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General, Incoming

OK

cc: Steve Schneider
Dave Hadlock

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
P. O. Box 46667
Denver, Colorado 80201-6667

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DIV. OF OIL, GAS & MINING

John R. Baza
Division of Oil, Gas and Mining
1594 West North Temple
P.O. Box 145801
Salt Lake City, Utah, 84114-5801

Dear Mr. Baza:

On October 28, 1994, December 19, 2000 and December 3, 2007, the Office of Surface Mining Reclamation and Enforcement (OSM) promulgated final rules that adopted or revised certain regulatory definitions and provisions pertaining to review of applications; permit eligibility; application information; applicant, operator, and permittee information; automated information entry and maintenance; permit suspension and rescission; ownership and control findings and challenge procedures; transfer, assignment, or sale of permit rights; and alternative enforcement. The effects of these final rules are found at 30 CFR Parts 701, 773, 774, 778, 840, 843 and 847.

Under 30 CFR 732.17(d), OSM must notify States of all changes in the Act and the Federal regulations that may require a State to modify its regulatory program to remain consistent with all Federal requirements. Pursuant to 30 CFR 732.17(c), OSM also must notify States whenever it determines that such amendments are in fact required.

In compliance with these regulations, OSM has determined that States must amend their programs as necessary to be no less effective than the changes and additions which resulted from promulgation of the Federal regulations pertaining to the above-listed regulatory subject matter. The enclosed Narrative of Major Rule Changes provides a description of potentially required Utah amendments; the full *Federal Register* text and preamble should be consulted when developing the precise language of the State amendments. The enclosed Narrative also identifies the counterpart State rule citation, if one exists. Following your review of the Narrative, we will be glad to discuss how these rule changes affect your program.

Also enclosed are the following published final *Federal Register* notices for the three Federal final rulemaking actions pertinent to these regulatory subjects.

(1) Ownership and Control; Permit and Application Information; Transfer, Assignment, or Sale of Permit rights – published December 3, 2007 (72 FR 68000) and referred to hereafter as the 2007 rule.

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(2) Application and Permit Information Requirements; Permit Eligibility; Definitions of Ownership and Control; the AVS; Alternative Enforcement – published December 19, 2000 (65 FR 79582) and referred to hereafter as the 2000 rule.

(3) Use of the AVS in Surface Coal Mining and Reclamation Permit Approval; Standards and Procedures for Ownership and Control Determinations – published on October 28, 1994 (59 FR 54306) and referred to hereafter as the 1994 Procedures rule.

Previously we provided your staff a detailed side-by-side comparison of the Utah and Federal regulations pertaining to ownership and control.

In accordance with 30 CFR 732.17(f)(1), I am requesting that, within 60 days of this letter, you submit either proposed written amendments or a description of amendments to be proposed in response to the revised Federal regulations, and a timetable for enactment. The timetable should include the dates by which you intend to submit the amendments and a schedule for the State legislative and rule making procedures. As always, if you believe no amendment is necessary in a specific instance, please so advise and OSM will consider any rationale you wish to submit.

Utah's program revisions will supersede the March 21, 1991 Memorandum of Understanding between OSM and Utah concerning Utah's use of OSM's nationwide applicant/violator computerized data system.

Please note that OSM sent Utah two 30 CFR Part 732 letters concerning ownership and control dated May 11, 1989, and January 13, 1997. Because of ongoing litigation, OSM advised States to delay their response to these letters until all litigation was completed. DOGM responded to OSM's May 11, 1989 732 letter on July 3, 1990. Changes proposed at that time were approved on August 23, 1991 (56 FR 41795). Additional changes have been made to the Federal Program since that time. This letter concerning ownership and control amendments replaces those earlier 30 CFR Part 732 letters.

DOGM does not have any other outstanding required amendments pertaining to Ownership and Control at this time. Such required amendments would be codified under 30 CFR 944.16.

Please address all submittals to James F. Fulton. Any questions or requests for assistance also should be directed to James F. Fulton at (303) 293-5015 or jfulton@OSMRE.gov.

We look forward to working with you on this effort.

Sincerely,

Allen D. Klein
Regional Director
Western Region

Enclosures

COPY

cc: James F. Fulton, Chief, DFD, WR
Matthew McKeown, Regional Solicitor, Rocky Mountain Region

MAJOR PROGRAM CHANGES AS A RESULT OF THE OCTOBER 28, 1994; DECEMBER 19, 2000; and DECEMBER 3, 2007 FEDERAL REGULATIONS AT 30 CFR PARTS 701, 773, 774, 778, 840, 843 AND 847

(59 FR 54306, 65 FR 79582 AND 72 FR 68000)

IMPORTANT! This Narrative documents only those rule changes that may be considered **major changes**. It does not address or include the net results of all changes from the 2000 and 2007 rules. For complete documentation of **all** rule language and rule organizational changes, refer to the enclosed Side-by-Side Rule Changes Template and *Federal Register* notices.

A. 30 CFR 701.5 Definitions

1. *Applicant Violator System* or *AVS* means an automated information system of applicant, permittee, operator, violation and related data OSM maintains to assist in implementing the Act.
[2000 rule, 65 FR 79662]

No State Counterpart

Note: The preamble discussion for the 2000 amendment can be found at 65 FR 79594.

2. *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.
[2007 rule, 72 FR 68029]

UT Counterpart: "Owned or controlled and owns and controls"

Note: In the 2000 rule, we defined *control* separately from *ownership* (the previous regulations defined a compound term, "'*owns or controls*' and '*owned or controlled,*'" discontinued the use of rebuttable presumptions of ownership or control (*e.g.*, an officer or director was previously presumed to be an owner or controller), and provided examples of persons who may be controllers. *See* preamble discussion for the 2000 amendments at 65 FR 79594-79595; 79596-79604.

In the 2007 rule, we continued to define *control* separately from *ownership*, retained the flexible "ability to determine" standard, removed certain specific categories of controllers (*e.g.*, general partners in a partnership) from the definition (because if these persons are controllers then they can be captured under the "ability to determine" standard), and removed the examples of control. *See* preamble discussion for the 2007 amendments at 72 FR 68003.

3. *Knowing* or *knowingly* means that a person who authorized, ordered, or carried out an act or omission knew or had reason to know that the act or omission would result in either a violation or a failure to abate or correct a violation.
[2000 rule, 65 FR 79662]

UT Counterpart: "Knowingly"

Note: In the 2000 rule, we broadened the scope of the definition and replaced the term "individual" with the term "person" so as to include business entities. *See* preamble discussion for the 2000 amendment at 65 FR 79604-79605.

4. *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.
[2007 rule, 72 FR 68029]

UT Counterpart: "Owned or controlled and owns and controls"

Note: In the 2000 rule, we defined *control* separately from *ownership* (the previous regulations defined a compound term, "'*owns or controls*' and '*owned or controlled.* '" We revised the definition to include sole proprietors, added a reference to *controlling* instruments of ownership, and clarified that the definition did not apply to ownership of real property. *See* preamble discussion for the 2000 amendments at 65 FR 79594-79596.

In the 2007 rule, we removed the reference to controlling instruments of ownership; we found that reference to "control" concepts was confusing, given that *control* is a separately defined term. Instead, we used the term "owning of record," which is found in the Act. *See* preamble discussion for the 2007 amendment at 72 FR 68005-68007.

5. *Transfer, assignment, or sale of permit rights* means a change of a permittee.
[2007 rule, 72 FR 68029]

UT Counterpart: "Transfer, Assignment, or Sale of Permit Rights"

Note: In the 2007 rule, we removed the effects of any definition of ownership or control on the definition of *transfer, assignment, or sale of permit rights* or the implementing procedures. The new definition is a better reflection of the Act and removes confusion by disentangling transfer, assignment, or sale of permit rights from section 510(c) of SMCRA. *See* preamble discussion for the 2007 amendment at 72 FR 68008–68010.

6. *Violation*, when used in the context of the permit application information or permit eligibility requirements of sections 507 and 510(c) of the Act and related regulations, means --

(1) A failure to comply with an applicable provision of a Federal or State law or regulation pertaining to air or water environmental protection, as evidenced by a written notification from a governmental entity to the responsible person; or

(2) A noncompliance for which OSM has provided one or more of the following types of notice or a State regulatory authority has provided equivalent notice under corresponding provisions of a State regulatory program --

(i) A notice of violation under § 843.12 of this chapter.

(ii) A cessation order under § 843.11 of this chapter.

(iii) A final order, bill, or demand letter pertaining to a delinquent civil penalty assessed under part 845 or 846 of this chapter.

(iv) A bill or demand letter pertaining to delinquent reclamation fees owed under part 870 of this chapter.

(v) A notice of bond forfeiture under § 800.50 of this chapter when --

(A) One or more violations upon which the forfeiture was based have not been abated or corrected;

(B) The amount forfeited and collected is insufficient for full reclamation under § 800.50(d)(1) of this chapter, the regulatory authority orders reimbursement for additional reclamation costs, and the person has not complied with the reimbursement order; or

(C) The site is covered by an alternative bonding system approved under § 800.11(e) of this chapter, that system requires reimbursement of any reclamation costs incurred by the system above those covered by any site-specific bond, and the person has not complied with the reimbursement requirement and paid any associated penalties.

[2000 rule, 65 FR 79662 & 79663]

No State Counterpart

Note: In the 2000 rule, this term was defined for the first time and separately from *violation notice* to distinguish action or inaction that constitutes a violation from the written notification of a violation. The definition added a new violation type at (2) (v), when the amount forfeited and collected is insufficient for full reclamation, the regulatory authority is authorized to order reimbursement of the additional reclamation costs. *See* 2000 rule preamble discussion beginning at 65 FR 79605.

7. *Violation, failure or refusal*, for purposes of parts 724 and 846 of this chapter, means --

(1) A failure to comply with a condition of a Federally-issued permit or of any other permit that OSM is directly enforcing under section 502 or 521 of the Act or the regulations implementing those sections; or

(2) A failure or refusal to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under section 518(b) or section 703 of the Act.

[2000 rule, 65 FR 79663]

UT Counterpart: "Violation, Failure, or Refusal"

Note: This definition was clarified in the 2000 rule as being applicable only to parts 724 and 846 (Individual Civil Penalties) of the regulation. *See* 2000 rule preamble discussion at 65 FR 79606.

8. *Violation notice* means any written notification from a regulatory authority or other governmental entity, as specified in the definition of *violation* in this section. [2000 rule, 65 FR 79663]

UT Counterpart: "Violation Notice"

Note: The revised definition clarifies that the term means the written notification of a violation from a regulatory authority or other governmental entity. *See* 2000 rule preamble discussion at 65 FR 79605.

9. *Willful or Willfully* means that a person who authorized, ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation acted --

(1) Intentionally, voluntarily, or consciously; and

(2) With intentional disregard or plain indifference to legal requirements.

[2000 rule, 65 FR 79663]

UT Counterpart: "Willfully"

Note: In the 2000 rule, we clarified that the term applies to violations, failures to abate or correct violations, and the scope is broadened from "individuals" to *person(s)* to include business entities. *See* 2000 rule preamble discussion beginning at 65 FR 79606.

10. The definition of "Willful violation" was removed from the Federal regulations. [2000 rule, 65 FR 79662].

UT Counterpart: "Willful Violation"

B. 30 CFR 724.5 Definitions.

No State Counterpart – these changes are addressed elsewhere

Section 724.5, Definitions, was removed from the Federal regulations in the 2000 rule. the section contained the definitions for "knowingly," now *knowing* or *knowingly*, *violation, failure or refusal*, and "willfully," now *willful* or *willfully*. All three definitions were revised and moved to 30 CFR 701.5. *See* 2000 rule, 65 FR 79663, and the preamble discussions at 65 FR 79604-79605 and 79606-79607.

