in interest.

In sum, as a result of our research, we propose that defining *successor in interest* as an independent concept, and not in the context of a transfer,

assignment, or sale of permit rights, represents a more accurate and desirable implementation of the "successor in interest" concept embodied in section 506(b) of the Act. We are also proposing that the key conceptual differences between a successor in interest and transfer, assignment, or sale of permit rights are that a successor in interest: (1) Occurs as the result of an operation of law or other non-commercial event and involves a non-substantive change in form, (2) has an expectation of privilege to continue mining operations under the existing permit not present in a transfer, assignment, or sale of permit rights, and (3) must apply for a new permit and not for a permit revision. These differences create a "bright line" distinction between entities who become successors in interest and entities that seek validation of permit rights acquired by way of a transfer, assignment, or sale.

One other important aspect of our proposed definition of successor in interest bears mention. We propose to remove the subjective concept of control—or "effective control"—from the definition; at the same time, we propose to retain the more objective concept of "ownership" in the definition. (Although the current definition does not contain the words ownership or control, the concepts of ownership and control are effectively incorporated into the definition by reference to the definition of transfer, assignment, or sale of permit rights, which contains the terms "ownership" and "effective control.") Retention of the ownership concept is appropriate, in our view, because a successor in interest scenario involves a change in ownership, even though the change is technical or non-substantive. In the 2000 rule, we defined *own*, *owner*, or *ownership* to mean "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." See 30 CFR 701.5. (On December 29, 2003, we proposed a non-substantive revision to this definition. 68 FR 75038. Our proposed revision remains pending. If adopted, the proposed revision would not affect today's proposed rule.) Thus, under this proposal, a successor in interest would result when there has been a non-substantive change in ownership of greater than 50 percent of a permittee. By way of example, under this proposal, if a corporate permittee undergoes a reorganization (for example changing its legal status from a C corporation to a limited-liability company), resulting in a name change but retention of the same ownership

interests, the new entity would be a successor in interest and would be subject to the regulatory requirements discussed below under proposed new section 774.18. Also, if a person inherits an ownership interest in a permittee of greater than 50 percent, the person would be a successor in interest to the permittee. A corollary to this proposal is that a change in ownership of 50 percent or less of the permittee or a change in control, standing alone, would never result in a successor in interest (or, as explained below, a transfer, assignment or sale) and, thus, would only require, at most, an information update under 30 CFR 774.12(c). Thus, if adopted, this aspect of the proposed rule would achieve the twin goals of providing a “bright line,” objective standard as to which circumstances will give rise to a successor in interest and which changes will require only an information update under 30 CFR 774.12(c). We invite comment on the statutory rationale provided above for the proposed changes to the definition of *successor in interest*. We also invite comment on whether, after applying the current definition for 25 years, there are practical reasons warranting or arguing against these changes.

*B. Section 701.5—Definition: Transfer, Assignment, or Sale of Permit Rights*

We propose to revise the regulatory definition of *transfer, assignment, or sale of permit rights*. The current definition of *transfer, assignment, or sale of permit rights* is as follows: “*Transfer, assignment, or sale of permit rights* means a change in ownership or other effective control over the right to conduct surface coal mining operations under a permit issued by the regulatory authority.” We propose to revise the definition to read: “*Transfer, assignment, or sale of permit rights* means a commercial transaction resulting in a change in ownership over the right to conduct surface coal mining operations granted under a permit or a change in operator. A transfer, assignment, or sale of permit rights involves a substantive change and not a mere change in form.” As with our proposed definition of *successor in interest*, the most significant aspect of our proposed revision to the definition of *transfer, assignment, or sale of permit rights* is the proposed removal of the subjective concept of control (or “effective control”) from the definition. Again, as with the definition of *successor in interest*, we also retained the more objective standard of “ownership.” The proposal would, to the extent possible, establish an

objective standard that can be readily understood by both regulatory authorities and the regulated community.

