

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Parts 701, 773, 774, 778, 843, and 847****RIN 1029-AC52****Ownership and Control; Permit and Application Information; 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 certain provisions of our December 19, 2000, final "ownership and control" and related rules, as well as our rules pertaining to the transfer, assignment, or sale of permit rights. More specifically, we propose to amend our definitions pertaining to ownership, control, and transfer, assignment or sale of permit rights and to revise our regulatory provisions governing: permit eligibility determinations; improvidently issued permits, ownership or control challenges; post-permit issuance actions and requirements; transfer, assignment, or sale of permit rights; application and permit information; and alternative enforcement. Additionally, we propose to remove our current rules pertaining to improvidently issued State permits. In order to satisfy our obligations under a settlement agreement we entered into with the National Mining Association, we previously issued two proposed rules covering these subjects.

(Ownership and Control Settlement Rule, December 29, 2003; Transfer, Assignment, or Sale of Permit Rights, January 26, 2005.) After receiving comments on those proposed rules, and holding an outreach meeting with our State co-regulators to discuss the ramifications of finalizing the proposed rules, we have decided to alter the proposals in certain respects and to propose additional revisions. We have also decided to combine the two prior proposals into one new proposed rule, which will allow the public to review and comment on the proposed revisions in context. As with the two prior proposals, our primary objective in issuing this proposed rule is to introduce greater clarity to our regulations and to achieve regulatory stability with regard to aspects of our regulatory program that have been the subject of litigation for many years. This proposed rulemaking does not suspend or withdraw any of the provisions of our

2000 final ownership and control rule or our current rules pertaining to the transfer, assignment, or sale of permit rights. We are, however, withdrawing our December 29, 2003, proposed rule and our January 26, 2005, proposed rule. This proposed rule is authorized under the Surface Mining Control and Reclamation Act of 1977, as amended (SMCRA or the Act).

**DATES:** *Written comments:* Comments on the proposed rule must be received by or before 4:30 p.m., Eastern Time, on December 11, 2006 to ensure our consideration.

*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 October 31, 2006. 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-AC52, by any of the following methods:

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

Include docket number 1029-AC52 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 e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

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 Office, Room 101, 1951 Constitution Avenue, NW., Washington, DC 20240. The Administrative Record Office is open Monday through Friday, excluding holidays, from 8 a.m. to 4 p.m. The telephone number is (202) 208-2847.

*Instructions:* All written submissions 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 notice.

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 reasonable 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

This proposed rule would amend certain provisions of our 2000 final ownership and control rule (65 FR 79582) and our current rules pertaining to the transfer, assignment, or sale of permit rights at 30 CFR 701.5 (definition of *transfer, assignment, or sale of permit rights*) and 30 CFR 774.17 (regulatory requirements). The 2000 final rule, which took effect for Federal programs (*i.e.*, SMCRA programs for which OSM is the regulatory authority) on January 18, 2001, primarily addresses issues concerning and related to ownership or control of surface coal mining operations under section 510(c) of SMCRA. 30 U.S.C. 1260(c). Under section 510(c), an applicant for a permit to conduct surface coal mining and reclamation operations (hereafter “applicant” or “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. Our current rules pertaining to the transfer, assignment, or sale of permit rights contain, among other things, application submission, review, and approval criteria. We have historically viewed our transfer, assignment, or sale rules as related to our ownership and control rules because our current definition of *transfer, assignment, or sale of permit rights* (30 CFR 701.5) incorporates ownership and control concepts.

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 challenged our 2000 final rule on

multiple grounds. NMA’s lawsuit included a challenge to our transfer, assignment, or sale rules. Although the 2000 rule did not include any amendments to our transfer, assignment, or sale rules, NMA argued that we reopened those rules by proposing to revise them in the proposed rule that preceded the 2000 final rule. *See* 63 FR 70580, 70591, 70601 (Dec. 21, 1998).

As we explained in our 2003 proposed rule, 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. Dep’t of the Interior*, 177 F.3d 1 (DC 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, 54 FR 8982, 54 FR 18438), which were invalidated by the DC Circuit because the court found that one aspect of the rules was inconsistent with section 510(c) of SMCRA. *National Mining Ass’n v. Dep’t 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 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 publish two proposed rules in the **Federal Register** 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. In order to fulfill our obligations under the settlement agreement, we published the first of the proposed rules—relating to ownership and control and related issues—on December 29, 2003. 68 FR 75036 (2003 proposed rule). The public comment

period, as extended, closed on March 29, 2004. We published the second proposed rule—relating to the transfer, assignment, or sale of permit rights—on January 26, 2005. 70 FR 3840 (2005 proposed rule). The public comment period, as extended, closed on April 15, 2005. In the settlement agreement, we also agreed to publish certain clarifications to our preamble supporting the 2000 final rule. We published those clarifications in the preamble to our December 29, 2003 proposed rule. 68 FR 75043. However, because we today withdraw our 2003 proposed rule (as well as our 2005 proposed rule), we are repeating the clarifications in today’s proposed rule.

After the comment periods had closed on the two proposed rules described above, we reviewed all comments received and decided it was appropriate to meet with representatives of our State co-regulators before taking further action on the two proposals. States with OSM-approved SMCRA programs have primary responsibility for the regulation of surface coal mining and reclamation operations within their State and must have State rules that are consistent with, and no less stringent than, our national rules. Thus, because any new national rules could directly affect the primacy States, we deemed it important to meet with the States prior to promulgating any new rules. We met with the State representatives from June 7–9, 2005, in Cincinnati, OH. The results of the outreach meeting are detailed in a report that is included in the administrative record supporting this rulemaking initiative. After our outreach meeting with the States, we also met with representatives of NMA, as a courtesy, to inform them of the status of, and our potential future actions with regard to, the two proposed rules we issued in accordance with the settlement agreement. We deemed this meeting appropriate because the litigation NMA instituted over our 2000 final rule is still pending in Federal district court, and the parties are still required to file periodic joint status reports with the court.

After meeting with the States, we conducted further internal research and deliberations and reassessed our options. Given the historic interrelatedness of our ownership and control and transfer, assignment, or sale rules, we decided it was best to combine the topics covered in the two proposed rules and issue one, new reproposal. This approach will allow the public to view the proposed changes in context and provide more meaningful comments. With respect to the ownership and control amendments we

propose today, we have considered the comments received on our 2003 proposed rule and additional input from the States and have concluded that, with a few exceptions, we do not need to deviate substantially from our 2003 proposal. (We note any significant departures in the discussion of the proposed rule, below.) However, our proposed transfer, assignment, or sale amendments (discussed under headings C and T, below) do differ from our 2005 proposal in material respects.

As with the 2003 and 2005 proposed rules, our settlement agreement with NMA does not obligate us 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. We view this rulemaking initiative as an opportunity to ensure we and our State counterparts have the tools we need to enforce SMCRA, clarify ambiguous provisions in our regulations, and reduce reporting burdens on the coal mining industry and regulatory authorities. We are hopeful that any final rule resulting from this proposal will introduce a measure of regulatory stability to areas that have been in flux since at least 1988.

## II. Discussion of the Proposed Rule

In this section we discuss the proposed revisions to our rules. With relatively few modifications, we are carrying forward the proposed ownership and control and related amendments that were the subject of our 2003 proposed rule, which was based on our settlement agreement with NMA. With regard to the transfer, assignment, or sale issues discussed under headings C and T, below, the settlement did not require us to propose any specific regulatory language; we committed only to propose new transfer, assignment, or sale rules. While we are carrying forward some aspects of the proposed transfer, assignment, or sale amendments from our 2005 proposed rule, including the key conceptual change, today's proposal does differ from the 2005 proposal in some material respects.

Following are discussions of our proposed revisions to certain of our definitions at 30 CFR 701.5 and to our rules at 30 CFR parts 773, 774, 778, 843, and 847.

### A. Section 701.5—Definition: Control or Controller

In the 2000 final rule, we defined *control* or *controller* in terms of certain circumstances or relationships that

establish a person's 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 of *control* or *controller* on multiple grounds, including allegations 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 an applicant must list all of its controllers in a 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 all of the examples at paragraphs (5)(i) through (5)(vi). Both parties agreed that if we adopted the proposed revisions, the remaining portion of the definition would still allow a 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 the "ability to determine" standard could encompass indirect and direct control, as well as control in concert with others, where there is actual ability to control. We are carrying this proposal forward from our 2003 proposal.

Despite our renewed proposal to remove two categories of controllers from the definition of *control* or *controller* (general partner in a partnership; person who has the ability to commit financial or real property assets), and 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 determine" 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 determine the manner in which a surface coal mining operation is conducted. In our experience implementing section 510(c) of SMCRA 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.

In today's proposed rulemaking, our proposed revision 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, which is also carried forward from our 2003 proposal. Instead, as discussed in more detail under heading V, below, we propose to modify the information disclosure requirements of 30 CFR 778.11 so that they more closely resemble certain application information requirements of section 507 of SMCRA. We propose this revision to the permit application information requirements in order to establish an 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). This proposed revision would also reduce the information collection burden for both permit applicants and regulatory authorities.

The "ability to determine" 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 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 and less burdensome.

