

## 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: Final Rule.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are publishing this final rule to amend certain provisions of our "ownership and control" and related rules, as well as our rules pertaining to the transfer, assignment, or sale of permit rights. More specifically, we are amending our definitions pertaining to ownership, control, and transfer, assignment, or sale of permit rights and 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 are removing our current rules pertaining to improvidently issued State permits. This final rule implements various provisions of, and is authorized by, the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act).

EFFECTIVE DATE: January 2, 2008.

**FOR FURTHER INFORMATION CONTACT:**

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Additional information concerning OSM, this rule, and related documents may be found on OSM's Internet home page (Internet address: <http://www.osmre.gov>) and on our Applicant/Violator System Office's (AVS Office's) Internet home page (Internet address: <http://www.avs.osmre.gov>).

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**I. Background to the Final Rule**

This final rule is based on our October 10, 2006, proposed rule (71 FR 59592), in which we proposed to amend certain provisions of our 2000 final ownership and control rule (65 FR 79582) and our 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 areas 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 2000 final 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 79661-79671. Previously, we viewed our transfer, assignment, or sale rules as related to our ownership and control rules because our previous definition of *transfer, assignment, or sale of permit rights* incorporated ownership and control concepts. *See* 30 CFR 701.5 (2007).

Shortly after we promulgated our 2000 final rule, the National Mining Association (NMA) filed a lawsuit in the U.S. District Court for the District of Columbia in which NMA challenged the ownership and control and related provisions of our 2000 final rule on multiple grounds. NMA's suit also included a challenge to our transfer, assignment, or sale rules. Although the 2000 rule did not amend 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.

As we explained in our 2006 proposed rule, NMA's lawsuit was another in a series of lawsuits concerning ownership and control and related issues. Litigation in this area—involving, at times, OSM, State regulatory authorities (administering OSM-approved State programs), NMA, and environmental groups—has been contentious and ongoing since at least 1988. The 2000 final rule 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 D.C. 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 (DC Cir. 1997) (*NMA v. DOI I*). The

preamble to our 2000 final rule contains a detailed discussion of the prior rules and the related litigation. *See generally* 65 FR 79582–79584.

This continuous litigation has created regulatory uncertainty for OSM, State regulatory authorities, the regulated community, and the public. In an effort to end the litigation concerning our 2000 final rule, we entered into negotiations with NMA in an attempt to settle NMA's judicial challenge. Ultimately, in three partial settlement agreements, we were able to settle all of the issues presented in NMA's rule challenge. The three partial settlement agreements (along with a modification to the third of those agreements), which were filed with and approved by the court, are included in our public record supporting this final rule. Under the terms of the settlement, we agreed to publish two proposed rules in the **Federal Register** (one pertaining to ownership and control and related issues and the other pertaining to transfer, assignment, or sale issues) 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 and, indeed, this final rule departs from the settlement agreement and our 2006 proposed rule in significant respects. To the extent we promulgate final rules in accordance with the terms of the three partial settlements, NMA agreed not to challenge those final rules.

With respect to the two proposed rules, the settlement obligated us to take various types of actions. For example, in some instances, we agreed to propose specific rule language. In other instances, we agreed only to publish certain clarifications to the preamble supporting our 2000 rule (we published these clarifications in our 2006 proposed rule—71 FR 59605–59606—and do not repeat them in this final rule). With regard to transfer, assignment, or sale issues, we agreed only to publish a proposed rule, and did not agree upon any specific rule language. As part of the overall settlement, NMA also agreed to drop several of its claims without any further action on our part. We view the settlement as highly favorable in that it gave us the opportunity to clarify and simplify our regulations without hampering our ability to enforce SMCRA. More importantly, the settlement allowed us to retain key aspects of our regulatory program without the risk of having them overturned in court.

After giving due consideration to all public comments received on our 2006

proposed rule, we decided to issue this final rule. Our final rule clarifies ambiguous provisions in our previous regulations and clearly sets forth the responsibilities and obligations of the regulated community and regulatory authorities. Most importantly, however, this final rule ensures that we and our State counterparts have the tools we need to enforce SMCRA. While we are certainly aware that not all interested parties will be entirely satisfied with every aspect of this final rule, we are confident that, on balance, the rule, which required difficult line drawing, strikes a fair and appropriate balance between competing interests. Our sincere hope is that this final rule will introduce regulatory stability—which is important to all interested parties—to aspects of our regulatory program that have been mired in uncertainty and litigation for years.

## II. Public Participation in the Rulemaking Process

In order to obtain as broad a range of suggestions and ideas as possible, we made sure there were ample opportunities for public participation in the rulemaking process. To satisfy our obligations under the settlement, we published the first of the two proposed rules—relating to ownership and control and related issues—on December 29, 2003. 68 FR 75036 (2003 proposed rule). We received and granted a request for an extension of the public comment period. 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). Again, we received and granted an extension request. The public comment period, as extended, closed on April 15, 2005.

After the comment periods had closed on the two proposed rules described above, we reviewed all comments received and decided to meet with representatives of our State co-regulators before taking further action. States with OSM-approved SMCRA programs (primacy states) 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. Because any new national rules could impact the primacy States, it was important to meet with those States prior to issuing a final rule. We met with 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 our public record supporting this rulemaking.

Based on the comments from our 2003 and 2005 proposed rules and information gathered at our meeting with the States, we decided it was best to combine the topics covered in the two proposed rules and issue one new, re-proposed rule. Whereas we could have proceeded to finalize the 2003 and 2005 proposed rules, without additional public participation, we issued the combined 2006 proposed rule for the express purpose of allowing the public another opportunity to comment on the proposed changes.

Our combined proposed rule was published on October 10, 2006. We did not receive any extension requests, and the comment period closed on December 11, 2006. We received 15 comment documents, including seven submitted by or on behalf of State regulatory authorities, seven from companies and associations connected with the coal mining industry, and one from organizations representing environmental and citizens' interests. The three primary sets of comments we received were from the Interstate Mining Compact Commission (IMCC), the National Mining Association (NMA), and Kentucky Resources Council, Inc. and Citizens Coal Council (KRC/CCC) (these organizations submitted one joint comment document). IMCC represents State regulatory authorities, the front-line regulators under SMCRA in most coal-producing states. IMCC's comments were supported, in whole or in part, by several State regulatory authorities. NMA is an industry trade association. NMA's comments were supported, in whole or in part, by several coal companies. KRC/CCC represent environmental and citizens' interests.

We did not receive a request for a public hearing and none was held. After our evaluation of all the public comments, and based on our nearly 30 years of implementing the relevant statutory provisions, we decided to issue a final rule. In short, this final rule is the culmination of a carefully-considered, lengthy process, marked by ample opportunities for meaningful public comment.

## III. Discussion of the Final Rule

This final rule amends our definitions of ownership, control, and transfer, assignment or sale of permit rights; amends our regulatory provisions governing permit application information collection, permit eligibility reviews and determinations, provisionally issued permits, improvidently issued permits, ownership or control challenges, post-

permit issuance information requirements, and alternative enforcement; and removes the Federal procedures for improvidently issued State permits. Below, we discuss each aspect of this final rule and respond to comments received on our 2006 proposed rule.

#### A. General Comments

On balance, most aspects of our 2006 proposed rule were well received by most commenters. One commenter said that, “[g]enerally, the proposed rule is an improvement over the existing rule,” noting that “the improvement is primarily the result of the simplification of the rules.” Similarly, another commenter found the proposed rule to be a “breath of fresh air” that will put an end to “unnecessary complexity.” Another commenter said the “new proposed rule provides a more reasonable and workable framework for regulatory authorities.” We appreciate these comments.

One commenter disagreed with virtually every aspect of our 2006 proposed rule. In addition to specific comments on the proposed amendments, this commenter opined that we should not amend our 2000 rule because, unlike our 2006 proposed rule, the 2000 rule was “fully considered.” We disagree with the premise of this comment. As explained above, this final rule is the culmination of a lengthy process that afforded ample opportunity for public participation. Indeed, rather than finalizing our 2003 and 2005 proposed rules, we instead repropounded the amendments to allow another opportunity for public comments. In this final rule, as with our 2000 rule, we carefully considered, and responded to, all of the comments we received. In fact, we modified the proposed rule in several respects based on comments.

This commenter also stated that, with a single exception, the proposed amendments lacked a “reasoned analysis” or “lawful purpose,” particularly to the extent that we proposed to “change course” by rescinding prior rule provisions. Consistent with the Administrative Procedure Act (APA), the primary purpose of the proposed rule was to provide sufficient explanation of the proposed amendments to allow for informed public comments. The best evidence that we achieved that objective is the quality of the comments we actually received on the proposed rule, including the comments submitted by this commenter. Further, with regard to this final rule, it is well accepted that we, as the agency charged with implementing SMCRA, may reconsider

the wisdom of our policies on a continuing basis. None of our interpretations are set in stone. In our discussion of the substantive provisions of this final rule, below, we sufficiently set forth a “reasoned analysis” and the basis and purpose of the amendments to our previous rules. Finally, in many instances, the amendments to our 2000 rule do not constitute a reversal of policy but are better described as clarifications to our previous rules.

The commenter also chides us for not litigating NMA’s challenge to our 2000 rule and instead electing to settle the litigation. In this regard, the commenter refers to our decision to settle as an “astounding collapse.” We disagree. Any litigation has an attendant risk of loss, as past litigation over our previous ownership and control rules demonstrates. In both *NMA v. DOI I* and *NMA v. DOI II*, the D.C. Circuit invalidated key aspects of our prior rules, even though we thought those rules were well reasoned and lawful. We saw our settlement with NMA as an opportunity to eliminate the risk of losing important aspects of our regulatory program. This rulemaking initiative has also allowed us to simplify and clarify our previous rules, while continuing to ensure that regulatory authorities have all the tools they need to enforce SMCRA. We view the settlement as a success, not a “collapse.”

The commenter implies that, as a result of our settlement with NMA, we may have prejudged this final rule. The commenter similarly refers to our “supposedly reserved discretion” to decline to adopt the revisions we agreed to propose under the settlement. We reiterate that under the settlement agreement, we were only required to propose two rules—*i.e.*, our 2003 and 2005 proposed rules—and were not required to finalize any provisions as proposed. The best evidence that we have not prejudged this final rule is the fact that the rule departs from the settlement agreement and our 2003, 2005, and 2006 proposed rules in significant respects, especially with regard to the information permit applicants must disclose in their permit applications (*see* heading III.W., below).

Next, the commenter asserts that we did not “endorse the proposed changes as better interpretation[s] of the statute at issue or as better policy choices.” Specifically with regard to our 2003 proposed rule (which has been withdrawn), the commenter states that we “did not believe that SMCRA requires or would be best implemented by many, if indeed any, of the proposed revisions.” In support of these

comments, the commenter points to isolated portions of the preambles to our *proposed* rules, where we did not state, or even imply, that we did not endorse our own proposed rules. Rather, we simply pointed out that, at the proposed rule stage, we did not necessarily agree with NMA’s analysis supporting its position with regard to *one* proposed amendment in this multi-issue rulemaking. Moreover, our statements were limited to the specific issue being discussed and did not, in any way, apply to the totality of the proposed rules. To be sure, we fully endorse every aspect of this final rule—each of which is authorized by SMCRA—as part of our comprehensive regulatory program related to ownership and control issues.

This commenter also expressed the opinion that our administrative record for this rulemaking is inadequate with regard to our settlement with NMA or our potential prejudgment of the issues in the proposed rulemaking. The commenter asked us to supplement our public record supporting this rulemaking with various documents pertaining to the settlement, including the settlement agreements themselves, every draft of the agreements, every item of correspondence relating to the settlement, and every note or memorandum of communications relating to the settlement. After the requested supplementation of our public record, the commenter requested that we reopen the comment period to solicit further comments regarding any “actual basis” for this rulemaking and any possible agency prejudgment of its outcome.

In response to this comment, we will place the three partial settlement agreements, along with a modification to the third of those agreements, in our public record, but we otherwise decline to honor the commenter’s requests. The three partial settlement agreements discussed above, which were filed with and approved by the U.S. District Court for the District of Columbia, collectively represent the totality of our settlement agreement with NMA. We note that these agreements have been publicly available ever since they were filed with the court. The additional information requested by the commenter is irrelevant to this rulemaking and/or privileged. If this final rule is challenged in court, the administrative record we will lodge with the court will contain all information that is legally required to support the rulemaking.

Another commenter asked about the transition from our previous rules to these new rules. For example, the commenter asked whether there will be a requirement for existing permittees to

provide information for their permits under the new rules. The provisions we adopt in this final rule will become effective for Federal programs 30 days after the publication date of this final rule and will apply prospectively. The rule will apply to Federal permitting as applications are received for new permits, renewals, revisions, and transfers, reassignments or sales. Similarly, with regard to information requirements, existing permittees will not have to comply with the new permit application information disclosures until their next permitting action. The rule will become effective in primacy States after we approve amendments to State programs and will apply in the manner outlined above for Federal programs.

An industry commenter said it would be desirable to have better coordination between OSM and the State regulatory authorities with regard to the maintenance and application of ownership and control information. We believe coordination between our AVS Office and the State regulatory authorities on ownership or control issues is already excellent. However, we appreciate this comment and will continue to strive to achieve even greater levels of cooperation and coordination with the States.

Finally, some State commenters expressed concern that our 2006 proposed rule would place an undue burden on state regulatory authorities to identify persons who control surface coal mining operations. In this final rule, we believe we have alleviated this concern by making sure State regulatory authorities will have the information they need to identify potential controllers. Further, as always, our AVS Office remains ready to assist the States with ownership or control investigations.

#### *B. Section 701.5—Definition: Control or Controller*

Under section 510(c) of SMCRA, 30 U.S.C. 1260(c), where “any surface coal mining operation owned or controlled by the applicant is currently in violation of this Act or such other laws referred to [in] this subsection, the permit shall not be issued \* \* \*.” Thus, under this section, permit applicants who own or control surface coal mining operations with outstanding violations of SMCRA or certain other laws are not eligible for new permits. SMCRA does not define the terms “owned” or “controlled,” or any variations thereof.

At 30 CFR 701.5, our 2000 rule contained definitions of “control or controller” and “own, owner, or ownership” to implement section 510(c)

of the Act. In our 2006 proposed rule, we identified a problem with our 2000 rule. On the one hand, the 2000 rule had a broad, flexible definition of *control* or *controller* (30 CFR 701.5). For example, any person who had the “ability” to determine the manner in which a surface coal mining operation was conducted was a controller. At the same time, we had information disclosure requirements at 30 CFR 778.11(c)(5) that required permit applicants to disclose all of their controllers in a permit application. We deemed this unfair to permit applicants because, under the flexible definition, reasonable minds could differ as to who met the regulatory definition of *control* or *controller*, and permit applicants could be taken to task for failing to identify a person the regulatory authority later deemed to be a controller.

To remedy this problem, we could have modified the definition of *control* or *controller* to make it more specific, removing a regulatory authority’s leeway and flexibility to determine control relationships on a case-by-case basis. Or, we could have made the information disclosure requirements more objective, while retaining the flexible definition of *control* or *controller*. In our 2006 proposed rule, we chose to propose the latter approach. We conclude that the “ability to determine” standard is desirable from a regulatory standpoint because it “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.” (One commenter aptly referred to the “ability to determine” standard as a “general, functional definition” that “enable[s] regulatory authorities to follow control in whatever unconventional direction it may lead.”) We also conclude that it would be easier for the regulated community to evade a definition with specific categories of controllers by reorganizing their business structures and relationships so as not to fall within the defined categories. In short, we feel it is essential to have a flexible definition of *control* or *controller* that allows regulatory authorities to identify controllers in real-world situations. For these reasons, we are retaining the flexible “ability to determine” standard that was contained in our 2000 rule by adopting the definition of *control* or *controller* as proposed, with one minor modification. In conjunction with retaining the “ability to determine” standard, we are amending our permit

application information disclosure requirements so that they are more objective. See heading III.W., below.

While we proposed to retain the “ability to determine” standard, we proposed to amend other aspects of our definition. In our 2000 final rule, we defined *control* or *controller* in terms of circumstances or relationships that establish a person’s control of a surface coal mining operation. We also took the somewhat unusual step of including in the regulatory text examples of persons who may be, but are not always, controllers. As we explained in our 2006 proposed rule, the National Mining Association, in its judicial challenge to our 2000 rule, alleged that our definition of *control* or *controller* was vague, arbitrary and capricious, and contrary to *NMA v. DOI II*.