As discussed above, to clearly distinguish a transfer, assignment, or sale from a successor in interest scenario, we also propose that a transfer, assignment, or sale always involves a “commercial transaction” and a “substantive change” in ownership of a permittee, and not, as in the case of a successor in interest, a mere change in form. As previously explained, we propose that a successor in interest scenario, unlike a transfer, assignment, or sale, occurs as the result of an operation of law or other non-commercial event and involves a non-substantive change in form. In this proposal, we use the terms “transfer” and “sale” interchangeably. While there are technical differences between the terms—such as the fact that a sale involves monetary consideration while a transfer may not—the differences are of no practical consequence under this proposal because all substantive changes of ownership—whether accomplished by sale or transfer—would be subject to the same regulatory requirements. When we refer to a “commercial transaction,” we mean acquisition of an ownership interest in exchange for goods, services, or monetary or other consideration. By “substantive change,” we mean that the new owner does not retain the same rights and legal attributes as the original owner and does not succeed to the wealth of the original owner. We derive this understanding of the term “substantive change” from the definition of the term “successor in interest.” As previously discussed, the caselaw interpreting the term “successor in interest” makes clear that an entity acquiring an ownership interest in another entity by way of a sale or transfer is not a successor in interest because sales and transfers involve substantive changes in ownership.

Throughout our deliberations, we were mindful of *Peabody Western’s* admonition that our existing definition, to the extent it relies on the concept of “effective control,” is “vague and imprecise” and “discloses no meaningful standard and provides no advance notice to a regulated corporate entity” as to which corporate changes will constitute a transfer, assignment, or sale. We determined that it was the inclusion of the phrase “or other effective control” that created the imprecision in the current definition. The concept of control is embodied in section 510(c) of the Act. Under that section, an applicant is not eligible to

receive a permit if it owns or controls an operation with an outstanding violation. Our existing definition of *transfer, assignment, or sale of permit rights* imports the control concept from section 510(c), but nothing in the Act compels that approach. However, we believe that a substantive change in majority ownership, which almost always involves a change of control, remains a sufficient indicator of a transfer or sale. As such, we propose to remove the concept of “effective control” from the definition of *transfer, assignment, or sale of permit rights*, while expressly retaining the ownership criterion.

Under this proposal, both direct transfer and sale of a permit to a new entity and a transfer or sale of an entity holding permit rights would trigger the regulatory requirements associated with transfer, assignment, or sale of permit rights. In the first scenario, involving transfer or sale of a permit to a new entity, the new entity would have to seek regulatory approval to become the new permittee, and the regulatory authority would have to determine whether the new entity is eligible to receive a permit. In the second scenario, involving a transfer or sale of an entity holding permit rights, the permittee would remain the same, and the regulatory authority would have to determine whether the existing permittee remains eligible to conduct surface coal mining operations. While we cannot address every hypothetical transaction in this preamble, the following examples outline our general understanding of the types of transactions that would constitute transfers or sales of permit rights under this proposal.

*Example 1:* Company A holds a SMCRA mining permit. Company B, through a commercial transaction involving an exchange of consideration, acquires greater than 50 percent of the stock or other ownership instruments of Company A. This transaction will be considered a transfer or sale under the definition we propose today. If Company A wishes to remain the permittee, A would have to, at a minimum, apply for a permit revision under section 774.17, discussed below. The regulatory authority would then have to determine whether A (not B) remains eligible for a permit under SMCRA and its implementing regulations. If Company B wishes to become the new permittee, B would become the subject of the permit eligibility determination. On the other hand, if Company B acquires 50 percent or less of Company A, there would not be a transfer or sale under the proposed definition. However, the existing permittee, A, would have to inform the regulatory authority of this transaction, by way of an information update, under 30 CFR 774.12(c).

*Example 2:* Parent Company A has a wholly-owned subsidiary, S, which holds a SMCRA mining permit. Company A, through a commercial transaction involving an exchange of consideration, sells or transfers greater than 50 percent of the stock or other ownership instruments in S to a new company, B. This transaction will be considered a transfer or sale under the definition we propose today. If S wishes to remain the permittee, S would have to, at a minimum, apply for a permit revision under section 774.17, discussed below. The regulatory authority would then have to determine whether S (not B) remains eligible for a permit under SMCRA and its implementing regulations. If Company B wishes to become the new permittee, B would become the subject of the permit eligibility determination. On the other hand, if Company B acquires 50 percent or less of S, there would not be a transfer or sale under the proposed definition. However, the existing permittee, S, would have to inform the regulatory authority of this transaction, by way of an information update, under 30 CFR 774.12(c).