C. 30 CFR 773.5 Definitions.

No State Counterpart – these changes are addressed elsewhere

The contents of previous § 773.5 was removed from the Federal regulations and the section designation has been reassigned in the total reorganization of Part 773. The surviving definitions for *Applicant/Violator System (AVS)*, "Owned or controlled and owns or controls," and *Violation notice* were revised and moved to 30 CFR 701.5. The permanently removed definitions are "Federal violation notice," "State violation notice," and "Ownership or control link." *See* 2000 rule, 65 FR 79663, and the preamble discussion at 65 FR 79607.

D. 30 CFR Part 773 Requirements for Permits and Permit Processing

UT Counterpart: R645-300

Part 773 has been completely reorganized. The reorganization includes new sections, removed sections, revised section headings, and significant revisions of previous sections and provisions. The reorganization of this part clarifies the permit eligibility review process, permit eligibility determinations and the presumption of NOV abatement, AVS data entry requirements, written findings of the permit eligibility determination, suspension and revocation of permits, and challenges of ownership and control listings and findings. See 65 FR 79663-79667 and the preamble discussions at 65 FR 70607-79641.

Please refer to the Rule Changes Side-by-Side Template to see the revised Table of Contents for Part 773.

E. Application and Permit Review Requirements

1. 30 CFR 773.7 Review of permit applications.

UT Counterpart: R645-300-131.100

(a) The regulatory authority will review an application for a permit, revision, or renewal; written comments and objections submitted; and records of any informal conference or hearing held on the application and issue a written decision, within a reasonable time set by the regulatory authority, either granting, requiring modification of, or denying the application. If an informal conference is held under § 773.6(c) of this part, the decision will be made within 60 days of the close of the conference.
(b) The applicant for a permit or revision of a permit shall have the burden of establishing that his application is in compliance with all the requirements of the regulatory program.
[2000 rule, 65 FR 79663 (redesignation only) and 2007 Rule, 72 FR 68029]

Note: The 2007 rule corrects a cross-reference and eliminates a cross-reference that is no longer necessary under the revised regulatory scheme.

2. 30 CFR 773.8 General provisions for review of permit application

information and entry of information into AVS.

No State Counterpart

(a) Based on an administratively complete application, we, the regulatory authority, must undertake the reviews required under §§ 773.9 through 773.11 of this part.
(b) We will enter into AVS --
(1) The information you are required to submit under §§ 778.11 and 778.12(c)of this subchapter.
(2) The information you submit under § 778.14 of this subchapter pertaining to violations which are unabated or uncorrected after the abatement or correction period has expired.
(c) We must update the information referred to in paragraph (b) of this section in AVS upon our verification of any additional information submitted or discovered during our permit application review.
[2000 rule, 65 FR 79663 and 2007 rule, 72 FR 68029]

Note: Created from regulatory previously found in separate provisions in Part 773 and provisions in the Memoranda of Understanding between OSM and States concerning AVS operation, this section includes a new requirement to enter Notice of Violations (NOVs) into AVS if they remain unabated or uncorrected after the period for abatement or correction has expired. *See* the 2000 rule preamble discussion at 65 FR 79605 of the definitions of *Violation* and *Violation notice*.

In the 2007 rule, we amended certain cross-references based upon other changes in the rulemaking.

3. **30 CFR 773.9 Review of applicant and operator information.**

No State Counterpart

(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 you and your operator's organizational structure and ownership or control relationships.
(b) We must conduct the review required under paragraph (a) of this section before making a permit eligibility determination under § 773.12 of this part.
[2000 rule, 65 FR 79664 and 2007 rule, 72 FR 68029]

Note: This section was newly constructed in the 2000 rule. It is the first of a three-part review process and revises the previous review process. The revised process clarifies the review requirements leading to a permit eligibility determination. The preamble discussion in the 2000 rule language is at 65 FR 79612-79614.

In 2007, this section was revised such that controllers are no longer required to be disclosed by applicants and their operators under §778.11. Therefore, the reference to controllers in application reviews has been removed. *See* preamble discussion in the 2007 rule at 72 FR 68010-68011.

4. **30 CFR 773.10 Review of permit history.**

No State Counterpart, but relates to R645-300-132, Review of Compliance

(a) We, the regulatory authority, will rely upon the permit history information you, the applicant, submit under § 778.12 of this subchapter, information from AVS, and any other available information to review you and your operator's permit histories. We must conduct this review before making a permit eligibility determination under § 773.12 of this part.
(b) We will also determine if you or your operator have previous mining experience.
(c) If you or your operator do not have any previous mining experience, we may conduct an additional review under § 774.11(f) of this subchapter. The purpose of this review will be to determine if someone else with mining experience controls the mining operation.
[2000 rule, 65 FR 79664 and 2007 rule, 72 FR 68029]

Note: In the 2000 rule, this section was newly constructed to allow for an additional review by the regulatory authority if the applicant, operator or controller do not indicate previous mining experience in their required disclosure under § 778.12 or it is otherwise determined that the applicant, operator, or controller have no previous mining experience. This circumstance could indicate the possibility of an undisclosed controller. Section 773.10 is part two of the clarified application review process. *See* 2000 rule preamble discussion at 65 FR 79615.

In the 2007 rule, this section was revised to remove the applicability to controllers without mining experience because this rulemaking removed the requirement under Part 778 for applicants and operators to disclose their controllers. However, the section retains the provision for an additional review to determine if there are undisclosed controllers when an applicant or operator is determined to have no previous mining experience. *See* 2007 rule preamble discussion at 72 FR 68011.

5. **30 CFR 773.11 Review of compliance history.**

UT Counterpart: R645-300-132

(a) We, the regulatory authority, will rely upon the violation information supplied by you, the applicant, under § 778.14 of this subchapter, a report from AVS, and any other available information to review histories of compliance with the Act or the applicable State regulatory program, and any other applicable air or water quality laws, for --
(1) You;
(2) Your operator;
(3) Operations you own or control; and
(4) Operations your operator owns or controls.
(b) We must conduct the review required under paragraph (a) of this section before making a permit eligibility determination under § 773.12 of this part.
[2000 rule, 65 FR 79664]

Note: This is a new section in the 2000 rule and is part three of the three-part application review process adopted in the 2000 rule. It was constructed from previous provisions in Part 773. One major change from the previous compliance review provisions is the requirement of a compliance report from AVS and not just a review of the information found in AVS. *See* the 2000 rule preamble discussion at 65 FR 79616 and 79620.

6. **30 CFR 773.12 Permit eligibility determination.**

No State Counterpart

Based on the reviews required under §§ 773.9 through 773.11 of this part, we, the regulatory authority, will determine whether you, the applicant, are eligible for a permit under section 510(c) of the Act.
(a) Except as provided in §§ 773.13 and 773.14 of this part, you are not eligible for a permit if we find that any surface coal mining operation that --
(1) You directly own or control has an unabated or uncorrected violation; or
(2) You or your operator indirectly control has an unabated or uncorrected violation and your control was established or the violation was cited on or after November 2, 1988.
(b) We will not issue you a permit if you or your operator are permanently ineligible to receive a permit under § 774.11(c) of this subchapter.
(c) After we approve your permit under § 773.15 of this part, we will not issue the permit until you comply with the information update and certification requirement of § 778.9(d) of this subchapter. After you complete that requirement, we will again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect your permit eligibility under paragraphs (a) and (b) of this section. We will request this report no more than five business days before permit issuance under § 773.19 of this part.
(d) If you are ineligible for a permit under this section, we will send you written notification of our decision. The notice will tell you why you are ineligible and include notice of your appeal rights under part 775 of this subchapter and 43 CFR 4.1360 through 4.1369.
[2000 rule, 65 FR 79664 and 2007 rule, 72 FR 68029]

Note: In the 2000 rule, this new section was constructed based in part on the previous eligibility provisions. It also contains provisions to comport with appellate court decisions resulting from the NMA lawsuits. It also includes a new regulatory requirement to perform an AVS compliance check no sooner than 5 days before anticipated permit issuance and to make the report from AVS part of the record of the review. *See* the 2000 rule preamble discussion at 65 FR 79620.

In the 2007 rule the reach of permit denial is amended. At paragraph (a), permits may be denied only if an applicant directly (one level down) owns or controls, or if the applicant <u>or</u> operator indirectly controls an entity with an unabated or uncorrected ("outstanding") violation if the control and the violation occurred after November 2, 1988. At paragraph (b), the reference to "independent authority" for denial is removed, but its removal does not represent a policy change. *See* the 2007 rule preamble discussion at 72 FR 68011.

7. **30 CFR 773.13 Unanticipated events or conditions at remining sites.**

No State Counterpart

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

(1) Occurred after October 24, 1992; and

(2) Resulted from an unanticipated event or condition at a surface coal mining and reclamation operation on lands that are eligible for remining under a permit that was --

(i) Issued before September 30, 2004, including subsequent renewals; and

(ii) Held by the person applying for the new permit.

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

(1) Arose after permit issuance;

(2) Was related to prior mining; and

(3) Was not identified in the permit application.

[2000 rule, 65 FR 79664]

Note: This section was created in the 2000 rule from previous provisions to contribute to the improved organization of Part 773.. It was also revised to correct an erroneous date reference from the 1995 rule. *See* the 2000 rule preamble discussion at 65 FR 79620 on the proposed changes to previous § 773.15(b)(4).

8. 30 CFR 773.14 Eligibility for provisionally issued permits.

UT Counterpart: R645-300-132.200

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

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

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

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

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

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

(3) You are pursuing a good faith --

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

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

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

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

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

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

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

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

[2000 rule, 65 FR 79664 and 2007 rule, 72 FR 68029]

Note: This section was newly constructed in the 2000 rule to address the presumption of NOV abatement. One primary change was that "conditionally" issued permits would now be called "provisionally" issued permits. This was done to make a distinction between provisionally issued permits and permits issued with conditions under § 773.17. *See* 2000 rule preamble discussion at 65 FR 79622.

In the 2007 rule, this section was amended to indicate that an applicant "will" be eligible to receive a permit when the criteria under § 773.14 are met rather than the previous "may" be eligible to receive a provisionally issued permit if the applicant is pursuing a good faith appeal. *See* preamble discussion at 72 FR 68012.

9. 30 CFR 773.15 Written findings for permit application approval.

UT Counterpart: R645-300-133

No permit application or application for a significant revision of a permit shall be approved unless the application affirmatively demonstrates and the regulatory authority finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, the following:

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

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

(c) The proposed permit area is --

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

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

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

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

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

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

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

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

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

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

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

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

(i) Lands eligible for remining;

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

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

(n) The applicant is eligible to receive a permit, based on the reviews under §§ 773.7 through 773.14 of this part.

[2000 rule, 65 FR 79665]

Note: This section was extracted from a previous section and redesignated in the 2000 rule. New requirements were added to mandate written findings by the regulatory authority for permit approval and eligibility and that the application is complete, accurate, and in compliance. *See* the 2000 rule preamble discussion at 65 FR 79620.

10. **30 CFR 773.16 Performance bond submittal.**

UT Counterpart: R645-300-134

Note: This section was extracted from previous provisions in part 773 and redesignated. This amendment to our rules, intended to be in the 2000 rule, was published in a *Federal Register* correction notice at 66 FR 16127, March 23, 2001.

11. **30 CFR 773.17 Permit Conditions.**

UT Counterpart: R645-300-140

Note: In the 2000 rule, previous paragraph (h) was removed from § 773.17. During the construction of § 773.14, we determined that a clear distinction was required between permit conditions and the status of a permit issued where the applicant has an unabated or uncorrected violation at the time of the permit eligibility determination and carries specific obligations that must be met to keep the permit. *See* the 2000 rule preamble discussion at 65 FR 79624.