To settle NMA’s claim, we agreed to propose removing certain specific categories of controllers from our definition at previous paragraphs (3) (general partner in a partnership) and (4) (person who has the ability to commit financial or real property assets). In addition, from previous paragraph (5), we agreed to propose removing the phrase “alone or in concert with others,” the phrase “indirectly or directly,” and all the examples of control at previous paragraphs (5)(i) through (5)(vi). In satisfaction of our obligation under the settlement agreement, we proposed these revisions to our definition of *control* or *controller* in December 2003 (68 FR 75037). When we issued our 2006 proposed rule, on which this final rule is based, we decided to carry forward these aspects of our 2003 proposal. In this final rule, we are adopting the proposed amendments because they streamline and simplify the previous definition, without weakening it.

We stress that though we are removing certain language from the previous definition, the new definition still allows a regulatory authority to reach any person or entity with the ability to determine how a surface coal mining operation is conducted. Further, the “ability to determine” standard will continue to encompass both indirect and direct control, as well as control in concert with others, where there is actual ability to control. While we are removing from the regulatory text two specific categories of controllers (general partner in a partnership; person who has the ability to commit financial or real property assets), as well as the list of examples of persons who may be controllers, we stress that, under this final rule, all of these persons may still be controllers. In fact, as we explained

in the proposed rule, 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, specific reference to them in the regulatory text is unnecessary.

With specific reference to the examples of controllers, we deemed it awkward to retain them in the regulatory text when the examples do not impose any regulatory requirements. These types of examples, we concluded, are best addressed in preamble language. Further, the examples were potentially misleading, as they did not describe the universe of persons who could be controllers. Although we are removing the examples of controllers from the regulatory text, the persons in the examples may still be controllers if they in fact have the ability to control a surface coal mining operation. As we said in the proposed rule, in our experience implementing section 510(c) of the Act since 1977, the persons identified in the examples are often controllers. Therefore, our discussion of these examples in the preamble to the 2000 final rule (65 FR 79598–600) remains instructive.

For ease of reference, the examples of controllers in the 2000 definition are as follows: (1) The president, an officer, a director (or a person performing functions similar to a director), or an agent of an entity; (2) a partner in a partnership, or a participant, member, or manager of a limited liability company; (3) a person who owns between 10 and 50 percent of the voting securities or other forms of ownership of an entity, depending upon the relative percentage of ownership compared to the percentage of ownership by other persons, whether a person is the greatest single owner, or whether there is an opposing voting bloc of greater ownership; (4) an entity with officers or directors in common with another entity, depending upon the extent of overlap; (5) a person who owns or controls the coal mined or to be mined by another person through lease, assignment, or other agreement and who also has the right to receive or direct delivery of the coal after mining; and (6) a person who contributes capital or other working resources under conditions that allow that person to substantially influence the manner in which a surface coal mining operation is or will be conducted. Relevant contributions of capital or working resources include, but are not limited to: (a) Providing mining equipment in exchange for the coal to be extracted; (b)

providing the capital necessary to conduct a surface coal mining operation when that person also directs the disposition of the coal; or (c) personally guaranteeing the reclamation bond in anticipation of a future profit or loss from a surface coal mining operation. While we decided to reprint these examples for ease of reference, it is important to remember that not all persons identified in these examples are always controllers; in order to be a controller, the person must meet the regulatory definition in this final rule. Further, this list of examples is by no means exhaustive; that is, other persons not identified in the examples may also be controllers.

In sum, the definition of *control* or *controller* we are adopting in this final rule retains the most critical aspect of the 2000 definition, namely, the flexible “ability to determine” standard. Like our 2000 rule, this final rule also provides that permittees and operators of surface coal mining operations are always controllers. Although we removed some of the language from the 2000 definition of *control* or *controller* for the sake of simplifying the definition and removing unnecessary verbiage, the definition in this final rule is substantively identical to the prior definition, and we intend for regulatory authorities to enforce it as such.

#### Responses to Comments

Multiple commenters responded to our proposal both in favor of and against the proposed amendments. IMCC and other State commenters did not oppose our proposed definition of *control* or *controller*. In particular, these commenters found “merit in the ‘ability to determine’ standard.” IMCC and another State commenter said we should remove the word “other” from paragraph (3) of the proposed definition. In the proposed rule, paragraph (3) of the definition reads as follows: “(3) Any other person who has the ability to determine the manner in which a surface coal mining operation is conducted.” (Emphasis added.) We agree with these commenters that the word “other” is unnecessary. Thus, in this final rule, we are removing the word “other,” so that the final paragraph, redesignated as paragraph (c), reads: “Any person who has the ability to determine the manner in which a surface coal mining operation is conducted.”

Another commenter said that eliminating specific categories from the definition, such as officers, directors, and general partners creates an unreasonable burden for the regulatory authorities and creates a false sense of

security for applicants and permittees. We note that under our 2000 rule, officers and directors were not deemed to be controllers. Instead, they were included in the examples of persons who might be controllers. Because, as explained above, we are moving away from listing discrete categories of controllers in the regulatory definition, we decline to add these categories of persons to the definition. At the same time, under amended 30 CFR 778.11, discussed below under heading III.W., the identity of these persons will have to be disclosed by permit applicants in their permit applications. Thus, while regulatory authorities will have to make findings of control, they will have the information they need up front to identify potential controllers. This commenter also suggested that we create two classes of controllers, with one category of “presumed” controllers. In our 2000 rule, we made a considered decision to eliminate the use of presumptions of ownership or control in our definitions. We did not reopen that issue in our 2006 proposed rule, and the commenter has not given us sufficient reason to reconsider our decision.

NMA, an industry trade association, and other industry commenters, noted that our proposed definition of *control* or *controller* is a “vast improvement over the current rules,” but suggested that we further revise the definition “to be more clearly based on operations owned or controlled by the applicant (instead of *entities* or *any person* owning or controlling them).” We are not adopting this suggestion because we do not read section 510(c) of the Act to be so limiting. While section 510(c) provides that an applicant who owns or controls a surface coal mining operation with outstanding violations is not eligible for a permit, we have historically found that, in the specific context of section 510(c), control of an entity is a reasonable surrogate for control of that entity’s surface coal mining operations. Thus, if an applicant controls an entity that, in turn, controls a surface coal mining operation with a violation, the applicant will not be eligible for a permit. This approach has been embodied in all versions of our ownership and control rules since the first rule was promulgated in 1988. Moreover, the approach was expressly approved by the United States Court of Appeals for the District of Columbia Circuit in NMA’s challenge to a prior version of our rules. *NMA v. DOI II*, 177 F.3d at 4–5.

KRC/CCC disagreed with our proposal to remove paragraphs (3) (general partner in a partnership) and (4) (person who has the ability to commit financial

or real property assets) from our previous definition of *control* or *controller*; the examples of control at previous 30 CFR 701.5; and the language relating to “indirect control” and “control in concert.” KRC/CCC asserts that the “sole rationale that OSM states for rescinding much of the current definition of *control* or *controller* is the same rationale the agency gives for rescinding the requirement to list all of a permit applicants’ controllers: OSM prefers to establish a “bright line,” “objective” standard for permit information that an applicant must submit. KRC/CCC similarly asserts that these aspects of the proposed rule are based on our proposal to remove the requirement for an applicant to list all of its controllers in a permit application. These comments miss the mark. There is no linkage between our decision to simplify the definition by removing the examples of control and the other language identified by the commenters. Rather, as explained above, the aspect of the control definition that related to the information disclosure requirements was the flexible “ability to determine” standard. That is, if we were going to keep that flexible standard, which we deemed to be crucial, we wanted to eliminate information disclosure requirements based on that standard. Thus, in our 2006 proposed rule, we proposed to retain the “ability to determine” standard in the definition, while simultaneously proposing to make the information disclosure requirements more objective.

Our proposed definition of *control* or *controller* was an outgrowth of our settlement with NMA. In settling NMA’s challenge to the definition, we were able to retain the “ability to determine” standard in exchange for proposing the other changes to the definition that the commenters take issue with. Given that the changes to the definition are non-substantive, and the new definition has the same reach as its 2000 counterpart, we view the settlement on this issue to be favorable. Moreover, we were not obligated to finalize the definition as proposed.

Aside from the settlement, we identified other bases for the proposed changes in the preamble to the proposed rule. For example, in support of our proposal to remove paragraphs (3) and (4) of the previous definition, along with the examples of control, we explained that the persons identified in those paragraphs were already covered by the “ability to determine” standard, and, thus, it was not necessary to include them separately in the regulatory text; we also explained that removal of the unnecessary verbiage would simplify

the regulatory text, which had become rather unwieldy and cluttered with language that did not contain any regulatory requirements. 71 FR 59594. As we explained above, another reason we decided to remove the examples of control was that they were potentially misleading to the extent that the list was not exhaustive; we did not want to create the incorrect impression that only those persons listed could be controllers.

KRC/CCC also states that our decision to simplify the definition “runs afoul of the fact that OSM promulgated the current definition six years ago based on well-supported findings that all of its elements were necessary to allow the agency to implement SMCRA effectively.” We disagree with this comment. In the very passage of the preamble to the 2000 rule cited by these commenters, we stated that the definition of “*control* or *controller* stand[s] alone, but the examples are useful \* \* \*.” 65 FR 79599. Stating that the examples are “useful” hardly equates with saying they are a necessary part of the regulatory text. To the contrary, because the examples do not impose any independent regulatory requirements, we have determined that they are best discussed in preamble language explaining the scope of the rule.

KRC/CCC also object to the removal of the phrases “alone or in concert with others” and “indirectly or directly” from paragraph (5) of our previous definition of *control* or *controller*. They believe that the removal of the phrases will impact the ability of regulatory authorities to identify controllers, particularly in situations where control may only be exercised indirectly, in concert with others, or both. We understand the commenters’ concern, but we nevertheless disagree with the comment. As we explained above, we are removing these phrases in order to simplify what had become a cumbersome definition and because they are already encompassed in the “ability to determine” standard that we are retaining in this final rule. We can understand how a change in substance might possibly be inferred from a change in the regulatory text without a corresponding explanation as to the effect of the change. However, we have expressly stated, in the preambles to our 2006 proposed rule and this final rule, that the “ability to determine” standard will continue to encompass both indirect and direct control, as well as control in concert with others, where there is actual ability to control. We will continue to enforce this aspect of the rule in Federal program states, and we

expect State regulatory authorities to enforce it in primacy states.

After careful consideration of the public comments, we are adopting the revisions to the definition of *control* or *controller* as proposed, with the one minor modification discussed above. In sum, we determined that it is best to have a clear, concise definition of *control* and *controller* that retains the crucial “ability to determine” standard. We are fully confident that the definition in this final rule will continue to allow regulatory authorities to follow control wherever it exists.

### C. Section 701.5—Definition: Own, Owner, or Ownership

As mentioned above, section 510(c) of the Act, 30 U.S.C. 1260(c), uses, but does not define, the term “owned.” Our 2000 rule, which we are amending in this final rule, contained a definition of *own*, *owner*, or *ownership* at 30 CFR 701.5. Shortly after we promulgated the 2000 rule, NMA filed its judicial challenge, which included a claim that our definition of *own*, *owner*, or *ownership* was inconsistent with SMCRA, arbitrary and capricious, and contrary to the DC Circuit’s decision in *NMA v. DOI II*. NMA also took issue with the “downstream” reach of the rule, as it pertained to ownership. The term “downstream,” as used by the DC Circuit in the *NMA v. DOI I* and *NMA v. DOI II* decisions, means a surface coal mining operation that is 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 from the applicant when making a permit eligibility determination based on ownership (as distinct from control) of a surface coal mining operation. Just as SMCRA does not define the terms “owned” or “controlled,” it also does not address the downstream reach of the ownership and control provisions.

To settle NMA’s claim, we agreed to propose to revise our previous definition of *own*, *owner*, or *ownership* and the provision at previous 30 CFR 773.12(a)(2) that governs the downstream reach of the definition when making a permit eligibility determination. In satisfaction of the settlement agreement, we proposed the revisions in our 2003 proposed rule. When we issued our 2006 proposed rule, on which this final rule is based,

we decided to carry forward this aspect of the 2003 proposal. In this final rule, we are adopting the amendments as proposed.

The first revision is to the definition itself. Our prior definition of ownership, at 30 CFR 701.5, included persons “possessing or *controlling* in excess of 50 percent of the voting securities or other instruments of ownership of an entity.” (Emphasis added.) We have concluded that the prior definition of ownership was confusing to the extent that it included “control” concepts. Given that *control* or *controller* is defined in the same section of the CFR, the natural tendency of the reader was to try to import that definition into the definition of *own*, *owner*, or *ownership*, which renders the ownership definition nonsensical. To remove this confusion, we are adopting our proposal to amend the definition by substituting the term “owning of record” in place of “possessing or controlling.” Thus, the revised definition will read as follows: “*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.”

Our use of the term “owning of record” better effectuates our intent with regard to the meaning of ownership (as distinct from control), creates a “bright line” standard, and removes the inherent confusion with the previous definition. As we explained in the preamble to our 2006 proposed rule, “owning of record” is a term found in section 507(b) of the Act, 30 U.S.C. 1257(b), under which permit applicants must identify, among other things, “any person owning[ ] of record 10 percent or more of any class of voting stock of the applicant \* \* \*.” Because the Act itself uses the term “owning of record” in an analogous context, we deemed it a good fit for our definition of *own*, *owner*, or *ownership*. Moreover, we used the statutory term “owning of record” in our ownership and control rules from 1988 through 2000. See, e.g., 30 CFR 773.5 (2000). It was only in our 2000 rule that we used the phrase “possessing or controlling” in our ownership definition, and that definition was immediately challenged in Federal court, in part because of the confusion that results from defining ownership in terms of control. Since the term “owning of record” has been in the statute since 1977, and in our ownership and control rules from 1988 through 2000, regulatory authorities and

the regulated industry will be familiar with the term and its meaning.

The second revision affects 30 CFR 773.12(a)(2), with respect to the downstream reach of the definition under the rules pertaining to permit eligibility. In *NMA v. DOI II*, the D.C. Circuit held that a regulatory authority 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 limitlessly downstream from the applicant.

Although the DC Circuit’s decision clearly addresses downstream control in the context of permit eligibility, it does not squarely address the situation where there is downstream ownership of entities, without control. For example, assume Company A owns 51 percent of Company B, and Company B, in turn, owns 51 percent of Company C, a coal mining company whose mining operations are in violation of SMCRA. While it is clear that we could deny a permit to Company A if it *controls* Company C through its ownership or control of Company B, it is not clear, under the *NMA v. DOI II* decision, whether OSM could deny a permit to Company A based solely on Company A’s *ownership* of Company B, which, in turn, owns the violator, Company C. There is at least a plausible argument that the DC Circuit’s decision does not allow us to deny permits based solely on downstream ownership (absent control) of an operation with a violation.

Our former rules allowed us to reach “downstream” with regard to both ownership *and* control. Under those rules, the regulatory authority could deny a permit if an applicant indirectly owned an operation in violation of SMCRA or other applicable laws. The operation in violation could be infinitely downstream from the applicant—meaning that ownership of the operation could be indirect, through intermediary entities—as long as there was an uninterrupted chain of ownership between the applicant and the operation. NMA argued that this provision was contrary to the plain meaning of SMCRA and violated 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.

To settle NMA’s claim we agreed to propose a regulatory revision at 30 CFR 773.12(a) to limit the reach of permit denials based on ownership to “one level down” from the applicant. We proposed the revision in our 2003 proposed rule. Because we continued to find merit in the proposal, we carried it forward in our 2006 proposed rule. In this final rule, we are adopting the amendment to section 773.12(a) as proposed. Under this final rule, 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 is not eligible for a permit. In other words, the rule would reach one level down from the applicant to the entity the applicant owns. On the other hand, an applicant’s *indirect* ownership of an entity with a violation, standing alone, would not make the applicant ineligible for a permit. However, the same applicant would not be eligible for a permit if it controls the violator entity.

While we stated in the preamble to our 2006 proposed rule that the “one level down” approach is not compelled by the Act, we conclude that it is a reasonable interpretation of the Act, especially in light of the DC Circuit’s decision in *NMA v. DOI II*. Moreover, because regulatory authorities may continue to consider violations at “downstream” operations, as long as *control* (as opposed to *ownership*) is present, the amendment will not impair a regulatory authority’s ability to adequately enforce section 510(c) of the Act. The mechanics of the amendment to 30 CFR 773.12(a) that pertains to the downstream reach of the definition of *own*, *owner*, or *ownership* is further discussed under heading III.J., below.