*Example 3:* Company A holds a SMCRA mining permit, but wishes to leave the mining business. Company B acquires all of Company A's assets, including the mining permit. This transaction, which involves the direct sale or transfer of a mining permit, would constitute a transfer or sale requiring regulatory approval. Under section 774.17, discussed below, Company B, as the new mining entity, would have to apply to become the new permittee and would, thus, be the subject of the regulatory authority's permit eligibility determination. As explained below, although Company B purportedly acquired Company A's mining permit, Company B does not have the right to mine under the permit without regulatory approval.

*Example 4:* Company A, which holds a SMCRA mining permit, merges with Company B. Under the terms of the merger, B acquires a greater than 50 percent ownership interest in A. This transaction would constitute a transfer or sale under the proposed definition. If Company A is the surviving corporation and wishes to remain the permittee, A would have to, at a minimum, apply for a permit revision under section 774.17, discussed below. The regulatory authority would then have to determine whether A (not B) remains eligible for a permit under SMCRA and its implementing regulations. On the other hand, if Company B is the surviving company, Company B would have to seek regulatory approval to become the new permittee and would, thus, become the subject of the permit eligibility determination. If, through the merger, Company B acquires 50 percent or less of Company A, there would not be a transfer or sale under the proposed definition. However, the existing permittee, A, would have to inform the regulatory authority of this transaction, by way of an information update, under 30 CFR 774.12(c).

*Example 5:* Company A, which holds a SMCRA permit, is experiencing financial difficulties and becomes involved, either

voluntarily or involuntarily, in Chapter 7 bankruptcy proceedings. The bankruptcy trustee liquidates Company A's assets and sells the mining equipment and mining permit to Company B. This transaction, which involves the direct sale or transfer of a mining permit, would constitute a transfer or sale requiring regulatory approval. Under section 774.17, discussed below, Company B, as the new mining entity, would have to apply to become the new permittee and would, thus, be the subject of the regulatory authority's permit eligibility determination. As explained below, although Company B purportedly acquired Company A's mining permit, Company B does not have the right to mine under the permit without regulatory approval. If Company A is going through a Chapter 11 bankruptcy reorganization, Company A will typically continue to operate its business as a "debtor in possession." This scenario, which typically will not involve a substantive change in ownership of Company A, generally will not constitute a transfer or sale under the proposed definition. However, as in the non-bankruptcy setting, if a new entity does acquire a greater than 50 percent ownership interest in A, the transaction would constitute a transfer, assignment, or sale requiring regulatory approval.

We expressly invite comment on our proposed approach to these issues, including whether both direct transfer or sale of a permit and transfer or sale of an entity holding permit rights should constitute a transfer, assignment, or sale of permit rights requiring regulatory approval.

The Act, at section 507(b)(1), requires a permit applicant to identify the operator, if different from the applicant. In our experience, the best, and perhaps only, example of an assignment of permit rights, in the SMCRA context, is a change in the designated operator. While a change in the designated operator shares with a transfer and a sale the common feature of a substantive commercial transaction, a change of operator does not involve a change in the permittee, who still retains the obligations associated with the approved permit. Rather, the permittee stays the same and only the mining entity changes. Because "assignment" of permit rights is included in section 511(b), and section 507(b)(1) requires identification of the operator if different from the applicant, a change of the designated operator appears significant enough to expressly require regulatory approval under section 511(b), even though it does not necessarily involve a change of ownership. Therefore, we propose expressly to clarify that a change in operator constitutes an assignment and triggers the regulatory requirements associated with transfer, assignment, or sale of permit rights. Under this proposal, when there is a

change of the designated operator, the regulatory authority would have to determine whether the new operator is eligible to conduct surface coal mining operations under the Act and its implementing regulations. We are proposing this clarification because, under current rules, some regulatory authorities have considered a change in operator as subject to transfer, assignment, or sale provisions, while others have not. We expressly invite comment on this clarification.