12. **30 CFR 773.21 Initial review and finding requirements for improvidently issued permits.**

UT Counterpart: R645-300-160

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

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

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

(2) The violation remains unabated or uncorrected; and

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

(c) When we make a preliminary finding under paragraph (a) of this section, we must serve you with a written notice of the preliminary finding, which must be

based on evidence sufficient to establish a prima facie case that your permit was improvidently issued.
(d) Within 30 days of receiving a notice under paragraph (c) of this section, you may challenge the preliminary finding by providing us with evidence as to why the permit was not improvidently issued under the criteria in paragraphs (a) and (b) of this section.
(e) The provisions of §§ 773.25 through 773.27 of this part apply when a challenge under paragraph (d) of this section concerns a preliminary finding under paragraphs (a) and (b)(1) of this section that you or your operator currently own or control, or owned or controlled, a surface coal mining operation.
[2000 rule, 65 FR 79665 and 2007 rule, 72 FR 68029]

Note: This section was revised in the 2000 rule. It sets forth the process for review and making of preliminary findings. *See* the 2000 rule preamble discussion at 65 FR 79626.

In the 2007 rule, this section was clarified to emphasis that a preliminary finding requires evidence sufficient for a prima facie case and that notices must be given in writing to the subject of the finding. *See* the 2007 rule preamble discussion at 72 FR 68012.

13. **30 CFR 773.22 Notice requirements for improvidently issued permits.**

UT Counterpart: R645-300-164

(a) We, the regulatory authority, must serve you, the permittee, with a written notice of proposed suspension or rescission, together with a statement of the reasons for the proposed suspension of rescission, if --
(1) After considering any evidence submitted under § 773.21(d) of this part, we find that a permit was improvidently issued under the criteria in paragraphs (a) and (b) of § 773.21 of this part; or
(2) Your permit was provisionally issued under § 773.14(b) of this part and one or more of the conditions in §§ 773.14(c)(1) through (4) exists.
(b) If we propose to suspend your permit, we will provide 60 days notice.
(c) If we propose to rescind your permit, we will provide 120 days notice.
(d) If you wish to appeal the notice, you must exhaust administrative remedies under the procedures at 43 CFR 4.1370 through 4.1377 (when OSM is the regulatory authority) or under the State regulatory program equivalent (when a State is the regulatory authority).
(e) After we serve you with a notice of proposed suspension or rescission under this section, we will take action under § 773.23 of this part.
(f) The regulations for service at § 843.14 of this chapter, or the State regulatory program equivalent, will govern service under this section.
(g) The times specified in paragraphs (b) and (c) of this section will apply unless you obtain temporary relief under the procedures at 43 CFR 4.1376 or the State regulatory program equivalent.
[1994 Procedures rule, 59 FR 54353; 2000 rule, 65 FR 79665; 2007 rule, 72 FR 68029]

Note: The 2000 rule requires the regulatory authority provide a written notice of proposed suspensions or rescissions and the provisions specify the thresholds of considerations. *See* the 2000 rule preamble discussion at 65 FR 79626.

In the 2007 rule the requirement to post a proposed suspension or rescission (d) is removed. *See* the 2007 rule preamble discussion at 72 FR 68013. Also, the 2007 rule removes the requirement to post at the AVS Office Internet website. However, the rule retains both the requirement to post notices at the closest office for §773.23(c)(2), and the requirement to post a final agency decision on an ownership or control on the AVS database, not the AVS Office's Internet website, at §773.28(d). *See* the 2007 rule language at 72 FR 68029-68030.

14. **30 CFR 773.23 Suspension or rescission requirements for improvidently issued permits.**

UT Counterpart: R645-300-164 et. seq.

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

(1) The violation has been abated or corrected to the satisfaction of the agency with jurisdiction over the violation;

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

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

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

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

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

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

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

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

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

(d) If we suspend or rescind your permit under this section, you may request administrative review of the notice under the procedures at 43 CFR 4.1370 through 4.1377 (when OSM is the regulatory authority) or under the State regulatory program equivalent (when a State is the regulatory authority). Alternatively, you may seek judicial review of the notice.

[1994 Procedures rule, 59 FR 54354; as corrected at 59 FR 61656; 2000 rule, 65 FR 79665: 2007 rule, 72 FR 68029]

Note: Prior to the 2000 rule, § 773.23 was titled "Review of ownership or control and violation information." In the 2000 rule, the provisions from this section were removed because we no longer

used presumptions of ownership or control, or links to violations, based upon presumptions of ownership or control. This section was then titled "Suspension or rescission requirements for improvidently issued permits." *See* the 2000 rule preamble discussion at 65 FR 79627.

The 2007 rule removed Internet posting requirements, clarified notice procedures for preliminary findings, and required that only final notices will be posted at closest office to the permit area. *See* the 2007 rule preamble discussion at 72 FR 68013. Also, the 2007 rule removes the requirement to post at the AVS Office's Internet website. However the rule retains both the requirement to post notices at the closest office for §773.23(c)(2), and the requirement to post a final agency decision on an ownership or control challenge on the AVS database, not AVS Office's Internet website, at §773.28(d). *See* the 2007 rule language at 72 FR 68029-68030.

F. Ownership or Control Challenges

1. 30 CFR 773.25 Who may challenge ownership or control listings and findings.

No State Counterpart

You may challenge a listing or finding of ownership or control using the provisions under §§ 773.26 and 773.27 of this part if you are --
(a) Listed in a permit application or in AVS as an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof;
(b) Found to be an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof, under §§ 773.21 or 774.11(g) of this subchapter; or
(c) An applicant or permittee affected by an ownership or control listing or finding.
[2000 rule, 65 FR 79666 and 2007 rule, 72 FR 68029]

Note: This section was revised and redesignated in the 2000 rule. As a result, previous § 773.24 was removed. Section 773.25 provides for challenges to ownership or control listings or findings regardless of whether there is a pending application. *See* the 2000 rule preamble discussion at 65 FR 79631.

In the 2007 rule, paragraph (b) was revised to update a cross-reference.

2. 30 CFR 773.26 How to challenge an ownership or control listing or finding.

No State Counterpart

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

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

(b) The provisions of this section and of §§ 773.27 and 773.28 of this part apply only to challenges to ownership or control listings or findings. You may not use

these provisions to challenge your liability or responsibility under any other provision of the Act or its implementing regulations.
(c) When the challenge concerns a violation under the jurisdiction of a different regulatory authority, the regulatory authority with jurisdiction over the permit application or permit must consult the regulatory authority with jurisdiction over the violation and the AVS Office to obtain additional information.
(d) A regulatory authority responsible for deciding a challenge under paragraph (a) of this section may request an investigation by the AVS Office.
(e) At any time, you, a person listed in AVS as an owner or controller of a surface coal mining operation, may request an informal explanation from the AVS Office as to the reason you are shown in AVS in an ownership or control capacity. Within 14 days of your request, the AVS Office will provide a response describing why you are listed in AVS.
[2000 rule, 65 FR 79666 and 20007 rule, 72 FR 68029]

Note: The 2000 rule provided revised and clarified guidelines for challenges. A table was introduced to help determine the proper authority for challenges. The availability of the AVS Office to provide information and investigative assistance was added. *See* the 2000 rule preamble discussion at 65 FR 79631.

The 2007 rule revised the table to clarify that challenges must be submitted in writing to the regulatory authority with jurisdiction over a pending permit, or in situations without a pending permit, to the regulatory authority with jurisdiction over the associated mining operation(s). The 2007 rule also clarified so that a person listed in AVS may request an informal explanation from the AVS Office at any time and should expect a response within 14 days. *See* the 2007 rule preamble discussion at 72 FR 68013.

3. 30 CFR 773.27 Burden of proof for ownership or control challenges.

No State Counterpart

This section applies to you if you challenge an ownership or control listing or finding.
(a) When you challenge a listing of ownership or control, or a finding of ownership or control made under §774.11(g) of this subchapter, you must prove by a preponderance of the evidence that you either --
(1) Do not own or control the entire operation or relevant portion or aspect thereof; or
(2) Did not own or control the entire operation or relevant portion or aspect thereof during the relevant time period.
(b) In meeting your burden of proof, you must present reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority. The materials presented in connection with your challenge will become part of the permit file, an investigation file, or another public file. If you request, we will hold as confidential any information you submit under this paragraph which is not required to be made available to the public under § 842.16 of this chapter (when OSM is the regulatory authority) or under § 840.14 of this chapter (when a State is the regulatory authority).
(c) Materials you may submit in response to the requirements of paragraph (b) of this section include, but are not limited to --

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

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

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

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

(i) Evidentiary materials;

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

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

[2000 rule, 65 FR 79666 and 2007 rule, 72 FR 68030]

Note: In the 2000 rule this section was introduced as a separate section carved out of previous § 773.25 - Standards for challenging ownership or control links and the status of violations. *See* the 2000 rule preamble discussion at 65 FR 79631.

The evidentiary standards language was clarified in the 2007 rule to point out that the burden for the challenger in either a finding or a listing is to prove by "a preponderance of the evidence" that they are not owners or controllers of the operation. The burden of persuasion remains on the challenger.

The regulatory authority will have established a *prima facie* case in making a finding of ownership or control. A listing of ownership or control is based upon a submission or disclosure of information under 30 CFR 778.11, 30 CFR 774.12, or other comparable circumstance. A listing in AVS by the regulatory authority based on this information is not subject to the *prima facie* standard because it is information provided to the regulatory authority by the applicant, permittee, or operator. *See* the 2007 rule preamble discussion at 72 FR 68014.

4. 30 CFR 773.28 Written agency decision on challenges to ownership or control listings or findings.

No State Counterpart

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

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

(1) Certified mail, return receipt requested; or

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

(c) Service of the decision on you is complete upon delivery and is not incomplete if you refuse to accept delivery.
(d) We will post all decisions made under this section on AVS.
(e) Any person who receives a written decision under this section, and who wishes to appeal that decision, must exhaust administrative remedies under the procedures at 43 CFR 4.1380 through 4.1387 or, when a State is the regulatory authority, the State regulatory program counterparts, before seeking judicial review.
(f) Following our written decision or any decision by a reviewing administrative or judicial tribunal, we must review the information in AVS to determine if it is consistent with the decision. If it is not, we must promptly revise the information in AVS to reflect the decision.
[2000 rule, 65 FR 79666 and 2007 rule, 72 FR 68030]

Note: The 2000 rule revised the 1994 requirements for a written agency decision, as well as the service and appeals procedures were defined for State challenges where there are State pending applications. We also added a 60-day deadline for the issuance of a decision. *See* the 2000 rule preamble discussion at 65 FR 79637.

The 2007 rule removes the requirement to post the written agency decision on the AVS Office Internet website. However, the requirement to post notices at the closest office and the requirement to post a final agency decision on an ownership or control challenge on the AVS database, not the AVS Office's Internet website, at §773.28(d) are retained. *See* the 2007 rule language at 72 FR 68029-68030.

G. 30 CFR Part 774: Revision; Renewal; Transfer, Assignment, or Sale of Permit Rights; and Other Actions Based on Ownership, Control, and Violation Information

UT Counterpart: R645-300; R645-303

Note: The 2000 rule amended the title of Part 774 and the Table of Contents. This amendment reflected the subject matter added to this part at new §§ 774.11 and 774.12. In the 2007 rule, we amended certain provisions in § 774.11 and in § 774.17.

We added requirements for regulatory authorities to enter and maintain AVS information and added provisions for regulatory authority actions in the face of potential undisclosed controllers of applicants and permittees. We moved regulatory authority provisions for determining permanent permit ineligibility to this part from Part 773. We also added requirements for permittees to provide updates to information initially provided under Part 778 when specific circumstances occur. The major changes from these rulemaking actions are discussed immediately below.