### B. Section 701.5—Definition: 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

DC 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 an applicant. For example, if an applicant has a subsidiary, the subsidiary would be considered “downstream” from the applicant; by contrast, if an applicant has a parent company, the parent company would generally be considered “upstream” from the applicant. NMA’s claim pertained to how far downstream a 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 NMA’s claim, we agreed to propose to revise the regulatory definition of *own, owner, or ownership* at 30 CFR 701.5 and the provision at 30 CFR 773.12(a)(2) that governs the downstream reach of the definition when making a permit eligibility determination. Our first proposed revision is to the definition itself. The 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.” We concede the definition could be confusing in that it uses the word “controlling,” which is an intrinsic part of the separately defined term *control* or *controller*. 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, which is carried forward from our 2003 proposal, would not change the substance of our current definition of *own, owner, or ownership*.

Our second proposed revision would affect current 30 CFR 773.12(a)(2), which addresses the downstream reach of the definition under the rules pertaining to permit eligibility. In *NMA v. DOI II*, the U.S. Court of Appeals for the District of Columbia 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 an applicant indirectly controls an operation with a violation, through its ownership or control of intermediary entities, the applicant is not eligible for a permit. *Id.* at 5. The operation with a violation can be limitless 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. See proposed 30 CFR 773.12 for greater discussion concerning the effects of the proposed definition on permit eligibility determinations.

Our current rules allow us to reach “downstream” with regard to both ownership and control. Thus, under the current rules, we can deny a permit if an 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 be able to deny a permit based on ownership only 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 denials 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 the entity with violations. Of course, the same applicant would be ineligible for a permit if it controlled the violator entity. This proposed revision is also carried forward from our 2003 proposed rule.

We do not believe this approach is compelled by either SMCRA or the decision in *NMA v. DOI II*. However, we do believe it is a reasonable interpretation of the Act. Moreover, with regard to control, the rules for determining permit eligibility 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, our proposal to limit 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 under heading I, below.

#### C. Section 701.5—Definition: Transfer, Assignment, or Sale of Permit Rights

As mentioned above, in order to settle the litigation instituted by NMA, we agreed to propose new transfer, assignment, or sale rules. In accordance with the settlement agreement, we published a proposed rule on January 26, 2005. 70 FR 3840. In that proposed rule, we proposed fairly sweeping changes to our existing regulations. More specifically, we proposed to: revise our regulatory definitions of *transfer, assignment, or sale of permit rights* and *successor in interest* at 30 CFR 701.5; revise our regulatory provisions at 30 CFR 774.17 relating to the transfer, assignment, or sale of permit rights; and create, for the first time, separate rules for successors in interest.

At various points in the preamble to our 2005 proposed rule, we expressly invited comments as to whether such major changes are warranted given that the existing regulatory scheme has been in existence for more than 25 years. In response, a number of commenters suggested that the broad conceptual changes we proposed are not warranted. Several commenters stated that our statutory rationales for some of the proposed changes, including our reading of the legislative history, were flawed. Further, commenters suggested that we did not achieve our primary purpose of providing greater clarity in our transfer, assignment, or sale regulations. Upon consideration of these and other comments, and input from our State co-regulators, we have come to believe that we can achieve our purpose of simplifying and clarifying our regulations through more modest revisions to our existing rules. As a result, today we propose to revise our current definition of *transfer, assignment, or sale of permit rights* at section 701.5 but to keep our existing regulatory requirements for transfers, assignments, or sales of permit rights

largely intact. As with our 2005 proposed rule, we also seek to distinguish clearly the circumstances that will trigger a transfer, assignment, or sale of permit rights as opposed to an information update under 30 CFR 774.12 (see heading S, below).

Section 511(b) of SMCRA, 30 U.S.C. 1261(b), provides that “[n]o transfer, assignment, or sale of permit rights granted under any permit issued pursuant to this Act shall be made without the written approval of the regulatory authority.” Under our current definition, *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 our regulatory definition of *transfer, assignment, or sale of permit rights* to mean a change of a permittee. Our proposal is informed by a decision of the Department of the Interior’s Office of Hearing and Appeals (OHA) *Peabody Western Coal Co. v. OSM*, No. DV 2000–1–PR (June 15, 2000) (*Peabody Western*), comments received on our 2005 proposed rule, and our further discussions with our State co-regulators.

In *Peabody Western*, OHA examined the impact of *NMA v. DOI II* on transfer, assignment, or sale issues. OSM had 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 that 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 other observations that we assigned particular weight to in developing our 2005 proposed rule and today’s proposal. 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.

Throughout our deliberations, we were mindful of OHA’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 concede that our definition has created confusion—among regulatory authorities, the regulated industry, and the public—that has led to various interpretations of the regulatory requirements. As in our 2005 proposed rule, we conclude that the imprecision in our current definition was created largely by our inclusion of the phrase “or other effective control.” Under SMCRA, the concept of control, in the context of permit eligibility, is found 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 unabated or uncorrected violation. Our existing definition of *transfer, assignment, or sale of permit rights* imports the ownership and control concept from section 510(c), but nothing in the Act compels that approach. Because we believe that infusing transfer, assignment, or sale issues with the section 510(c) ownership and control concepts has created undue confusion as to what constitutes a transfer, assignment, or sale of permit rights, we propose to remove ownership and control concepts from the definition. As explained in more detail below, one of the results of this proposed revision is that a change of a permittee’s owners or controllers would not constitute a transfer, assignment, or sale.

In addition to responding to the decision in *Peabody Western*, we also believe that revising our definition of *transfer, assignment, or sale of permit rights* to mean a change of a permittee is consistent with the objective of section 511(b) of the Act. As explained above, section 511(b) requires regulatory approval for a transfer, assignment, or sale of permit rights. Those permit rights are held by the permittee. As long as the permit continues to be held by the same legal entity or “person”—for example, a corporation or other business entity recognized under State law—we see no reason to apply the regulatory provisions governing transfer, assignment, or sale of permit rights. When the permittee changes—such as when the existing permittee sells its assets, including a mining permit or the rights granted under a permit, to a new permittee—there clearly has been a transfer, assignment, or sale of permit rights that would require regulatory approval. However, we propose that if

the permittee’s owners or controllers change, but the permittee remains the same, there has not been a transfer, assignment, or sale; in this instance, the existing permittee is the entity that will continue mining under the permit and will, as such, have to maintain appropriate bond coverage. Under this proposed definition, we would be looking for indicia that the existing permittee has actually conveyed its permit rights to a new permittee that desires to continue mining under the permit. We emphasize that while a permittee’s change of an officer, director, shareholder, owner, controller, or certain other persons in its organizational structure would not trigger a transfer, assignment, or sale of permit rights under this proposal, the permittee would be required to report certain of these changes under proposed 30 CFR 774.12 (see heading S, below). Our proposed revision to the definition of *transfer, assignment, or sale of permit rights* at section 701.5 would reduce the reporting burden on both the coal mining industry and regulatory authorities due to the fact that fewer transactions or events would qualify as a transfer, assignment, or sale requiring an application and regulatory approval under 30 CFR 774.17. We invite your comments as to whether there are legal or practical reasons weighing in favor of or against our proposed revision.

It also bears mention that we are not proposing to revise our definition of *successor in interest*, as we did in our 2005 proposed rule. Historically, we have viewed a successor in interest as “any person who succeeds to rights granted under a permit, by transfer, assignment, or sale of those rights.” See 30 CFR 701.5. In our 2005 proposed rule, we proposed to give the term successor in interest independent meaning, apart from our definition of *transfer, assignment, or sale of permit rights*. However, based on comments received on the proposed rule, we have determined that there is no benefit in creating separate regulatory requirements and that our historic approach is preferable.

#### D. Section 773.3—Information Collection

Current 30 CFR 773.3 contains a discussion of Paperwork Reduction Act requirements and the information collection aspects of 30 CFR part 773. In keeping with the Office of Management and Budget’s guidelines, we propose to revise current section 773.3 by streamlining the codified information collection discussion. A more detailed discussion of the information collection burdens associated with part 773 is

contained under the *Procedural Determinations* section (see heading V.10.), below.

#### E. Section 773.7—Review of Permit Applications

We propose to revise current 30 CFR 773.7(a) in order to correct one cross-reference and to eliminate a cross-reference that is no longer relevant. In general, section 773.7(a) requires the regulatory authority to review certain information developed in connection with an application for a permit, revision, or renewal and to issue a written decision on the application. The second sentence of the current provision reads: "If an informal conference is held under § 773.13(c), the decision shall be made within 60 days of the close of the conference, unless a later time is necessary to provide an opportunity for a hearing under paragraph (b)(2) of this section." In our 2000 final rule, we redesignated previous section 773.15(a)(1) as 773.7(a), but made no other revisions to the provision at that time. Since the promulgation of our 2000 rule, it has come to our attention that the cross-references in that provision are either incorrect or no longer applicable.

We propose to correct the first cross-reference so that it properly refers to current section 773.6(c). We also propose to remove the language that includes the second cross-reference because it is no longer relevant due to certain revisions we adopted in our 2000 final rule. More specifically, we propose to remove the qualifier phrase "unless a later time is necessary to provide an opportunity for a hearing under paragraph (b)(2) of this section" because "(b)(2)" refers to a provision—previous 30 CFR 773.15(b)(2)—that no longer exists and because the logic behind the current provision is no longer applicable. The hearing contemplated by previous section 773.15(b)(2) was a hearing held in conjunction with an applicant's appeal of a notice of violation. Under today's proposal, if an applicant is pursuing a good faith appeal of a violation, and otherwise meets the criteria of proposed 30 CFR 773.14 (see heading J, below), the applicant will be eligible to receive a provisionally issued permit. Under these circumstances, we no longer see a need to delay the permitting decision in order to provide an opportunity for a hearing on a violation.