As previously mentioned, in our settlement with NMA, we agreed to reconsider whether a change in majority shareholder of a permittee or operator is a transfer, assignment, or sale of permit rights requiring approval under 30 CFR 774.17. We have reconsidered the issue and, for the reasons explained above, have decided to incorporate the concept of majority ownership—through cross-reference to our definition of ownership at 30 CFR 701.5—in our proposed definitions of *successor in interest* and *transfer, assignment, or sale of permit rights*. Thus, based on our reconsideration of the issue, we have concluded that a non-substantive change in majority ownership always gives rise to a successor in interest (requiring a new permit) and a substantive change in majority ownership always constitutes a transfer, assignment, or sale (requiring, at a minimum, a permit revision). We specifically invite comments on this approach.

In the settlement with NMA, we also agreed to clarify the interplay between our transfer, assignment, or sale regulations and the permittee information update requirements found at 30 CFR 774.12(c), which references 30 CFR 778.11(c) and (d). Under today's proposal, as explained, a change of majority ownership would always result in a successor in interest or transfer, assignment, or sale of permit rights. As such, any change in ownership of 50 percent or less or a change in control, standing alone, would never result in a successor in interest or a transfer, assignment or sale and, thus, would only require, at most, an information update under 30 CFR 774.12(c). While a change in majority ownership would require an information update under existing section 774.12(c) (based on the cross-reference to section 778.11(c)), we have separately proposed changes to section 778.11(c). See 68 FR 75047. Therefore, we have not included specific proposed changes to section 774.12(c) at this time because of the possible changes to the sections it references. However, it is our intent to include, as part of any final rule,

changes to section 774.12(c) that would provide an objective “bright line” between its permit information update requirements and those changes subject to sections 774.17 or proposed 774.18.

#### C. Revised Heading for 30 CFR Part 774

As a result of proposing to create a new section in 30 CFR part 774 pertaining to successors in interest, we also propose to revise the heading for 30 CFR part 774 by inserting the term “successor in interest.” The revised heading would read: “Revision; Renewal; Transfer, Assignment, or Sale of Permit Rights; Successor in Interest; Post Permit Issuance Requirements; and Other Actions Based on Ownership, Control, and Violation Information.”

#### D. Section 774.1—Scope and Purpose

Also as a result of proposing to create new regulatory provisions for successors in interest in 30 CFR part 774, we propose to revise the current scope and purpose at 30 CFR 774.1 by inserting the term “successor in interest.” It will then read as follows: “This part provides requirements for revision; renewal; transfer, assignment, or sale of permit rights; successor in interest; 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.”

#### E. Section 774.17—Transfer, Assignment, or Sale of Permit Rights

Section 511(b) of SMCRA states: “No transfer, assignment, or sale of the rights granted under any permit issued pursuant to this Act shall be made without the written approval of the regulatory authority.” 30 U.S.C. 1261(b). Our regulations implementing this statutory provision are currently found at 30 CFR 774.17; the definition of *transfer, assignment, or sale of permit rights* is found at 30 CFR 701.5.

As we agreed in our settlement with NMA, we have examined and reconsidered all aspects of our existing regulations for the transfer, assignment, or sale of permit rights as well as all the aspects of 30 CFR 774.17 that we addressed in our 1998 proposed rule. As a result, along with proposing to revise the definition of *transfer, assignment, or sale of permit rights*, we are also proposing to revise each portion of our rules establishing the regulatory requirements for transfers, assignments, or sales of permit rights. Below, we discuss each proposed revision by paragraph.

#### 30 CFR 774.17(a)

Existing paragraph 774.17(a) provides that no transfer, assignment, or sale of rights granted by a permit shall be made without the regulatory authority’s prior written approval. This provision has been construed by some as an attempt to require regulatory authority approval of private business transactions. We propose to revise this provision to make clear that the regulatory authority has no involvement in private business transactions. However, in doing so, we also stress that, under this proposal, a person’s acquisition of a permit or an entity holding rights granted under a permit does not mean that the purchaser has acquired the right to mine. We continue to believe that only the regulatory authority can validate permit rights upon transfer, assignment, or sale and that, in validating such permit rights, the regulatory authority must determine if the entity that proposes to mine as a result of the private transaction is eligible to conduct surface coal mining operations under the Act and its implementing regulations. Stated differently, only upon validation by the regulatory authority can it be said that the acquiring entity has permit rights. Thus, our proposal not only retains the concept that a regulatory authority must give written approval of a transfer, assignment, or sale, but that such approval must be granted before mining operations can commence.

