

## § 772.15

demonstrate that the amount of coal to be removed is not the total reserve, but is a sampling of a larger reserve.

(4) An explanation as to why other means of exploration, such as core drilling, are not adequate to determine the quality of the coal and/or the feasibility of developing a surface coal mining operation.

[53 FR 52949, Dec. 29, 1988]

### § 772.15 Public availability of information.

(a) Except as provided in paragraph (b) of this section, all information submitted to the regulatory authority under this part shall be made available for public inspection and copying at the local offices of the regulatory authority closest to the exploration area.

(b) The regulatory authority shall keep information confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and the information concerns trade secrets or is privileged commercial or financial information relating to the competitive rights of the persons intending to conduct coal exploration.

(c) Information requested to be held as confidential under paragraph (b) of this section shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information.

## PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

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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.*

SOURCE: 48 FR 44391, Sept. 28, 1983, unless otherwise noted.

EDITORIAL NOTE: At 82 FR 54938, Nov. 17, 2017, as required by the Congressional Review Act and Public Law 115–5, the Office of Surface Mining Reclamation and Enforcement removed all amendments to part 773 made effective on Jan. 19, 2017, at 81 FR 93323–93325, Dec. 20, 2016.

### § 773.1 Scope and purpose.

This part provides minimum requirements for permits and permit processing and covers obtaining and reviewing permits; coordinating with other laws; public participation; permit decision and notification; permit conditions; and permit term and right of renewal.

### § 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 1029–0115. 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.

[72 FR 68029, Dec. 3, 2007]

**§ 773.4 Requirements to obtain permits.**

(a) *All operations.* On and after 8 months from the effective date of a permanent regulatory program within a State, no person shall engage in or carry out any surface coal mining operations, unless such person has first obtained a permit issued by the regulatory authority except as provided for in paragraph (b) of this section. A permittee need not renew the permit if no surface coal mining operations will be conducted under the permit and solely reclamation activities remain to be done. Obligations established under a permit continue until completion of surface coal mining and reclamation operations, regardless of whether the authorization to conduct surface coal mining operations has expired or has been terminated, revoked, or suspended.

(b) *Continuation of initial program operations.* (1) If a State program receives final disapproval under part 732 of this chapter, including judicial review of the disapproval, existing surface coal mining and reclamation operations may continue pursuant to the provisions of subchapter B of this chapter and section 502 of the Act until promulgation of a complete Federal program for the State. During this period, no new permits for surface coal mining and reclamation operations shall be issued by the State. Permits that lapse during this period may continue in full force and effect within the specified permit area until promulgation of a Federal program for the State.

(2) Except for coal preparation plants separately authorized to operate under 30 CFR 785.21(e), a person conducting surface coal mining operations, under a permit issued or amended by the regu-

latory authority in accordance with the requirements of section 502 of the Act, may conduct such operations beyond the period prescribed in paragraph (a) of this section if—

(i) Not later than 2 months following the effective date of a permanent regulatory program, regardless of litigation contesting that program, an application for a permanent regulatory program permit is filed for any operation to be conducted after the expiration of 8 months from such effective date in accordance with the provisions of the regulatory program;

(ii) The regulatory authority has not yet rendered an initial administrative decision approving or disapproving the permit; and

(iii) The surface coal mining and reclamation operation is conducted in compliance with the requirements of the Act, subchapter B of this chapter, applicable State statutes and regulations, and all terms and conditions of the initial program authorization or permit.

(3) No new initial program permits may be issued after the effective date of a State program unless the application was received prior to such date.

(c) *Continued operations under Federal program permits.* (1) A permit issued by the Director pursuant to a Federal program for a State shall be valid under any superseding State program approved by the Secretary.

(2) The Federal permittee shall have the right to apply to the State regulatory authority for a State permit to supersede the Federal permit.

(3) The State regulatory authority may review a permit issued pursuant to the superseded Federal program to determine that the requirements of the Act and the approved State program are not violated by the Federal permit, and to the extent that the approved State program contains additional requirements not contained in the Federal program for the State, the State regulatory authority shall—

- (i) Inform the permittee in writing;
- (ii) Provide the permittee an opportunity for a hearing;
- (iii) Provide the permittee a reasonable opportunity to resubmit the permit application in whole or in part, as appropriate; and

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(iv) Provide the permittee a reasonable time to conform ongoing surface coal mining and reclamation operations to the requirements of the State program.

(d) *Continued operations under State program permits.* (1) A permit issued pursuant to a previously approved or conditionally approved State program shall be valid under a superseding Federal program.