#### F. Section 773.8—General Provisions for Review of Permit Application Information and Entry of Information into AVS

Among other things, current 30 CFR 773.8 requires a regulatory authority to enter certain permit application information into AVS. We propose to revise current 30 CFR 773.8 by removing the phrase "ownership and control" from paragraph (b)(1). We propose this revision because we are also proposing to revise the heading of current 30 CFR 778.11 by removing the phrase "ownership and control." See discussion under heading V, below. Our rationale for these proposed revisions is that, under section 778.11, an applicant must submit information in addition to what could be called "ownership and control" information. At paragraph 773.8(b)(1), we are also proposing to add language clarifying that the information described (through a cross-reference to sections 778.11 and 778.12(c)) is required to be disclosed; disclosure of this information is not optional. The entire proposed provision at paragraph 773.8(b)(1) would read: "The information you are required to submit under §§ 778.11 and 778.12(c) of this subchapter."

#### G. Section 773.9—Review of Applicant and Operator Information

Current 30 CFR 773.9 requires a regulatory authority to review certain information provided by the applicant during the regulatory authority's permit eligibility review. Similar to our proposed revision to section 773.8, we are proposing to revise the section heading at current 30 CFR 773.9 by removing references to "ownership and control" information. Thus, the revised section heading would read, "Review of applicant and operator information." We also propose to revise current section 773.9(a) by removing the phrase "applicant, operator, and ownership or control." Again, these non-substantive proposed revisions merely clarify that the information that the applicant is required to disclose under section 778.11 is not limited to ownership and control information.

As with the proposed revision to section 773.8, we also propose to revise section 773.9(a) by adding language that clarifies that the information described in the section (through a cross-reference to section 778.11) must be disclosed in a permit application; disclosure is not optional. Finally, we propose to revise section 773.9(a) by changing the term "business structure" to "organizational structure." This proposed change is a

broader description of the entities subject to the review.

In sum, revised paragraph (a) would read: "We, the regulatory authority, will rely upon the information that you, the applicant are required to submit under § 778.11 of this subchapter, information from AVS, and any other available information, to review your and your operator's organizational structure and ownership and control relationships."

#### H. Section 773.10—Review of Permit History

We propose to revise current 30 CFR 773.10, which requires a regulatory authority to, among other things, review the permit history of an applicant and its operator during the regulatory authority's permit eligibility review. More specifically, we propose to revise section 773.10(b) by removing the reference to the applicant's "controllers disclosed under §§ 778.11(c)(5) and 778.11(d) of this subchapter." Paragraph (b) would then read: "We will also determine if you or your operator have previous mining experience."

In paragraph (c), we propose to remove the language "your controllers, or your operator's controllers" from the first sentence. 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 or your operator do not have any previous mining experience, we may conduct an additional review 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." We are proposing these revisions because we also propose to remove the requirement for an applicant to disclose its controllers (including its "designated controller") in a permit application. See discussion under heading V, below. These proposed revisions differ from the proposed revisions in our 2003 proposed rule in that we are proposing to remove all references to controllers. In our 2003 proposed rule, we proposed to substitute the references to all controllers with references to the designated controller an applicant is required to disclose under current 30 CFR 778.11(d). See 68 FR 75038. In light of today's proposal to remove section 778.11(d), cross-references to that section would no longer be necessary.

#### I. Section 773.12—Permit Eligibility Determination

We propose to revise our provisions for permit eligibility determinations at current 30 CFR 773.12. As indicated above, under our discussion of the

definition of *own*, *owner*, or *ownership* (see heading B), current 30 CFR 773.12(a) is the provision in our 2000 final rule that determines the “downstream” reach of the rule in terms of permit eligibility. More 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; we would, however, 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), without changing the substantive meaning of those provisions. The proposed revision to paragraph (a)(2), which would remove the reference to ownership, would provide that a permit applicant is not eligible for a permit if any surface coal mining operation that the applicant or the applicant’s operator “indirectly control[s] has an unabated or uncorrected violation and [the applicant’s or operator’s] control was established or the violation was cited after November 2, 1988.” Thus, as explained above under heading B (definition of *own*, *owner*, or *ownership*), with respect to *ownership*, we could only look “one level down” from the applicant in making a permit eligibility determination. This proposed revision is carried forward from our 2003 proposed rule.

We are also proposing to revise current 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. This proposed revision is carried forward from our 2003 proposed rule.

Finally, although we are not proposing any regulatory changes on this issue, we want to emphasize an inherent aspect of current section 773.12: In meeting its obligations under section 510(c) of the Act and the State counterparts to that provision, each State, when it processes 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. Consistent with the concept of State primacy, it is appropriate for the regulatory authority with jurisdiction over an application to apply its own ownership or control rules when making a permit eligibility determination, since that regulatory authority has the greatest interest in whether or not mining should commence or continue within its jurisdiction. However, when a regulatory authority is applying its ownership or control rules to violations in other jurisdictions, it is advisable for the regulatory authority to consult and coordinate, as necessary, with the regulatory authority with jurisdiction over the violation and our Applicant/Violator System Office (AVS Office). We also stress that a regulatory authority processing a permit application has *no* authority to make determinations relating to the initial existence or current status of a violation, or a person’s responsibility for a violation, in another jurisdiction.

#### J. Section 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 the preamble discussion in our 2000 rule 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, today we propose to revise 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. This proposed revision is carried forward from our 2003 proposed rule.

#### K. Section 773.21—Initial Review and Finding Requirements for Improvidently Issued Permits

Sections 773.21 through 773.23 of our rules are the provisions governing improvidently issued permits. In this context, these are permits we should not have issued in the first instance because of an applicant’s ownership or control of a surface coal mining operation with an unabated or uncorrected violation at the time of permit issuance. We propose two substantive revisions to 30 CFR 773.21(c).

The first revision concerns our burden of proof when making a preliminary finding that a permit was improvidently issued. In our 2003 proposed rule, in accordance with our settlement with NMA, we proposed to revise section 773.21(c) so that our preliminary finding that a permit was improvidently issued “must be based on reliable, credible, and substantial evidence and establish a *prima facie* case that [the permittee’s] permit was improvidently issued.” See 68 FR 75039. Based on input received from our State co-regulators—both in their comments on our 2003 proposed rule and in our outreach meeting—and other commenters, we have come to believe that requiring a *prima facie* case of improvident permit issuance to be based on “reliable, credible, and substantial” evidence is too high of a burden on a regulatory authority (particularly in the context of a *preliminary* finding). Thus, today we propose that our preliminary finding that a permit was improvidently issued “must be based on evidence sufficient to establish a *prima facie* case that [the permittee’s] permit was improvidently issued.” This evidentiary standard, we believe, is more in line with traditional notions of what it takes to establish a *prima facie* case and is consonant with the standard that typically applies to OSM’s regulatory findings. See headings O and R, below, for additional discussions on burden of proof issues.

We also propose to remove current 30 CFR 773.21(c)(2), which requires us to post a notice of a *preliminary* finding of improvident permit issuance at our

office closest to the permit area and on the Internet. This proposed revision is carried forward from our 2003 proposed rule. We are also carrying forward our 2003 proposal to remove all other Internet posting requirements adopted in our 2000 final rule. In addition to 30 CFR 773.21(c)(2), we propose to remove the Internet posting requirements found in current 30 CFR 773.22(d), 773.23(c)(2), and 773.28(d). We also propose to remove the requirement to post *preliminary* decisions “at our office closest to the permit area.” The requirements to post preliminary decisions that we propose to remove are found in current 30 CFR 773.21(c)(2) and 773.22(d). (Current section 843.21 contains additional posting requirements that would be removed as part of our proposal to remove 843.21 in its entirety. See discussion under heading W, below.) We would retain the current requirement at 30 CFR 773.23(c)(2) to post a notice of permit suspension or rescission at our office closest to the permit area. We also would retain the current requirement at 30 CFR 773.28(d) to post a final agency decision on a challenge of an ownership or control listing or finding on AVS.

Our inclusion of the Internet posting requirements in the 2000 rule 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.

#### *L. Section 773.22—Notice Requirements for Improvidently Issued Permits*

As discussed above, we propose to remove 30 CFR 773.22(d), which contains posting requirements similar to those found at current 30 CFR 773.21(c)(2), discussed above under heading K. 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. Because we propose to remove paragraph (d), we further propose to redesignate current paragraphs (e) through (h) as paragraphs (d) through (g). In the proposed rule language that follows this discussion of the proposed rules, our proposed revision to 30 CFR 773.22 is shown as a **Federal Register** instruction. This proposed revision is carried forward from our 2003 proposed rule.

#### *M. Section 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. We propose to remove the requirement to post final notices on the Internet. (Our rationale for removing this and similar posting requirements is discussed more fully above under heading K.) However, because section 773.23(c)(2) pertains to *final* findings (as opposed to the *preliminary* and *proposed* findings under sections 30 CFR 773.21 and 773.22, respectively), we have decided to retain the requirement to post a final notice at our office closest to the permit area. We believe it is appropriate to post notices of such final actions for public view. These proposed revisions are carried forward from our 2003 proposed rule.

#### *N. Section 773.26—How to Challenge an Ownership or Control Listing or Finding*

Sections 773.25 through 773.28 of our rules govern challenges to ownership or control listing or findings. Generally speaking, an ownership or control *listing* arises when an applicant identifies, or “lists,” a person as an owner or controller in a permit application. That information is, in turn, entered into AVS by a 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. NMA also expressed concern that the provision seems to refer only to applicants and permittees, but not other persons who are identified in AVS as owners or controllers.