Although section 511(b) of the Act does not include the word “prior,” we continue to believe a requirement of prior regulatory approval can reasonably be inferred from the statutory language. The requirement for a regulatory authority’s prior approval before mining operations can commence also comports with our conclusion that a transferee, assignee, or purchaser has no expectation of privilege to continue mining under an existing permit. Thus, these proposed revisions retain the requirement for prior approval before mining by the transferee, new assignee, or purchaser resumes or commences, while clarifying that we are not attempting to regulate private commercial transactions. We invite comment upon this approach and our rationale for it. We also invite comment on whether, after over 20 years under the current rules, these changes are needed or warranted.

#### 30 CFR 774.17(b)

Paragraph (b) sets forth the proposed application requirements for a permit revision allowing a transferee, assignee, or purchaser of permit rights to conduct surface coal mining operations.

In paragraph (b)(1)(i), we propose that the applicant identify the telephone number of the existing permittee in the application. We believe this information is beneficial to the regulatory authority during its review of the application. In this same paragraph, the existing provision requires the applicant to provide the existing permit number or “other identifier.” Because no other identifier is as unique to a transfer, assignment, or sale of permit rights as the permit number itself, we propose to remove the “other identifier” language.

Proposed paragraph (b)(1)(ii) would require a description of the transfer, assignment, or sale. Whereas the current provision requires a “brief description,” we propose to remove the modifier “brief” as too limiting. We do not intend for the description to be exceedingly lengthy, but it should provide sufficient information concerning the transaction for the regulatory authority to understand the nature of the commercial transaction affecting rights granted under the permit.

Proposed paragraph (b)(1)(iv) would be a new provision. We propose that the application under section 774.17 must include any proposed changes to the existing mining and/or reclamation plan. We believe that it is important for the regulatory authority to review the applicant’s anticipated changes in the mining and/or reclamation plan at the same time the regulatory authority is determining whether the applicant is eligible for a permit. However, by this proposal, we do not intend to limit the right of an approved applicant to later seek revision of an approved permit.

Current paragraph (b)(2) requires the applicant to advertise the filing of the application, including the requirement to identify the name and address of the permittee. We propose to add the modifier “existing” to the word “permittee.” “Existing permittee” means the permittee that transferred, assigned, or sold the permit rights. Significantly, we also propose that no advertisement is required for an assignment or when there is only a change in operator. We note that the existing requirement for public notice is less extensive than that required for significant revisions, which, under our rules, are subject to the full public notice requirements applicable to new permit applications. See 30 CFR 773.6. We propose to retain the substance of existing paragraph (b)(2) for transfers and sales. However, we do not believe that an assignment of permit rights to a designated operator is significant enough to require public notice and comment. An assignment of permit rights involves only a conveyance of the

permittee's right to mine, without affecting his obligation for full compliance under the permit. Therefore, we believe that advertising and public comment are not necessary for an assignment of permit rights to a designated operator.

#### 30 CFR 774.17(c)

Proposed paragraph (c), which addresses public participation requirements, would remain substantively similar to the existing provisions. However, as with the advertising provision proposed at paragraph (b)(2), we do not believe an assignment of rights granted under a permit or a change in operator is significant enough to require public participation.

#### 30 CFR 774.17(d)

Proposed paragraph 774.17(d) sets forth the criteria for approval of a permit application submitted under 30 CFR 774.17. The proposed provisions are substantively similar to the existing rules. We propose to revise the performance bond provision in paragraph (d)(2) to clarify that an applicant must submit proof of a sufficient performance bond or other guarantee. We propose removing that portion of the current provision that indicates an applicant can obtain the bond coverage of the original permittee because it is unnecessary and included within the concept of submitting proof of sufficient bond.