(2) Immediately following promulgation of a Federal program, the Director shall review the permits issued under the previously approved State program to determine that the requirements of the Act, this chapter, and the Federal program are not violated. If the Director determines that a permit was granted contrary to the requirements of this Act, the Director shall—

- (i) Inform the permittee in writing;
- (ii) Provide the permittee an opportunity for a hearing;
- (iii) Provide the permittee a reasonable opportunity to resubmit the permit application in whole or in part, as appropriate; and
- (iv) Provide the permittee a reasonable time to conform ongoing surface coal mining and reclamation operations to the requirements of the Federal program, as prescribed in the Federal program for the State.

[48 FR 44391, Sept. 28, 1983, as amended at 53 FR 11607, Apr. 7, 1988; 54 FR 13823, Apr. 5, 1989. Redesignated at 65 FR 79663, Dec. 19, 2000.]

### § 773.5 Regulatory coordination with requirements under other laws.

Each regulatory program shall, to avoid duplication, provide for the coordination of review and issuance of permits for surface coal mining and reclamation operations with applicable requirements of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*); the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661 *et seq.*); the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. 703 *et seq.*); The National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 *et seq.*); the Bald Eagle Protection Act, as amended (16 U.S.C. 668a); for Federal programs only, the Archeological and Historic Preservation Act of 1974 (16 U.S.C. 469 *et seq.*); and the Ar-

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chaeological Resources Protection Act of 1979 (16 U.S.C. 470aa *et seq.*) where Federal and Indian lands covered by that Act are involved.

[52 FR 4262, Feb. 10, 1987. Redesignated at 65 FR 79663, Dec. 19, 2000, as amended at 81 FR 93323, Dec. 20, 2016; 82 FR 54937, Nov. 17, 2017]

### § 773.6 Public participation in permit processing.

(a) *Filing and public notice.* (1) Upon submission of an administratively complete application, an applicant for a permit, significant revision of a permit under § 774.13, or renewal of a permit under § 774.15, shall place an advertisement in a local newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operation at least once a week for four consecutive weeks. A copy of the advertisement as it will appear in the newspaper shall be submitted to the regulatory authority. The advertisement shall contain, at a minimum, the following:

- (i) The name and business address of the applicant.
- (ii) A map or description which clearly shows or describes the precise location and boundaries of the proposed permit area and is sufficient to enable local residents to readily identify the proposed permit area. It may include towns, bodies of water, local landmarks, and any other information which would identify the location. If a map is used, it shall indicate the north direction.
- (iii) The location where a copy of the application is available for public inspection.
- (iv) The name and address of the regulatory authority where written comments, objections, or requests for informal conferences on the application may be submitted under paragraphs (b) and (c) of this section.

(v) If an applicant seeks a permit to mine within 100 feet of the outside right-of-way of a public road or to relocate or close a public road, except where public notice and hearing have previously been provided for this particular part of the road in accordance with § 761.14 of this chapter; a concise statement describing the public road, the particular part to be relocated or

closed, and the approximate timing and duration of the relocation or closing.

(vi) If the application includes a request for an experimental practice under §785.13, a statement indicating that an experimental practice is requested and identifying the regulatory provisions for which a variance is requested.

(2) The applicant shall make an application for a permit, significant revision under §774.13, or renewal of a permit under §774.15 available for the public to inspect and copy by filing a full copy of the application with the recorder at the courthouse of the county where the mining is proposed to occur, or an accessible public office approved by the regulatory authority. This copy of the application need not include confidential information exempt from disclosure under paragraph (d) of this section. The application required by this paragraph shall be filed by the first date of newspaper advertisement of the application. The applicant shall file any changes to the application with the public office at the same time the change is submitted to the regulatory authority.

(3) Upon receipt of an administratively complete application for a permit, a significant revision to a permit under §774.13, or a renewal of a permit under §774.15, the regulatory authority shall issue written notification indicating the applicant's intention to mine the described tract of land, the application number or other identifier, the location where the copy of the application may be inspected, and the location where comments on the application may be submitted. The notification shall be sent to—

(i) Local governmental agencies with jurisdiction over or an interest in the area of the proposed surface coal mining and reclamation operation, including but not limited to planning agencies, sewage and water treatment authorities, water companies; and

(ii) All Federal or State governmental agencies with authority to issue permits and licenses applicable to the proposed surface coal mining and reclamation operation and which are part of the permit coordinating process developed in accordance with section 503(a)(6) or section 504(h) of the Act, or

§773.5; or those agencies with an interest in the proposed operation, including the U.S. Department of Agriculture Soil Conservation Service district office, the local U.S. Army Corps of Engineers district engineer, the National Park Service, State and Federal fish and wildlife agencies, and the historic preservation officer.