Please refer to the Rule Changes Side-by-Side Template to see the revised Table of Contents for Part 774.

H. Post-permit Issuance Requirements

1. 30 CFR 774.11 Post-permit issuance requirements for regulatory authorities and other actions based on ownership, control, and violation information.

No State Counterpart

(a) For the purposes of future permit eligibility determinations and enforcement actions, we, the regulatory authority, must enter into AVS the data shown in the following table --

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.

(b) If, at any time, we discover that any person owns or controls an operation with an unabated or uncorrected violation, we will determine whether enforcement action is appropriate under part 843, 846 or 847 of this chapter. We must enter the results of each enforcement action, including administrative and judicial decisions, into AVS.

(c) We must serve a preliminary finding of permanent permit ineligibility under section 510(c) of the Act on you, an applicant or operator, if the criteria in paragraphs (c)(1) and (c)(2) are met. In making a finding under this paragraph, we will only consider control relationships and violations which would make, or would have made, you ineligible for a permit under §§ 773.12(a) and (b) of this subchapter. We must make a preliminary finding of permanent permit ineligibility if we find that --

(1) You control or have controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations under section 510(c) of the Act; and

(2) The violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate your intent not to comply with the Act, its implementing regulations, the regulatory program, or your permit.

(d) You may request a hearing on a preliminary finding of permanent permit ineligibility under 43 CFR 4.1350 through 4.1356.

(e) Entry into AVS.

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

(2) If you request a hearing, we will enter our finding into AVS only if that finding is upheld on administrative appeal.

(f) At any time, we may identify any person who owns or controls an entire operation or any relevant portion or aspect thereof. If we identify such a person, we must issue a written 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.
[2000 rule, 65 FR 79667 and 2007 rule, 72 FR 68030]

Note: In the 2000 rule, we created § 774.11 to subsume data entry and maintenance provisions from the Memoranda of Understanding with States regarding AVS operation; better organize provisions for certain required regulatory authority actions previously provided for in Part 773 that are based on ownership, control and violation information; and specify which outcomes would be posted on AVS and other media. The rule also adds provisions for identifying an undisclosed controller who may be the "alter ego" of an applicant or permittee or a "true" applicant or permittee. *See* the 2000 rule preamble discussions at 65 FR 79629, 79630, and 79640.

In the 2007 rule, the following paragraphs in § 774.11 were amended for clarification.
(a) Removes reference to ownership and control information and amended the AVS data entry and maintenance table.
(e) Requires that permanent permit ineligibility be entered into AVS only after a hearing and administrative review or after the time for such hearing or review has passed.
(f) Clarifies that there must be a preliminary finding of ownership or control and that such a finding requires *prima facie* evidence.
(g) Clarifies that responses or non-responses to preliminary finding notices of ownership or control will be reviewed by the regulatory authority and a written decision will be provided. Final decisions will be entered into AVS within 30 days after the decision.
(h) Clarifies that those subject to a written finding of ownership or control may challenge the finding using the procedures in §§ 773.25, 773.26, and 773.27.
See the 2007 rule preamble discussion at 72 FR 68015.

2. **30 CFR 774.12 Post-permit issuance information requirements for permittees.**

UT Counterpart: R645-300-148

(a) Within 30 days after the issuance of a cessation order under § 843.11 of this chapter, or its State regulatory program equivalent, you, the permittee, must provide or update all the information required under § 778.11 of this subchapter.
(b) You do not have to submit information under paragraph (a) of this section if a court of competent jurisdiction grants a stay of the cessation order and the stay remains in effect.
(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.
[2000 rule, 65 FR 79667 and 2007 rule, 72 FR 68030]

Note: The 2000 rule created a new section from previous provisions and the Memoranda of Understanding with States regarding AVS operation to consolidate the information required from coal mining operators under § 778.11 after a permit has been issued. *See* the 2000 rule preamble discussion at 65 FR 79641-42 and 78667.

In the 2007 rule, we amended § 774.12 to remove a cross-reference in paragraph (c) to a provision in § 778.11 that was removed by way of this rulemaking due to procedural concerns and determined to be at odds with the goal of the 2000 rule to create clarity in the information required from applicants and permittees. *See* the 2007 rule preamble discussion at 72 FR 68017.

I. Transfer, Assignment, or Sale of Permit Rights (TAS)

30 CFR 774.17 Transfer, assignment, or sale of permit rights.

UT Counterpart: R645-303-300

(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.
(b) *Application requirements*. An applicant for approval of the transfer, assignment, or sale of permit rights shall--
(1) Provide the regulatory authority with an application for approval of the proposed transfer, assignment, or sale including --
(i) The name and address of the existing permittee and permit number or other identifier;
(ii) A brief description of the proposed action requiring approval; and
(iii) The legal, financial, compliance, and related information required by part 778 of this chapter for the applicant for approval of the transfer, assignment, or sale of permit rights.
(2) Advertise the filing of the application in a newspaper of general circulation in the locality of the operations involved, indicating the name and address of the applicant, the permittee, the permit number or other identifier,

the geographic location of the permit, and the address to which written comments may be sent;

(3) Obtain appropriate performance bond coverage in an amount sufficient to cover the proposed operations, as required under subchapter J of this chapter.

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

(d) *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 773.15 of this chapter;

(2) Has submitted a performance bond or other guarantee, or obtained the bond coverage of the original permittee, as required by subchapter J of this chapter; and

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

(e) *Notification*.

(1) The regulatory authority shall notify the permittee, the successor, commenters, and OSM, if OSM is not the regulatory authority, of its findings.

(2) The successor shall immediately provide notice to the regulatory authority of the consummation of the transfer, assignment, or sale of permit rights.

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

[2000 rule, 65 FR 79668 and 2007 rule, 72 FR 68030]

Note: The 2000 rule revised cross-references in § 774.17 based on other provisions adopted in the rulemaking.

2007 rule clarifies at paragraphs (a) and (d) that at the regulatory authorities' discretion, a prospective successor in interest, with sufficient bond coverage, may continue to mine during the TAS process. Also noted is that a successor in interest remains the *prospective* permittee until the approval process for the new permit is complete. *See* the 2007 rule preamble discussion at 72 FR 68018.

J. 30 CFR Part 778 Permit Applications – Minimum Requirements for Legal, Financial, Compliance, and Related Information

UT Counterpart: R645-301-110

Note: Note: The 2000 rule amended the Table of Contents for Part 778. This amendment reflected the addition of a new section and the reorganization of the subject matter previous to this part. We added new provisions to allow applicants for permits to take advantage of the information in AVS to reduce the burden of providing repetitive hard-copy information on multiple permits. We reorganized

the previous identification of interests (previous § 778.13) into smaller sections to clarify and streamline the separate categories of requirements. We removed the requirement to identify all but one of an applicant's controllers. *See* the 2000 rule language at 65 FR 79668-79669 and the preamble discussions at 65 FR 79642-79651.

In the 2007 rule, we removed provisions in § 778.11 that addressed controllers that, upon further consideration, we believe to be burdensome and potentially confusing. We clarified that the burden of identifying persons who meet the definition of *control* or *controller* is on a regulatory authority, it is not the burden of applicants and operators to identify their controllers in applications or otherwise. We also removed the requirement to disclose the person responsible for submitting OSM-1 forms but added a requirement that an applicant and its operator must disclose complete ownership information, up to and including the ultimate parent entity. The major changes from these rulemaking actions are discussed immediately below. *See* the 2007 rule language at 72 FR 69031 and the preamble discussion at 72 FR 68019-68024.

Please refer to the Rule Changes Side-by-Side Template to see the revised Table of Contents for Part 778.

K. Applicant/Permittee Information Requirements

1. 30 CFR 778.9 Certifying and updating existing permit application information.

No State Counterpart

In this section, "you" means the applicant and "we" or "us" means the regulatory authority.
(a) If you have previously applied for a permit and the required information is already in AVS, then you may update the information as shown in the following table.

If...	then you...
(1) All or part of the information already in AVS is accurate and complete	may certify to us by swearing or affirming, under oath and in writing, that the relevant information in AVS is accurate, complete, and up to date.
(2) Part of the information in AVS is missing or incorrect	must submit to us the necessary information or corrections and swear or affirm, under oath and in writing, that the information you submit is accurate and complete.
(3) You can neither certify that the data in AVS is accurate and complete nor make needed	must include in your permit application the information required under this part.

corrections	

(b) You must swear or affirm, under oath and in writing, that all information you provide in an application is accurate and complete.
(c) We may establish a central file to house your identity information, rather than place duplicate information in each of your permit application files. We will make the information available to the public upon request.
(d) After we approve an application, but before we issue a permit, you must update, correct, or indicate that no change has occurred in the information previously submitted under this section and §§ 778.11 through 778.14 of this part.
[2000 rule, 65 FR 79668]

Note: This is a new section adopted in the 2000 rule. It was designed to reduce paperwork and burden for applicants for permits. Applicants may certify to the status of their information in AVS, thereby avoiding the need for an applicant and operator to submit identical information in multiple applications to the regulatory authority and for the regulatory authority to review and compare multiple submissions to the information in AVS. *See* the 2000 rule preamble discussion at 65 FR 79643.

2. 30 CFR 778.11 Providing applicant and operator information.

UT Counterpart: R645-301-110

(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;
(2) Taxpayer identification numbers for you and your operator.
(b) You must provide the name, address, and telephone number for --
(1) The applicant.
(2) Your resident agent who will accept service of process.
(3) Any operator, if different from the applicant.
(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 other 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 --
(1) The person's name, address, and telephone number.

(2) The person's position title and relationship to you, including percentage of ownership and location in the organizational structure.

(3) The date the person began functioning in that position.

(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.

[2000 rule, 65 FR 79668 and 2007 rule, 72 FR 68031]

Note: In the 2000 rule, this section was created from previous § 778.13. It was re-titled for clarity and to specify that the information requirements for applications pertain to both applicants and the applicant's operators. It was amended to more closely mirror the requirements of section 507(b) of the Act. *See* 2000 rule preamble discussion at 65 FR 79643-79644.

The 2007 rule adopted several amendments to § 778.11.

- To more clearly reflect the intent of the 2000 rule, the requirement for an applicant or operator to identify any controller in an application was removed.
- Again, to more clearly reflect the intent of the 2000 rule, certain relationship information required in an application is no longer referred to as "ownership and control" information. The title of the section was revised in 2007 for the same reason.
- "Associations," "partner," and "member" were added to the classes of relationships other entities have with the applicant business entity.
- The requirement to identify person(s) responsible for OSM-1 submissions was removed.
- The applicant and operator are required to identify in an application each business entity in the applicant's and operator's organizational structure "up to and including the ultimate parent entity."
- Modified the information disclosure requirement to identify owners of 10 to 50 percent to the requirement to disclose all owners of 10 percent or more. We determined that the 2000 rule introduced confusion by citing a percentage not provided for in section 507(b) of the Act.
- We codified that OSM (or other regulatory authority) does not have to make a finding of ownership or control before entering into AVS information required from applicants under this section, § 774.12, or otherwise provided by an applicant or its operator. We also clarified that the disclosure of relationship information under § 778.11 and its subsequent listing in AVS does not create a presumption of ownership or control.

See the 2007 rule preamble discussion at 72 FR 68019.

3. **30 CFR 778.12 Providing permit history information.**

UT Counterpart: R645-301-112.340

(a) You, the applicant, must provide a list of all names under which you, your operator, your partners or principal shareholders, and your operator's partners or principal shareholders operate or previously operated a surface coal mining operation in the United States within the five-year period preceding the date of submission of the application.