We propose to add new paragraph (d)(3), which requires regulatory authority approval of any proposed changes to the existing permittee's approved mine and/or reclamation plan. This proposed change corresponds to the proposed addition of new paragraph (b)(1)(iv), discussed above. In our view, any proposed change to the mining and reclamation plans should be approved as part of this process. Nonetheless, we recognize that the permittee may apply for a revision of an approved permit at any time.

#### 30 CFR 774.17(e)

We propose to revise current paragraph (e), which contains provisions for notification of the regulatory authority's permitting decision. Proposed paragraph (e)(1) is substantively similar to existing paragraph (e). We propose to eliminate existing paragraph (e)(2), which is predicated on the idea that the applicant is seeking approval of a private business transaction; in its place, we propose to add a new provision that would require the regulatory authority to update the application, permit, and other relevant

records in the Applicant/Violator System (AVS) (*see* definition at 30 CFR 701.5) once a permitting decision under these procedures has been made. We believe that keeping the information in AVS accurate and current remains critical to the effective and efficient operation of the computer system.

#### 30 CFR 774.17(f)

Proposed paragraph 774.17(f) is substantively similar to the existing paragraph. The only noteworthy change would be removal of the term "successor in interest" to emphasize that 30 CFR 774.17, as revised, would no longer apply to successors in interest. Instead, the proposed revision would focus on "any new permittee approved to commence surface coal mining operations under this section."

#### F. Section 774.18—Successor in Interest

Section 506(b) of SMCRA states, in pertinent part:

A successor in interest to a permittee who applies for a new permit within thirty days of succeeding to such interest and who is able to obtain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until such successor's application is granted or denied.

30 U.S.C. 1256(b). Previously, as under our existing rules, we have commingled the concepts of "successor in interest" and "transfer, assignment, or sale." Thus, *successor in interest* is currently defined to mean a person who succeeds to rights granted under a permit, by transfer, assignment, or sale of those rights. Due to this merger of concepts, we have never promulgated separate regulatory provisions pertaining exclusively to successors in interest, as distinct from transferees, assignees, and purchasers. As explained previously in this preamble, we now propose to give separate regulatory effect to section 506(b)'s "successor in interest" provisions at proposed new 30 CFR 774.18. Our reasons for proposing to separate the successor in interest provisions from the transfer, assignment, or sale provisions are explained elsewhere in this preamble. The most significant aspect of these proposed provisions is that a successor in interest may, under certain specified circumstances, continue to mine under the existing permit while the regulatory authority processes the successor in interest's new permit application. Below, we discuss each proposed provision by paragraph.

#### 30 CFR 774.18(a)

We propose to add new paragraph 774.18(a), which would establish application requirements for successors in interest. Consistent with SMCRA section 506(b), proposed paragraph (a)(1) would provide that a successor in interest must apply for a new permit within 30 days of succeeding to the rights granted under an existing permit. Proposed paragraph (a)(2) would require a successor in interest to obtain performance bond coverage in an amount sufficient to cover the operations proposed in the permit application and provide proof of such coverage to the regulatory authority. Proposed paragraph (a)(3) requires the successor in interest to meet any other requirements specified by the regulatory authority. Proposed paragraph (a)(3) is consistent with provisions in our other permitting rules and is also consistent with our belief that a regulatory authority should retain some discretion to specify additional requirements based on the case-specific circumstances of a particular permit application.

#### 30 CFR 774.18(b)

At paragraph (b), we propose to give effect to SMCRA section 506(b)'s provision for successors in interest to continue mining under the existing permit. Consistent with section 506(b), we propose that a successor in interest who applies for a new permit within 30 days, and who is able to obtain the bond coverage of the original permittee, or equivalent bond coverage, may continue uninterrupted surface coal mining and reclamation operations under the existing permit. This provision comports with the statutory text of section 506(b) and the legislative history supporting that section. Although the Act specifies that the successor in interest must obtain the bond coverage of the original permittee, we believe that it is consistent with the Act to allow the successor in interest to obtain new bond coverage equivalent to the original permittee's coverage.