(b) *Comments and objections on permit applications.* (1) Within a reasonable time established by the regulatory authority, written comments or objections on an application for a permit, significant revision to a permit under §774.13, or renewal of a permit under §774.15 may be submitted to the regulatory authority by public entities notified under paragraph (a)(3) of this section with respect to the effects of the proposed mining operations on the environment within their areas of responsibility.

(2) Written objections to an application for a permit, significant revision to a permit under §774.13, or renewal of a permit under §774.15 may be submitted to the regulatory authority by any person having an interest which is or may be adversely affected by the decision on the application, or by an officer or head of any Federal, State, or local government agency or authority, within 30 days after the last publication of the newspaper notice required by paragraph (a) of this section.

(3) The regulatory authority shall upon receipt of such written comments or objections—

(i) Transmit a copy of the comments or objections to the applicants; and

(ii) File a copy for public inspection at the same public office where the application is filed.

(c) *Informal conferences.* (1) Any person having an interest which is or may be adversely affected by the decision on the application, or an officer or a head of a Federal, State, or local government agency, may request in writing that the regulatory authority hold an informal conference on the application for a permit, significant revision to a permit under §774.13, or renewal of a permit under §774.15. The request shall—

(i) Briefly summarize the issues to be raised by the requestor at the conference;

(ii) State whether the requestor desires to have the conference conducted in the locality of the proposed operation; and

(iii) Be filed with the regulatory authority no later than 30 days after the last publication of the newspaper advertisement required under paragraph (a) of this section.

(2) Except as provided in paragraph (c)(3) of this section, if an informal conference is requested in accordance with paragraph (c)(1) of this section, the regulatory authority shall hold an informal conference within a reasonable time following the receipt of the request. The informal conference shall be conducted as follows:

(i) If requested under paragraph (c)(1)(ii) of this section, it shall be held in the locality of the proposed surface coal mining and reclamation operation.

(ii) The date, time, and location of the informal conference shall be sent to the applicant and other parties to the conference and advertised by the regulatory authority in a newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operation at least 2 weeks before the scheduled conference.

(iii) If requested in writing by a conference requestor at a reasonable time before the conference, the regulatory authority may arrange with the applicant to grant parties to the conference access to the proposed permit area and, to the extent that the applicant has the right to grant access to it, to the adjacent area prior to the established date of the conference for the purpose of gathering information relevant to the conference.

(iv) The requirements of section 5 of the Administrative Procedure Act, as amended (5 U.S.C. 554), shall not apply to the conduct of the informal conference. The conference shall be conducted by a representative of the regulatory authority, who may accept oral or written statements and any other relevant information from any party to the conference. An electronic or stenographic record shall be made of the conference, unless waived by all the parties. The record shall be maintained and shall be accessible to the parties of the conference until final release of the

applicant's performance bond or other equivalent guarantee pursuant to subchapter J of this chapter.

(3) If all parties requesting the informal conference withdraw their request before the conference is held, the informal conference may be canceled.

(4) Informal conferences held in accordance with this section may be used by the regulatory authority as the public hearing required under §761.14(c) of this chapter on proposed relocation or closing of public roads.

(d) *Public availability of permit applications*—(1) *General availability*. Except as provided in paragraph (d)(2) or (d)(3) of this section, all applications for permits; revisions; renewals; and transfers, assignments or sales of permit rights on file with the regulatory authority shall be available, at reasonable times, for public inspection and copying.

(2) *Limited availability*. Except as provided in paragraph (d)(3)(i) of this section, information pertaining to coal seams, test borings, core samplings, or soil samples in an application shall be made available to any person with an interest which is or may be adversely affected. Information subject to this paragraph shall be made available to the public when such information is required to be on public file pursuant to State law.

(3) *Confidentiality*. The regulatory authority shall provide procedures, including notice and opportunity to be heard for persons both seeking and opposing disclosure, to ensure confidentiality of qualified confidential information, which shall be clearly identified by the applicant and submitted separately from the remainder of the application. Confidential information is limited to—

(i) Information that pertains only to the analysis of the chemical and physical properties of the coal to be mined, except information on components of such coal which are potentially toxic in the environment;

(ii) Information required under section 508 of the Act that is not on public file pursuant to State law and that the applicant has requested in writing to be held confidential;

(iii) Information on the nature and location of archeological resources on

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public land and Indian land as required under the Archeological Resources Protection Act of 1979 (Pub. L. 96-95, 93 Stat. 721, 16 U.S.C. 470).