#### Responses to Comments

NMA, and other industry commenters, commented that our proposed definition of *own*, *owner*, or *ownership* is “a significant improvement over the existing rule,” but nevertheless stated that “ownership of an entity alone does not equate to ownership of the entity’s surface coal mining operation.” As such, NMA maintains that the proposed rule “is not entirely consistent with the principles of American corporate law.” Under NMA’s formulation, a regulatory authority could not even reach one level down with regard to ownership; that is, the regulatory authority could only deny a permit based on ownership if the applicant itself owns an *operation* (as opposed to an *entity*) with an outstanding violation. We disagree. We

have historically found that, in the specific context of section 510(c), which pertains to permit eligibility and does not impose personal financial liability on owners, ownership of an entity is a reasonable surrogate for ownership of that entity's surface coal mining operations. Furthermore, we have carefully considered whether this approach is not only reasonable but also consistent with the legal maxim that to abrogate a common-law principle, a statute must speak directly to the question addressed by the common law. The Supreme Court has addressed this issue consistently in *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *Astoria Fed. Sav. & Loan Assn v. Solimino*, 501 U.S. 104, 108 (1991); *United States v. Texas*, 507 U.S. 529, 534 (1993); and *United States v. Bestfoods*, 524 U.S. 51, 63 (1998). As to this specific principle of statutory interpretation, we believe that the interpretation of section 510(c) adopt today with respect to an owned surface coal mining operation is sufficiently broad to satisfy administrative purposes while being fully consistent with Supreme Court precedent and *NMA v. DOI II*.

KRC/CCC claims that our substitution of the phrase "owning of record" for "possessing or controlling" represents a substantive change, despite our assertion in our 2006 proposed rule that the change would be non-substantive. In support of their comment, KRC/CCC cites to the preamble to our 2000 final rule, in which we stated: "We added the term 'controlling' based on the reality that sometimes persons who do not technically own stock (or other instruments of ownership) nonetheless have the ability to control the stock, either by holding the voting rights associated with the stock or other arrangement with the owner of record." While we agree with these commenters that this revision is not purely non-substantive, we are not persuaded to deviate from the proposed amendment. The confusion we identified in the definition—*i.e.*, defining ownership in terms of control—was real and is remedied by the amendment we are adopting in this final rule. Moreover, under the old definition, which included the "possessing or controlling" language, a regulatory authority would have had to make a finding that a person controlled in excess of 50 percent of the voting securities or other instruments of ownership of an entity. That same finding would, in all likelihood, support a finding that that person is a controller of the entity under our definition of

*control* or *controller*. As such, anything that might be lost under the definition of *own*, *owner*, or *ownership*, would still be covered under the definition of *control* or *controller*, based on similar proof. Thus, as the commenters requested, the definitions, when taken together, will "encompass[] all of the same persons that the existing regulations sweeps in."

KRC/CCC also objected to our proposal to limit the downstream reach of our definition of *own*, *owner*, or *ownership*. These commenters' objection is multi-faceted. First, they reference our statements at 71 FR 59595 that "we do not necessarily agree with NMA's analysis [that ownership of a corporation does not equate to ownership of the corporation's assets]" and "[w]e do not believe this approach is compelled by either SMCRA or the decision in *NMA v. DOI II*." It is important to remember that, as discussed above, under NMA's formulation of section 510(c) of the Act, regulatory authorities could not even look "one level down" with respect to ownership. Thus, in this final rule, we continue to disagree with NMA's argument that ownership of an entity does not equate to ownership of that entity's surface coal mining operations. Further, while the "one level down" approach is not necessarily compelled by the Act—which is entirely silent on the point—it is certainly a reasonable construction of section 510(c)'s ownership provision. Also, based on *NMA v. DOI II*'s uncertain holding on this issue (discussed above), we did perceive at least some risk of loss in court if our rules continued to reach infinitely downstream on the ownership side (as opposed to the control side). Thus, the amendment we adopt today is a good compromise on the issue, one which allows us to retain the ability to look one level down with regard to ownership, rather than just at the applicant's own operations.

KRC/CCC also asserts that our proposed amendment "rests upon yet another glaring error of statutory and regulatory interpretation." The alleged "error" appears to be the commenters' perception that the amendment is inconsistent with our prior statements to the effect that ownership is distinct from control and that ownership of an operation with a violation, standing alone, can provide the basis for a permit denial. Our prior statements, which we continue to stand by, did not speak to the downstream reach of the definition and are, therefore, not inconsistent with today's amendment. Further, under this final rule, ownership and control are still distinct concepts; thus, if an

applicant owns, but does not control, an operation with a violation, under the definition of *own*, *owner*, or *ownership*, the applicant is not eligible for a permit.

KRC/CCC further opines that "ownership is more easily established than control." Thus, in KRC/CCC's view, "the proposed regulation will make it more time consuming, costly, and uncertain for regulatory authorities to pursue links between applicants and remote downstream subsidiaries who are responsible for uncorrected regulatory violations." In response, we note that, even though ownership may be more easily established than control, regulatory authorities will be required to enforce the rules as written, regardless of the associated time and cost.

Moreover, as explained above, regulatory authorities will be empowered to make case-specific determinations of control based on the flexible "ability to determine" standard.

Finally, KRC/CCC imply that Congress intended for SMCRA to reach infinitely downstream with regard to ownership and state that the proposed amendment would "make it impossible for OSM or state regulatory authorities to deny permits to applicants that own subsidiaries responsible for uncorrected violations, where regulators cannot establish the applicant's actual control of the subsidiary." We disagree with the predicate to this comment—that Congress intended for section 510(c)'s ownership provision to reach infinitely downstream. As stated previously, Congress was entirely silent on this issue, and the holding in *NMA v. DOI II* casts at least some doubt on the correctness of KRC/CCC's position. Again, the amendment we adopt today represents a reasonable interpretation of section 510(c).

IMCC, whose member States will be the regulatory authorities most often making findings of downstream control under these provisions, did not object to our proposed amendment to the downstream reach of the rule with regard to ownership, as long as the States are empowered to obtain the information necessary to make control findings. As explained below under heading III.W., under this final rule, regulatory authorities will have the necessary information.

A State commenter said that our proposal to limit the downstream reach of ownership does not make sense. The premise of this comment is that, under our definition of *own*, *owner*, or *ownership*, an owner will always be a controller. Thus, if we can go limitlessly downstream with regard to control, we should be able to do the same with regard to ownership. We agree with this

commenter that owning greater than 50 percent of entity will almost always confer control over that entity. However, if Company A owns Company B and Company B owns Company C, it does not stand to reason that Company A controls Company C. However, Company A may in fact control or have the ability to control Company C; under this final rule, regulatory authorities are empowered to make that finding.

This commenter also said it appears inconsistent under section 510(c) of SMCRA to distinguish between ownership and control in terms of downstream relationships because section 510(c) couples ownership and control. We disagree with this comment. Section 510(c) refers disjunctively to ownership or control. As of our 2000 final rule, we have treated ownership and control as distinct concepts. Further, these terms have different meanings under corporate law. We conclude, for the reasons explained above, that it is entirely appropriate, and consistent with SMCRA, to continue to give separate effect to the ownership and control aspects of section 510(c).

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

Over the years, we have found that the regulatory provisions pertaining to the transfer, assignment, or sale (TAS) of permit rights have generated a great deal of confusion. We have discovered that the various State regulatory authorities have very different views as to what constitutes a transfer, assignment, or sale requiring regulatory approval. As mentioned above, in order to settle the litigation instituted by NMA, we agreed to propose new transfer, assignment, or sale rules. However, we did not agree to propose any specific provisions. We viewed the rulemaking called for under the settlement as an excellent opportunity to revisit our TAS 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 TAS 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.

A number of commenters on our 2005 proposal suggested that the broad conceptual changes we proposed were 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 those and other comments, and input from our State co-regulators, we determined that we could achieve our purpose of simplifying and clarifying our regulations through more modest revisions to our rules.

As a result, in our 2006 proposed rule, we proposed to revise our current definition of *transfer*, *assignment*, or *sale of permit rights* at section 701.5 but to keep our existing TAS regulatory requirements largely intact. The primary purpose of our 2006 proposal was to 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 III.T., 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 previous definition, *transfer*, *assignment*, or *sale of permit rights* meant “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 proposed to revise our regulatory definition of transfer, assignment, or sale of permit rights to mean a change of a permittee. Our 2006 proposal was informed by a decision of the Department of the Interior’s Office of Hearing and Appeals (OHA) in *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. After consideration of the public comments we received on our 2006 proposal, we are adopting the amendment to our TAS definition as proposed.

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 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 2006 proposed rule. The judge noted that the “other effective control” language is “vague and imprecise” and “discloses no meaningful standard and provides no advance notice to a regulated corporate entity” as to which corporate changes will constitute a transfer, assignment, or sale. This defect, according to the judge, does not provide “adequate advance notice of the purported regulatory standard” and leaves permittees “to speculate” as to when regulatory approval is required. Because we ultimately agreed with many of the judge’s observations about our previous TAS rules, we did not seek further review of OHA’s decision.

Throughout our deliberations on TAS-related issues, we were mindful of OHA’s admonitions that our previous definition, to the extent it relied on the concept of “effective control,” was “vague and imprecise” and “disclose[d] no meaningful standard and provide[d] no advance notice to a regulated corporate entity” as to which corporate changes would constitute a transfer, assignment, or sale. We acknowledge that our previous definition created confusion—among regulatory authorities, the regulated industry, and the public—that lead to various interpretations of the regulatory requirements.

We conclude that the imprecision in our previous 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. As explained above, 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 previous definition of *transfer*, *assignment*, or *sale of permit rights* imported the ownership and control concept from section 510(c), but nothing in the Act compels that approach. We conclude that importing section 510(c) ownership and control concepts into our TAS regulations created undue confusion as to what constitutes a transfer, assignment, or sale of permit rights. Thus, the TAS definition we are adopting in this final rule disentangles TAS and ownership and control concepts. This final rule clearly provides that a change of a permittee’s

owners or controllers does not constitute a transfer, assignment, or sale.

In addition to responding to the decision in *Peabody Western*, we also conclude 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 "person"—under section 701(19) of the Act, 30 U.S.C. 1291(19), the term "person" includes corporations, partnerships, and other business organizations—we see no reason to apply the regulatory provisions governing transfer, assignment, or sale of permit rights.

Under this final rule, a change in permittee triggers a TAS that requires regulatory approval. In determining whether there is a change in permittee, we are looking for indicia that the existing permittee has actually conveyed its permit rights to a new person (the putative new permittee/successor in interest) who desires to continue mining under the permit. There would also be a change in permittee when an existing permittee reorganizes itself into a new type of business entity (for example, from a partnership to a limited liability company). In that instance, there is a fundamental legal change in the nature of the permittee that will trigger a TAS. Similarly, a merger or acquisition would trigger a TAS if the non-permittee entity seeks to become the new, named permittee or if the merger or acquisition results in a new type of business entity being created (e.g., if the permittee is a corporation and the merged entities become a limited liability company).

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, among other things, have to maintain appropriate bond coverage. We emphasize that while a permittee's change of an officer, director, shareholder, 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 final 30 CFR 774.12 (see heading III.T., below).

In sum, our final TAS definition introduces the clarity we have been seeking with regard to our TAS

regulations. Importantly, the TAS definition also reduces the burden on both the coal mining industry and regulatory authorities due to the fact that fewer transactions or events will qualify as a transfer, assignment, or sale requiring an application and regulatory approval under 30 CFR 774.17. Our TAS definition is also fully consistent with the Act.

IMCC and other State commenters supported our proposed TAS definition. These commenters stated that "this is a more sensible and understandable approach." Another State commenter said the new TAS definition is much simpler and eliminates much of the confusion regarding permit transactions.

IMCC also said we should clarify in the preamble that a corporation that converts to a limited liability company is considered a separate and distinct permittee, thus triggering a TAS, and that a merger will result in a TAS unless the new merged entity continues to do business in the existing permittee's name. In response to these comments, we have included a preamble discussion, above, of the TAS-related effects of these types of transactions.

NMA and other industry commenters strongly supported our proposed definition. These commenters agreed with the holding in *Peabody Western* and that the previous definition was confusing. They also agreed that ownership and control concepts should be removed from the definition of TAS. Another State commenter said it would really like to see a more streamlined process for permit transfers. For the reasons stated above, we believe our new TAS definition will substantially streamline the TAS process.

KRC/CCC opposed our proposed definition. These commenters said our proposal was inconsistent with SMCRA because it provides a clear avenue for circumvention of the ownership and control provisions of section 510(c) of the Act. These commenters opine that, under the proposed definition, an individual who owns or controls a surface coal mining operation that is in continuing violation of SMCRA might continue to mine without regard to section 510(c) of SMCRA by assuming control of a clean entity that already has a mining permit. They explain that the tainted individual may have been truly separate from the existing permittee or the permittee may be a "straw man" created by the tainted individual to circumvent section 510(c). Either way, these commenters said our proposed definition would leave regulatory authorities powerless to enforce section 510(c).

We understand these commenters' concerns but, for the reasons explained above, we disagree that there is a necessary linkage between section 510(c)'s ownership and control provisions and the TAS provisions of section 511(b). Based on our own analysis and the near unanimous support of other commenters, we have chosen to separate the two concepts, and KRC/CCC's comments do not persuade us to do otherwise. Moreover, we note that we are constrained by the DC Circuit's decisions in *NMA v. DOI I* and *NMA v. DOI II*. In *NMA v. DOI I*, the DC Circuit concluded that when making permit eligibility determinations under section 510(c), we can only consider violations at operations the applicant owns or controls; the court struck down our ability to deny permits based on violations at operations owned or controlled by the applicant's owners or controllers. 105 F.3d at 694. If we cannot consider these "upstream" violations in the first instance, when making permit eligibility determinations under section 510(c) and 30 CFR 773.12, we likewise cannot consider them under section 511(b)'s TAS provisions (even if there were a linkage between section 510(c) and section 511(b)). In *NMA v. DOI II*, the DC Circuit held that we can deny a permit under section 510(c) only when an applicant, through ownership or control, is in violation at the time of application. We cannot consider current violations at an operation the applicant "has controlled" but no longer does (unless the applicant has a demonstrated pattern of willful violations under section 510(c) of the Act). 177 F.3d at 5. Thus, even if we could consider an upstream controller's violations, we could not consider those violations if the controller ended the control relationship with the operation that is in violation.

With regard to the "straw man" hypothetical, we note that the DC Circuit has explained that we have the authority to determine who the "real applicant is—i.e., to pierce the corporate veil in cases of subterfuge" in order to ensure that we have the true applicant before us. *NMA v. DOI I*, 105 F.3d at 695. Thus, if a violator does try to set up a "straw man" to evade section 510(c) of the Act, the regulatory authority is empowered to identify the "real applicant" and deny the permit if that person currently owns or controls an operation with a violation. And, of course, a regulatory authority can always pursue an appropriate alternative enforcement action against the "tainted individual" under the Act's various enforcement provisions. See,

e.g., SMCRA § 518(f), 30 U.S.C. 1268(f); 30 CFR part 846.

Finally, KRC/CCC takes us to task for relying on the decision in *Peabody Western* because, in these commenters' view, the judge's observations were *ultra vires*. These commenters assert that OHA "is not authorized to review the validity of the Secretary's regulations or to shrink from applying them fully." These commenters also state that OHA's decision is not precedential and does not necessarily constitute a legal interpretation of OHA as a whole. As explained above, regardless of its precedential value, we ultimately agreed with *Peabody Western's* observations about our previous definition and opted not to seek further review of that decision. Moreover, virtually all other commenters agreed with the underlying basis of the *Peabody Western* decision: That our previous definition was vague, imprecise, and confusing. After the decision, we reevaluated the statutory basis for our definition and determined that the Act does not require us to import ownership or control concepts into the TAS analysis.

Although IMCC and other State commenters supported our proposed TAS definition and related TAS provisions at 30 CFR 774.17 (see discussion under heading III.U., below), they did echo KRC/CCC's concerns about a new owner or controller with outstanding violations trying to "enter through the back door" by joining an existing permittee. They said that even though the addition of this person will no longer trigger a TAS, the regulatory authority should be able to "suspend the permit immediately" until the new person has complied with all provisions of the Act. These commenters offered specific language to this effect that they proposed for a new paragraph 774.12(d). Section 774.12 contains "Post-permit issuance information requirements for permittees." See heading III.T., below, for a full discussion of that section.