(b) For you and your operator, you must provide a list of any pending permit applications for surface coal mining operations filed in the United States. The list must identify each application by its application number and jurisdiction, or by other identifying information when necessary.
(c) For any surface coal mining operations that you or your operator owned or controlled within the five-year period preceding the date of submission of the application, and for any surface coal mining operation you or your operator own or control on that date, you must provide the --
(1) Permittee's and operator's name and address;
(2) Permittee's and operator's taxpayer identification numbers;
(3) Federal or State permit number and corresponding MSHA number;
(4) Regulatory authority with jurisdiction over the permit; and
(5) Permittee's and operator's relationship to the operation, including percentage of ownership and location in the organizational structure.
[2000 rule, 65 FR 79669]

Note: This section was newly added in the 2000 rule. It was constructed from provisions in previous § 778.13. In 2000, the requirement for an applicant to provide the permit history information for the operator was added and the required submission of the date of MSHA identification number issuance was removed. *See* the 2000 rule preamble discussion at 65 FR 79644.

4. **30 CFR 778.13 Providing property interest information.**

UT Counterpart: R645-301-112.500

You, the applicant, must provide in the permit application all of the following information for the property to be mined --
(a) The name and address of --
(1) Each legal or equitable owner(s) of record of the surface and mineral.
(2) The holder(s) of record of any leasehold interest.
(3) Any purchaser(s) of record under a real estate contract.

(b) The name and address of each owner of record of all property (surface and subsurface) contiguous to any part of the proposed permit area.
(c) A statement of all interests, options, or pending bids you hold or have made for lands contiguous to the proposed permit area. If you request in writing, we will hold as confidential, under § 773.6(d)(3)(ii) of this chapter, any information you are required to submit under this paragraph which is not on public file under State law.
(d) The Mine Safety and Health Administration (MSHA) numbers for all structures that require MSHA approval.
[2000 rule, 65 FR 79669]

Note: In the 2000 rule, this new section was created from provisions in previous § 778.13. It changed little from the previous provisions except for redesignations. One change was the removal of the provision that required an applicant to submit information in any format OSM prescribes. *See* the 2000 rule preamble discussion at 65 FR 79664.

5. **30 CFR 778.14 Providing violation information.**

UT Counterpart: R645-301-113

(a) You, the applicant, must state, in your permit application, whether you, your operator, or any subsidiary, affiliate, or entity which you or your operator own or control or which is under common control with you or your operator, has --

(1) Had a Federal or State permit for surface coal mining operations suspended or revoked during the five-year period preceding the date of submission of the application; or

(2) Forfeited a performance bond or similar security deposited in lieu of bond in connection with surface coal mining and reclamation operations during the five-year period preceding the date of submission of the application.

(b) For each suspension, revocation, or forfeiture identified under paragraph (a), you must provide a brief explanation of the facts involved, including the --

(1) Permit number.

(2) Date of suspension, revocation, or forfeiture, and, when applicable, the amount of bond or similar security forfeited.

(3) Regulatory authority that suspended or revoked the permit or forfeited the bond and the stated reasons for the action.

(4) Current status of the permit, bond, or similar security involved.

(5) Date, location, type, and current status of any administrative or judicial proceedings concerning the suspension, revocation, or forfeiture.

(c) A list of all violation notices you or your operator received for any surface coal mining and reclamation operation during the three-year period preceding the date of submission of the application. In addition you must submit a list of all unabated or uncorrected violation notices incurred in connection with any surface coal mining and reclamation operation that you or your operator own or control on that date. For each violation notice reported, you must include the following information, when applicable --

(1) The permit number and associated MSHA number.

(2) The issue date, identification number, and current status of the violation notice.

(3) The name of the person to whom the violation notice was issued,

(4) The name of the regulatory authority or agency that issued the violation notice.

(5) A brief description of the violation alleged in the notice.

(6) The date, location, type, and current status of any administrative or judicial proceedings concerning the violation notice.

(7) If the abatement period for a violation in a notice of violation issued under § 843.12 of this chapter, or its State regulatory program equivalent, has not expired, certification that the violation is being abated or corrected to the satisfaction of the agency with jurisdiction over the violation.

(8) For all violations not covered by paragraph (c)(7) of this section, the actions taken to abate or correct the violation.

[2000 rule, 65 FR 79669]

Note: In the 2000 rule, we re-titled the section and amended several requirements. We imposed a 5-year window for reporting bond forfeitures and added the requirement to expressly identify a violation number or other unique identifier for a violation. We removed the requirements to report permit issuance dates, MSHA number issuance dates, and abatement information. *See* the 2000 rule preamble discussion starting at 65 FR 79649.

L. 30 CFR 840.13 Enforcement authority

UT Counterpart: R645-400-120

(b) The enforcement provisions of each State program shall contain sanctions which are no less stringent than those set forth in section 521 of the Act and shall be consistent with §§ 843.11, 843.12, 843.13, and 843.23 and subchapters G and J of this chapter.
[1994 Procedures rule, 59 FR 54356]

Note: The 1994 Procedures rule amended § 840.13 by adding a cross-reference to the list of Federal sections (843.11, 843.12, and 843.13) whose sanctions with which each State program's inspection and enforcement provisions must be consistent. *See* 59 FR 54356. However, while anticipated in the 1994 Procedures rule, a section 843.23 has not been adopted into the Federal rules. Therefore, it is unnecessary to include any reference to § 843.23 in § 840.13.

M. 30 CFR 843.11 Cessation Orders.

UT Counterpart: R645-400-310

(a)(1) An authorized representative of the Secretary shall immediately order a cessation of surface coal mining and reclamation operations or of the relevant portion thereof, if he or she finds, on the basis of any Federal inspection, any condition or practice, or any violation of the Act, this chapter, any applicable program, or any condition of an
exploration approval or permit imposed under any such program, the Act, or this chapter which:

(i) Creates an imminent danger to the health or safety of the public; or

(ii) Is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

(2) Surface coal mining operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm to land, air, or water resources unless such operations:

(i) Are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations; or

(ii) Were conducted lawfully without a permit under the interim regulatory program because no permit has been required for such operations by the State in which the operations were conducted.

(3) If the cessation ordered under paragraph (a)(1) of this section will not completely abate the imminent danger or harm in the most expeditious manner physically possible, the authorized representative of the Secretary shall impose affirmative obligations on the permittee to abate the imminent danger or significant environmental harm. The order
shall specify the time by which abatement shall be accomplished.

(b)(1) When a notice of violation has been issued under § 843.12(a) and the permittee fails to abate the violation within the abatement period fixed or subsequently extended by the authorized representative, the authorized

representative of the Secretary shall immediately order a cessation of coal exploration or surface coal mining and reclamation operations, or of the portion relevant to the violation.

(2) A cessation order issued under this paragraph (b) shall require the permittee to take all steps the authorized representative of the Secretary deems necessary to abate the violations covered by the order in the most expeditious manner physically possible.

(c) A cessation order issued under paragraphs (a) or (b) of this section shall be in writing, signed by the authorized representative who issues it, and shall set forth with reasonable specificity: (1) The nature of the condition, practice or violation; (2) the remedial action or affirmative obligation required, if any, including interim steps, if appropriate; (3) the time established for abatement, if appropriate; and (4) a reasonable description of the portion of the coal exploration or surface coal mining and reclamation operation to which it applies. The order shall remain in effect until the condition, practice or violation resulting in the issuance of the cessation order has been abated or until vacated, modified or terminated in writing by an authorized representative of the Secretary, or until the order expires pursuant to section 521(a)(5) of the Act and § 843.15.

(d) Reclamation operations and other activities intended to protect public health and safety and the environment shall continue during the period of any order unless otherwise provided in the order.

(e) An authorized representative of the Secretary may modify, terminate or vacate a cessation order for good cause, and may extend the time for abatement if the failure to abate within the time previously set was not caused by lack of diligence on the part of the permittee.

(f) An authorized representative of the Secretary shall terminate a cessation order by written notice to the permittee when he or she determines that all conditions, practices or violations listed in the order have been abated. Termination shall not affect the right of the Office to assess civil penalties for those violations under part 845 of this chapter.

(g) Within 60 days after issuing a cessation order, OSM will notify in writing the permittee, the operator, and any person who has been listed or identified by the applicant, permittee, or OSM as an owner or controller of the operation, as defined in § 701.5 of this chapter.

[2000 rule, 65 FR 79670]

Note: Prior to the 2000 rule, this section required notification of those identified as owners and controllers when a cessation order (CO) was written. The 2000 rule changes the notification requirement from only those identified as owners and controllers, to a general notification of those persons listed in the CO that a CO has been issued.

N. Federal role in Improvidently Issued State Permits & Oversight of Permit Decisions

1. 30 CFR 843.21 Procedures for improvidently issued State permits.

No State Counterpart

[2000 rule, 65 FR 79670]

Note: The 2000 rule amended this section to include inspection provisions analogous to the statutory provision at section 521(a)(3) of the Act and to add a provision for a written finding by OSM of an improvidently issued permit. *See* 65 FR 79670-79671.

In the 2007, rule, this section was removed in its entirety. After reviewing our historic use of § 843.21, we concluded it no longer added significant value to the Federal enforcement program. *See* the 2007 rule preamble discussion at 72 FR 68024.

2. **30 CFR 843.24 Oversight of State permitting decisions with respect to ownership or control or the status of violations.**

No State Counterpart

[1994 Procedures rule, 59 FR 54356]

Note: This section was removed in its entirety in the 2000 rule. The section was conceptually connected to other provisions in the 1994 Procedures rule that also have been removed or amended. *See* the 2000 rule preamble discussion at 65 FR 79654.

O. Part 847 Alternative Enforcement

No State Counterpart

We created new Part 847 in the 2000 rule to provide for enforcement actions not previously addressed in our Federal regulations. New Part 847 implements sections 518(e), 518(g), and 521(c) of the Act.

Please refer to the Rule Changes Side-by-Side Template to see the complete Table of Contents and provisions for Part 847.

P. Alternative Enforcement

1. **30 CFR 847.2 General provisions.**

No State Counterpart

(a) Whenever a court of competent jurisdiction enters a judgment against or convicts a person under these provisions, we must update AVS to reflect the judgment or conviction.
(b) The existence of a performance bond or bond forfeiture cannot be used as the sole basis for determining that an alternative enforcement action is unwarranted.
(c) Each State regulatory program must include provisions for civil actions and criminal penalties that are no less stringent than those in this part and include the same or similar procedural requirements.
(d) Nothing in this part eliminates or limits any additional enforcement rights or procedures available under Federal or State law.

[2000 rule, 65 FR 79671]

Note: We created new Part 847 in the 2000 rule to provide for enforcement actions not previously addressed in the Federal rules. Section 847.2 includes general provisions that—

- address the practice of not pursuing alternative enforcement after bond forfeiture,
- judgments and convictions under Part 847 will be shown in AVS,
- require State programs to provide for civil actions and criminal penalties that are no less stringent than in Part 847, and
- nothing in Part 847 eliminates or limits any additional enforcement actions a regulatory authority may take.

See the 2000 rule preamble discussion at 65 FR 79655.

2. 30 CFR 847.11 Criminal penalties.

No State Counterpart

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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--
(a) Willfully and knowingly violates a condition of the permit;
(b) Willfully and knowingly fails or refuses to comply with --
    (1) Any order issued under section 521 or 526 of the Act; or
    (2) Any order incorporated into a final decision issued by the Secretary under
the Act (except for those orders specifically excluded under section 518(e) of the
Act); or
(c) Knowingly makes any false statement, representation, or certification, or
knowingly fails to make any statement, representation, or certification in any
application, record, report, plan, or other document filed or required to be
maintained under the regulatory program or any order or decision issued by the
Secretary under the Act.
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[2000 rule, 65 FR 79671 and 2007 rule, 72 FR 68031]

Note: This was adopted in new Part 847 and was created to implement the criminal sanctions under sections 518(e) and 518(g) of the Act. *See* the 2000 rule preamble discussion at 65 FR 79655.