[48 FR 44391, Sept. 28, 1983, as amended at 64 FR 70837, Dec. 17, 1999. Redesignated and amended at 65 FR 79663, Dec. 19, 2000; 66 FR 16127, Mar. 23, 2001; 75 FR 60275, Sept. 29, 2010]

### § 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.

(b) The applicant for a permit or revision of a permit shall have the burden of establishing that his application is in compliance with all the requirements of the regulatory program.

[48 FR 44391, Sept. 28, 1983, as amended at 65 FR 79663, Dec. 19, 2000; 72 FR 68029, Dec. 3, 2007; 81 FR 93323, Dec. 20, 2016; 82 FR 54937, Nov. 17, 2017]

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

(a) Based on an administratively complete application, we, the regulatory authority, must undertake the reviews required under §§ 773.9 through 773.11 of this part.

(b) We will enter into AVS—

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

(2) The information you submit under § 778.14 of this subchapter pertaining to violations which are unabated or uncorrected after the abatement or correction period has expired.

(c) We must update the information referred to in paragraph (b) of this section in AVS upon our verification of any additional information submitted or discovered during our permit application review.

[65 FR 79663, Dec. 19, 2000, as amended at 72 FR 68029, Dec. 3, 2007]

### § 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.

(b) We must conduct the review required under paragraph (a) of this section before making a permit eligibility determination under § 773.12 of this part.

[65 FR 79663, Dec. 19, 2000, as amended at 72 FR 68029, Dec. 3, 2007; 75 FR 60275, Sept. 29, 2010]

### § 773.10 Review of permit history.

(a) We, the regulatory authority, will rely upon the permit history information you, the applicant, submit under § 778.12 of this subchapter, information from AVS, and any other available information to review your and your operator's permit histories. We must conduct this review before making a permit eligibility determination under § 773.12 of this part.

(b) We will also determine if you 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.

[65 FR 79663, Dec. 19, 2000, as amended at 72 FR 68029, Dec. 3, 2007]

### § 773.11 Review of compliance history.

(a) We, the regulatory authority, will rely upon the violation information supplied by you, the applicant, under § 778.14 of this subchapter, a report from AVS, and any other available information to review histories of compliance with the Act or the applicable State regulatory program, and any other applicable air or water quality laws, for—

- (1) You;
- (2) Your operator;

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(3) Operations you own or control; and

(4) Operations your operator owns or controls.

(b) We must conduct the review required under paragraph (a) of this section before making a permit eligibility determination under § 773.12 of this part.

[65 FR 79663, Dec. 19, 2000]

### § 773.12 Permit eligibility determination.

Based on the reviews required under §§ 773.9 through 773.11 of this part, we, the regulatory authority, will determine whether you, the applicant, are eligible for a permit under section 510(c) of the Act.

(a) Except as provided in §§ 773.13 and 773.14 of this part, you are not eligible for a permit if we find that any surface coal mining operation that—

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

(b) We will not issue you a permit if you or your operator are permanently ineligible to receive a permit under § 774.11(c) of this subchapter.

(c) After we approve your permit under § 773.15 of this part, we will not issue the permit until you comply with the information update and certification requirement of § 778.9(d) of this subchapter. After you complete that requirement, we will again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect your permit eligibility under paragraphs (a) and (b) of this section. We will request this report no more than five business days before permit issuance under § 773.19 of this part.

(d) If you are ineligible for a permit under this section, we will send you written notification of our decision. The notice will tell you why you are ineligible and include notice of your appeal rights under part 775 of this sub-

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chapter and 43 CFR 4.1360 through 4.1369.

[65 FR 79663, Dec. 19, 2000, as amended at 72 FR 68029, Dec. 3, 2007]

### § 773.13 Unanticipated events or conditions at remining sites.

(a) You, the applicant, are eligible for a permit under § 773.12 if an unabated violation—

(1) Occurred after October 24, 1992; and

(2) Resulted from an unanticipated event or condition at a surface coal mining and reclamation operation on lands that are eligible for remining under a permit that was held by the person applying for the new permit.

(b) For permits issued under § 785.25 of this subchapter, an event or condition is presumed to be unanticipated for the purpose of this section if it—

(1) Arose after permit issuance;

(2) Was related to prior mining; and

(3) Was not identified in the permit application.