### 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 the 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 impending 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 practical. 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 and submit your comment by regular mail, not electronically. 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 4:30 p.m., eastern time, on February 16, 2005. 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*

The proposed rule is considered a significant rule and is subject to review by the Office of Management and Budget under Executive Order 12866.

a. The proposed 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 proposed revisions to the regulations implementing SMCRA sections 506(b) and 511(b) will not have an adverse economic impact on the coal industry or State regulatory authorities. The anticipated expenses for the coal industry and the States under the proposed creation of separate provisions for successors in interest are not significant, given that these costs previously have been a subset of costs projected for the coal industry and States under the provisions for transfer, assignment, or sale of permit rights. Therefore, any change in the estimated costs would be relatively small. None of the changes significantly alter the fundamental framework of our regulatory program.

b. The proposed rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. The proposed rule would not alter the budgetary effects of entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. The proposed rule may raise novel legal or policy issues which is why it is considered significant.

##### *Regulatory Flexibility Act*

The Department of the Interior certifies that this proposed 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 proposed revisions to the regulations implementing sections 506(b) and 511(b) of SMCRA would not have an adverse economic impact on the coal industry or State regulatory authorities. In addition, the proposed rule would produce 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 proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

a. Does not have an annual effect on the economy of \$100 million or more.

b. Will not cause major increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the United States-based enterprises to compete with foreign-based enterprises.

##### *Unfunded Mandates Reform Act of 1995*

For the reasons previously stated, this proposed rule would not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The proposed rule does not have a significant or unique effect on State, local or tribal governments or the private sector. A statement concerning information required under the Unfunded Mandates Reform Act (2 U.S.C. 1531) is not required.

##### *Executive Order 12630—Takings*

This proposed rule does not have any significant takings implications under Executive Order 12630. Therefore, a takings implication assessment is not required.

##### *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*

For the reasons discussed above, this proposed rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment under Executive Order 13132.

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

In accordance with Executive Order 13175, we have evaluated the potential effects of this proposed rule on Federally recognized Indian tribes. We have determined that the proposed rule 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 proposed rule is not considered a significant energy action under Executive Order 13211. For the reasons previously stated, the proposed revisions to the regulations implementing SMCRA sections 506(b) and 511(b) would not have a significant effect on the supply, distribution, or use of energy.

*Paperwork Reduction Act*

The proposed rule requires an information collection under the 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 774 to the Office of Management and Budget (OMB) for review and approval.

*Title:* Revision; Renewal; Transfer, Assignment, or Sale of Permit Rights; Successor in Interest; Post-Permit Issuance Requirements; and Other Actions Based on Ownership, Control, and Violation Information.

*OMB Control Number:* 1029–New.

*Summary:* Sections 506 and 511 of Public Law 95–87 provide that persons seeking permit revisions, renewals, transfer, assignment, or sale of their permit rights for coal mining activities submit relevant information to the regulatory authority to allow the regulatory authority to determine whether the applicant meets the requirements for the action anticipated.

*Bureau Form Number:* None.

*Frequency of Collection:* On occasion.

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

*Total Annual Responses:* 6,701.

*Total Annual Burden Hours:* 59,331.

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. To obtain a copy of OSM's information collection clearance request, 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 February 25, 2005, 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, Room 252–SIB, 1951 Constitution Ave., NW., Washington, DC 20240, or electronically to [jtreleas@osmre.gov](mailto:jtreleas@osmre.gov).

*National Environmental Policy Act*

We have reviewed this proposed rule and determined that it is categorically excluded from the National Environmental Policy Act process in accordance with the Departmental Manual 516 DM 2, Appendices 1.9 and 2.

*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, § 774.17. (5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed rule? 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 774*

Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: December 22, 2004.

**Rebecca W. Watson,**

*Assistant Secretary, Land and Minerals Management.*

For the reasons given in the preamble, OSM proposes to amend 30 CFR Parts 701 and 774 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 *Successor in interest*.

b. Revise the definition of *Transfer, assignment, or sale of permit rights*.

The revised definitions read as follows.

**§ 701.5 Definitions.**

\* \* \* \* \*

*Successor in interest* means a person who follows a permittee, by statutory succession, operation of law, or as a result of a similar, non-substantive change in form, in ownership over the right to conduct surface coal mining

operations granted under a permit. Successors in interest will result from a non-commercial, non-substantive event, such as a business name change or an inheritance.