In the 2007 rule, the opening paragraph of the section was amended to clarify that pursuit of alternative enforcement under § 847.11 is always at the discretion of the regulatory authority. *See* the 2007 rule preamble discussion at 72 FR 68026.

3. 30 CFR 847.16 Civil actions for relief.

No State Counterpart [authorized under UCA 40-10-20(4)]

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(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 --
    (1) Violate or fail or refuse to comply with any order or decision that we
issue under the Act or regulatory program;
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(2) Interfere with, hinder, or delay us in carrying out the provisions of the Act or its implementing regulations;
(3) Refuse to admit our authorized representatives onto the site of a surface coal mining and reclamation operation;
(4) Refuse to allow our authorized representatives to inspect a surface coal mining and reclamation operation;
(5) Refuse to furnish any information or report that we request under the Act or regulatory program; or
(6) Refuse to allow access to, or copying of, those records that we determine necessary to carry out the provisions of the Act and its implementing regulations.
(b) A civil action for relief includes a permanent or temporary injunction, restraining order, or any other appropriate order by a district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which you have your principal office.
(c) Temporary restraining orders will be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended.
(d) Any relief the court grants to enforce an order under paragraph (b) of this section will continue in effect until completion or final termination of all proceedings for review of that order under the Act or its implementing regulations unless, beforehand, the district court granting the relief sets aside or modifies the order.
[2000 rule, 65 FR 79671 and 2007 rule, 72 FR 68031]

Note: Section 847.16 was adopted in new Part 847 and was created to implement the civil actions provisions under section 521(c) of the Act. *See* the 2000 rule preamble discussion at 65 FR 79655.

In the 2007 rule, paragraph (a) of the section was amended to clarify that pursuit of alternative enforcement under § 847.16 is always at the discretion of the regulatory authority. *See* the 2007 rule preamble discussion at 72 FR 68026.

Q. Abandoned Mine Land Contractor Eligibility

1. 30 CFR 874.16 Contractor eligibility.

UT Counterpart: R643-874-160

To receive AML funds, every successful bidder for an AML contract must be eligible under §§ 773.12, 773.13, and 773.14 of this chapter at the time of contract award to receive a permit or provisionally issued permit to conduct surface coal mining operations.

[AML Reclamation Fund Reauthorization Implementation rule, 59 FR 28172; 2000 rule, 65 FR 79671]

Note: The 2000 rule amended the section heading and updated cross-references in both §§ 874.16 and 875.20 based upon the amended eligibility provisions adopted in the rulemaking.

2. 30 CFR 875.20 Contractor eligibility.

UT Counterpart: R643-875-200

To receive AML funds for noncoal reclamation, every successful bidder for an AML contract must be eligible under §§ 773.12, 773.13, and 773.14 of this chapter at the time of contract award to receive a permit or provisionally issued permit to conduct surface coal mining operations.

Note: The 2000 O&C rule changed the title and corrected cross references.

FEDERAL REGISTER: 59 FR 54306 (October 28, 1994)

DEPARTMENT OF THE INTERIOR
AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 701, 773, 778, 840, and 843
Use of the Applicant/Violator Computer System (AVS) in Surface Coal Mining and Reclamation Permit Approval; Standards and Procedures for Ownership and Control Determinations; Part III

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) establishes new regulations to require regulatory authorities to use OSM's Applicant/Violator Computer System (AVS) and other information sources to identify ownership or control links between permit applicants and violators.

The regulations establish the procedures, standards, and type of proof required to challenge ownership or control links and to disprove violations.

OSM also amends a number of regulations affecting blocking of permits, abatement of notices of violation, improvidently issued permits, and permit application information.

The regulations reduce the possibility of violators receiving and retaining permits in violation of the permit approval provisions of SMCRA. Finally, the rules establish enhanced due process procedures for the regulated community.

EFFECTIVE DATE: November 28, 1994.

ADDRESSES: Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Russell Frum, Acting Chief, Applicant/Violator System Office, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1849 C Street NW., Washington, DC 20240. Telephone: 202-208-4655.

SUPPLEMENTARY INFORMATION:

I. Background.
II. Rules Adopted and Responses to Public Comments.
III. Procedural Matters.

I. BACKGROUND

Section 510(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) and 30 CFR part 773 establish certain requirements for permits and permit processing. These requirements include the identification of ownership or control links between permit applicants and individuals or entities who are responsible for unabated violations of certain Federal or State laws and rules. See 30 CFR 773.5; 30 CFR 773.15(b). The purpose of such inquiry is to determine whether a permit applicant is linked to unabated violations of the Act and related air and water quality requirements. See 30 CFR 773.15(b). In the event that a permit applicant is so linked, the regulatory authority may not issue a permit to the applicant unless the applicant submits proof that the violation has been or is in the process of being corrected to the satisfaction of the agency that has jurisdiction over the violation. In the alternative, the applicant may establish that the violation is the subject of a good faith, direct, administrative or judicial appeal which contests the validity of the violation. Id. In the event that a permit applicant is so linked and proof of the violation's correction or good faith appeal is not submitted, issuance of a permit to the applicant may constitute improvident issuance and may subject the permittee to certain remedial measures including suspension or rescission of the permit. See 30 CFR 773.20 and 30 CFR 773.21.

Under a court order in the case of Save Our Cumberland Mountains, Inc. et al. v. Clark, No. 81-2134 (D.D.C. January 31, 1985) (Parker, J.), the Secretary of the Interior was required to improve the enforcement and implementation of Section 510(c) of SMCRA, and to establish a computerized Applicant/Violator System ("AVS") to match permit applicants and their owners and controllers with current violators of SMCRA. OSM has developed such a computer system to enable OSM and State regulatory authorities to comply effectively with the responsibilities prescribed by Section 510(c) of SMCRA and 30 CFR part 773.

On January 24, 1990, OSM and DOI entered into a Settlement Agreement attempting to resolve litigation with Save Our Cumberland Mountains ("SOCM") and other plaintiffs. The Settlement Agreement was approved by the U.S. District Court on September 5, 1990, and became effective, by its own terms, on that date. See Memorandum of the Court, Save Our Cumberland Mountains, Inc., et al., v. Lujan, No. 81-2134 (D.D.C. September 5, 1990). That Settlement Agreement contained provisions whereby OSM agreed to propose rules to implement Section 510(c) of SMCRA and the AVS. Accordingly, on September 6, 1991, OSM proposed rules whose purpose was:

"to require that, prior to issuing permits to applicants, regulatory authorities consider complete ownership and control information in conducting the analysis mandated by section 510(c) of SMCRA and 30 CFR 773.15(b). The proposed rules would mandate the use of AVS as a critical component of the ownership and control information consideration process."

See Proposed Rule, Use of the Applicant/Violator Computer System in Surface Coal Mining and Reclamation Permit Approval, *56 FR 45780, 45781* (September 6, 1991). While the proposal of the rules fulfilled certain provisions of OSM's Settlement Agreement with SOCM, OSM indicated that:

"it must be emphasized that OSM independently believes that the proposal and public consideration of such rules are important to assist OSM in implementing its duties under Section 510(c) of SMCRA and duties imposed by regulations such as 30 CFR 773.15. The proposed rules should be viewed as proposals that OSM would have made regardless of any litigation or settlement."

Id. Subsequently, on March 16, 1992, the U.S. Court of Appeals (D.C. Cir.) vacated the District Court's approval of the Settlement Agreement with SOCM. Save Our Cumberland Mountains, Inc., et al., v. Lujan, No. 90-5374, Slip. Op. (U.S. Court of Appeals, D.C. Cir., May 22, 1992). In its decision, the Court noted that "nothing" in the Court's opinion precluded OSM's maintenance and improvement of the AVS as agency policy. Id., at page 22.

As OSM indicated at the time of its proposal of September 1991, these rules are important and appropriate-independent of any litigation or settlement. OSM continues to be committed to the maintenance and improvement of the AVS as a matter of agency policy and believes that the publication of final rules is now necessary to the effective implementation of section 510(c) of the Act and the implementation of the AVS. OSM's commitment to AVS is in accord with the position recently expressed by the Senate Appropriations Committee:

"Regarding the AVS, the Committee joins the House in commending OSM for improvements made to the system. The Committee has consistently supported development and implementation of the AVS because the AVS is essential to effective enforcement of the Surface Mining Control and Reclamation Act of 1977 [SMCRA]."

Report of the Senate Appropriations Committee, Senate Report No. 103-114, at page 47 (July 28, 1993). Accordingly, OSM has determined to go forward with the final rules published today without regard to the course of litigation between OSM and SOCM or any other person. OSM has reviewed the proposed rules in light of the comments that have been made with a view towards serving the agency's commitment to protecting the environment, to implementing SMCRA, and ultimately, to serving the public interest.

These final rules incorporate the AVS into the Federal regulations and mandate the use of the system by State and Federal surface mining regulatory authorities. At the same time that these rules strengthen the enforcement of Section 510(c), they also establish a detailed set of procedural pathways to assure the protection of due process for the regulated community.

PUBLIC PARTICIPATION

As indicated above, OSM published proposed rules on September 6, 1991. The proposed regulations were available for public comment until November 20, 1991. Comments were received from members of the regulated community, representatives of environmental advocacy groups, representatives of State regulatory authorities, and various citizens. While a total of 20 commenters submitted written comments, most comments can be grouped into three major categories which are captioned below. After the discussion of these three major issues, this preamble will then provide a section-by-section discussion of the final rules.

II. RULES ADOPTED AND RESPONSES TO PUBLIC COMMENTS

A. SUMMARY OF RULES ADOPTED

These final rules include the following provisions:

PART 701-PERMANENT REGULATORY PROGRAM

Section 701.5 is amended to delete the definition of "Violation notice."

PART 773-REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

The Table of Contents is amended to include new section numbers 773.22, verification of ownership or control application information; 773.23, review of ownership or control and violation information; 773.24, procedures for challenging ownership or control links shown in AVS; and 773.25, standards for challenging ownership or control links and the status of violations.

Section 773.5 is amended to include definitions of "Applicant/Violator System" or "AVS." The terms are defined to mean the computer system maintained by OSM to identify ownership or control links involving permit applicants, permittees, and persons cited in violation notices. The regulation is further amended to include definitions of "Federal violation notice," "Ownership or control link," "State violation notice," and "Violation notice."

A "Federal violation notice" is defined to include a violation notice issued by OSM or by another agency or instrumentality of the United States.

An "ownership or control link" is defined as any relationship included in the definition of "owned or controlled" or "owns or controls" in 30 CFR 773.5 or in the violations review provisions of 30 CFR 773.15(b). It includes any relationship presumed to constitute ownership or control under 30 CFR 773.5(b) unless such presumption has been successfully rebutted under sections 773.24 and 773.25 of this rule or under the provisions of 30 CFR part 775 and Sec. 773.25 of this rule. It also includes an identity between persons, e.g., an applicant and a violator.

A "State violation notice" is defined as a violation notice issued by a State regulatory authority or by another agency or instrumentality of State government.