Section 773.25 of our 2000 final rule provides that any person listed in a permit application or in 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 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 an 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 to the provisions in 773.26(a), and in accordance with our settlement with NMA, we proposed (in our 2003 proposed rule) to revise our regulations at 30 CFR 773.26(a) to more clearly specify the forum in which a person may initiate an ownership or control challenge. Today, we carry forward this aspect of our 2003 proposed rule. Specifically, we propose that challenges pertaining to a pending permit application must be submitted to the regulatory authority with jurisdiction over the pending application. We further propose that all other challenges concerning ownership or control of a surface coal mining operation must be submitted to the regulatory authority with jurisdiction over the relevant 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 decides an ownership or control challenge under its counterpart to 30 CFR 773.28, must apply its own ownership and control rules to determine whether the applicant owns or controls (or owned or controlled) 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.

In our 2003 proposed rule, we also proposed to add new 30 CFR 773.26(e), in accordance with our settlement with NMA. Today, we carry forward this aspect of our 2003 proposed rule. This new provision would allow a person who is unsure why he or she is shown in AVS as an owner or controller of a surface coal mining operation to request an informal 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 AVS will give persons a better sense of the type of evidence they will need to introduce in an ownership or control challenge. *See also* 30 CFR 773.27(c), which provides examples of materials a person may submit in support of his or her ownership or control challenge.

#### *O. Section 773.27—Burden of Proof for Ownership or Control Challenges*

As mentioned above, our rules contain provisions for challenging ownership or control listings or findings. Under current 30 CFR 773.27(a), 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 to our 2000 final rule, NMA argued that we must 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 made it clear that we had to establish a *prima facie* case when making a finding of ownership or control:

[I]n making a finding [of ownership or control] 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 settle NMA's claim and to set forth more clearly the relative burdens of the parties, we agreed to propose revisions to section 30 CFR 773.27(a) and 774.11(f), as well as a related revision to 30 CFR 773.21(c) (*see* discussion above under heading K). The proposed revisions were part of our 2003 proposed rule. Today, we are proposing revisions that deviate slightly from the 2003 proposed revisions but retain the general substance of our prior proposals. As explained in more detail below under heading R, we are proposing to amend 30 CFR 774.11(f) in order to clarify that a regulatory authority's finding of ownership or control must be based on evidence sufficient to establish a *prima facie* case of ownership or control. We propose to amend section 773.27(a) so that it reads:

(a) When you challenge a listing of ownership or control, or a 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.

Our proposed revision to paragraph (a) merely clarifies that a person can challenge either an ownership or control listing or a finding of ownership or control under 30 CFR 774.11(f). In our 2003 proposed rule, we proposed adding the term "*prima facie*" before the word "finding" in paragraph (a). However, we now believe the addition of that term is redundant given that our proposed revision to section 774.11(f) would clarify that our written findings of ownership or control must be based on evidence sufficient to establish a *prima facie* case. At paragraphs (a)(1) and (a)(2), we propose to clarify that the "operation" referred to in these provisions is a surface coal mining operation.

Under the burden of proof allocation we propose today, as under our current rules, if the challenge concerns a finding of ownership or control, the regulatory authority will have borne the initial burden of establishing a *prima facie* case of ownership or control by issuing its finding in accordance with section 774.11(f). 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.

#### *P. Section 773.28—Written Agency Decision on Challenges to Ownership or Control Listings or Findings*

We propose to revise the posting requirements of 30 CFR 773.28, our rules governing written agency decisions on challenges to ownership or control listings or findings. Current section 773.28(d) requires us to post final decisions on ownership or control challenges on AVS and on the AVS Office's Internet home page. We propose to remove the requirement to post these decisions on the Internet. However, because 30 CFR 773.28 pertains to final decisions on ownership or control challenges, we have decided to retain the requirement to post these decisions on AVS. Because these final decisions may have permit eligibility consequences, it is appropriate to make such decisions publicly available by posting them on AVS. This proposed revision is carried forward from our 2003 proposed rule. Our rationale for removing this and similar posting requirements is set forth more fully above, under the discussion of 30 CFR 773.21 (*see* heading K).

#### *Q. Section 774.9—Information Collection*

Current 30 CFR 774.9 contains a discussion of Paperwork Reduction Act requirements and the information collection aspects of 30 CFR part 774. In keeping with the Office of Management and Budget's guidelines, we propose to revise current section 774.9 by streamlining the codified information collection discussion. A more detailed discussion of the information collection burdens associated with part 774 is contained under the *Procedural Determinations* section (*see* heading V.10.), below.

#### *R. Section 774.11—Post-Permit Issuance Requirements for Regulatory Authorities and Other Actions Based on Ownership, Control, and Violation Information*

We propose several revisions to current 30 CFR 774.11 which, among other things, contains requirements for

regulatory authorities following the issuance of a permit. First, we propose to revise section 774.11(a)(3), which currently requires a 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 paragraph (a)(3) by removing “Changes in ownership or control” and replacing it with “Changes to information initially required to be provided by an applicant under 30 CFR 778.11.” We propose this revision because we are also proposing to revise the heading of current 30 CFR 778.11 by removing the phrase “ownership and control.” See discussion below, under heading V. Our rationale for these proposed revisions is that, under section 778.11, an applicant must submit information in addition to what could be called “ownership and control” information. This proposed revision is carried forward from our 2003 proposed rule.

Second, we propose to revise 30 CFR 774.11(e). Under the specified circumstances, 30 CFR 774.11(c) of our rules requires us to make a preliminary finding of permanent permit ineligibility. Section 30 CFR 774.11(d) provides for administrative review of a preliminary finding. Current 30 CFR 774.11(e) reads as follows: “We must enter the results of the finding and any hearing into AVS.” Confusion has arisen as to whether we must enter a preliminary finding into AVS, prior to administrative resolution.

To settle a claim brought by NMA, we agreed to clarify that a finding of permanent permit ineligibility would be entered into AVS only 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. In order to incorporate this clarification into our regulatory requirements, we propose to revise 30 CFR 774.11(e). Specifically, at the beginning of paragraph (e), we propose to add the subheading “Entry into AVS.” We further propose to create new paragraph (e)(1), which would read: “If you do not request a hearing, and the time for seeking a hearing has expired, we will enter our finding into AVS,” and new paragraph (e)(2), which would read: “If you request a hearing, we will enter our finding into AVS only if that finding is upheld on administrative appeal.” With a minor, non-substantive modification, this proposed revision is carried forward from our 2003 proposed rule.

Third, we propose to revise 30 CFR 774.11(f), which governs a regulatory authority’s finding of ownership or

control. As with the proposed revision of 30 CFR 773.27, discussed above under heading O, 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 evidence sufficient to establish a *prima facie* case. In the preamble to our 2000 final rule, we explained that a finding of ownership or control must be based on a *prima facie* determination of ownership or control (65 FR 79640); the revision we propose today makes this requirement explicit. In the context of a regulatory authority’s finding of ownership or control, 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.

In our 2003 proposed rule, we proposed that a regulatory authority’s *prima facie* finding under section 774.11(f) must be based on reliable, credible, and substantial evidence. However, as with section 773.21 (see heading K, above), based on input received from our State co-regulators and other commenters, we have come to believe that requiring a *prima facie* finding of ownership or control to be based on “reliable, credible, and substantial” evidence is too high of a burden on a regulatory authority for an initial finding. Thus, we propose that our findings of ownership or control under section 774.11 “must be based on evidence sufficient to establish a *prima facie* case of ownership or control.” This evidentiary standard, we believe, is more in line with traditional notions of what it takes to establish a *prima facie* case and is consonant with the standard that typically applies to OSM’s regulatory findings.

For logistical reasons, we also propose to merge the substance of current paragraph (f)(1) into proposed paragraph (f); merge the substance of current paragraph (f)(2) into proposed paragraph (g) (discussed below); and remove current paragraph (f)(3), to be consistent with the revisions we propose to 30 CFR 778.11(c)(5) and (d) (discussed below under heading V). These proposed changes include removing the current requirement at paragraph (f)(3) that, following a finding of ownership or control, a person must disclose his or her identity under 30 CFR 778.11(c)(5) and, if appropriate, certify that they are a controller under 30 CFR 778.11(d). As discussed below under heading V, we propose to remove the information disclosure requirements at 778.11(c)(5) and (d). Therefore, the cross-references

to those provisions in section 774 would no longer make sense.

Fourth, we propose to revise 30 CFR 774.11 to address 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. (See 30 CFR 701.5 for definition of *Applicant/Violator System* or *AVS*.) While we disagree with the characterization that we enter “links” to violations into AVS, today we propose to create a new paragraph (g). The new regulatory provision would specify that, after we issue a written 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 any 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 or if the person does not submit any information within the 30-day period, we must enter our finding under paragraph (f) into AVS. The requirement to enter our decision into AVS is currently found in section 774.11(f)(2); we propose to move that requirement into proposed paragraph (g). The process envisioned in proposed paragraph (g) would be informal and non-adjudicatory. With a minor modification, this proposed revision is carried forward from our 2003 proposed rule.