\* \* \* \* \*

*Transfer, assignment, or sale of permit rights* means a commercial transaction resulting in a change in ownership over the right to conduct surface coal mining operations granted under a permit or a change in operator. A transfer, assignment, or sale of permit rights involves a substantive change and not a mere change in form.

\* \* \* \* \*

3. Revise the heading for part 774 to read as follows:

**PART 774—REVISION; RENEWAL; TRANSFER, ASSIGNMENT, OR SALE OF PERMIT RIGHTS; SUCCESSORS IN INTEREST; POST-PERMIT ISSUANCE REQUIREMENTS; AND OTHER ACTIONS BASED ON OWNERSHIP, CONTROL, AND VIOLATION INFORMATION**

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

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

5. 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; successors in interest; 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.

6. Revise § 774.17 to read as follows:

**§ 774.17 Transfer, assignment, or sale of permit rights.**

(a) *General.* Permit rights obtained by way of a transfer, assignment, or sale of those rights are not valid without the prior written approval of the regulatory authority.

(b) *Application requirements.* An applicant for approval to conduct surface coal mining operations under permit rights obtained by way of a transfer or sale of those rights, or wishing to assign permit rights to an

operator other than the permittee, must—

(1) Provide the regulatory authority with an application that must include—

(i) The name, address, and telephone number of the existing permittee and relevant permit number;

(ii) A description of the transfer, assignment, or sale;

(iii) The applicant's or operator's legal, financial, compliance, and related information as specified under part 778 of this chapter; and

(iv) Any proposed changes to the existing mining plan or reclamation plan.

(2) Advertise the filing of the application in a newspaper of general circulation in the locality of the existing and proposed operations involved, indicating the name and address of the applicant, the existing permittee, the permit number, the geographic location of the permit, and the address to which written comments may be sent. No advertisement is required where there is only a change in operator through assignment.

(3) Obtain performance bond coverage in an amount sufficient to cover the proposed operations, as required under part 800 of this chapter, and provide proof of such coverage to the regulatory authority.

(c) *Public participation.* Any person having an interest that is or may be adversely affected by a decision on an application submitted under this section involving a transfer or sale, including an official of any Federal, State, or local government agency, may submit written comments on the application to the regulatory authority within a time specified by the regulatory authority.

(d) *Approval Criteria.* The regulatory authority may approve an application under this section if it finds in writing, in accordance with § 773.15(n) of this chapter, that the applicant or permittee—

(1) Is eligible to receive a permit under § 773.12 or § 773.14 of this chapter;

(2) Has submitted proof of sufficient performance bond coverage or other guarantee, as required under part 800 of this chapter;

(3) Has received approval of any proposed changes to the existing permittee's approved mining plan or reclamation plan; and

(4) Meets any other requirements specified by the regulatory authority.

(e) *Notification.* Following the permitting decision, the regulatory authority must—

(1) Notify the existing permittee; the transferee, assignee, or purchaser; commenters; and OSM, if OSM is not the regulatory authority, of its findings, and

(2) Enter and update application, permit, and other relevant information in AVS.

(f) *Continued mining and reclamation.* Any new permittee approved to commence surface coal mining operations under this section shall assume the liability and reclamation responsibilities of the existing permit and shall conduct the surface coal mining and reclamation operations in full compliance with the Act, the regulatory program, and the terms and conditions of the existing permit, unless the applicant has obtained a new or revised permit as provided in this subchapter.

7. Add new § 774.18 to read as follows:

**§ 774.18 Successors in Interest.**

(a) *Application requirements.* A successor in interest must—

(1) Apply for a new permit within 30 days of succeeding to the right to conduct surface coal mining operations granted under an existing permit; and

(2) Obtain performance bond coverage in an amount sufficient to cover the proposed operations, as required under part 800 of this chapter, and provide proof of such coverage to the regulatory authority.

(3) Meet any other requirements specified by the regulatory authority.

(b) *Continued operation under the existing permit.* A successor in interest who complies with paragraph (a)(1) of this section and is able to obtain the bond coverage of the original permittee, or equivalent bond coverage, may continue surface coal mining and reclamation operations under an existing permit until such successor in interest's application for a new permit is granted or denied.

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