[65 FR 79663, Dec. 19, 2000, as amended at 73 FR 67630, Nov. 14, 2008]

### § 773.14 Eligibility for provisionally issued permits.

(a) This section applies to you if you are an applicant who owns or controls a surface coal mining and reclamation operation with—

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

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

(b) We, the regulatory authority, 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—

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

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

(3) You are pursuing a good faith—

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

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

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

(c) We will consider a provisionally issued permit to be improvidently issued, and we must immediately initiate procedures under §§ 773.22 and 773.23 of this part to suspend or rescind that permit, if—

(1) Violations included in paragraph (b)(1) of this section are not abated within the specified abatement period;

(2) You, your operator, or operations that you or your operator own or control do not comply with the terms of an abatement plan or payment schedule mentioned in paragraph (b)(2) of this section;

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

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

[65 FR 79663, Dec. 19, 2000, as amended at 72 FR 68029, Dec. 3, 2007]

**§ 773.15 Written findings for permit application approval.**

No permit application or application for a significant revision of a permit

shall be approved unless the application affirmatively demonstrates and the regulatory authority finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, the following:

(a) The application is accurate and complete and the applicant has complied with all requirements of the Act and the regulatory program.

(b) The applicant has demonstrated that reclamation as required by the Act and the regulatory program can be accomplished under the reclamation plan contained in the permit application.

(c) The proposed permit area is—

(1) Not within an area under study or administrative proceedings under a petition, filed pursuant to parts 764 and 769 of this chapter, to have an area designated as unsuitable for surface coal mining operations, unless the applicant demonstrates that before January 4, 1977, he has made substantial legal and financial commitments in relation to the operation covered by the permit application; or

(2) Not within an area designated as unsuitable for surface coal mining operations under parts 762 and 764 or 769 of this chapter or within an area subject to the prohibitions of § 761.11 of this chapter.

(d) For mining operations where the private mineral estate to be mined has been severed from the private surface estate, the applicant has submitted to the regulatory authority the documentation required under § 778.15(b) of this chapter.

(e) The regulatory authority has made an assessment of the probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area and has determined that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(f) The applicant has demonstrated that any existing structure will comply with § 701.11(d), and the applicable performance standards of subchapter B or K of this chapter.

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(g) The applicant has paid all reclamation fees from previous and existing operations as required by subchapter R of this chapter.

(h) The applicant has satisfied the applicable requirements of part 785 of this chapter.

(i) The applicant has, if applicable, satisfied the requirements for approval of a long-term, intensive agricultural postmining land use, in accordance with the requirements of § 816.111(d) or § 817.111(d).

(j) The operation would not affect the continued existence of endangered or threatened species or result in destruction or adverse modification of their critical habitats, as determined under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(k) The regulatory authority has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places. This finding may be supported in part by inclusion of appropriate permit conditions or changes in the operation plan protecting historic resources, or a documented decision that the regulatory authority has determined that no additional protection measures are necessary.

(l) For a proposed remining operation where the applicant intends to reclaim in accordance with the requirements of § 816.106 or § 817.106 of this chapter, the site of the operation is a *previously mined area* as defined in § 701.5 of this chapter.

(m) For permits to be issued under § 785.25 of this chapter, the permit application must contain:

(i) Lands eligible for remining;

(ii) An identification of the potential environmental and safety problems related to prior mining activity which could reasonably be anticipated to occur at the site; and

(iii) Mitigation plans to sufficiently address these potential environmental and safety problems so that reclamation as required by the applicable requirements of the regulatory program can be accomplished.

(n) The applicant is eligible to receive a permit, based on the reviews

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under §§ 773.7 through 773.14 of this part.

[48 FR 44391, Sept. 1983, as amended at 65 FR 79663, Dec. 19, 2000; 81 FR 93324, Dec. 20, 2016; 82 FR 54937, Nov. 17, 2017]

### § 773.16 Performance bond submittal.

If the regulatory authority decides to approve the application, it shall require that the applicant file the performance bond or provide other equivalent guarantee before the permit is issued, in accordance with the provisions of subchapter J of this chapter.

[48 FR 44391, Sept. 23, 1983, as amended at 52 FR 4262, Feb. 10, 1987; 52 FR 17529, May 8, 1987; 53 FR 38890, Oct. 3, 1988; 54 FR 8991, Mar. 2, 1989; 59 FR 54353, Oct. 28, 1994; 60 FR 58491, Nov. 27, 1995; 62 FR 19458, Apr. 21, 1997; 64 FR 70837, Dec. 17, 1999; 65 FR 79663, Dec. 19, 2000. Redesignated at 65 FR 79663, Dec. 19, 2000; 66 FR 16127, Mar. 23, 2001]

### § 773.17 Permit conditions.

Each permit issued by the regulatory authority shall be subject to the following conditions:

(a) The permittee shall conduct surface coal mining and reclamation operations only on those lands that are specifically designated as the permit area on the maps submitted with the application and authorized for the term of the permit and that are subject to the performance bond or other equivalent guarantee in effect pursuant to subchapter J of this chapter.