Again, although we understand the concern, we decline to adopt this comment for the reasons discussed above. In the final analysis, we are constrained by the decision in *NMA v. DOI* and otherwise find no authority in SMCRA to "suspend the permit immediately" when a new person with a violation, such as an officer, director, or shareholder, joins the permittee's organizational structure. However, as explained above, under section 510(c) of the Act, the regulatory authority has the authority to identify the true applicant and, the regulatory can always employ SMCRA's array of enforcement powers

to seek to compel abatement of outstanding violations.

#### *E. Section 773.3—Information Collection*

At 30 CFR 773.3, our regulations contain a discussion of Paperwork Reduction Act requirements and the information collection aspects of 30 CFR part 773. We proposed to amend this section by streamlining the codified information collection discussion. We did not receive any comments on our proposal and are adopting the amendment as proposed. A more detailed discussion of the information collection burdens associated with part 773 is contained under the Procedural Determinations section (see heading IV.10.), below.

#### *F. Section 773.7—Review of Permit Applications*

We proposed to revise previous 30 CFR 773.7(a) to correct a cross-reference and to eliminate a cross-reference that is no longer relevant. In general, section 737.7(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 previous section provided: "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. After the promulgation of our 2000 rule, it came to our attention that the cross-references in that provision were either incorrect or no longer applicable.

We proposed to correct the first cross-reference so that it properly refers to section 773.6(c). We also proposed to remove the language that included the second cross-reference because it is no longer relevant due to certain provisions in our 2000 final rule. More specifically, we proposed 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)" referred 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.

We did not receive any comments on our proposal and are adopting the amendments as proposed. Thus, under this final rule, if an applicant is pursuing a good faith appeal of a violation, and otherwise meets the criteria of 30 CFR 773.14 (see heading III.K., 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 to provide an opportunity for a hearing on a violation.

#### *G. Section 773.8—General Provisions for Review of Permit Application Information and Entry of Information Into AVS*

Under 30 CFR 773.8, a regulatory authority is required to enter certain permit application information into AVS. (See 30 CFR 701.5 for definition of *Applicant/Violator System* or *AVS*.) We proposed to revise previous 30 CFR 773.8 by removing the phrase "ownership and control" from paragraph (b)(1). We proposed this revision because we also proposed to revise the heading of 30 CFR 778.11 by removing the phrase "ownership and control." See discussion under heading III.W., below. Our rationale for the proposed revisions was that, under § 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 also proposed 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.

We did not receive any specific comments on our proposal and are adopting the amendments as proposed. Under this final rule, the entire provision at paragraph 773.8(b)(1) now reads: "The information you are required to submit under §§ 778.11 and 778.12(c) of this subchapter."

#### *H. Section 773.9—Review of Applicant and Operator Information*

As part of a regulatory authority's permit eligibility determination, our regulations at 30 CFR 773.9 require regulatory authorities to review certain information provided by permit applicants. Similar to our amendment to section 773.8, we proposed to revise the section heading at 30 CFR 773.9 by removing references to "ownership and control" information. We also proposed to revise section 773.9(a) by removing the phrase "applicant, operator, and ownership or control." We explained that these revisions clarify that the applicant information, required to be disclosed under section 778.11, is not

limited to ownership and control information.

As with the revision to section 773.8, we also proposed to revise section 773.9(a) by clarifying that the information described in the section (through a cross-reference to section 778.11) is not optional and must be disclosed in a permit application. Finally, we proposed to revise section 773.9(a) by changing the term “business structure” to “organizational structure.” We explained that this is a broader and more inclusive description of the entities subject to the review.

We are adopting the amendments as proposed. (We respond to the one comment we received on the proposed provision under heading III.W., below.) Thus, the amended section heading now reads: “Review of applicant and operator information” and amended paragraph (a) provides: “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.”

#### *I. Section 773.10—Review of Permit History*

We proposed to revise 30 CFR 773.10, which requires regulatory authorities to, among other things, review the permit history of a permit applicant and its operator during the permit eligibility review. More specifically, we proposed 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.” In paragraph (c), we proposed to remove the language “your controllers, or your operator’s controllers” from the first sentence. In the second sentence of paragraph (c), we proposed to remove the language “and was not disclosed under § 778.11(c)(5) of this subchapter.” We proposed these revisions because we also proposed to remove the requirement at section 778.11 for an applicant to disclose its controllers (including its “designated controller”) in a permit application. See discussion under heading III.W., below.

We did not receive any specific comments on our proposal and are adopting the amendments as proposed. Under this final rule, paragraph (b) now reads: “We will also determine if you or your operator have previous mining experience.” Paragraph (c) now reads: “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.”

#### *J. Section 773.12—Permit Eligibility Determination*

We proposed to revise our provisions for permit eligibility determinations at 30 CFR 773.12, which, along with other provisions, implement section 510(c) of the Act. We received multiple comments about the different aspects of our proposed changes. After careful consideration of all the comments we received, we decided to adopt the amendments as proposed. Below, we discuss each aspect of the final rule provisions and respond to comments we received on our 2006 proposals.

##### **1. Section 773.12(a)—“Downstream” Ownership**

As indicated above, under our discussion of the definition of *own*, *owner*, or *ownership* (see heading III.C), paragraph 773.12(a) is our regulatory provision that governs the “downstream” reach of the rule in terms of permit eligibility. We proposed to revise paragraph (a)(2) so that the regulatory authority would no longer be able to deny a permit based on indirect ownership of a surface coal mining operation with a violation; however, we explained that we would keep the right to deny a permit based on indirect control. To simplify the rule, we also proposed to merge previous paragraphs (a)(2) and (a)(3), without changing the substantive meaning of those provisions. Under the new paragraph (a)(2), we proposed to remove the reference to ownership so that a permit applicant would not be 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, with respect to ownership, regulatory authorities could only look “one level down” from the applicant in making a permit eligibility determination. For the reasons explained under heading III.C., we are adopting these amendments as proposed.

We have already responded to comments relating to the downstream reach of the rule under the discussion of our amended definition of *own*, *owner*, or *ownership*. See heading III.C., above.

##### **2. Section 773.12(b)—Independent Authority Language**

We also proposed to remove previous 30 CFR 773.12(b). Consistently with the D.C. Circuit’s ruling on retroactivity in *NMA v. DOI II*, our 2000 final rule explained, at paragraph 773.12(b), that an applicant is eligible to receive a permit, despite it or its operator’s indirect ownership or control of 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 provided 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. To settle this claim, we proposed to remove 30 CFR 773.12(b). We satisfied our obligation under the settlement in our 2003 proposed rule. Because we continued to find merit in the proposal, we carried it forward in our 2006 proposed rule.

We conclude that any “independent authority” exists with or without this regulatory provision. Thus, because the language is in fact superfluous, we are adopting our proposal to remove this provision. We assume that regulatory authorities will be familiar with any other laws that may affect an applicant’s ability to obtain a permit. We do note that the explanation in former 30 CFR 773.12 is still true and valid; however, we conclude that this type of explanatory information is best left for preamble language. This amendment makes section 773.12, as a whole, more clear and concise, without diminishing its effectiveness. Because we removed 30 CFR 773.12(b), we also redesignated paragraphs (c), (d), and (e) as (b), (c), and (d), respectively.

KRC/CCC oppose the removal of the “independent authority” language, asserting that this language served as an important reminder to regulatory authorities involved in permit eligibility determinations. Further, these commenters state that, because the Federal regulations serve as a benchmark for judging counterpart provisions in State programs, we should retain this language to signal to States that State programs may not be drawn

so as to eliminate independent authority as a basis for permit denial. Finally, these commenters claim that, to the extent the proposed change was intended to be non-substantive, we run the risk that regulatory personnel, the courts, or both will impute unintended meaning to the action that OSM proposed.

We conclude that explanatory language like that contained in previous 30 CFR 773.12 is properly contained in preamble discussions. To the extent that a change in policy can be inferred by our removal of this language, we clarify that we do not intend a policy change. Again, we trust that the States are aware of the legal authorities that could affect permit eligibility, and it is not our place to instruct States how to enforce laws other than SMCRA.

### 3. State Regulatory Authorities Apply Their Own Ownership and Control Rules

In our 2006 proposed rule, we explained in preamble language that, 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. The concept is important enough to repeat in this final rule. Consistently with 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 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.

We did not receive any specific comments on this explanation in our 2006 proposed rule. However, one commenter expressed a general concern that the "practical effect of the proposed ownership and control rules on interstate evaluations will be to dilute

the strongest state systems by applying the weaker rules of states who have adopted a lower standard." Based on our foregoing explanation, this result should not occur because each State will apply its own rules when making permit eligibility determinations. Thus, States with stronger rules will apply those provisions, and not those of any other State, when making permit eligibility determinations.

#### K. 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 codified regulatory language used the word "may," indicating that the regulatory authority had discretion to grant a provisionally issued permit, even if the applicant otherwise met the eligibility criteria at paragraph 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, we proposed to revise our rule language at 30 CFR 773.14(b) so that it plainly states that an applicant who meets the 30 CFR 773.14(b) eligibility criteria *will* be eligible for a provisionally issued permit.

One commenter, a State regulatory authority, said changing "may" to "will" improves this section. We did not receive any other comments on our proposal and are adopting the amendment as proposed. However, we stress that an applicant must meet all other permit application approval and issuance requirements before receiving a provisionally issued permit, and the provisional permittee must comply with all performance standards.

#### L. 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. These are permits that should not have been issued 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 proposed two substantive revisions to 30 CFR 773.21(c). Below, we discuss each aspect of the final rule provisions and respond to comments we received on our 2006 proposals.

#### 1. Evidentiary Standard

Our first proposed revision related to our burden of proof and evidentiary standard 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 amend 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—we determined 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 for a preliminary finding). As a result, in our 2006 proposed rule, we proposed that a 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." After reviewing the comments on our proposal, we conclude that this evidentiary standard is consistent with the standard that typically applies to OSM's regulatory findings. As such, we are adopting the amendment as proposed. *See* headings III.P. and III.S., below, for additional discussions on burden of proof issues.

We did not receive any adverse comments on our proposal. IMCC and other State commenters strongly supported the proposed revision. IMCC reiterated its comments on our 2003 proposed rule, noting that our 2003 proposal would have required more weighty evidence than would normally be the case and essentially converted the concept of "*prima facie*" to a higher evidentiary standard. KRC/CCC also supported the 2006 proposal. They explained that our 2003 proposed rule contained an unexplained and unnecessary evidentiary standard for *prima facie* showings. We agree with these comments and, therefore, abandoned the 2003 approach.

#### 2. Removal of Various Posting Requirements

We proposed to remove previous 30 CFR 773.21(c)(2), which required 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. Similarly, we also proposed to remove the requirement at

previous paragraph 773.22(d) to post a *preliminary* decision “at our office closest to the permit area.”

Additionally, we proposed to remove all other Internet posting requirements adopted in our 2000 final rule. In addition to paragraph 773.21(c)(2), we proposed to remove the Internet posting requirements found at previous paragraphs 773.22(d), 773.23(c)(2), and 773.28(d). We proposed to retain the requirement at paragraph 773.23(c)(2) to post a notice of permit suspension or rescission at our office closest to the permit area. We also proposed to retain the requirement at paragraph 773.28(d) to post a final agency decision on a challenge of an ownership or control listing or finding on AVS. After consideration of the public comments, we adopted these amendments as proposed.

Our inclusion of the Internet posting requirements in our 2000 final 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 concluded that the various Internet posting requirements in our 2000 final rule were 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. We deem it improper to require States to establish and maintain potentially costly information technology systems and hire qualified staff to implement posting requirements that do not have proven utility. Moreover, nothing in the Act requires these postings. In addition, regulatory authorities are already required to enter much of the relevant information into AVS, which is available to the public. We also conclude that posting preliminary findings by any method is unduly burdensome, particularly because this information is of questionable value to the public. In sum, in this final rule, we removed all Internet and preliminary finding posting requirements, but retained public posting of our final decisions.

We received only one comment on our proposal to remove these various posting requirements. KRC/CCC opposed our proposals. First, these commenters state that we pointed to no objection from any SMCRA regulatory authority or to any experience of our own to support our “conclusory assertions.” We concede that experience under these provisions has been limited, particularly because these requirements never took effect for the States. However, we note that the States have

not expressed any objection to removing the provisions. In short, we reconsidered the wisdom of these provisions prior to their widespread implementation. As such, our removal of the provisions in this final rule does not alter the *status quo*. We have concluded that our multiple posting requirements were unnecessary overkill. Moreover, the Act provides ample opportunities for public participation, which have been adequate prior to and since 2000. These commenters have not given us any reason to conclude otherwise.

Next, these commenters point to a preamble discussion in our 2000 final rule where we acknowledged, generally, the Act's public participation requirements. However, we did not state or conclude that the provisions we are removing in this final rule are required by the Act. In the same preamble, we noted the Act's various public participation requirements. Upon reconsideration of this issue, we conclude that the Act's public participation requirements are sufficient.

Finally, these commenters assert that our statement in our 2006 proposed rule that these provisions were of “questionable value to the public” was politically motivated. We disagree. As explained above, upon further examination, we determined that the multiple posting requirements in our 2000 rule were unnecessary and excessive. We also note that these commenters do not present any concrete reasons why these posting requirements are needed. For example, the commenters do not explain why posting requirements not contained in the Act are so beneficial that we should require States to undertake the expense of implementing them. In short, these commenters have not provided a convincing argument in favor of retaining the provisions.

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

We proposed to remove 30 CFR 773.22(d), which contained posting requirements similar to those found at previous 30 CFR 773.21(c)(2), discussed above under heading III.L. Specifically, we proposed 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 proposed to remove paragraph (d), we also proposed to redesignate paragraphs (e) through (h) as paragraphs (d) through (g). For the reasons discussed under heading III.L., above, we are adopting these amendments as

proposed. In the final rule language that follows this preamble discussion of our final rule, our amendments to 30 CFR 773.22 are shown as a **Federal Register** instruction.

#### *N. Section 773.23—Suspension or Rescission Requirements for Improvidently Issued Permits*

We proposed to revise the posting requirements contained in 30 CFR 773.23. Previous 30 CFR 773.23(c)(2) required 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 proposed to remove the requirement to post final notices on the Internet. However, because section 773.23(c)(2) pertains to *final* findings (as opposed to *preliminary* and *proposed* findings under sections 773.21 and 773.22, respectively), we proposed to retain the requirement to post them at our office closest to the permit area. For the reasons discussed under heading III.L., above, we are adopting the amendments as proposed. We conclude it is appropriate to post such notices of final actions for public view.

#### *O. 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* happens when an applicant identifies, or “lists,” a person as an owner or controller in a permit application. That information is then entered into AVS by a regulatory authority. By contrast, an ownership or control *finding* under 30 CFR 774.11(g) 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 previous 30 CFR 773.26(a) was confusing. That section explains how and where a person may challenge an ownership or control listing or finding. NMA claimed that the provision did not clearly delineate the appropriate forum in which to bring a challenge. NMA also expressed concern that the provision seemed 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 provided 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 to the 2000 rule, our intent was 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 never intended to limit who may use the challenge procedures under 30 CFR 773.25; rather, it only specified the procedure and forum in which to challenge an ownership or control listing or finding.

However, to provide even greater clarity to the language at section 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. Because we continued to find merit in the proposal, we carried it forward to our 2006 proposed rule. Specifically, we proposed that challenges pertaining to a pending permit application must be submitted to the regulatory authority with jurisdiction over the pending application. We further proposed 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 are adopting this amendment as proposed.

We also proposed to add new 30 CFR 773.26(e), in accordance with our settlement with NMA. In this final rule, we are adopting new paragraph 773.26(e) as proposed. This new provision allows 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 requires 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(g) (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.

We emphasize that, in meeting its obligations under section 510(c) of the Act and the State counterparts to that provision, each State must apply its own ownership and control rules to determine whether the applicant owns or controls any surface coal mining operations with violations. See generally 65 FR 79637. Further, we stress that an ownership or control decision by one State is not necessarily binding on any other State. This approach is consistent with principles of State primacy and recognizes that not all States will have identical ownership and control rules.

We did not receive any adverse comments on the proposed amendments. NMA and other industry commenters voiced support for the changes, stating that the new language "makes clear" that any person listed in a permit application or in AVS may challenge that listing at any time. Further, these commenters state that proposed paragraph 773.26(e) adds another protection for persons listed in AVS.