Fifth, we propose to add a new paragraph (h), which would specify that we do not need to make a finding of ownership or control under paragraph (f) before entering into AVS the information that permit applicants are required to disclose under sections 778.11(b) and (c). For example, if we find that an applicant failed to disclose an operator in a permit application, we can enter the identity of the operator into AVS without making a finding of ownership or control. This is so because an applicant is required to identify its operator under section 507(b)(1) of the Act, 30 U.S.C. 1257(b)(1); 30 CFR 778.11(b)(3). However, proposed paragraph (h) would also make clear that the mere listing of a person in 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, in fact, 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. This proposal is carried forward from our 2003 proposed rule.

Finally, we propose to make non-substantive revisions to current paragraph (g) and redesignate that provision as paragraph (i). Proposed paragraph (i) would read: "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." This proposed revision is carried forward from our 2003 proposed rule.

#### *S. Section 774.12—Post-permit Issuance Information Requirements for Permittees*

We propose to revise 30 CFR 774.12, which sets forth information reporting requirements for permittees after the issuance of a permit. More specifically, at paragraph (c), we propose to remove the reference to 30 CFR 778.11(d) (as we are proposing to remove that provision) and to add new paragraph (3), which would require a permittee to provide written notification to the surety, bonding entity, guarantor, or other person that provides the bonding coverage currently in effect whenever there is an addition, departure, or change in any position of any person the permittee was required to identify under 30 CFR 778.11(c). Sureties have expressed to us that it is important to review bond coverage following such events. We agree and believe notifying the bonding entities of such events is important to ensure that appropriate bond coverage remains in place. In addition, proposed paragraph (c)(3) would provide that the regulatory authority with jurisdiction over the permit may require written verification of continued appropriate bond coverage following such additions, departures, or changes. Given that some of these changes can be quite significant, we believe it is reasonable for a regulatory authority to require proof that bond coverage will continue and has not been jeopardized by the changes. We invite your comments as to whether there are practical or legal reasons weighing in favor of or against these proposed new provisions.

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

In 2005, we proposed to revise our regulations governing the transfer, assignment, or sale of permit rights. Our proposal was expansive and constituted a significant departure from our existing

regulations. As explained above under heading C, we have decided to scale back the scope of our proposal. Under today's proposal, the primary change to our transfer, assignment, or sale regulations would be our proposed revision to our definition of *transfer*, *assignment*, or *sale of permit rights* at 30 CFR 701.5. By contrast, we propose relatively minor revisions to our existing regulations at 30 CFR 774.17, which contains our regulatory procedures governing the transfer, assignment, or sale of permit rights.

Current 30 CFR 774.17(a) provides that "[n]o transfer, assignment, or sale of rights granted by a permit shall be made without the prior written approval of the regulatory authority." Our requirement for "prior written approval" of a transfer, assignment, or sale has been construed by some as an attempt to require regulatory authority approval of private business transactions. We want to make clear that we have no involvement in private business transactions. However, we also stress that, under this proposal, a person's acquisition of a permit or the 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 a transfer, assignment, or sale and that, in validating such permit rights, the regulatory authority must determine that 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 and that the entity has obtained sufficient bond coverage. Only upon validation by the regulatory authority can it be said that the successor in interest has become the new permittee and has permit rights.

However, we also recognize that requiring operations to cease while a permittee seeks regulatory approval of a transfer, assignment, or sale of permit rights could result in unnecessary disruptions to the nation's energy supply. Thus, we propose that operations on the permit may continue on a short-term basis, at the discretion of the regulatory authority, while the permittee seeks regulatory approval of a transfer, assignment, or sale, but only if the successor in interest can demonstrate to the satisfaction of the regulatory authority that sufficient bond coverage will remain in place. Prior to a decision on an application for a transfer, assignment, or sale, the regulatory authority retains all of its enforcement powers and should take immediate action if the successor in interest is not complying with the terms

of the permit or any requirements of the Act or its implementing regulations. Revised paragraph (a) would read: "(a) *General*. No transfer, assignment, or sale of rights granted by a permit shall be made without the prior written approval of the regulatory authority. At its discretion, the regulatory authority may allow a successor in interest to continue surface coal mining and reclamation operations under the permit during the pendency of an application for approval of a transfer, assignment, or sale of permit rights submitted under paragraph (b) of this section, provided that the successor in interest can demonstrate to the satisfaction of the regulatory authority that sufficient bond coverage will remain in place." We invite your comments as to whether there are practical or legal reasons weighing in favor of or against this proposed new provision.

At paragraph (d)(1), we propose to revise the cross-references to our permit eligibility rules. While the reference to section 773.12 remains correct, the reference to section 773.15 is no longer correct, due to revisions we adopted in our 2000 final rule. Thus, we propose to revise the paragraph so that it cross-references sections 773.12 and 773.14.

#### *U. Section 778.8—Information Collection*

Current 30 CFR 778.8 contains a discussion of Paperwork Reduction Act requirements and the information collection aspects of 30 CFR part 778. In keeping with the Office of Management and Budget's guidelines, we propose to revise current section 778.8 by streamlining the codified information collection discussion. A more detailed discussion of the information collection burdens associated with part 778 is contained under the *Procedural Determinations* section (*see* heading V.10.), below.

#### *V. Section 778.11—Providing Applicant and Operator Information*

We propose several revisions to current 30 CFR 778.11, which sets forth certain information disclosure requirements for permit applicants. First, in a proposal carried forward from our 2003 proposed rule, 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, under section 778.11, an applicant must submit information in addition to what could be called "ownership and control" information and because we are also proposing to

remove current 30 CFR 778.11(c)(5) and (d), which require an applicant to disclose all of its owners and controllers in a permit application, including its "certified controller" under paragraph (d). (See discussions above under heading A and below under this heading). As a result of these proposed changes, and the other 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 would in fact be owners or controllers under our regulatory definitions, the broad term "applicant and operator" information more aptly describes the range of information an applicant would be required to disclose.

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." As we did in our 2003 proposed rule, we today propose to add "associations" to this list of business entities to conform the provision more closely to section 507(b)(4) of the Act.

We propose to remove current paragraph 778.11(b)(4), which requires an applicant to disclose the identity of the person(s) responsible for submitting the Federal Coal Reclamation Fee Report (Form OSM-1) and for remitting the fee to OSM. As a practical matter, this information may not be known at the time of the application, and therefore, characterizing it as an application requirement seems improper. Moreover, the requirements for submission of OSM-1 forms and reclamation fee payments are clearly provided for under Subchapter R of our rules; an overlapping requirement is not necessary. Finally, the current provision requires States to obtain this information even though mining operators pay the reclamation fee to OSM. We see no reason to impose an information collection burden on the States when they have no use for the information. By removing the provision, we would also reduce the information collection burden on permit applicants. This proposed revision was not contained in either our 2003 or 2005 proposed rules.

We propose to replace current paragraph (b)(4) with a new provision that would require an applicant to disclose the identity of each business entity in the applicant's and operator's organizational structure, up to and including the ultimate parent entity of the applicant and operator. This

proposed provision is based on our discussions with our State co-regulators, who explained that it is important for a regulatory authority to obtain this information at the time of application, particularly if we remove the requirement for applicants to disclose all of their owners and controllers (see discussion under this heading, below). Under this proposal, an applicant would only have to identify the business entities in its and its operator's organizational structures and not, for example, the officers, directors, and shareholders of each of those entities. This proposed provision was not contained in our 2003 or 2005 proposed rules.

We also propose to revise paragraph 778.11(c). A permit applicant must provide certain information for the persons listed in the provision. We propose to add "partner" and "member" to this list of persons and to reorder the list. We propose to add "partner" because that term is used in section 507(b)(4) of the Act and because partnerships are common business entities in the coal mining industry. Likewise, limited liability companies, comprised of "members," have become prevalent in the industry. Thus, we propose to include the term "member" to ensure that we obtain the necessary information for members of a limited liability company. We also propose to redesignate current 30 CFR 778.11(c)(4) as 30 CFR 778.11(c)(6) and revise it to read: "Person who owns, of record, 10 percent or more of the applicant or operator." This proposed change comports with section 507(b)(4) of the Act.

As we explain under heading A, above, in conjunction with revising the definition of *control* or *controller*, we propose to remove the requirement at current 30 CFR 778.11(c)(5), which requires an applicant to identify all of its owners or controllers in a permit application (though we would still obtain ownership information under proposed paragraph (c)(6) and some of the persons a permit applicant identifies under section 778.11 would likely, in fact, be controllers under our regulatory definition). We propose this revision because we believe it is important to establish "bright line," objective permit information requirements. As explained above, 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; we have concluded that it is difficult to impose an objective reporting requirement based on that type of 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, as implemented in our regulations at 30 CFR 778.11, 778.12, and 778.14, will give regulatory authorities information sufficient to enforce the ownership and control provisions of section 510(c), as well as other provisions of the Act.

Finally, we propose to remove current 30 CFR 778.11(d), which was part of NMA's challenge to our 2000 final rule. 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 agreed to propose a revision to clarify the applicability and scope of the provision, which we did in our 2003 proposed rule. However, after receiving input from our State co-regulators, we propose to remove this provision from our regulations. Our sense is that this concept is ultimately unworkable given that an applicant may not know the identity of this person at the time of application and the identity of the person may change over time. As a result of this proposed revision, we also propose to redesignate current paragraph 778.11(e) as 778.11(d).

Although we are proposing a new information collection at proposed paragraph (b)(4), the revisions we propose at 30 CFR 778.11 would result in a net reduction in the information disclosure requirements for applicants and in the information collection requirements for us and State regulatory authorities.