(b) The permittee shall conduct all surface coal mining and reclamation operations only as described in the approved application, except to the extent that the regulatory authority otherwise directs in the permit.

(c) The permittee shall comply with the terms and conditions of the permit, all applicable performance standards of the Act, and the requirements of the regulatory program.

(d) Without advance notice, delay, or a search warrant, upon presentation of appropriate credentials, the permittee shall allow the authorized representatives of the Secretary and the State regulatory authority to—

(1) Have the right of entry provided for in §§ 842.13 and 840.12 of this chapter; and

(2) Be accompanied by private persons for the purpose of conducting an

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inspection in accordance with parts 840 and 842, when the inspection is in response to an alleged violation reported to the regulatory authority by the private person.

(e) The permittee shall take all possible steps to minimize any adverse impact to the environment or public health and safety resulting from noncompliance with any term or condition of the permit, including, but not limited to—

(1) Any accelerated or additional monitoring necessary to determine the nature and extent of noncompliance and the results of the noncompliance;

(2) Immediate implementation of measures necessary to comply; and

(3) Warning, as soon as possible after learning of such noncompliance, any person whose health and safety is in imminent danger due to the noncompliance.

(f) As applicable, the permittee shall comply with §701.11(d) and subchapter B or K of this chapter for compliance, modification, or abandonment of existing structures.

(g) The operator shall pay all reclamation fees required by subchapter R of this chapter for coal produced under the permit for sale, transfer or use, in the manner required by that subchapter.

[48 FR 44391, Sept. 28, 1983, as amended at 49 FR 27499, July 5, 1984; 54 FR 8991, Mar. 2, 1989; 62 FR 19459, Apr. 21, 1997; 65 FR 79663, Dec. 19, 2000; 81 FR 93324, Dec. 20, 2016; 82 FR 54937, Nov. 17, 2017]

### § 773.19 Permit issuance and right of renewal.

(a) *Decision.* If the application is approved, the permit shall be issued upon submittal of a performance bond in accordance with subchapter J. If the application is disapproved, specific reasons therefore shall be set forth in the notification required by paragraph (b) of this section.

(b) *Notification.* The regulatory authority shall issue written notification of the decision to the following persons and entities:

(1) The applicant, each person who files comments or objections to the permit application, and each party to an informal conference.

(2) The local governmental officials in the local political subdivision in which the land to be affected is located within 10 days after the issuance of a permit, including a description of the location of the land.

(3) If the regulatory authority is a State agency, the local OSM office.

(c) *Permit term.* Each permit shall be issued for a fixed term of 5 years or less, unless the requirements of §778.17 of this chapter are met.

(d) *Right of renewal.* Permit application approval shall apply to those lands that are specifically designated as the permit area on the maps submitted with the application and for which the application is complete and accurate. Any valid permit issued in accordance with paragraph (a) of this section shall carry with it the right of successive renewal, within the approved boundaries of the existing permit, upon expiration of the term of the permit, in accordance with §774.15.

(e) *Initiation of operations.* (1) A permit shall terminate if the permittee has not begun the surface coal mining and reclamation operation covered by the permit within 3 years of the issuance of the permit.

(2) The regulatory authority may grant a reasonable extension of time for commencement of these operations, upon receipt of a written statement showing that such an extension of time is necessary, if—

(i) Litigation precludes the commencement or threatens substantial economic loss to the permittee; or

(ii) There are conditions beyond the control and without the fault or negligence of the permittee.

(3) With respect to coal to be mined for use in a synthetic fuel facility or specified major electric generating facility, the permittee shall be deemed to have commenced surface mining operations at the time that the construction of the synthetic fuel or generating facility is initiated.

(4) Extensions of time granted by the regulatory authority under this paragraph shall be specifically set forth in the permit, and notice of the extension shall be made public by the regulatory authority.

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

(a) If we, the regulatory authority, have reason to believe that we improvidently issued a permit to you, the permittee, we must review the circumstances under which the permit was issued. We will make a preliminary finding that your permit was improvidently issued if, under the permit eligibility criteria of the applicable regulations implementing section 510(c) of the Act in effect at the time of permit issuance, your permit should not have been issued because you or your operator owned or controlled a surface coal mining and reclamation operation with an unabated or uncorrected violation.

(b) We will make a finding under paragraph (a) of this section only if you or your operator—

(1) Continue to own or control the operation with the unabated or uncorrected violation;

(2) The violation remains unabated or uncorrected; and

(3) The violation would cause you to be ineligible under the permit eligibility criteria in our current regulations.

(c) When we make a preliminary finding under paragraph (a) of this section, we must 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.