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

As discussed above, our rules contain provisions for challenging ownership or control listings or findings. Under previous 30 CFR 773.27(a), a successful challenger had to 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, 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 III.L. above). In satisfaction of our settlement obligation, we proposed the revisions in our 2003 proposed rule. Because we continued to find merit in the proposals, we carried them forward, in slightly modified form, in our 2006 proposed rule. After consideration of the public comments, we are adopting the amendments as proposed, with slight modifications.

Under this final rule, we are amending 30 CFR 774.11(f) to clarify that a regulatory authority's preliminary finding of ownership or control must be based on evidence sufficient to establish a *prima facie* case of ownership or control. We are also adding a new provision at paragraph 774.11(g) that requires us to issue a final finding of ownership or control after giving the person subject to the preliminary finding an opportunity to submit information tending to demonstrate a lack of ownership or control. The final finding at paragraph 774.11(g) will be based upon, and, if necessary, amplify, the *prima facie* finding under paragraph 774.11(f). As such, the final finding will, at a minimum, be based on evidence sufficient to establish a *prima facie* case. Based upon the changes at section 774.11, we have amended 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(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.

Our amendment to paragraph (a) clarifies that a person can challenge either an ownership or control listing or a finding of ownership or control under 30 CFR 774.11(g). Further, due to the cross-reference to paragraph 774.11(g), it is clear that any such challenge will be based on a finding that is, at a minimum, supported by evidence sufficient to establish a *prima facie* case of ownership or control. At paragraphs 773.27(a)(1) and (a)(2), this final rule clarifies that the "operation" referred to in the previous provisions is a surface coal mining operation.

Under the burden of proof allocation in this final rule, as under our previous rules, if the challenge concerns a finding of ownership or control, the regulatory authority will already have borne the initial burden of establishing a *prima facie* case of ownership or control by

issuing its finding in accordance with paragraph 774.11(g). 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.

We did not receive any adverse comments on our proposed amendments. NMA and other industry commenters supported our proposals, noting that the *prima facie* standard adds fairness to the process. KRC/CCC did not oppose making express the implicit requirement that ownership or control findings must be based on evidence sufficient to establish a *prima facie* case.

*Q. Section 773.28—Written Agency Decisions on Challenges to Ownership or Control Listings or Findings*

We proposed 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. Former paragraph 773.28(d) required us to post final decisions on ownership or control challenges on AVS and on the AVS Office's Internet home page. We proposed 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 proposed to keep 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.

After consideration of the public comments received on our proposal, we decided to adopt this amendment as proposed. Our rationale for removing the Internet posting requirement and our responses to comments are set forth more fully above, under the discussion of 30 CFR 773.21 (see heading III.L).

One State commenter said we should specify the location of the posting required under paragraph 773.28(d). The final provision requires posting on AVS. After this rule takes effect in primary States, our AVS Office will notify these States how to input the required information.

*R. Section 774.9—Information Collection*

At 30 CFR 774.9, our regulations contain a discussion of Paperwork Reduction Act requirements and the information collection aspects of 30 CFR part 774.9. We proposed to amend this section by streamlining the codified information collection discussion. We did not receive any comments and are adopting the amendment as proposed. A more detailed discussion of the information collection burdens associated with part 774 is contained under the Procedural Determinations section (see heading IV.10.), below.

*S. Section 774.11—Post-permit Issuance Requirements for Regulatory Authorities*

We proposed several revisions to 30 CFR 774.11, which primarily contains requirements for regulatory authorities following the issuance of a permit. After consideration of the public comments received on our proposals, we are adopting them as proposed, with the minor modifications described below.

First, we proposed to revise paragraph 774.11(a)(3), which previously required a regulatory authority to enter into AVS all “[c]hanges of ownership or control within 30 days after receiving notice of a change.” We proposed 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 proposed this revision because we also proposed to revise the heading of 30 CFR 778.11 by removing the phrase “ownership and control.” See discussion below, under heading III.W. Our rationale for the proposed revisions was that, under section 778.11, an applicant must submit information in addition to what could be called “ownership and control” information. We are adopting this amendment because we are also adopting the corresponding amendment to section 778.11.

Second, we proposed 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. Paragraph 30 CFR 774.11(d) provides for administrative review of a preliminary finding. Previous paragraph 774.11(e) provided: “We must enter the results of the finding and any hearing into AVS.” There was substantial confusion as to whether we had to 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. To incorporate this clarification into our regulatory requirements, we proposed to revise paragraph 774.11(e). Specifically, at the beginning of paragraph (e), we proposed to add the subheading “Entry into AVS.” We also proposed to create new paragraph (e)(1), to provide: “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), to provide: “If you request a hearing, we will enter our finding into AVS only if that finding is upheld on administrative appeal.” After consideration of the comments received on these proposals, we are adopting the amendments as proposed. We conclude that, given the severe consequences that attach to a finding of permanent permit ineligibility, it is only fair to afford a measure of due process before entering the finding into AVS.

Third, we proposed to revise 30 CFR 774.11(f), which governs a regulatory authority's finding of ownership or control. As with our amendment to 30 CFR 773.27, discussed above under heading III.P., we proposed to revise paragraph 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). In our 2006 proposed rule, we proposed to make this implicit 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 III.L., above), based on input received from our State co-regulators and other commenters, we determined 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, in our 2006 proposed rule, we proposed that our findings of ownership or control under paragraph 774.11(f) “must be based on evidence sufficient to establish a *prima facie* case of ownership or control.” We explained that this is the evidentiary standard that typically applies to OSM’s regulatory findings. After consideration of the public comments received on this proposal, we are adopting the amendment as proposed.

In this final rule, we are also modifying proposed paragraph 774.11(f) to clarify that the finding in this section is a *preliminary* finding. This amendment merely makes express an implicit aspect of our 2006 proposal. It was clear, in context, that the finding in paragraph 774.11(f) was intended to be preliminary, as it preceded the final determination required under proposed paragraph 774.11(g). We are also amending paragraph 774.11(f) to make clear that the “operation” referenced in that provision is a “surface coal mining operation.”

For logistical reasons, we also proposed to merge previous paragraph 774.11(f)(1) into new paragraph 774.11(f); merge the substance of former paragraph 774.11(f)(2) into new paragraph 774.11(g) (discussed below); and remove former paragraph 774.11(f)(3) to be consistent with the removal of the requirements at previous 30 CFR 778.11(c)(5) and (d) (discussed below under heading III.W.). These proposed changes included the removal of the requirement at previous paragraph 774.11(f)(3) that, following a finding of ownership or control, a person had to disclose his or her identity under 30 CFR 778.11(c)(5) and, if appropriate, certify that he or she was a controller under 30 CFR 778.11(d). As discussed below under heading III.W., we removed the information disclosure requirements at previous paragraphs 778.11(c)(5) and (d). Therefore, the cross-references to those provisions in previous section 774.11 no longer made sense. We adopted these amendments as proposed.

Fourth, we proposed to revise section 774.11 to address NMA’s claim that our 2000 final rule denied 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. While we disagree with the characterization that we enter “links” to violations into AVS, we proposed to create a new paragraph 774.11(g).

In our 2006 proposed rule, we explained that, under the new regulatory provision, after we make a preliminary written finding of ownership or control under paragraph

774.11(f), but before we enter the finding into AVS, we will allow the person subject to the preliminary finding 30 days in which to submit any information tending to demonstrate a lack of ownership or control. After reviewing all 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 into AVS. The requirement to enter our finding into AVS was previously found at paragraph 774.11(f)(2); we moved that requirement into new paragraph 774.11(g).

After consideration of the public comments we received on proposed paragraphs 774.11(f) and (g), we are adopting the amendments as proposed, with a minor modification. We modified the proposal to provide that, if we make a final finding (under paragraph 774.11(g)) that the person is an owner or controller, we will issue a written finding to that person. The process under new paragraph 774.11(g) will be informal and non-adjudicatory, and we expect regulatory authorities to make prompt determinations after receipt of any information under this provision. We conclude that NMA had a legitimate concern regarding previous paragraph 774.11(f). Moreover, any delay of entry of a finding of ownership or control into AVS will be very minor.

Fifth, we proposed to add a new paragraph 774.11(h), which would have specified that we do not need to make a finding of ownership or control before entering into AVS the information that permit applicants are required to disclose under paragraphs 778.11(b) and (c). With non-substantive changes, we are adopting the amendment as proposed. However, we decided to move this provision to new paragraph 778.11(e) because we determined that it makes more sense in the section pertaining to permit information. See complete discussion under heading III.W., below.

Finally, we proposed to make non-substantive revisions to previous paragraph 774.11(g) and redesignate that provision. We adopted this amendment as proposed. Final paragraph 774.11(h) now reads: “If we identify you as an owner or controller under paragraph (g) of this section, you may challenge the finding using the provisions of §§ 773.25, 773.26, and 773.27 of this subchapter.”

IMCC and other State commenters strongly supported the evidentiary standards in our 2006 proposed rule.

IMCC reiterated its comments on our 2003 proposed rule, noting that our 2003 proposal would have required more weighty evidence than would normally be the case and essentially converted the concept of “*prima facie*” to a higher evidentiary standard. Another State commenter said “using the *prima facie* standard is an improvement and provides clarity.” We agree with these comments.

NMA and other industry commenters also supported the *prima facie* standard. These commenters said the fact that OSM must establish a *prima facie* case, coupled with the changes that limit entry in AVS until after findings become final, provides fairness to the process. While NMA did reiterate its belief that it is not unreasonable to expect the agency to base its findings on “reliable, credible, and substantial” evidence, NMA accepts the *prima facie* standard as part of the larger settlement agreement. These commenters also supported our proposal to allow a person found to be an owner or controller 30 days to provide contrary evidence to the agency before the finding is entered into AVS. In sum, NMA said that our proposed revisions to sections 773.26 and 774.11, taken as a whole, would enhance the fairness of the AVS system by providing clearer avenues for those who are improperly listed in AVS to be removed in a prompt manner. We agree with these comments and conclude that the amendments we adopt today will in fact increase procedural fairness.

KRC/CCC supported our proposed *prima facie* standard. They explained that our 2003 proposed rule contained an unexplained and unnecessary evidentiary standard for *prima facie* showings. However, these commenters objected to what they consider an “automatic stay” for ownership or control findings under proposed paragraph 774.11(e). We disagree with these commenters that the proposed provision, which we have adopted in this final rule, amounts to an unlawful automatic stay.

One aspect of section 510(c) of the Act is that an applicant is not eligible for a permit “after a finding by the regulatory authority, after opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this Act of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this Act.” 30 U.S.C. 1260(c). We implement this “permanent permit ineligibility” provision at 30 CFR

774.11(c) through (e); these provisions are separate and distinct from the provisions relating to ownership and control findings at proposed (and final) paragraphs 774.11(f) and (g).

KRC/CCC assert that the proposed provision at 774.11(e), under which we would not enter a preliminary finding of permanent permit ineligibility into AVS unless the person subject to the finding fails to request an administrative hearing within the allotted time or the finding is upheld on administrative appeal, amounts to an impermissible automatic stay. In these commenters' view, the provision is inconsistent with sections 514(d) and 525(c) of the Act, 30 U.S.C. 1264(d), 1275(c), and their state law counterparts.

We disagree with these commenters. The relevant portion of section 510(c) provides that an applicant is permanently permit ineligible only "after opportunity for hearing." (Emphasis added.) In our 2000 rule, we determined that the appropriate hearing is under 43 CFR 4.1350 through 4.1356. See 30 CFR 774.11(d) (2001). If we were to adopt KRC/CCC's comments, we would have to enter a *preliminary* finding of permanent permit ineligibility into AVS *prior* to an opportunity for hearing. Because that approach would be in contravention of the Act, we decline to adopt the comment.

These commenters' citation to a preamble discussion in our 2000 final rule is unpersuasive. In that passage, we were addressing ownership and control findings under previous paragraph 774.11(f), not preliminary findings of permanent permit ineligibility under paragraph 774.11(c). Because section 510(c) expressly requires a hearing before a finding of permanent permit ineligibility, our final provision at paragraph 774.11(e) is not inconsistent with our prior preamble discussion relating to ownership or control findings.

In sum, given the severity of a finding of permanent permit eligibility, we conclude that it is appropriate to delay entry of the finding into AVS until it becomes final, after the opportunity for a hearing. This approach is consistent with the Act's statutory mandate.

#### *T. Section 774.12—Post-Permit Issuance Information Requirements for Permittees*

We proposed to revise 30 CFR 774.12, which sets forth information reporting requirements for permittees after the issuance of a permit. More specifically, in the introductory language at paragraph 774.12(c), we proposed to remove the cross-reference to previous

30 CFR 778.11(d) because we also proposed to remove that provision. We are adopting this amendment as proposed because we are adopting the proposal to remove previous paragraph 778.11(d). As a result of our removal of previous paragraph 778.11(d), we are also redesignating paragraph 778.11(e) as new paragraph 778.11(d). Accordingly, we are revising the cross-reference at paragraph 774.12(c)(1) so that it properly refers to new section 778.11(d).

We also proposed to add new paragraph 774.12(c)(3), which would have required 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). However, based on numerous negative comments, we are not adopting the proposed surety notification language. Based on the comments, we have concluded that the proposed notification is unnecessary and that it is inappropriate for us to become involved in private contractual matters between permittees and sureties.

In addition, proposed paragraph 774.12(c)(3) would have provided that the regulatory authority with jurisdiction over the permit could require written verification of continued appropriate bond coverage following the identified additions, departures, or changes. However, due to negative comments, we are not adopting this proposed provision. We conclude that that verification is unnecessary because our regulations already provide that a surety bond is "noncancellable" during its term. 30 CFR 800.20.

We did not receive any comments in favor of requiring permittees to notify sureties or other bond providers upon the addition, departure, or change in position of any person identified in paragraph 778.11(c). Those who did comment were strongly against the proposal.

IMCC and other State commenters were against the surety notification provision. These commenters state that, while bonding entities may want to evaluate bond coverage following additions, departures, or changes in positions of certain persons, this is a private contractual matter between permittees and bonding companies. Another State commenter echoed these concerns, stating that the proposed provision is not supported by the Act and that these are private matters between the parties. This commenter

also said that, in crafting their indemnity agreements, bond providers can require updated information from the insured.

IMCC explained that the States did not want to become involved in these otherwise private business transactions by having to monitor, track, and enforce these corporate changes. They assert that under the proposed rule, the States would have been responsible for insuring that these written verifications were provided to the surety and for enforcing any failures to do so. Another State commenter said it is not a logical approach to make the States responsible to verify that these written notifications take place. Two other State commenters said assuring compliance would likely create a substantial burden on both permittees and regulatory authorities.

IMCC and other State commenters also stated that there was a question as to how a State's failure to enforce the provision could impact the future viability of existing bonds. Similarly, another State commenter expressed concern that a permittee's failure to provide the notification to a surety could be raised as a defense by the surety in the event of a bond forfeiture.

NMA and other industry commenters strongly disagreed with our proposal. NMA explained that, under the proposal, the permittee would have to provide surety notification for additions, departures, or changes in position for persons including officers and directors. For large companies, NMA explained, these changes may be frequent. As such, NMA viewed our proposal as unduly burdensome and unnecessary. Like the State commenters, NMA also noted that OSM should not interfere in the contractual arrangements between the surety and the mining company. Another industry commenter, who supported the entire proposed rule except for our proposed revisions to section 774.12, asserted that the proposed revisions would be an imposition on the private contractual relations between sureties and the operator.

NMA and other industry commenters also noted that if a surety wants this type of information, the surety should bargain for it as part of its contract with the mining company. Similarly, one industry commenter said that sureties are well positioned to negotiate these types of notifications in their surety agreements, while another said sureties are quite adept at requiring information that satisfies their needs. Another industry commenter said the proposed notification is unneeded and may cause bonding companies to increase premiums. Finally, an industry

commenter said updates to permit documents are already subject to general public disclosure under the applicable regulations.

In sum, all commenters were strongly against our surety notification proposal. We agree with most of the concerns identified above, and, therefore, decided not to adopt our proposal.

IMCC and other State commenters did suggest that we adopt the substance of the second part of our proposal by requiring permittees to provide written verification of continued appropriate bond coverage within 60 days of any relevant addition, departure, or change. A State commenter agreed, noting that some sureties are of the view that such changes in a permittee's principals materially alter a surety's liability under the bond. Thus, this commenter agreed with IMCC that States should have the authority to require a permittee to provide assurances that the bond remains valid.