"Violation notice" is defined as any written notification from any governmental entity advising of violations of the Act or any other laws which would form the basis for a regulatory authority to deny issuance of a permit in accordance with the criteria contained in Sec. 773.15(b) of the regulations. The type of written notification is broadly defined to include a letter, memorandum, legal or administrative pleading, or other written communication. Consistent with the provisions of Sec. 773.15(b), the term includes notification of a violation of the Act, any Federal rule or regulation promulgated pursuant thereto, a State program, or any Federal or State law, rule, or regulation pertaining to air or water environmental protection in connection with a surface coal mining operation. It includes, but is not limited to, a notice of violation; an imminent harm cessation order; a failure-to-abate cessation order; a final order, bill, or demand letter pertaining to a delinquent civil penalty; a bill or demand letter pertaining to delinquent abandoned mine reclamation fees; and a notice of bond forfeiture, where one or more violations upon which the forfeiture was based have not been corrected.

Section 773.10 is revised to include the new sections of the AVS-related rules that result in information collection requirements. The revision provides an estimate of the average public reporting burden of four and one-half hours

per response for the collection of information under part 773 as such part is revised by these final rules. The section also lists the addresses for OSM and OMB where comments on the information collection requirements may be sent.

Paragraph 773.15(b)(1) is amended to require the regulatory authority to review all reasonably available information concerning violation notices and ownership or control links involving the applicant. Such information would include that obtained pursuant to Sec. 773.22 (verification of ownership or control application information); Sec. 773.23 (review of ownership or control and violation information); Sec. 778.13 (identification of interests); and Sec. 778.14 (violation information).

The net effect of referencing such provisions in Sec. 773.15(b)(1) is to assure that the regulatory authority makes a decision with respect to permit issuance or denial based upon complete information relating to ownership, control, and violations. Such complete information includes the mandated use of AVS.

Furthermore, in accordance with Sec. 773.23, the regulatory authority will follow the procedures and standards set forth in Secs. 773.24 and 773.25 in deciding whether to issue the permit under Sec. 773.15(b).

OSM has also decided to amend 30 CFR 773.15(b)(1) to provide that, in the absence of a failure-to-abate cessation order (FTACO), a regulatory authority may presume that a notice of violation (NOV) is being corrected to the satisfaction of the agency with jurisdiction over the violation where the abatement period for such notice of violation has not yet expired and where the permit applicant has provided certification in his or her permit application that such violation is in the process of being abated to the satisfaction of the agency with jurisdiction over the violation. In addition, OSM has also amended 30 CFR 773.15(b)(2) to provide that any permits issued incident to such presumption and certification will be conditionally issued based upon successful completion of the necessary abatement.

Section 773.20 is amended by the insertion of a new paragraph (b)(2), which makes the provisions of proposed Sec. 773.25, standards for challenging ownership or control links and the status of violations, applicable when a regulatory authority makes determinations with respect to improvidently issued permits. In this context, Sec. 773.25 is applicable when a regulatory authority determines whether a violation, penalty, or fee existed at the time that it was cited, remains unabated or delinquent, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, and whether any ownership or control link between the permittee and the person responsible for the violation, penalty, or fee existed, still exists, or has been severed.

The insertion of the language referring to Sec. 773.25 has the effect of assuring that the standards, responsibilities, and procedures created by proposed Sec. 773.25 are consistently applied to permit issuance and to determinations regarding improvident permit issuance. Such an approach enhances the fairness of the permitting process and the prospect for the uniform enforcement of nationwide minimum standards. In one respect, however, the improvident permit issuance process will differ from the permit issuance process. In the improvident permit issuance process, prior to permit suspension or rescission, the permittee will be able to challenge the existence of the violation at the time it was cited. In the permit issuance process, prior to permit denial, the applicant will not be able to challenge the existence of the violation at the time it was cited.

OSM has also renumbered certain provisions of the regulation at 30 CFR 773.20(c). Among such provisions, renumbered paragraph (c)(1)(iv), which authorizes the regulatory authority to use rescission as one of the remedial measures for improvident permit issuance, deletes a specific reference contained in the former 30 CFR 773.20(c)(4) to the rescission procedures of 30 CFR 773.21.

The reason for this deletion is that OSM today establishes a prior notice and a common appeal procedure for both permit suspensions and permit rescissions with respect to improvidently issued permits. The former regulation governing permit suspensions at 30 CFR 773.20(c)(3) did not impose any specific requirements for prior notice, opportunity to be heard, or right of appeal for the permittee whose permit is to be suspended. See *54 FR 18450 (1989)*. In contrast to this, regulations governing permit rescissions at 30 CFR 773.21 contained specific requirements for prior notice to a permittee and an explicit right of appeal. OSM has now provided for greater consistency in its procedures governing suspension and rescission of permits.

Accordingly, OSM amends 30 CFR 773.20 to add a new paragraph (c)(2) which requires that a regulatory

authority which decides to suspend a permit must provide at least 30 days' prior written notice to the permittee. In the event that the regulatory authority decides to rescind a permit, it must provide notice in accordance with the provisions of 30 CFR 773.21. The amendment further provides that a permittee be given the opportunity to request administrative review of the notice under Office of Hearings and Appeals, (OHA) rule 43 CFR 4.1370 et seq., where OSM is the regulatory authority, or under the State program equivalent, where the State is the regulatory authority.

The regulation further allows for enhanced due process protection and fairness by providing that temporary relief from the regulatory authority's decision is available in accordance with the provisions of OHA rule 43 CFR 4.1376 or the State program equivalent. In the absence of such temporary relief, the regulatory authority's decision remains in effect during the pendency of appeal.

OSM has retained the language in paragraph 773.20 which addresses the situation which occurs when a permit is issued in reliance upon the presumption that an NOV is being abated in the absence of a cessation order and a cessation order is, in fact, issued with respect to the violation. In such an event, a regulatory authority is required to find that the permit has been improvidently issued.

OSM amends paragraph (a) of 30 CFR 773.21 to make the provisions of Sec. 773.25, standards for challenging ownership or control links and the status of violations, applicable when a regulatory authority invokes the automatic suspension and rescission procedures of 30 CFR 773.21. The rationale for such amendment is the same as that discussed above with respect to similar language contained in Sec. 773.20.

Further, OSM deletes former paragraph (c) of 30 CFR 773.21 which provides for appeals of rescission notices. As discussed above, rescission appeal procedures are incorporated in 30 CFR 773.20.

Section 773.22 is a new section and mandates an inquiry whose focus is to assure that the regulatory authority develops complete and accurate information as to the identification of the applicant and all owners or controllers of the applicant prior to making a determination on a permit application and enters such information promptly into the AVS. Accordingly, this section focuses on verification of ownership or control application information. Such accurate and complete information enables the regulatory authority to make an informed decision as to whether the applicant is linked to a surface coal mining and reclamation operation in violation of the Act or other any other environmental law within the terms of 30 CFR 773.15(b)(1).

Paragraph (a) of Sec. 773.22 imposes a duty upon a regulatory authority to review the information provided in the permit application, pursuant to 30 CFR 778.13(c) and 778.13(d), to determine whether the information provided, including the identification of the operator and all owners and controllers of the operator, is complete and accurate. In making such determination, the regulatory authority is required to compare information provided in the application with information contained in manual and automated data sources. Manual sources for review include the regulatory authority's own enforcement and inspection records and State corporation commission or tax records, to the extent they contain information concerning ownership or control links. Automated data sources include the regulatory authority's own computer systems, if any, and the AVS.

Paragraph (b) of Sec. 773.22 provides that, if it appears from information provided in the application pursuant to paragraphs (c) and (d) of Sec. 778.13 that none of the persons identified in the application has had any previous mining experience, the regulatory authority has to inquire of the applicant and investigate whether anyone other than those persons identified in the application will own or control the mining operation as either an operator or as another type of owner or controller.

Paragraph (c) of Sec. 773.22 provides that if, after conducting the information review described above, the regulatory authority identifies any potential omission, inaccuracy, or inconsistency in the ownership or control information provided in the application, it must contact the applicant prior to making a final determination with respect to the application. The applicant is then required to resolve the potential omission, inaccuracy, or inconsistency through submission of an amendment to the application or a satisfactory explanation which includes credible information sufficient to demonstrate that no actual omission, inaccuracy, or inconsistency exists. The regulation also contains a reference to required action by the regulatory authority in accordance with Sec. 843.23, sanctions for knowing omissions or inaccuracies in ownership or control and violation information, or the State

program equivalent, where appropriate. As will be described more fully below, OSM is deferring action at this time with respect to proposed Sec. 843.23. Such proposed section will be considered as part of a subsequent rulemaking. OSM has, however, retained the reference to proposed Sec. 843.23 in final Sec. 773.22 in the event that proposed Sec. 843.23 is ultimately adopted. Nevertheless, OSM has made no decision with respect to the adoption of proposed Sec. 843.23 and the retention of such reference does not mean that OSM will ultimately adopt proposed Sec. 843.23 as a final rule.

Paragraph (d) of Sec. 773.22 requires that, upon completion of the information review mandated by Sec. 773.22, the regulatory authority promptly enter into or update all ownership or control information on AVS.

Section 773.23 is a new section which delineates the regulatory authority's review obligations with respect to a permit application after the regulatory authority has completed the process of verifying ownership or control application information as described in proposed Sec. 773.22.

Paragraph (a) of Sec. 773.23 requires the regulatory authority to review all reasonably available information concerning violation notices and ownership or control links involving the applicant to determine whether the application can be approved under the provisions of 30 CFR 773.15(b). With respect to ownership or control links involving the applicant, such information includes all information obtained under proposed Sec. 773.22 and 30 CFR 778.13. With respect to violation notices, such information includes all information obtained under Sec. 778.14, information obtained from OSM, including information shown in the AVS, and information obtained from the regulatory authority's own records concerning violation notices.

In substance, the regulation assures that the regulatory authority considers complete ownership, control, and violation information in making the decision required by 30 CFR 773.15(b)(1) with respect to a permit application.

Paragraph (b) of Sec. 773.23 provides the course of action which a regulatory authority is required to take if the review conducted pursuant to paragraph (a) of the section discloses any ownership or control link between the applicant and any person cited in a violation notice.

Thus, paragraph (b)(1) of Sec. 773.23 requires that the regulatory authority notify the applicant of such link and refer the applicant to the agency with jurisdiction over the violation notice.

Paragraph (b)(2) of Sec. 773.23 requires that the regulatory authority not approve the permit application unless and until it determines that all ownership or control links between the applicant and any person cited in a violation notice are erroneous or have been rebutted, or the regulatory authority determines that the violation to which the applicant has been linked has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1) or the State program equivalent. The determinations to be made by the regulatory authority under paragraph (b)(2) of the regulation are made in accordance with the provisions of Sec. 773.24, procedures for challenging ownership or control links shown in AVS, and Sec. 773.25, standards for challenging ownership or control links and the status of violations, or their State program equivalents.

Paragraph (c) of Sec. 773.23 requires that, following the regulatory authority's decision on the application or following the applicant's withdrawal of the application, the regulatory authority is required to promptly enter all relevant information related to the decision or withdrawal into AVS. The regulatory authority's decision could include unconditional issuance, conditional issuance, or denial of the permit. The requirement that all relevant information be promptly entered into AVS is intended to insure that AVS is continually updated to reflect the most current information available with respect to permit applicants. A critical source of such information is the regulatory authority.

Section 773.24 is a new section that establishes the procedures to be followed if a person wishes to challenge an ownership or control link between a person and any other person shown on AVS. The procedures to be followed by both OSM and the challenger are included. The section provides procedures for direct appeals of such links to OSM by persons who have been so linked. The section also provides for challenges concerning the status of violations to which persons shown on AVS have been linked. The section further provides the opportunity for those persons making a challenge to obtain a temporary relief from any adverse use of the challenged link or violation information

during the pendency of such challenge.

Paragraph (a)(1) of Sec. 773.24 provides that an applicant or anyone else shown in AVS is an ownership or control link to any person could challenge such a link in accordance with the provisions of paragraphs (b) through (d) of Sec. 773.24 and in accordance with the provisions of Sec. 773.25. Paragraph (a)(1) of Sec. 773.24 provides, however, that such challenge is not available if the challenger is bound by a prior administrative or judicial decision with respect to the link.