(d) Within 30 days of receiving a notice under paragraph (c) of this section, you may challenge the preliminary finding by providing us with evidence as to why the permit was not improvidently issued under the criteria in paragraphs (a) and (b) of this section.

(e) The provisions of §§ 773.25 through 773.27 of this part apply when a challenge under paragraph (d) of this section concerns a preliminary finding under paragraphs (a) and (b)(1) of this section that you or your operator currently own or control, or owned or controlled, a surface coal mining operation.

[65 FR 79665, Dec. 19, 2000, as amended at 72 FR 68029, Dec. 3, 2007]

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### § 773.22 Notice requirements for improvidently issued permits.

(a) We, the regulatory authority, must serve you, the permittee, with a written notice of proposed suspension or rescission, together with a statement of the reasons for the proposed suspension or rescission, if—

(1) After considering any evidence submitted under § 773.21(d) of this part, we find that a permit was improvidently issued under the criteria in § 773.21 paragraphs (a) and (b) of § 773.21 of this part; or

(2) Your permit was provisionally issued under § 773.14(b) of this part and one or more of the conditions in §§ 773.14(c)(1) through (4) exists.

(b) If we propose to suspend your permit, we will provide 60 days notice.

(c) If we propose to rescind your permit, we will provide 120 days notice.

(d) If you wish to appeal the notice, you must exhaust administrative remedies under the procedures at 43 CFR 4.1370 through 4.1377 (when OSM is the regulatory authority) or under the State regulatory program equivalent (when a State is the regulatory authority).

(e) After we serve you with a notice of proposed suspension or rescission under this section, we will take action under § 773.23 of this part.

(f) The regulations for service at § 843.14 of this chapter, or the State regulatory program equivalent, will govern service under this section.

(g) The times specified in paragraphs (b) and (c) of this section will apply unless you obtain temporary relief under the procedures at 43 CFR 4.1376 or the State regulatory program equivalent.

[65 FR 79665, Dec. 19, 2000, as amended at 72 FR 68029, Dec. 3, 2007; 75 FR 60275, Sept. 29, 2010]

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

(a) Except as provided in paragraph (b) of this section, we, the regulatory authority, must suspend or rescind your permit upon expiration of the time specified in § 773.22(b) or (c) of this part unless you submit evidence and we find that—

(1) The violation has been abated or corrected to the satisfaction of the

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agency with jurisdiction over the violation;

(2) You or your operator no longer own or control the relevant operation;

(3) Our finding for suspension or rescission was in error;

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

(5) The violation is the subject of an abatement plan or payment schedule that is being met to the satisfaction of the agency with jurisdiction over the violation; or

(6) You are pursuing a good faith challenge or administrative or judicial appeal of the relevant ownership or control listing or finding (unless there is an initial judicial decision affirming the listing or finding, and that decision remains in force).

(b) If you have requested administrative review of a notice of proposed suspension or rescission under § 773.22(e) of this part, we will not suspend or rescind your permit unless and until the Office of Hearings and Appeals or its State counterpart affirms our finding that your permit was improvidently issued.

(c) When we suspend or rescind your permit under this section, we must—

(1) Issue you a written notice requiring you to cease all surface coal mining operations under the permit; and

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

(d) If we suspend or rescind your permit under this section, you may request administrative review of the notice under the procedures at 43 CFR 4.1370 through 4.1377 (when OSM is the

regulatory authority) or under the State regulatory program equivalent (when a State is the regulatory authority). Alternatively, you may seek judicial review of the notice.

[65 FR 79665, Dec. 19, 2000, as amended at 72 FR 68029, Dec. 3, 2007]

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

You may challenge a listing or finding of ownership or control using the provisions under §§ 773.26 and 773.27 of this part if you are—

(a) Listed in a permit application or AVS as an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof;

(b) Found to be an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof, under §§ 773.21 or 774.11(g) of this subchapter; or

(c) An applicant or permittee affected by an ownership or control listing or finding.

[65 FR 79666, Dec. 19, 2000, as amended at 72 FR 68029, Dec. 3, 2007]

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

This section applies to you if you challenge an ownership or control listing or finding.

(a) To challenge an ownership or control listing or finding, you must submit a written explanation of the basis for the challenge, along with any evidence or explanatory materials you wish to provide under § 773.27(b) of this part, to the regulatory authority, as identified in the following table.

|                                                                                                               |                                                                                    |
|---------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------|
| If the challenge concerns . . .                                                                               | 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. |

(b) The provisions of this section and of §§ 773.27 and 773.28 of this part apply only to challenges to ownership or control listings or findings. You may not use these provisions to challenge your liability or responsibility under any other provision of the Act or its implementing regulations.