#### *W. Section 843.21—Procedures for Improvidently Issued State Permits*

We propose to remove 30 CFR 843.21 in its entirety. Section 843.21 sets forth Federal procedures relative to State-issued permits that may have been improvidently issued based on certain ownership or control relationships. This section provides for direct Federal inspection and enforcement, including our authority to issue notices of violation and cessation orders, if, after an initial notice, a State fails to take appropriate action or show good cause for not taking action with respect to an improvidently issued State permit. We have decided to propose its removal for the two reasons discussed in more detail below. Further, its removal will provide greater regulatory stability through

clarification of the State/Federal relationship related to permitting in primacy States, which has been a source of great confusion for many years. *See, e.g., Coteau Prop. Co. v. Dep't of the Interior*, 53 F.3d 1466, 1472 (8th Cir. 1995) (“there exists a state of general confusion regarding SMCRA’s allocation of power between OSM and primacy states”).

First, we are proposing to remove section 843.21 because it is no longer needed. We first adopted regulations concerning improvidently issued permits on April 28, 1989 (54 FR 18438). (A discussion of the subsequent regulatory history and related litigation leading up to the present is found above under “Background to the Proposed Rule.”) In our 2003 proposal (68 FR 75036), we proposed to eliminate the various provisions of 30 CFR 843.21 that required posting of notices and findings on the Internet. In addition, pursuant to our settlement with NMA, we proposed to clarify the basis for a notice under 30 CFR 843.21(a).

Since we issued our 2003 proposal, we have reviewed our historic use of this section. Since 1989, when this rule was first promulgated, we have found no record of OSM taking enforcement action under its provisions against a permittee holding a State-issued permit. From 1989 through 1995, we issued fewer than 50 initial notices of improvidently issued permits to State regulatory authorities. In those cases, the issue that gave rise to the initial notice was resolved prior to the point at which OSM would have taken direct enforcement action against the permittee holding the State-issued permit. Since 1996, we have not even issued an initial notice for an improvidently issued permit to any State regulatory authority. The fact that we have not had a need to use the provisions of section 843.21 at all in at least a decade demonstrates that State regulatory authorities are making proper permit eligibility determinations pursuant to section 510 of the Act, 30 U.S.C. 1260, and their State-program counterparts and, in the rare case of improvident permit issuance, properly applying State counterparts to our improvidently issued permit regulations. (Under our improvidently issued permit regulations—currently found at 30 CFR 773.21 through 773.23—and the State counterparts to those regulations, a regulatory authority can initiate procedures to suspend or rescind permits it has improvidently issued due to certain ownership or control relationships.)

Further, most, if not all, of the initial notices OSM did issue under section

843.21 prior to 1996 would not have been valid under the D.C. Circuit’s subsequent decisions in *NMA v. DOI I* and *NMA v. DOI II*, which limited the scope of our rules implementing section 510(c) of the Act. (The *NMA v. DOI* decisions are discussed in greater detail above under “Background to the Proposed Rule” and at 65 FR 79582–84.) Consequently, we believe there is no longer a need for the provisions of 30 CFR 843.21 authorizing OSM to take direct enforcement action against an operation with a State-issued permit that may have been improvidently issued.

The second reason for proposing the removal of section 843.21 is that a recent event has caused us to examine further our oversight role relative to State permitting decisions. On October 21, 2005, the Department of the Interior’s Assistant Secretary for Land and Minerals Management (ASLMM) issued a final decision concerning a citizen group’s request that OSM conduct a Federal inspection in a case where the citizen’s group was dissatisfied with a State regulatory authority’s decision to issue a coal mining permit. (A copy of the ASLMM’s October 21, 2005, final decision is contained in the administrative record for this rulemaking.) The citizen’s group requested an inspection even though mining on the permit had not yet commenced and the citizen’s group failed to prosecute a direct appeal of the State’s permitting decision in State tribunals.

In her decision, the ASLMM pointed out that “OSM intervention at any stage of the state permit review and appeal process would in effect terminate the state’s exclusive jurisdiction over the matter and [would frustrate SMCRA’s] careful and deliberate statutory design.” *See also Bragg v. Robertson*, 248 F. 3d 275, 288–289, 293–295 (4th Cir. 2001) (regulation under SMCRA is “mutually exclusive, either Federal or State law regulates coal mining activity in a State, but not both simultaneously”; primacy States have “exclusive jurisdiction” over surface coal mining operations on nonfederal lands within their borders). The final decision also explained that in a “primacy state, permit decisions and any appeals are solely matters of the state jurisdiction in which OSM plays no role.” In support of this statement, the final decision cited the following passage from *In re: Permanent Surface Mining Regulation Litig.*, 653 F.2d 514 (DC Cir. 1981) (*PSMRL*):

In an approved and properly enforced state program, the state has the primary responsibility for achieving the purposes of the Act. First, *the State is the sole issuer of*

*permits*. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. *See Act §§ 506, 510*. It decides whether a permittee’s techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable. *Act § 510(b)*.

\* \* \* \* \*  
*Administrative and judicial appeals of permit decisions are matters of state jurisdiction in which the Secretary [of the Interior] plays no role.* *Act § 514*.

*Id.* at 519 (emphasis added).

The ASLMM’s decision has caused us to look more carefully at the statutory and regulatory scheme governing our oversight role related to State permitting decisions and, in particular, the propriety of retaining section 843.21. Inasmuch as current section 843.21 authorizes direct Federal enforcement against State permittees based on State permitting decisions, it is inconsistent with the ASLMM’s decision, and arguably inconsistent with *PSMRL*’s admonition that a primacy State is the “sole issuer of permits” within the State.

Further, under SMCRA, State permitting is entirely separate from Federal inspections and associated Federal enforcement. The statutory provisions related to permit application review and permit decisions are found at section 510 of the Act, 30 U.S.C. 1260, and appeals of permitting decisions are provided for under section 514 of the Act, 30 U.S.C. 1264. Nothing in these statutory provisions discusses inspections—the predicate to Federal enforcement under section 521 of the Act (30 U.S.C. 1271)—in connection with State permitting decisions, and certainly nothing in these provisions mandates Federal intervention in State permitting decisions.

The Act’s provisions for Federal inspections expressly provide that such inspections are of mining “operations.” *See SMCRA section 517(a)*, 30 U.S.C. 1267(a) (referring to inspections of surface coal mining and reclamation operations) and *SMCRA section 521(a)* (referring to inspections of surface coal mining operations). The definitions of *surface coal mining and reclamation operations* and *surface coal mining operations* at *SMCRA sections 701(27) and (28)*, 30 U.S.C. 1291(27) and (28), do not mention anything about permits or permitting decisions. Instead, those definitions refer to activities and the areas upon which those activities occur. In short, the purpose of a Federal inspection is to determine what is happening at the mine, and, thus,

SMCRA's inspection and enforcement provisions do not readily apply to State permitting decisions because they are not activities occurring at the mine. *See, e.g., Coteau*, 53 F.3d at 1473 (“Permitting requirements such as revelation of ownership and control links are not likely to be verified through the statutorily-prescribed method of physical Federal inspection of the mining operation \* \* \*”). In sum, we believe that Congress provided for inspection and enforcement for activities occurring at the mine, and purposely excluded permitting activities from the operation-specific inspection and enforcement process. Instead, the Secretary of the Interior's “ultimate power over lax state enforcement is set out in section 521(b) of the Act [30 U.S.C. 1271(b)].” *PSMRL*, 653 F.2d at 519. The Secretary's power under section 521(b) includes taking over an entire State permit-issuing process. *Id.*

We recognize that in the preamble to our December 19, 2000, final rule—in which we, among other things, repromulgated section 843.21—we stated that, in *NMA v. DOI II*, the U.S. Court of Appeals for the DC Circuit upheld our ability to take remedial action relative to improvidently issued State permits. 65 FR 79653. We still believe that that is one possible reading of the decision; however, after further review, we believe the better interpretation is that *NMA v. DOI II*, when taken together with the same court's decision in *PSMRL*, the ASLMM's final decision, and the statutory framework discussed above, does not support retention of section 843.21.

In *NMA v. DOI II*, the DC Circuit addressed, among other things, NMA's assertion that our 1997 version of section 843.21 (*see* 62 FR 19450) impinged on State primacy. The DC Circuit agreed with NMA and invalidated our improvidently issued State permit regulations. 177 F.3d at 9. In invalidating section 843.21, the court noted that section 521 of the Act “sets out specific procedural requirements to be met before the Secretary may take remedial action against a state permittee.” *Id.* Ultimately, the court concluded that our 1997 version of section 843.21 was invalid because it did not comply with the procedural requirements of section 521(a)(3) of the Act. *Id.* In our 2000 preamble, we interpreted the *NMA v. DOI II* decision as holding that our ability to take enforcement action against improvidently issued State permits is authorized by section 521 of the Act, as long as we adhere to the specific procedures set forth in that section.

Thus, in our 2000 final rule, we attempted to cure the perceived defect in the 1997 version of section 843.21 by repromulgating it in accordance with the procedures set forth in section 521 of the Act. 65 FR 79652. NMA timely challenged our 2000 rule, including section 843.21, but we ultimately settled that litigation by agreeing to propose new rules.