However, another State commenter disagreed with IMCC and the other State commenters on this point. This commenter disagreed that a permittee should be required to provide verification of bond coverage to a regulatory authority upon such change because bond coverage is irrevocable. NMA and other industry commenters likewise said there is no need for OSM to require written verification of continued appropriate bond coverage because, under 30 CFR 800.20, once a regulatory authority has a bond, the bond cannot be released until the regulatory authority approves the release. We agree with these commenters that, under section 800.20, surety bonds are "noncancellable," and, therefore, a permittee's verification is unnecessary. As such, we are not adopting our proposal.

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

In 2005, to effectuate our settlement with NMA, 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 then-existing regulations. As explained above under heading III.D., in our 2006 proposed rule, we decided to scale back the scope of our 2005 proposal. Under our 2006 proposal, the primary change to our transfer, assignment, or sale regulations was the proposed revision to our definition of *transfer, assignment, or sale of permit rights* at 30 CFR 701.5, which we have adopted in this final rule. By contrast, we proposed relatively minor revisions to our regulations at 30 CFR 774.17, which contain our

regulatory procedures governing the transfer, assignment, or sale of permit rights.

Previous paragraph 774.17(a) provided 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. In this final rule, we want to make clear that we have no involvement in private business transactions. However, we also stress that a person's purported acquisition of the rights granted under a permit does not mean the person has acquired the right to mine. Only the regulatory authority can validate permit rights upon a transfer, assignment, or sale. 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 acquiring entity has become the new permittee (or a *successor in interest*, as that term is defined under 30 CFR 701.5) and has a right to mine.

However, we also recognize that requiring operations to cease while a permittee seeks regulatory approval for a transfer, assignment, or sale of permit rights could result in unnecessary disruptions to the nation's energy supply. Thus, we proposed 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 prospective successor in interest can demonstrate to the satisfaction of the regulatory authority that sufficient bond coverage will remain in place. We also explained that, 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 prospective successor in interest is not complying with the terms of the permit or any requirements of the Act or its implementing regulations.

Based on the above considerations, we proposed to revise previous paragraph 774.17(a) as follows: "(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." After consideration of the public comments we received on this proposal, we are adopting the amendment as proposed, with minor modifications. In response to State comments, we added the word "prospective" before "successor in interest." These changes recognize that an acquiring entity only becomes the successor in interest to the rights granted under the permit (under 30 CFR 701.5) after the regulatory authority approves the transfer, assignment, or sale.

At paragraph 774.17(d)(1), we proposed to revise the cross-references to our permit eligibility rules. We explained that while the reference to section 773.12 was still correct, the reference to section 773.15 was no longer correct, due to revisions we adopted in our 2000 final rule. Thus, we proposed to revise the paragraph so that it cross-references sections 773.12 and 773.14. We adopted this amendment as proposed.

IMCC and other State commenters said that in section 774.17(a), the word "prospective" should be inserted each time before the words "successor in interest" since the actual succession to the permit rights does not transpire until the transfer, assignment, or sale has been completed and approved by the regulatory authority. We agree with this comment and, as explained above, have modified the final rule provision accordingly.

One State commenter said that in addition to sufficient bond coverage, the prospective successor in interest should also be required to demonstrate that appropriate insurance coverage remains in place. We are not adopting this comment because it is not a requirement under SMCRA. However, States remain free to seek this information as part of their State programs.

NMA and other industry commenters supported our proposal to allow operations on the permit to continue while the permittee seeks regulatory approval of a TAS. These commenters stated that the proposed provision requiring the prospective successor in interest to demonstrate adequate bond coverage is an appropriate guarantee that the surface coal mining operation

will continue in an environmentally acceptable manner. NMA also agreed with our observation that we retain all of our enforcement powers against the prospective successor pending approval of a TAS. Because of these protections that remain in place, NMA suggested that the final rule should provide that the regulatory *shall*, rather than *may*, allow a prospective successor to continue operations under the permit pending TAS review. We decline to adopt this comment. It is important for the regulatory authority to retain discretion in these matters because the regulatory authority will be in the best position to assess the situation on the ground and to make a reasonable forecast as to whether there are likely to be significant problems in approving the transfer, assignment, or sale. For example, the regulatory authority may already possess information that indicates that the TAS application is likely to be rejected. In that circumstance, it would make little sense to require the regulatory authority to allow mining to continue.

KRC/CCC objects to our proposal to allow operations to continue on a short-term basis pending TAS approval. These commenters assert that our proposal is flatly inconsistent with section 511(b) of SMCRA, 30 U.S.C. 1261(b). These commenters “urge OSM not to waste the time and resources of all concerned by adopting this flawed proposal.” We disagree with these commenters. Put simply, section 511(b) does not preclude the limited continued mining we are allowing for in this final rule. That section merely provides that no TAS “shall be made without the written approval of the regulatory authority.” The statutory provision is silent as to whether the permittee or the prospective successor can continue mining pending TAS review. For the reasons discussed above, we conclude that final section 774.17(a) is a reasonable interpretation of the statutory provision. The protections afforded by sufficient bond coverage and the regulatory authority’s enforcement powers will ensure that the operation continues to be in compliance with the requirements of the Act during the limited time it takes for the regulatory authority to render a decision on a TAS application. Moreover, section 506(b) of the Act, 30 U.S.C. 1256(b), provides that a “successor in interest to the permittee who applies for a new permit within thirty days of succeeding to such interest and who is able to obtain the bond coverage of the original permittee may continue” mining operations until the application is

granted or denied. This provision clearly demonstrates that Congress did not intend for mining operations to cease upon a transfer, assignment, or sale of permit rights.

#### V. Section 778.8—Information Collection

At 30 CFR 778.8, our regulations contain a discussion of Paperwork Reduction Act requirements and the information collection aspects of 30 CFR part 778. We proposed to amend this section by streamlining the codified information collection discussion. We did not receive any comments on this proposal and are adopting this amendment as proposed. A more detailed discussion of the information collection burdens associated with part 778 is contained under the Procedural Determinations section (*see* heading IV.10.), below.

#### W. Section 778.11—Providing Applicant and Operator Information

Section 507(b) of the Act, 30 U.S.C. 1257(b), contains minimum information requirements that permit applicants must comply with when they submit permit applications. Historically, our ownership and control and related rules have required permit applicants to disclose information in addition to section 507(b)’s minimum requirements. Most germane to this rulemaking, since 1989, we have required permit applicants to identify all of their “owners and controllers” in their permit applications. *See, e.g.*, 30 CFR 778.13(c) (1989); 30 CFR 778.11(c)(5) (2001).

Although section 507 does require the disclosure of certain “upstream” information, it does not require applicants to disclose all of their upstream “owners” and “controllers,” as those terms are used in the context of section 510(c) of the Act. Nevertheless, courts have consistently upheld our ability to collect information in excess of section 507(b)’s minimum requirements when that information is “needed to ensure compliance with the Act.” *NMA v. DOI II*, 177 F.3d at 9 (quoting *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 523 (DC Cir.) (*en banc*), *cert. denied sub nom., Peabody Coal Co. v. Watt*, 454 U.S. 822 (1981)).

In our settlement with NMA, we agreed to propose a definition of *control* or *controller* that retained the flexible “ability to determine” standard, coupled with a proposal to remove the requirement that permit applicants list all of their controllers in a permit application. We satisfied our settlement obligation by proposing those amendments in our 2003 proposed rule.

Because we continued to find merit in the proposal, we carried it forward in our 2006 proposed rule. However, we also proposed to add 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 entities of the applicant and operator.

In our 2006 proposed rule, we explained that while it is important to retain a flexible definition of control, it is difficult to have an objective information disclosure standard based on that type of definition. Our stated objective was to create a “bright line,” objective information disclosure standard for both applicants (who must submit certain information in permit applications) and regulatory authorities (who review applications for completeness and compliance with the Act).

Our proposal to remove the requirement for applicants to identify all of their controllers in a permit application generated the strongest adverse comments. In response to these comments, we modified the proposal in a key respect. Thus, in this final rule, permit applicants will have to continue to provide much of the “upstream” information that was required under the previous version of section 778.11, but will not have to identify all of their “owners” or “controllers,” as those terms are defined at 30 CFR 701.5. This final rule achieves the “bright line” information disclosure standard we desired, but also ensures that regulatory authorities will have the information they need to enforce the Act, including the ability to make informed “control” determinations. Below, we discuss the “upstream” information provisions of this final rule in greater detail as well as our other amendments to previous section 778.11.

We proposed to remove the term “ownership and control” from the heading of this section. We did not receive any specific comments on the proposed revision and are adopting the amendment as proposed. The new heading for 30 CFR 778.11 reads: “Providing applicant and operator information.” We revised this heading 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 eliminating the requirements at former 30 CFR 778.11(c)(5) and (d) for applicants to disclose all of their owners and controllers in a permit application, including the “certified controller” under former paragraph (d). As a result

of these amendments, and the other amendments discussed below, revised 30 CFR 778.11 now more closely tracks the permit application information requirements contained in section 507(b) of the Act. While some of the persons identified under amended 30 CFR 778.11 could be owners or controllers under our regulatory definitions, the broad term “applicant and operator information” is a better description of the information an applicant is required to disclose.

Previous paragraph 778.11(a)(1) required permit applicants to identify whether they or their operators were “corporations, partnerships, sole proprietorships, or other business entities.” We proposed to add “associations” to this list of business entities to conform the provision more closely to section 507 of the Act. We did not receive any comments on this proposal and are adopting the amendment as proposed.

Previous paragraph 778.11(b)(4) required 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. In our 2006 proposed rule, we proposed to eliminate this requirement. After considering comments on our 2006 proposed rule, we are adopting this amendment as proposed. When we imposed this requirement in our 1989 permit information rule (54 FR 8982), we stated that: “Furnishing the name of the person paying the reclamation fee will assist [OSM] in collecting the money and arranging for audits when necessary.” *Id.* at 8983. In our experience since 1989, we have found that there is little correlation between obtaining this information and our ability to collect reclamation fees and arrange for audits. This is particularly true given that Subchapter R of our rules clearly sets forth requirements for submission of OSM-1 forms and payment of reclamation fees; the overlapping requirement at section 778.11 did little or nothing to enhance our enforcement of the reclamation fee provisions.

Further, the identity of the person who will ultimately be responsible for submission of the OSM-1 may not be known at the time of application. Knowing the name of the anticipated submitter at the time of application is of little utility when that person may change prior to actual submission of the form. We also note that the former provision required States to get this information even though mining operators pay the reclamation fee to OSM. We saw no reason to impose an

information collection burden on the States when they do not need the information to enforce any provisions of their programs. Finally, we note that the information is not required to be in a permit application under section 507 of the Act.

We proposed to add a new provision at paragraph 778.11(b)(4) that would have required permit applicants to identify “[e]ach business entity in the applicant’s and operator’s organizational structure, up to and including the ultimate parent entity.” We are adopting a comment (discussed more fully below) to expand the proposed paragraph (b)(4) to require more “upstream” information. Under the proposed provision, an applicant would have had to identify only 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. Under this final rule, permit applicants will have to identify the business entities in the relevant organizational structures, plus, for every such entity, every president, chief executive officer, and director (or persons in similar positions), and every person who owns, of record, 10 percent or more of the entity.

As discussed in more detail below, in our responses to the comments received on proposed section 778.11, we have concluded that while the information we are requiring under final paragraph 778.11(b)(4) is not required to be disclosed under section 507(b) of the Act, it is necessary to ensure compliance with the Act. Given that we are removing the requirement for applicants to disclose all of their controllers, we conclude that the information required to be submitted under final paragraph 778.11(b)(4) is necessary to allow regulatory authorities to make “findings” of control under amended 30 CFR 774.11(g). After the decisions in *NMA v. DOI I* and *NMA v. DOI II*, there has been a greater emphasis on enforcement actions, such as those under section 518(f) of the Act (30 U.S.C. 1268(f)), as opposed to the permit-blocking mechanism contained in section 510(c) of the Act. *See, e.g., NMA v. DOI I*, 105 F.3d at 695 (noting that “blocking permits under section 510(c) is not the only regulatory mechanism under SMCRA” and referencing sections 518(a) (civil penalties), 518(f) (individual civil penalties), and 521(a), 30 U.S.C. 1271 (cessation orders)). As the DC Circuit concluded, some of the upstream information required under section 507(b)

is relevant to other statutory provisions. For example, section 507(b)(4)’s requirement that a corporate applicant provide information pertaining to its officers and directors can be used to identify individuals subject to civil penalties under section 518(f). \* \* \* In addition, OSM or the state regulatory authority can use the information required under section 507(b) to determine who the real applicant is—*i.e.*, to pierce the corporate veil in cases of subterfuge in order to ensure that it has the true applicant before it.

*NMA v. DOI I*, 105 F.3d at 695. We agree with the DC Circuit’s analysis and similarly conclude that the upstream information we are requiring under final 30 CFR 778.11(b)(4), though in addition to the information required under section 507(b) of the Act, is necessary to ensure that regulatory authorities can make informed “control” determinations and implement the enforcement provisions of the Act.

While we are eliminating the requirement for applicants to disclose all of their “controllers” (*see* discussion below under this heading), the information we are requiring under final paragraph 778.11(b)(4) will significantly overlap with our previous upstream ownership and control information requirements at 778.11(c)(5). However, final paragraph 778.11(b)(4) has the critical advantage of being based on “bright line,” objective criteria. That is, all the persons required to be disclosed under the provision are readily identifiable, without subjectivity, ambiguity, confusion, or uncertainty. As such, we achieved one of the major goals of this rulemaking: creating concrete, objective information requirements while ensuring that regulatory authorities have all the information they need to ensure compliance with the Act.

We proposed several revisions to previous paragraph 778.11(c). Under this paragraph, a permit applicant must provide certain information for the persons listed in the provision. We proposed to add “partner” and “member” to this list of persons and to reorder the list. We proposed 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 proposed to include the term “member” to ensure that we obtain the necessary information for members of a limited liability company. We did not receive any adverse comments on our proposal to add “partner” and “member” to the list at section 778.11(c) and are adopting the amendments as proposed. One State

commenter said this section has been improved by adding “partner” and “member.”

We also proposed to redesignate former 30 CFR 778.11(c)(4) as 30 CFR 778.11(c)(6) and to revise the regulatory language. The previous provision required permit applicants to provide certain information for every “Person who owns 10 to 50 percent of the applicant or the operator.” We proposed to revise the provision to read: “Person who owns, of record, 10 percent or more of the applicant or operator.” After due consideration to the comments received on this proposal, we are adopting the amendments as proposed. The previous provision did not cover persons who owned greater than 50 percent because those persons would have been covered under previous paragraph 778.11(c)(5). In this final rule, because we are removing previous paragraph 778.11(c)(5)—*i.e.*, the requirement to identify all owners and controllers—we are modifying the disclosure of ownership information to include all owners of 10 percent or more of the applicant and operator. This provision is designed to track section 507(b)(4) of the Act, which requires applicants to disclose “any person owning, of record 10 per centum or more of any class of voting stock of the applicant.” We decided not to include section 507(b)(4)’s reference to “voting stock”; instead, final paragraph 778.11(c)(6) will include all instruments of ownership, not just voting stock. We conclude that this information, like the information required to be disclosed under final paragraph 778.11(b)(4), is necessary to ensure compliance with the Act.

As explained above, we also proposed to remove previous section 778.11(c)(5), which required applicants to identify all of their owners or controllers in a permit application. At this risk of repetition, our desire was to create a “bright line” reporting standard that permit applicants and regulatory authorities could easily understand. We received strong, adverse comments on this proposal (which we respond to below). Although we are finalizing this amendment as proposed, we have expanded final paragraph 778.11(b)(4), which will, as a practical matter, require applicants to identify many of the same persons they would have identified under previous section 778.11(c)(5). We note that section 507(b) of the Act does not require applicants to identify their “owners” or “controllers,” as those terms are used in the context of section 510(c), though it does require the disclosure of some upstream information. In final paragraph

778.11(b)(4), we have expanded on section 507(b)’s upstream information disclosure requirements to ensure that regulatory authorities have all the information they need to enforce section 510(c) and other provisions of the Act.