(c) When the challenge concerns a violation under the jurisdiction of a different regulatory authority, the regulatory authority with jurisdiction over the permit application or permit must consult the regulatory authority with jurisdiction over the violation and

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the AVS Office to obtain additional information.

(d) A regulatory authority responsible for deciding a challenge under paragraph (a) of this section may request an investigation by the AVS Office.

(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.

[65 FR 796676, Dec. 19, 2000, as amended at 72 FR 68029, Dec. 3, 2007]

**§ 773.27 Burden of proof for ownership or control challenges.**

This section applies to you if you challenge an ownership or control listing or finding.

(a) When you challenge a listing of ownership or control, or a finding of ownership or control made under § 774.11(g) 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.

(b) In meeting your burden of proof, you must present reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority. The materials presented in connection with your challenge will become part of the permit file, an investigation file, or another public file. If you request, we will hold as confidential any information you submit under this paragraph which is not required to be made available to the public under § 842.16 of this chapter (when OSM is the regulatory authority) or under § 840.14 of this chapter (when a State is the regulatory authority).

(c) Materials you may submit in response to the requirements of paragraph (b) of this section include, but are not limited to—

(1) Notarized affidavits containing specific facts concerning the duties that you performed for the relevant operation, the beginning and ending dates of your ownership or control of the operation, and the nature and details of any transaction creating or severing your ownership or control of the operation.

(2) Certified copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records.

(3) Certified copies of documents filed with or issued by any State, municipal, or Federal governmental agency.

(4) An opinion of counsel, when supported by—

(i) Evidentiary materials;

(ii) A statement by counsel that he or she is qualified to render the opinion; and

(iii) A statement that counsel has personally and diligently investigated the facts of the matter.

[65 FR 79666, Dec. 19, 2000, as amended at 72 FR 68030, Dec. 3, 2007]

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

(a) Within 60 days of receipt of your challenge under § 773.26(a) of this part, we, the regulatory authority identified under § 773.26(a) of this part, will review and investigate the evidence and explanatory materials you submit and any other reasonably available information bearing on your challenge and issue a written decision. Our decision must state whether you own or control the relevant surface coal mining operation, or owned or controlled the operation, during the relevant time period.

(b) We will promptly provide you with a copy of our decision by either—

(1) Certified mail, return receipt requested; or

(2) Any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure, or its State regulatory program counterparts.

(c) Service of the decision on you is complete upon delivery and is not incomplete if you refuse to accept delivery.

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

(e) Any person who receives a written decision under this section, and who wishes to appeal that decision, must exhaust administrative remedies under the procedures at 43 CFR 4.1380 through 4.1387 or, when a State is the regulatory authority, the State regulatory program counterparts, before seeking judicial review.

(f) Following our written decision or any decision by a reviewing administrative or judicial tribunal, we must review the information in AVS to determine if it is consistent with the decision. If it is not, we must promptly revise the information in AVS to reflect the decision.

[65 FR 79666, Dec. 19, 2000, as amended at 72 FR 68030, Dec. 3, 2007]

**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**

Sec.

- 774.1 Scope and purpose.
774.9 Information collection.
774.10 Regulatory authority review of permits.
774.11 Post-permit issuance requirements for regulatory authorities and other actions based on ownership, control, and violation information.
774.12 Post-permit issuance information requirements for permittees.
774.13 Permit revisions.
774.15 Permit renewals.
774.17 Transfer, assignment, or sale of permit rights.

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

SOURCE: 48 FR 44395, Sept. 28, 1983, unless otherwise noted.

EDITORIAL NOTE: At 82 FR 54944, Nov. 17, 2017, as required by the Congressional Review Act and Public Law 115-5, the Office of Surface Mining Reclamation and Enforcement removed all amendments to part 774 made effective on Jan. 19, 2017, at 81 FR 93325-93326, Dec. 20, 2016.

§ 774.1 Scope and purpose.

This part provides requirements for revision; renewal; transfer, assignment, or sale of permit rights; entering and updating information in AVS following the issuance of a permit; post-permit issuance requirements for regulatory authorities and permittees; and other actions based on ownership, control, and violation information.

[65 FR 79667, Dec. 19, 2000]

§ 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 1029-0116. 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.

[72 FR 68030, Dec. 3, 2007, as amended at 81 FR 93325, Dec. 20, 2016; 82 FR 54944, Nov. 17, 2017]

§ 774.10 Regulatory authority review of permits.

(a) The regulatory authority shall review each permit issued and outstanding under an approved regulatory program during the term of the permit. This review shall occur not later than