As mentioned above, we reassessed the viability of section 843.21, including our analysis of the *NMA v. DOI II* decision, in light of the ASLMM's final decision. Upon reexamination, another possible reading of *NMA v. DOI II*, as it relates to our 1997 version of section 843.21, is that the court identified section 521(a)(3) of the Act as the only procedures under which we can take enforcement action against a State permittee, but did not expressly hold that our improvidently issued State permits regulations could, if amended, fall within the contours of section 521(a)(3). For a number of reasons, we now believe this is the better reading of *NMA v. DOI II*.

For example, we have already discussed the fact that a Federal inspection of mining operations is a predicate to Federal enforcement under section 521(a) and that there is a mismatch between these types of inspections and alleged permitting defects. Further, the ASLMM's decision and SMCRA's statutory scheme suggest that there is no Federal role in State permitting decisions. Finally, up until our 2000 final rule, our provisions related to Federal enforcement against State permittees resulting from the inspections identified in section 521(a) were contained in 30 CFR 843.12, and it is clear from the regulatory history that we have historically intended sections 843.11 and 843.12 to be the only regulatory provisions for Federal enforcement actions against State permittees based on the inspections identified in section 521(a) of the Act. When we repromulgated section 843.21, we unintentionally created overlapping provisions implementing section 521(a) of the Act. Removing section 843.21 would remove any confusion or uncertainty created by these unintentionally overlapping provisions.

Based on the preceding discussion, we have reexamined the need and statutory basis for current section 843.21. While we recognize that there may be legal arguments in support of retaining the rule, we have determined that its removal would be more consistent with the ASLMM's decision discussed above and the framework of SMCRA. As such, we propose to delete 30 CFR 843.21.

#### *X. Sections 847.11 and 847.16—Criminal Penalties and 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 when certain specified conditions occur. *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 agreed 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 proposed in 2003 to revise our regulations at 30 CFR 847.11 and 847.16 to remove the mandatory nature of referrals for alternative enforcement. In today's proposed rule, we carried forward this aspect of our 2003 proposed rule. Specifically, we propose to change 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.

#### **III. Clarifications to the Preamble to Our 2000 Ownership and Control Final 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 expect to address these topics again in any 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 79616, 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 do not require 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.

#### IV. Public Comment Procedures

*Electronic or Written comments:* If you submit written comments, they should be specific, confined to issues pertinent to this 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 implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications. Please note that, in the context of this proposed rule, we will not consider any comments received on our 2003 and 2005 proposals. 68 FR 75036; 70 FR 3840. To the extent your previous comments are applicable to this proposed rule, we request that you resubmit them if you want us to consider them in the context of this proposed rule.

Except for comments provided in an electronic format, you should submit three copies of your comments if practical. We will make every attempt to log all comments into the administrative record for this rulemaking, but

comments received after the close of the comment period (see **DATES**) or at locations other than those listed above (see **ADDRESSES**) may not be included in the administrative record or considered when we develop any final rule.

*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, state the basis for your request, 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 October 31, 2006. 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 for this rulemaking.

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 for this rulemaking.

## V. Procedural Determinations

### 1. Executive Order 12866—Regulatory Planning and Review

This proposed rule is not considered a significant regulatory action under the criteria of 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 will not have an adverse economic impact on the coal industry or State regulatory authorities.

The proposed revisions would result in a reduction in expenses for the coal industry and State regulatory authorities because of proposed programmatic changes to the regulations that would reduce the reporting burden for certain types of applicants and transactions. Expenses would be reduced primarily due to the fact that, as a result of our proposed revision to the definition of *transfer, assignment, or sale of permit rights* at 30 CFR 701.5, fewer transactions or events would qualify as a transfer, assignment, or sale requiring an application and regulatory approval under 30 CFR 774.17. In addition, permit applicants would no longer have to identify all of their controllers in a permit application under 30 CFR 778.11(c), and State regulatory authorities would no longer have to enter that information into AVS under 30 CFR 773.8(b)(1).

The programmatic changes to the regulations are estimated to result in a savings to the coal industry of approximately \$251,000 per year, and a savings to the State and Federal regulatory authorities of approximately \$127,000 per year. Paragraph 10, below, contains tables indicating the changes in the information collection burdens for Parts 773, 774, and 778. The tables for Parts 774 and 778 indicate an increase in total annual burden hours. However, the net increase for those parts is due to an increase in the number of

respondents and not to a net increase in the per respondent burden hours. None of the changes in the proposed rule would significantly alter the fundamental conceptual framework of our regulatory program.

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

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

d. This proposed rulemaking does not raise novel legal or policy issues.

### 2. 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 would likely reduce the cost of doing business for the regulated industry and State regulatory authorities and, therefore, would not have an adverse economic impact on the coal industry or State regulatory authorities. In addition, the proposed rulemaking 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.

### 3. 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 United States-based enterprises to compete with foreign-based enterprises.

### 4. 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.

### 5. Executive Order 12630—Takings

We have determined that this proposed rulemaking does not have any significant takings implications under Executive Order 12630. Therefore, a takings implication assessment is not required.

### 6. 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.

### 7. Executive Order 13132—Federalism

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

### 8. 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.

### 9. 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 would not have a significant effect on the supply, distribution, or use of energy.

### 10. Paperwork Reduction Act

The proposed rulemaking requires information collection under the Paperwork Reduction Act. In accordance with 44 U.S.C. 3507(d), we have submitted the information collection and record keeping requirements for 30 CFR Parts 773, 774, and 778 to the Office of Management



and Budget (OMB) for review and approval.

30 CFR Part 773

*Title:* Requirements for Permits and Permit Processing.

*OMB Control Number:* 1029–0115.

*Summary:* Sections 507 and 510 of SMCRA set forth requirements pertaining to, among other things,

information required from permit applicants, permit eligibility, and permit denial. Among other things, regulatory authorities use the information obtained from applicants in making permitting decisions. Our regulations at 30 CFR part 773 implement, in part, these statutory provisions.

*Bureau Form Number:* None.

*Frequency of Collection:* Occasionally.

*Description of Respondents:*

Applicants for permits to conduct surface coal mining and reclamation operations and State regulatory authorities.

*Total Annual Responses for All Respondents:* 1,470.

*Total Annual Burden Hours:* 10,955.

INFORMATION COLLECTION FOR 30 CFR PART 773

Section	Applicant responses	Applicant burden hours	Regulatory authority responses	Regulatory authority burden hours	Total hours	Currently approved hours	Change to burden hours
773.6 (a) & (b) .....	326	1.75	316	1	887	818	7069
773.10(c) .....	0	0	33	5	165	150	15
773.12 .....	0	0	282	32	9,024	9,312	(288)
773.14(b) .....	32	1	32	1	64	32	32
773.19(b) .....	0	0	282	.5	141	146	(5)
773.19(e)(2) .....	85	6	82	2	674	600	74
Totals .....	443	.....	1,027	.....	10,955	11,058	(103)

30 CFR Part 774

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

*OMB Control Number:* 1029–0125.

*Summary:* Sections 506 and 511 of SMCRA set forth requirements pertaining to, among other things, permit revisions; permit renewals; and transfers, assignments, or sales of permit rights. Section 507 and 510 set forth

requirements pertaining to, among other things, information required from applicants and, by extension, permittees and permit eligibility determinations. Regulatory authorities use the information collected, among other things, to determine whether a person is eligible for certain permit revisions; permit renewals; and transfers, assignments, or sales of permit rights. Our regulations at 30 CFR part 774 implement, in part, these statutory provisions.

*Bureau Form Number:* None.

*Frequency of Collection:* Occasionally.

*Description of Respondents:*

Applicants for certain permit revisions, permit renewals, and transfers, assignments, or sales of permit rights; permittees required to report changes to information initially disclosed under 30 CFR 778.11; and State regulatory authorities.

*Total Annual Responses for all Respondents:* 6,983.

*Total Annual Burden Hours:* 58,525.

INFORMATION COLLECTION FOR 30 CFR PART 774

Section	Applicant responses	Applicant burden hours	Regulatory authority responses	Regulatory authority burden hours	Total hours	Currently approved hours	Change to burden hours
774.12(a) .....	80	4	0	0	320	240	80
774.12(c) .....	433	1.5	408	.5	854	490	364
774.13 .....	1,978	8	1,929	8	31,256	32,400	(1,144)
774.15 .....	734	16	719	16.5	23,608	12,377	11,231
774.17(b)(1) .....	142	8	0	0	.....	.....	.....
774.17(b)(2) .....	142	.75	0	0	.....	.....	.....
774.17(d)(1) .....	0	0	138	8	2,487	3,657	(1,170)
774.17(e)(1) .....	0	0	138	.5	.....	.....	.....
774.17(e)(2) .....	142	.5	0	0	.....	.....	.....
Totals .....	3,651	.....	3,332	.....	58,525	49,164	9,361

30 CFR Part 778

*Title:* Permit Application—Minimum Requirements for Legal, Financial, Compliance, and Related Information.

*OMB Control Number:* 1029–0117.

*Summary:* Sections 507 and 510 of SMCRA require permit applicants to submit certain information to regulatory authorities. The required disclosures include information about the

applicant’s legal identity, business structure, and business relationships; permit and violation histories; and related information. Regulatory authorities use this information, in part, to make permit eligibility determinations. Our regulations at 30 CFR part 778 implement, in part, these statutory provisions.

*Bureau Form Number:* None.

*Frequency of Collection:* Once.

*Description of Respondents:*

Applicants for permits to conduct surface coal mining and reclamation operations and State regulatory authorities.

*Total Annual Responses for All Respondents:* 3,099.

*Total Annual Burden Hours:* 7,335.