In addition to proposing to remove the requirement to list all controllers under previous section 778.11(c)(5), we proposed to remove previous paragraph 778.11(d). That section provided 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 previous paragraph 778.11(d) on procedural and substantive grounds, claiming, among other things, that it is vague and raises self-incrimination concerns. In our settlement with NMA, we were not required to propose elimination of this requirement; instead, in our 2003 proposed rule, we proposed to retain the “certified controller” concept, albeit with proposed amendments to the regulatory text. However, in our 2006 proposed rule, based on further internal deliberations and input from our State co-regulators, we proposed to remove this provision from our regulations. After reviewing comments on our 2006 proposed rule, we are adopting our proposal to remove this requirement. We conclude that the concept is 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. Further, the information is of questionable value to regulatory authorities because a regulatory authority cannot necessarily take an enforcement action against a person just because the person has certified that he or she is a controller. Moreover, despite the fact that applicants will not have to identify a certified controller, the person who would have been identified under this provision will almost certainly be identified under one of the other information disclosure provisions at paragraphs 778.11(b)(4) and 778.11(c). Finally, the identity of the person, at the time of application, who is expected to have the greatest level of effective control could be a matter of some dispute between the applicant and the regulatory authority. As such, retention of this provision would be at odds with our desire to create objective permit disclosure requirements.

Finally, we are adopting proposed paragraph 774.11(h) as new paragraph 778.11(e). We proposed to add a new paragraph 774.11(h) to specify that we do not need to make a finding of

ownership or control under amended section 774.11 before entering into AVS the information that permit applicants are required to disclose under paragraphs 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).

Proposed paragraph (h) made 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. We did not receive any comments on our proposal and, with non-substantive changes, we are adopting the amendment as proposed. We decided to move this provision to new paragraph 778.11(e) because we determined that it makes more sense in the section pertaining to permit information.

#### Responses to Comments

##### “Upstream” Permit Application Information

As mentioned above, the “upstream” information disclosure aspects of our 2006 proposed rule generated the strongest adverse comments. IMCC and other State commenters identified our proposed amendments to section 778.11 as their “primary concern” with our proposed rule. These commenters said that our proposed elimination of the requirement for applicants to identify their owners and controllers would leave the States in an “untenable position” in attempting to make control determinations and asserted that we “painted with too broad of a brush” in attempting to reconcile objections that our prior definition of control or controller was vague, arbitrary, and capricious. IMCC asserted that, without the information, States would have to undertake time-consuming and costly investigations, without adequate resources to do so. Other State commenter asserted that it is inappropriate and unnecessary to shift the workload to the States to identify controllers. While IMCC and other State commenters appreciate our retention of

a flexible definition of control, these commenters state that without the necessary permit application information, the discretion and flexibility that a State regulatory authority enjoys is meaningless. Finally, these commenters asserted that the lack of adequate permit application information would inhibit the States' ability to enforce various sections of the Act, including sections 510(c) and 518(f). Given that State regulatory authorities are the front-line regulators under SMCRA in most coal-producing states, we attached great weight to their comments.

IMCC and other State commenters offered concrete alternatives to alleviate the perceived shortcomings in our proposal. First, borrowing from our amended definition of *control* or *controller*, these commenters suggested that we modify our proposal by requiring applicants to disclose "any person who has the ability to determine the manner in which a surface coal mining operation is conducted." We did not adopt this comment because it would have introduced the very uncertainty that we are attempting to avoid with respect to our permit application information disclosures. In this regard, another State commenter said that we overstate an applicant's uncertainty as to who its controllers are. While we agree with this commenter that our amended control definition is clearer than our previous definition, we still conclude that it is better to base our information disclosure requirements on purely objective criteria, rather than on our flexible control definition.

However, we are adopting IMCC's second suggestion. IMCC and other State commenters opined that

if the applicant is not required to identify its controllers or the officers, directors and owners of its parent entities, the regulatory authority must find some other means to discover the identity of those persons and entities in order to determine who may be subject to individual liability and if there is subterfuge as to who is the real applicant.

To remedy this identified information deficit, these commenters suggested that we modify our proposal by requiring permit applicants to identify not only the business entities in their organizational structures but also, for each business entity, the identity of the president, chief executive officer (CEO), directors, and greater-than-10 percent shareholders. These commenters explained that presidents and CEOs are unique due to the responsibility imposed upon them under corporate law for the day-to-day operation of the entity. Likewise, directors typically elect and can remove the president and

CEO, and shareholders elect the directors. By contrast, these commenters explained that, in the States' experience, it is rare that a junior officer several levels up the corporate chain is a controller. By obtaining the identified information, IMCC said that the States can effectively enforce the Act. We agree and, as discussed above, have adopted this comment in final paragraph 778.11(b)(4). IMCC's approach is an excellent compromise that allows us to create objective permit application information standards *and* obtain the information necessary for us and State regulatory authorities to enforce SMCRA.

Like the State commenters, KRC/CCC expressed dissatisfaction with our proposal to remove the requirement for applicants to identify all of their owners and controllers. These commenters stated that we could not lawfully promulgate the proposed revision based on our "unexplained and unsubstantiated desire to establish 'bright line,' 'objective' permit information requirements." In support of their position, these commenters cite various excerpts from preambles to our prior rules where we explained that the "upstream" information provisions of previous section 778.11 were necessary to enforce section 510(c) and other provisions of the Act. They also state that "it is inconceivable that allowing permit applicants to keep secret the identity of many, if not most, controllers would advance any of SMCRA's purposes." Further, these commenters state that permit applicants should not have any difficulty identifying their controllers in their permit applications. Finally, these commenters stated that we did not establish a lawful basis for our proposed revision to section 773.9. (Although the commenter referred to section 773.10, in context, it appears that the comment was actually directed at section 773.9.)

We understand and appreciate these comments. Upon consideration of these comments, and those submitted on behalf of the State regulatory authorities, we modified our proposed rule. As previously explained, under paragraph 778.11(b)(4) of this final rule, permit applicants will have to disclose each business entity in their organizational structure, up to and including their ultimate parent entity. Further, for every such business entity, applicants will be required to identify each president, CEO, and director (or persons in similar positions) and every person who owns 10 percent or more of the entity. While this upstream information is in addition to section 507's requirements, we agree with these

commenters and the State commenters that this information is necessary to enforce the Act. We do reiterate, however, that under this final rule, permit applicants will not have to identify their owners or controllers as those terms are defined at final section 701.5. However, as explained above, under final paragraph 778.11(b)(4), permit applicants will be required to identify many of the same persons they would have identified under previous section 778.11(c)(5).

We disagree with these commenters to the extent they suggest that our desire to create "bright line," "objective" permit information requirements does not justify our decision to remove the requirement for applicants to identify their owners and controllers. We believe it is a laudable goal, in and of itself, for any regulatory agency to make its rules as clear, concise, and objective as possible, which we feel we have accomplished in this final rule. Moreover, as we explained above, under heading III.B., we concluded there was a tension between our flexible control definition and the related, previous requirement for applicants to identify their controllers in permit applications. We have eliminated that tension by making the permit information disclosure requirements purely objective, while still ensuring that regulatory authorities have the information they need to enforce the Act. Further, shortly after we promulgated our 2000 rule, NMA sued us over the requirement for permit applicants to disclose all of their controllers, given the alleged vagueness of our previous definition. We perceived at least some risk of loss and, therefore, opted to settle NMA's challenge.

As mentioned, these commenters also said that permit applicants should not have any problem identifying their controllers and that allowing permit applicants to "keep secret" the identity of their controllers does not advance the purposes of SMCRA. As we stated in response to a similar State comment, our amended control definition is clearer than our previous definition; however, reasonable minds could still differ as to who meets the regulatory definition of *control* or *controller*. As such, we conclude that it is better to base our information disclosure requirements on purely objective criteria, rather than on our flexible control definition. This final rule is fully authorized by, and advances the purposes of, SMCRA. The rule comports with sections 507 and 510 of the Act, and provides regulatory authorities with the additional information they need to enforce the Act. The information

required under final paragraph 778.11(b)(4) will give regulatory authorities a complete picture of the applicant, allowing regulatory authorities to make informed permitting decisions and to take enforcement actions when necessary.

Finally, we respond to these commenters' statement that we did not establish a lawful basis for our proposed revision to section 773.9. That section, as amended in this final rule, requires regulatory authorities to rely on applicant and operator information, including the information applicants submit under section 778.11, to review the applicant's and operator's organizational structures and ownership or control relationships before making a permit eligibility determination under section 773.12. Given our adoption of final paragraph 778.11(b)(4), final section 773.9 is substantively identical to the previous provision, requiring the regulatory authority to engage in the same type of review, based on similar information, prior to making a permit eligibility determination. By not changing the substance of the provision, we have eliminated these commenters' concern that we did not provide a lawful basis for the proposed change.

NMA and other industry commenters strongly supported our proposed removal of the requirement for permit applicants to identify all of their owners and controllers in their permit applications, primarily because our proposal more closely resembled the information disclosure requirements of section 507 of the Act.

However, these commenters strongly opposed proposed paragraph 778.11(b)(4), which would have required permit applicants 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. Quoting the DC Circuit's decision in *NMA v. DOI I*, these commenters argued that our proposal was impermissible because it amounted to an "attempt[] to use section 510(c) to regulate those not covered by that section." *NMA v. DOI I*, 105 F.3d at 694. Similarly, contrary to the comments submitted by IMCC and other State regulatory authorities, one State commenter said proposed paragraph 778.11(b)(4) does not appear to be grounded in the Act and, from the regulatory viewpoint, appears to serve no purpose.

We strongly disagree with these commenters. In *NMA v. DOI I*, the DC Circuit concluded that when making permit eligibility determinations under section 510(c), we can only consider

violations at operations the applicant owns or controls; the court struck down our ability to deny permits based on "upstream" violations—*i.e.*, violations at operations owned or controlled by the applicant's owners or controllers. In our proposed rule, we did not suggest that OSM could use proposed paragraph 778.11(b)(4)'s "upstream" information to deny permits and, therefore, we were not attempting to use section 510(c) to regulate persons not covered by that section. Further, as explained above, in *NMA v. DOI I*, the DC Circuit actually noted that section 507 of the Act itself requires disclosure of some upstream information that is relevant to statutory provisions other than section 510(c). *NMA v. DOI I*, 105 F.3d at 695. For example, the court noted that the upstream information can be used "to identify individuals subject to civil penalties under section 518(f)" or "to determine who the real applicant is." *Id.* More importantly, in *NMA v. DOI II*, the DC Circuit expressly approved our previous information disclosure requirements that required permit applicants to identify all of their "upstream" owners or controllers. *NMA v. DOI II*, 177 F.3d at 9.

As explained above, we expanded proposed 778.11(b)(4) to require even more "upstream" information. Thus, under this final rule, permit applicants will have to disclose much of the same "upstream" information that they had to disclose under our prior rules. Based on our review of the comments submitted on our proposed rule, and a review of our own prior statements on the issue, we conclude that the information we are requiring in this final rule is necessary for us and the State regulatory authorities to enforce the Act. More specifically, by giving us a complete picture of the applicant and its organizational structure, the information will enhance our ability to take enforcement actions when necessary, identify "real applicants," and verify the applicant's statement under section 507(b)(5) of the Act as to "whether the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant" has ever forfeited a mining bond or had a mining permit suspended or revoked within the 5-year period preceding the date of application. Because we have amply demonstrated the "practical utility" of the information required to be disclosed under this final rule, we also disagree with these commenters that our information requirements violate the Paperwork Reduction Act.

Certified Controller

Previous 30 CFR 778.11(d) required the natural person with the greatest level of effective control over the entire proposed surface coal mining operation to submit a certification of that status. IMCC and the States, in their comments on our 2003 proposed rule and again during our outreach meeting described above, suggested that previous paragraph 778.11(d) was problematic and that it should be eliminated. In our 2006 proposed rule, we proposed to remove the requirement. IMCC and the other State commenters did not comment on this aspect of our 2006 proposed rule and, therefore, presumably still support removal of the provision.

NMA and other industry commenters strongly supported our proposed removal of the "certified controller" provision. These commenters contended that the provision was vague and raised concerns about self-incrimination under the Fifth Amendment to the United States Constitution. They also noted that permit applicants may not know the identity of the person at the time of application, and the person may change over time. Finally, they stated it is unfair to require identification of the person in advance of any violations at the surface coal mining operation. While we have adopted our proposal to remove this provision, we do not agree with all of these commenters' observations. For example, we do not agree that the provision implicated the Fifth Amendment's protection against self-incrimination, nor do we agree that our prior rule was unfair to the extent it required identification of the certified controller prior to the occurrence of any violations. Rather, for the reasons discussed above, we decided to remove the provision because we agree with the States that it was relatively meaningless and lacked practical utility. We do agree with these commenters that the identity of this person may not be known at the time of application and may change over time.

KRC/CCC opposed our proposed removal of the provision, arguing that any entity competent to conduct surface coal mining operations should be able to identify the natural person with the greatest level of effective control over the proposed operation. They state that, despite NMA's litigating position, the provision was not vague and did not raise Fifth Amendment concerns. Finally, they said that the fact that the identity of the person may change over time did not justify eliminating the provision. As stated above, we agree that the provision did not implicate the

Fifth Amendment. However, we do feel that the provision lacked the pure objectivity we sought to achieve. For example, what if the regulatory authority disagreed with the applicant's designation? Could, or should, the regulatory authority substitute its judgment for that of the applicant? And, if so, to what end? As explained above, regulatory authorities could not necessarily have taken an enforcement action against a person just because the person had certified that he or she was a controller under our regulatory definition. In sum, this information is not required by the Act, and we conclude that it is not necessary to ensure compliance with the Act. Further, under final paragraphs 778.11(b) and (c), applicants will still have to disclose the identity of the persons most likely to control their surface coal mining operations (*e.g.*, officers, directors, etc.). Thus, if a violation does occur at the operation, regulatory authorities will know whom to talk to first.

#### Identity of Person Responsible for Submitting Form OSM-1

NMA and other industry commenters supported our proposal to remove previous 30 CFR 778.11(b)(4), which required permit applicants to identify the person(s) responsible for submitting the Coal Reclamation Fee Report (Form OSM-1) and for remitting payment to OSM. These commenters said the provision is unnecessary and duplicative. For the reasons explained above, we agree with these commenters and have adopted our proposal to remove the provision.

KRC/CCC opposed removal of the provision. They stated that when we first adopted this provision we "necessarily concluded" that "identification of persons responsible for filing Form OSM-1 provides important information regarding ownership or control of the permit applicant." We disagree. As explained above, when we imposed this requirement in our 1989 permit information rule (54 FR 8982), we stated that: "Furnishing the name of the person paying the reclamation fee will assist [OSM] in collecting the money and arranging for audits when necessary." *Id.* at 8983. We did not conclude that the information is important for ownership or control purposes. In our experience since 1989, we have found that there is little correlation between obtaining this information and our ability to collect reclamation fees and arrange for audits, particularly because we have similar provisions in our other regulations.

These commenters also make the unsupported statement that requiring this information "helps ensure the level of pre-planning that Congress sought to require the coal industry to undertake." We cannot speak for Congress on this point, but we note that Congress did not provide for disclosure of this information under section 507(b) of the Act. Finally, these commenters said the fact that States will most often obtain this information, even though States do not use the information for any purpose, does not justify eliminating the provision. As explained above, we see no reason to impose an information collection burden on the States, particularly when we have concluded that the information is duplicative and unnecessary. In sum, this information is not required to be disclosed under section 507 of the Act, and we conclude that removal of previous paragraph 778.11(b)(4) will not impair our ability to enforce the Act.

#### X. Section 843.21—Procedures for Improvidently Issued State Permits

We are adopting our 2006 proposal to remove 30 CFR 843.21 in its entirety. Section 843.21 contained Federal procedures relative to State-issued permits that may have been improvidently issued based on certain ownership or control relationships. The section provided for direct Federal inspection and enforcement, including our authority to issue notices of violation and cessation orders, if, after an initial notice, a State failed to take appropriate action or show good cause for not taking action with respect to an improvidently issued State permit. Its removal provides 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. 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").

We first adopted regulations concerning improvidently issued permits on April 28, 1989 (54 FR 18438). In our 2003 proposed rule, we proposed to amend, but otherwise retain, section 843.21. More specifically, we proposed to eliminate the various provisions of section 843.21 that required posting of notices and findings on the Internet. In addition, based on our settlement with NMA, we proposed to clarify the basis for a notice under 30 CFR 843.21(a). After we issued our 2003 proposed rule, we reviewed our historic use of this section and, in our 2006

proposed rule, decided to propose its removal.