## INFORMATION COLLECTION FOR 30 CFR PART 778

Section	Applicant responses	Applicant burden hours	Regulatory authority responses	Regulatory authority burden hours	Total hours	Currently approved hours	Change to burden hours
778.9 .....	962	1.15	0	0	1,109	1,024	85
778.11 .....	81	5	0	0	429	526	(97)
778.12 .....	81	4	0	0	324	180	144
778.13 .....	81	4	0	0	324	180	144
778.14 .....	81	2.4	0	0	194	120	74
778.15 .....	326	5	316	1	1,946	1,806	140
778.16 .....	218	8	215	1	1,896	1,710	186
778.17 .....	326	2	316	1	968	903	65
778.22 .....	49	2	47	1	145	135	10
Totals .....	2,205	.....	894	.....	7,335	6,584	751

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, we 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) 308-2783 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 the 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 November 9, 2006, 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 telefacsimile to (202) 395-6566. Also, please send a copy of your comments to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, Room 202-SIB, 1951 Constitution Avenue, NW., Washington,

DC 20240, or electronically to [jtreleas@osmre.gov](mailto:jtreleas@osmre.gov).

### 11. National Environmental Policy Act

We have reviewed this proposed rule and determined that it is categorically excluded from the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4332 *et seq.* In addition, we have determined that none of the "extraordinary circumstances" exceptions to the categorical exclusion apply. This determination was made in accordance with the Departmental Manual (516 DM 2, Appendices 1.9 and 2).

### 12. Effect of the Proposed Rule on State and Indian Programs

Following publication of any 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 this proposed rule, we have made a preliminary determination that State program revisions will be required. The revisions in the proposed rule would apply to Indian lands as a result of the cross-referencing in 30 CFR 750.12.

### 13. Clarity of This Proposed Rule

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 record keeping requirements, Surface mining, Underground mining.

#### 30 CFR Part 774

Reporting and record keeping requirements, Surface mining, Underground mining.

#### 30 CFR Part 778

Reporting and record keeping requirements, Surface mining, Underground mining.

#### 30 CFR Part 843

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

30 CFR Part 847

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

Dated: September 26, 2006.

Chad Calvert,

Principal Deputy 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.

c. Revise the definition of transfer, assignment, or sale of permit rights.

The revisions read as follows:

§ 701.5 Definitions.

\* \* \* \* \*

Control or controller, when used in parts 773, 774, and 778 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 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.

\* \* \* \* \*

Transfer, assignment, or sale of permit rights means a change of a permittee.

\* \* \* \* \*

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. Revise § 773.3 to read as follows:

§ 773.3 Information collection.

The collections of information contained in part 773 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1029-XXX1. The information collected will be used by the regulatory authority in processing surface coal mining permit applications. Persons intending to conduct surface coal mining operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Response is required to obtain a benefit in accordance with SMCRA. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 202—SIB, 1951 Constitution Avenue, NW., Washington, DC 20240.

5. In § 773.7, revise paragraph (a) to read as follows:

§ 773.7 Review of permit applications.

(a) The regulatory authority will review an application for a permit, revision, or renewal; written comments and objections submitted; and records of any informal conference or hearing held on the application and issue a written decision, within a reasonable time set by the regulatory authority, either granting, requiring modification of, or denying the application. If an informal conference is held under § 773.6(c) of this part, the decision will be made within 60 days of the close of the conference.

\* \* \* \* \*

6. 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 are required to submit under §§ 778.11 and 778.12(c) of this subchapter.

\* \* \* \* \*

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

§ 773.9 Review of applicant and operator information.

(a) We, the regulatory authority, will rely upon the information that you, the applicant, are required to submit under § 778.11 of this subchapter, information from AVS, and any other available

information, to review your and your operator's organizational structure and ownership or control relationships.

\* \* \* \* \*

8. 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 or your operator have previous mining experience.

(c) If you or your operator do not have any previous mining experience, we may conduct an additional review 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.

9. 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.

\* \* \* \* \*

(a) \* \* \*

(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.

\* \* \* \* \*

10. 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—

\* \* \* \* \*

11. 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 evidence sufficient to establish a prima facie case that your permit was improvidently issued.

\* \* \* \* \*

12. Amend § 773.22, by removing paragraph (d) and redesignating

paragraphs (e), (f), (g), and (h) as (d), (e), (f), and (g), respectively.

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

**§ 773.23 Suspension or rescission requirements for improvidently issued permits.**

\* \* \* \* \*

(c) \* \* \*

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

\* \* \* \* \*

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

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

\* \* \* \* \*

(a) \* \* \*

If the challenge concerns . . .	Then you must submit a written explanation to . . .
(1) A pending State or Federal permit application . . .	The regulatory authority with jurisdiction over the application.
(2) Your ownership or control of a surface coal mining operation, and you are not currently seeking a permit . . .	The regulatory authority with jurisdiction over the 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 informal 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.

15. 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 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.

\* \* \* \* \*

16. 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**

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

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

18. Revise § 774.9 to read as follows:

**§ 774.9 Information collection.**

(a) The collections of information contained in part 774 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–XXX2. Regulatory authorities will use this information to:

(1) Determine if the applicant meets the requirements for revision; renewal; transfer, assignment, or sale of permit rights;

(2) Enter and update information in AVS following the issuance of a permit; and

(3) Fulfill post-permit issuance requirements and other obligations based on ownership, control, and violation information.

(b) A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Response is required to obtain a benefit in accordance with SMCRA. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 202–SIB, 1951 Constitution Avenue, NW., Washington, DC 20240.

19. Amend § 774.11 as follows:

a. Revise the table in paragraph (a).

b. Revise paragraphs (e), (f), and (g).

c. Add new paragraphs (h) and (i).

The amendments 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 . . .
(1) Permit records . . . .	The permit is issued or subsequent changes made.
(2) Unabated or uncorrected violations.	The abatement or correction period for a violation expires.
(3) Changes to information initially required to be provided by an applicant under 30 CFR 778.11.	Receiving notice of a change.
(4) Changes in violation status.	Abatement, correction, or termination of a violation, or a decision from an administrative or judicial tribunal.

\* \* \* \* \*

(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 on administrative appeal.

(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 evidence sufficient to 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 enter our finding under paragraph (f) into AVS.

(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 in AVS of a person identified in § 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.

20. In § 774.12, revise paragraph (c) to read as follows:

**§ 774.12 Post-permit issuance information requirements for permittees.**

\* \* \* \* \*

(c) Within 60 days of any addition, departure, or change in position of any person identified in § 778.11(c) of this subchapter, you must provide—

(1) The information required under § 778.11(d) of this subchapter;

(2) The date of any departure; and

(3) Written notification of the addition, departure, or change to the surety, bonding entity, guarantor, or other person that provides the bond coverage currently in effect. Further, as a result of these additions, departures, or changes, the regulatory authority may require written verification of continued appropriate bond coverage under subchapter J of this chapter.

21. In § 774.17, revise paragraph (a), paragraph (d) introductory text, and paragraph (d)(1) to read as follows:

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

\* \* \* \* \*

(a) *General.* No transfer, assignment, or sale of rights granted by a permit shall be made without the prior written approval of the regulatory authority. At its discretion, the regulatory authority may allow a successor in interest to engage in surface coal mining and reclamation operations under the permit during the pendency of an application for approval of a transfer, assignment, or sale of permit rights submitted under paragraph (b) of this section, provided that the successor in interest can demonstrate to the satisfaction of the regulatory authority that sufficient bond coverage will remain in place.

\* \* \* \* \*

(d) *Criteria for approval.* The regulatory authority may allow a permittee to transfer, assign, or sell permit rights to a successor, if it finds in writing that the successor—

(1) Is eligible to receive a permit in accordance with §§ 773.12 and 773.14 of this chapter;

\* \* \* \* \*

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

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

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

23. Revise § 778.8 to read as follows:

**§ 778.8 Information collection.**

The collections of information contained in part 778 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029–XXX3. The information collected will be used by the regulatory authority to ensure that all legal, financial, and compliance information requirements are satisfied before issuance of a permit. Persons intending to conduct surface coal mining operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Response is required to obtain a benefit in accordance with SMCRA. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 202–SIB, 1951 Constitution Avenue, NW., Washington, DC 20240.

24. Amend § 778.11 as follows:

a. Revise the section heading.

b. Revise paragraph (a) introductory text and paragraphs (a)(1), (b)(4), and (c).

c. Remove paragraph (d).

d. Redesignate paragraph (e) as paragraph (d).

e. Revise newly designated paragraph (d) introductory text.

The revisions read as follows:

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

(a) You, the applicant, must provide in the permit application—

(1) A statement indicating whether you and your operator are corporations, partnerships, associations, sole proprietorships, or other business entities;

\* \* \* \* \*

(b) \* \* \*

(4) Each business entity in the applicant's and operator's organizational structure, up to and including the ultimate parent entity.

(c) For you and your operator, you must provide the information required by paragraph (d) of this section for every—

(1) Officer.

(2) Partner.

(3) Member.

(4) Director.

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

(6) Person who owns, of record, 10 percent or more of the applicant or operator.

(d) You must provide the following information for each person listed in paragraph (c) of this section—

\* \* \* \* \*

**PART 843—FEDERAL ENFORCEMENT**

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

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

**§ 843.21 [Removed]**

26. Remove § 843.21.

**PART 847—ALTERNATIVE ENFORCEMENT**

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

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

28. 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—

\* \* \* \* \*

29. 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—

\* \* \* \* \*