We are removing section 843.21 for two reasons. First, based on our experience implementing this section, we conclude that it is no longer needed. Since we issued the rule in 1989, we are not aware of a single instance of OSM's having to take an enforcement action under section 843.21 against a permittee holding a State-issued permit. The fact that OSM, to our knowledge, did not have to take any enforcement actions under this provision indicates to us that State regulatory authorities are making proper permit eligibility determinations in the first instance or, in the rare case of improvident permit issuance, properly applying State counterparts to our improvidently issued permit regulations. (Under our improvidently issued permit regulations—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.) Consequently, we conclude that there is not a need for the provision of previous section 843.21 authorizing us to take a direct enforcement action against a State permittee regarding a State permit that may have been improvidently issued.

The second reason we are removing section 843.21 is that a decision within the Department of the Interior caused us to reexamine 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's 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 public 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 had 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 U.S. Court of Appeals for the District of Columbia Circuit's landmark *en banc* decision in *In re Permanent Surface Mining Regulation Litig.*, 653 F. 2d 514, 523 (DC Cir.) (*en banc*), *cert. denied sub nom., Peabody Coal Co. v. Watt*, 454 U.S. 822 (1981) (*PSMRL*). In that case, the *en banc* court held that SMCRA grants OSM the rulemaking authority to require States to secure permit application information beyond the Act's specific information requirements. *Id.* at 527. The court laid the groundwork for its holding with a discussion of the relative roles of the Secretary of the Interior and the States in administering the Act. More specifically, the court explained:

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). In a footnote accompanying this passage, the DC Circuit went on to explain that "[t]he independence of a state administering an approved state program under the Surface Mining Act may be contrasted with the continuing role of the Environmental Protection Agency after a state has assumed responsibility for pollution discharge permits under the Federal Water Pollution Control Act, 33 U.S.C. 1251–1376 (1976 & Supp. II 1978). The EPA Administrator retains veto power over individual permit decisions under that statute." *Id.*

The ASLMM's decision, and the materials cited therein, 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 section 843.21 authorized direct Federal enforcement against State permittees based on State permitting decisions, it was inconsistent with the ASLMM's decision and *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. There is no mention in these statutory provisions of the need for an inspection—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. Our regulations governing administrative and judicial review of permitting decisions (30 CFR part 775) are likewise silent as to the need for an inspection in the context of permitting appeals. Moreover, nothing in our Federal inspection regulations at 30 CFR parts 842 and 843 suggests that those procedures can be used as an alternative to our permitting appeal provisions.

The Act's provisions for Federal inspections expressly provide that such inspections are of mining "operations." *See SMCRA* § 517(a), 30 U.S.C. 1267(a) (referring to inspections of surface coal mining and reclamation operations) and *SMCRA* § 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* §§ 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 summary, the statutory and regulatory provisions related to inspections and enforcement are separate and distinct, both practically and legally, from permitting actions. The Act and our regulations provide specific administrative and judicial procedures for persons adversely affected and seeking relief from permitting decisions; our Federal inspection regulations do not serve as an alternative to those procedures. Distinct from the review of permitting decisions, 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. In short, Congress did not intend for OSM to second guess a State's permitting decisions. Instead, the Secretary of the Interior's ultimate power over a State's lax implementation of its permitting provisions 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.*

In the preamble to our December 19, 2000, final rule—in which we, among other things, repromulgated previous section 843.21—we stated that, in *NMA v. DOI II*, the U.S. Court of Appeals for the D.C. Circuit upheld our ability to take remedial action relative to improvidently issued State permits. 65 FR 79653. After further internal 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 and regulatory framework discussed above, does not support retention of section 843.21.

In *NMA v. DOI II*, the D.C. 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 D.C. 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 actions based on 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 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.

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, we concluded that another 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 containing the only procedures under which we can take enforcement actions 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 conclude 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, as outlined in the ASLMM's decision, SMCRA's statutory scheme suggests that there is no Federal role in State permitting decisions. 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 exclusively in 30 CFR 843.11 and 843.12. When we repromulgated section 843.21, we unintentionally created overlapping provisions implementing section 521(a). Removing section 843.21 eliminates any confusion or uncertainty created by these unintentionally overlapping provisions.

We did not receive any adverse comments on our proposal, but we did receive comments strongly in favor. As such, we are adopting our proposal to remove section 843.21.

IMCC and other State commenters strongly supported our proposal to remove section 843.21. These commenters stated: "We wholeheartedly endorse and agree with all of the reasons and legal justifications set forth in OSM's well crafted preamble language accompanying the decision to remove Section 843.21." We appreciate this comment. In support of their position, these commenters also cited various passages of the Act, *PSMRL*, and

the ASLMM decision described above. Another State commenter supported our proposal, noting that "[r]emoval of this section reflects a more appropriate conception of the relationship between OSM and primacy states." We agree with these commenters' observations and took them into consideration when deciding to adopt our proposal to remove section 843.21.

NMA and other industry commenters also strongly supported our proposal, noting that "OSM has set forth persuasive reasons for deleting this provision." NMA stated that removal of this provision would: (1) Conform the rules to the purpose and structure of that statute, which places exclusive regulatory and permitting jurisdiction with primacy States; (2) prevent third parties from circumventing the specific procedures for appealing State permits under the approved State permitting and administrative review provisions; and (3) recognize that inspections of mining operations were not intended, and are ill-suited, for questioning the efficacy of State permitting decisions. For the reasons set forth above, we agree with these observations.

NMA endorsed our reading of *NMA v. DOI II*, to the extent we suggested that the DC Circuit did not expressly hold that our previously-invalidated improvidently issued State permits regulations could, if amended, fall within the contours of section 521(a)(3). NMA also asserts that nothing in that decision suggests that section 843.21 was compelled by the Act. We agree with these comments. NMA also stated that "OSM has clearly articulated a reasoned basis in this proposal for changing its interpretation and policy under SMCRA." Again, we agree.

In the balance of its comments on this issue, NMA cites many of the cases that are cited in the ASLMM's decision and in our discussion above. NMA also agreed with our observation that there is a mismatch between the subject matter of previous section 843.21 and the inspections contemplated under section 521(a) of the Act. On the other hand, NMA notes that section 521(b), 30 U.S.C. 1271(b), appears to be the one provision where Congress contemplated OSM's stepping in and becoming the regulatory authority for permitting decisions. For the reasons set forth above, we agree with these comments.

Finally, NMA noted that we "identified compelling factual reasons" for removing previous section 843.21, including the fact that we have never taken an enforcement action against a State permittee under previous section 843.21. NMA asserts that "the rule has never served as an integral or necessary

part of assuring that States faithfully execute their responsibilities under their approved State programs." Moreover, according to NMA, the previous rule was a substantial intrusion on State primacy and undermined the federalism established in SMCRA. Again, for the reasons discussed above, we agree with these comments.

#### *Y. Section 847.11 and 847.16—Criminal Penalties and Civil Actions for Relief*

In our 2000 rule, we adopted certain new "alternative enforcement" provisions to implement sections 518(e), 518(g), and 521(c) of the Act. 30 U.S.C. 1268(e), 1268(g), 1271(c). During the course of litigation over our 2000 final rule, NMA claimed that certain of these provisions unlawfully abrogated State prosecutorial discretion by making it mandatory for States to seek criminal penalties or institute civil actions for relief when certain specified conditions occurred. See 30 CFR 847.11 (2001) (criminal penalties), 847.16 (2001) (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 have the discretion to evaluate the severity of a violation and ultimately to determine whether referral for alternative enforcement is warranted. Therefore, we agreed to settle NMA's claim. In 2003, to satisfy our obligation under the settlement, we proposed to revise our regulations at 30 CFR 847.11 and 847.16 to remove the mandatory nature of referrals for alternative enforcement. Because we continued to find merit in the proposal, we carried it forward in our 2006 proposed rule.

In this final rule, we are adopting the amendments as proposed. Specifically, we changed the word "will" to "may" in the operative provisions—*i.e.*, section 847.11 (introductory language) and paragraph 847.16(a)—to underscore that a regulatory authority "may," but is not bound to, refer a particular matter for alternative enforcement.

We first promulgated these provisions in our 2000 final rule. See generally 65 FR 79655–58. Although we stated in the preamble to that rule that the newly-adopted provisions "largely track the statutory provisions they implement," we did not explain why we chose to make these alternative enforcement actions mandatory when the Act does not compel that result.

Section 847.11 of our rules implements sections 518(e) and (g) of the Act. Under section 518(e), any person who willfully and knowingly commits certain actions, "shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than one year or both." Similarly, under section 518(g), whoever knowingly undertakes certain actions, or knowingly fails to undertake certain required actions, "shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than one year or both." By their terms, these sections do not make enforcement mandatory. As we explained in the preamble to our 2000 rule, the use of the word "shall" in sections 518(e) and (g) of SMCRA does not require the commencement of criminal proceedings, it only specifies the punishment that applies upon conviction. See 65 FR 79657. Thus, while these sections specify punishments, they do not specify when the regulatory authority is required to seek a conviction. As such, we assume that Congress intended for the government to retain prosecutorial discretion, as is customary in criminal law. Because we did not explain the basis for making these actions mandatory in our 2000 rule, and because we now determine that it is best for regulatory authorities to retain prosecutorial discretion, we are adopting the amendments to section 847.11 as proposed.

Section 847.16 of our rules implements section 521(c) of the Act. Under certain specified circumstances, section 521(c) of the Act provides that the "Secretary may request the Attorney General to institute a civil action for relief \* \* \*." (Emphasis added.) By its terms, this section—through use of the word "may"—vests the Secretary with complete discretion to refer matters to the Attorney General. In our 2000 rule, we made these referrals mandatory but did not explain our rationale for deviating from the statutory text. We now conclude that it is better to afford regulatory authorities the discretion contemplated by the Act. Requiring regulatory authorities to refer even the most minor violations to the Attorney General is inefficient, time consuming, and potentially costly. As such, we are adopting our proposed amendment to paragraph 847.16(a).

IMCC and other State commenters supported our proposal. They stated that they agree "it is important that the states retain the discretion to evaluate the severity of a violation and ultimately determine whether referral for alternative enforcement is warranted."

Another State commenter said these sections have been improved by adding discretion for regulatory authorities. For the reasons set forth above, we agree with these comments.

NMA and other industry commenters also supported our proposal. These commenters stated that the previous rules abrogated State prosecutorial discretion by making it mandatory for States to seek criminal penalties or institute civil actions, regardless of merit. They asserted that our proposal "will provide much rationality to the process, and will ensure that limited resources are allocated to the most important cases." NMA also said that our proposal was supported by case law and the Administrative Procedure Act. We agree with these comments.

KRC/CCC opposed our proposal, claiming that the "sole reason that OSM gives for proposing the change is that it has come to sympathize with NMA's allegation that the current rule[s] unlawfully abrogate State prosecutorial discretion." To the contrary: We agree with NMA's assertion because it is grounded in the Act. In the discussion above, we have adequately explained the statutory authority for, and basis and purpose of, our amendments to our alternative enforcement provisions. In sum, the Act does not make alternative enforcement actions mandatory, and we conclude that it is better for regulatory authorities to retain the customary discretion in this area.

These commenters also assert that, in prior preamble statements supporting our 2000 final rule, we made clear that our previous rules did not abrogate prosecutorial discretion. For example, we said that "[f]inal § 847.11 requires that the regulatory authority refer all cases meeting the criteria of section 518(e) and (g) to the Attorney General, who has the discretion to determine whether to act upon the referral." In this passage, we merely acknowledged that even if a regulatory authority makes a referral, the Attorney General will have prosecutorial discretion. In this final rule, we conclude that the SMCRA regulatory authorities, who have developed considerable expertise in the administration of the Act, should have the discretion to determine the severity of a violation in the first instance. Upon referral, the Attorney General will still have the usual prosecutorial discretion.

In another passage, we said that "[t]he circumstances that precipitate a civil action for relief are very specific in the Act. If a regulatory authority encounters one of these circumstances, final § 847.16(a) requires that the regulatory authority refer the case to the Attorney General." Again, while we certainly

made referrals under section 847.16(a) mandatory, we did not explain why we deviated from the statutory term "may" contained in section 521(c) of the Act. For the reasons discussed above, we have reconsidered the wisdom of our prior policy choice and decided to return to the language of the Act.

#### IV. Procedural Determinations

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

This final rule is not considered a significant regulatory action under the criteria of Executive Order 12866.

a. The final rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. The revisions to the regulations do not have an adverse economic impact on the coal industry or State regulatory authorities.

The revisions result in a minor reduction in expenses for the coal industry and State regulatory authorities because programmatic changes to the regulations reduce the reporting burden for certain types of applicants and transactions. Expenses are slightly reduced because revisions to the definition of transfer, assignment, or sale of permit rights at 30 CFR 701.5, result in fewer transactions or events qualifying as transfers, assignments, or sales requiring an application and regulatory approval under 30 CFR 774.17. In addition, permit applicants no longer identify all of their controllers in a permit application under 30 CFR 778.11(c), and State regulatory authorities no longer 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 \$64,000 per year and a savings to the State and Federal regulatory authorities of approximately \$40,000 per year. None of the changes in the rule significantly alter the fundamental conceptual framework of our regulatory program.

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

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

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

## 2. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). As previously stated, the revisions to the 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 rulemaking produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

## 3. Small Business Regulatory Enforcement Fairness Act

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

- 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

For the reasons previously stated, this rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement 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 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 Department of the Interior's 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 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 rule on Federally-recognized Indian tribes. We have determined that the 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 rule is not considered a significant energy action under Executive Order 13211. For the reasons previously stated, the 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 collections of information contained in this final rule have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned control numbers 1029–0116 and 1029–0117.

## 11. National Environmental Policy Act

We have found that this final rule is categorically excluded from environmental review under section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C). This determination was made in accordance with the Department of the Interior's Departmental Manual, 516 DM 2.3(A)(2), Appendix 1.10. In addition, we have determined that none of the "extraordinary circumstances" exceptions to the categorical exclusion apply. 516 DM 2, Appendix 2.

## 12. Effect of the Rule on State Programs

Following publication of this final rule, we will evaluate the State programs approved under section 503 of SMCRA, 30 U.S.C. 1253, 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 rule, we have made a preliminary determination that State program revisions will be required.

## 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: November 7, 2007.

## C. Stephen Allred,

Assistant Secretary, Land and Minerals Management.

■ For the reasons given in the preamble, OSM is amending 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—

(a) A permittee of a surface coal mining operation;

(b) An operator of a surface coal mining operation; or

(c) Any 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 1029–0115. 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.

■ 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 § 773.25 revise paragraphs (a) and (b) to read as follows:

\* \* \* \* \*

(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

■ 15. 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.

■ 16. 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(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.

■ 17. 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**

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

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

■ 19. 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 1029–0116. 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.

- 20. Amend § 774.11 as follows:
  - a. Revise the table in paragraph (a).
  - b. Revise paragraphs (e), (f), and (g).
  - c. Add new paragraph (h).
- 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 surface coal mining operation or any relevant portion or aspect thereof. If we identify such a person, we must issue a written preliminary finding to the person and the applicant or permittee describing the nature and extent of ownership or control. Our written preliminary finding must be based on evidence sufficient to establish a prima facie case of ownership or control.

(g) After we issue a written preliminary finding under paragraph (f) of this section, we will allow you, the person subject to the preliminary 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 will issue a written finding and enter our finding into AVS.

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

■ 21. 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; and
- (2) The date of any departure.

■ 22. 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 prospective 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 prospective 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**

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

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

■ 24. 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 1029-0117. 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.

- 25. 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.
  - f. Add a new paragraph (e).
- The revisions and addition 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 of the applicant and operator; for every such business entity, you must also provide the required information for every president, chief executive officer, and director (or persons in similar positions), and every person who owns, of record, 10 percent or more of the 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—

\* \* \* \* \*

(e) We need not make a finding as provided for under § 774.11(g) of this subchapter before entering into AVS the information required to be disclosed under this section; however, the mere listing in AVS of a person identified in paragraph (b) or (c) of this section does not create a presumption or constitute a determination that such person owns or controls a surface coal mining operation.

**PART 843—FEDERAL ENFORCEMENT**

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

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

§ 843.21 [Removed]

■ 27. Remove § 843.21.

**PART 847—ALTERNATIVE ENFORCEMENT**

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

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

■ 29. 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—

\* \* \* \* \*

■ 30. 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—

\* \* \* \* \*