Paragraph (a)(1) of Sec. 773.24 provides that challenges of ownership or control links shown on AVS are made before OSM.

Paragraph (a)(2) of Sec. 773.24 provides that an applicant or anyone else shown in AVS in an ownership or control link to a person cited in a Federal violation notice seeking to challenge the status of such violation may do so in accordance with the provisions of paragraphs (b) through (d) of Sec. 773.24 and in accordance with the provisions of Sec. 773.25, which are discussed in detail below. The procedures applicable are similar to those described in paragraph (a)(1) of Sec. 773.24.

The "status of the violation" means whether the violation remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good faith, direct administrative or judicial appeal to contest the validity of the violation. See 30 CFR 773.15(b)(1)(i)-(ii). This usage is carried forward into paragraphs (b) and (c) of Sec. 773.24 and into the provisions of paragraph (b)(1)(iv) of Sec. 773.25. The process for challenging the status of a Federal violation is a Federal process and such challenges will be made before OSM.

In challenging the current status of a violation under Sec. 773.24 or 773.25, a person will not be able to challenge the existence of the violation at the time it was cited unless the challenge is made by a permittee within the context of the improvidently issued permit process or by an applicant after permit denial. In general, the existence of the violation will have been established by prior administrative or judicial proceedings involving the person cited in the violation notice, or by such person's failure to exhaust its available remedies in a timely manner.

Paragraph (a)(2) of Sec. 773.24 provides, in language similar to that contained in paragraph (a)(1) of the regulation, that the opportunity to challenge the status of a violation is not available to any person who "is bound by a prior administrative or judicial determination concerning the status of the violation."

Paragraph (a)(3) of Sec. 773.24 provides that any applicant or person shown in AVS to be linked by ownership or control to a person cited in a State violation notice may challenge the status of the violation before the State that issued the violation notice. The challenge must be made in accordance with the State's program equivalents to paragraphs (b) through (d) of Sec. 773.24 and Sec. 773.25. Again, the challenge may not involve the existence of the violation at the time it was cited, and is not available if the challenger is bound by a prior administrative or judicial determination with respect to status of the violation.

Paragraph (b) of Sec. 773.24 requires that any applicant or other person seeking to challenge ownership or control links shown in AVS or the status of Federal violations must submit to OSM a written explanation of the basis for his or her challenge and provide relevant evidentiary materials and supporting documents. The information must be submitted to the Chief of OSM's AVS Office in Washington, DC.

Paragraph (c) of Sec. 773.24 provides that, in response to a challenge made under paragraph (b) of that section, OSM must make a written decision with respect to the ownership or control link and/or with respect to the status of the violation.

Paragraph (d)(1) of Sec. 773.24 provides that, if OSM has determined that the ownership or control link has been shown to be erroneous or has been rebutted and/or that the violation covered by the violation notice has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, OSM is required to provide notice of its determination to the permit applicant or other person challenging the link or the status of the violation. If an application is pending, OSM must also notify the regulatory authority before whom the application is pending. Further, OSM is required to correct information contained in AVS to reflect the determination which has been made.

Paragraph (d)(2) of Sec. 773.24 provides that, if OSM has determined that the challenged ownership or control link has not been shown to be erroneous and has not been rebutted, and that the violation remains outstanding, OSM must provide notice of its determination to the permit applicant or other person challenging the link or the status of the violation. If an application is pending, OSM must also notify the regulatory authority before whom the application is pending. Further, OSM is required to update information contained in AVS, if necessary, to reflect OSM's determinations.

Paragraph (d)(2)(i) of Sec. 773.24 provides that OSM must serve a copy of its decision with respect to a challenge upon the applicant or other challenger by certified mail, or by any other means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure. The regulation provides that service is complete upon tender of the notice or of the mail and is not deemed incomplete by virtue of a challenger's refusal to accept the notice or mail.

Paragraph (d)(2)(ii) of Sec. 773.24 provides that the applicant or other challenger can appeal OSM's decision to the Department of the Interior's Office of Hearings and Appeals (OHA) within 30 days of such decision in accordance with OHA regulations at 43 CFR 4.1380 et seq. Paragraph (d)(2)(ii) further provides that OSM's decision remains in effect unless temporary relief was granted in accordance with OHA regulations at 43 CFR 4.1386. The filing of an appeal will not automatically suspend the use of the information in AVS during the pendency of such appeal. The challenger must explicitly seek such relief in appeal proceeding before OHA.

Section 773.25 is a new section which establishes standards for challenges to ownership or control links and for challenges to the status of violations. The section allocates responsibilities between OSM and State regulatory authorities for resolving issues related to ownership and control and provides the standards for evidence to resolve such issues.

Paragraph (a) of Sec. 773.25 provides that provisions of Sec. 773.25 are applicable to any challenge concerning an ownership or control link to any person or the status of any violation covered by a violation notice when such challenge is made under the provisions of 30 CFR 773.20 and 30 CFR 773.21 (improvidently issued permits); Secs. 773.23 (the regulatory authority's review of ownership or control and violation information), and 773.24 (procedures for challenging ownership or control links shown in AVS); or 30 CFR part 775 (administrative and judicial review of permitting decisions).

Paragraph (b) of Sec. 773.25 provides the basic allocation of responsibility among regulatory authorities to make decisions with respect to ownership or control and with respect to the status of violations.

Paragraph (b)(1)(i) of Sec. 773.25 provides that the regulatory authority before which an application is pending has responsibility for making decisions with respect to the ownership or control relationships of the application.

Paragraph (b)(1)(ii) of Sec. 773.25 provides that the regulatory authority that issued a permit has responsibility for making decisions with respect to the ownership or control relationships of the permit.

Paragraph (b)(1)(iii) of Sec. 773.25 provides that the State regulatory authority that issued a State violation notice has responsibility for making decisions with respect to the ownership or control relationships of the violation.

Paragraph (b)(1)(iv) of Sec. 773.25 provides that the regulatory authority that issued a violation notice, whether State or Federal, has responsibility for making decisions concerning the status of the violation covered by the notice.

The "status" of the violation means whether the violation remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1).

Paragraph (b)(2) of Sec. 773.25 provides that OSM has responsibility for making decisions with respect to the ownership or control relationships of a Federal violation notice.

Paragraph (b)(3)(i) of Sec. 773.25 provides that with respect to information shown on AVS, the responsibilities of State regulatory authorities to make decisions with respect to ownership or control links are subject to the plenary

authority of OSM.

Paragraph (b)(3)(ii) of Sec. 773.25 provides that with respect to information shown on AVS relating to the status of a violation and with respect to ownership or control information which has not been entered into AVS by a State, the authority of a State regulatory authority is subject to OSM's oversight authority under 30 CFR parts 773, 842, and 843.

Paragraph (c) of Sec. 773.25 establishes evidentiary standards applicable to the formal and informal review of ownership or control links and the status of violations.

Paragraph (c)(1) of Sec. 773.25 provides that in any formal or informal review of an ownership or control link or of the status of a violation covered by a violation notice, the agency responsible for making a decision is required to first make a prima facie determination or showing that the link exists, existed during the relevant period, and/or that the violation remains outstanding. A prima facie determination is made when the agency is reviewing the evidence itself, in an informal process; a prima facie showing is made when the agency's determination is the subject of a formal administrative or judicial review process. When the agency makes such a determination or showing, the person seeking to challenge the link or the status of the violation then has the burden of proving the necessary elements of his or her challenge to the link or to the status of the violation by a preponderance of the evidence.

Under paragraph (c) of Sec. 773.25, a challenger of a link has to prove at least one of three proposed conclusions by a preponderance of the evidence to succeed in his or her challenge.

First, under paragraph (c)(1)(i) of Sec. 773.25, a challenger could prove that the facts relied upon by the responsible agency to establish ownership or control under the definition of "owned or controlled" or "owns or controls" in 30 CFR 773.5 do not or did not exist or that the facts relied upon to establish a presumption of ownership or control under the definition of "owned or controlled" or "owns or controls" in 30 CFR 773.5 do not or did not exist.

Paragraph (c)(1)(ii) of Sec. 773.25 provides that a person subject to a presumption of ownership or control under the definition of "owned or controlled" or "owns or controls" in 30 CFR 773.5 could rebut such presumption by demonstrating that he or she does not or did not in fact have the authority directly or indirectly to determine the manner in which surface coal mining operations are or were conducted.

Paragraph (c)(1)(iii) of Sec. 773.25 provides that a challenger could prove that the violation covered by a violation notice did not exist, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal within the meaning of 30 CFR 773.15(b)(1). Paragraph (c)(1)(iii) further provides, however, that a person challenging the status of a violation would not be able to challenge the existence of the violation at the time it was cited under the provisions of Sec. 773.24 unless such challenger is a permittee acting within the context of Secs. 773.20-773.21 of this part. In any circumstance, a person who had failed to take timely advantage of a prior opportunity to challenge the violation notice or who was bound by a previous administrative or judicial determination concerning the existence of the violation would also be precluded from making a challenge to the existence of the violation at the time it was cited in any proceeding.

Paragraph (c)(2) of Sec. 773.25 describes the type of evidence that a person challenging an ownership or control link or the status of a violation has to present to meet the burden of proof by a preponderance of the evidence. The regulation provides that the evidence presented be probative, reliable, and substantial. See *5 U.S.C. 556*(d).

Paragraph (c)(2) of Sec. 773.25 provides a list of examples of such evidence for proceedings before the "responsible agency" (the agency with responsibility for making a decision with respect to a challenge) and for proceedings before administrative or judicial tribunals reviewing the decisions of the responsible agency. The list of the types of acceptable evidence is intended to be illustrative, not exhaustive. It is expected that regulatory authorities will add to this list as they develop experience in making determinations under the regulation.

Paragraph (c)(2)(i) of Sec. 773.25 focuses upon proceedings before the responsible agency. The list of examples includes documents which are likely to be truthful and which have certain indicators of reliability which go beyond

the mere assertions of the individual presenting the evidence.

Paragraph (c)(2)(i)(A) of the section provides that a challenger may submit affidavits setting forth specific facts concerning the scope of responsibility of the various owners or controllers of an applicant, a permittee, or any person cited in a violation notice; the duties actually performed by such owners or controllers; the beginning and ending dates of such owners' or controllers' affiliation with the applicant, permittee, or person cited in a violation notice; and the nature and details of any transaction creating or serving an ownership or control link; or specific facts concerning the status of the violation.

Paragraphs (c)(2)(i)(B) and (c)(2)(i)(C) of section 773.25 each look to official certification as the basis for the reliability of a submitted document. Paragraph (c)(2)(i)(B) allows for the submission of copies of certain types of documents if they are certified. Such documents include copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence or other relevant company records. Paragraph (c)(2)(i)(C) allows for submission of certified copies of documents filed with or issued by any State, municipal, or Federal governmental agency.

Paragraph (c)(2)(i)(D) of final Sec. 773.25 provides for a challenger's submission of an opinion of counsel in support of his or her position. Such opinion would be appropriate for submission when it is supported by evidentiary materials; when it is rendered by an attorney who certifies that he or she is qualified to render an opinion of law; and when counsel states that he or she has personally and diligently investigated the facts of the matter or where counsel states that such opinion is based upon information which has been supplied to counsel and which is assumed to be true.

Paragraph (c)(2)(ii) of Sec. 773.25 provides that, when the decision of the responsible agency is reviewed by an administrative or judicial tribunal, the challenger could present any evidence to such tribunal which is admissible under the rules of the tribunal. Under the regulation, however, the evidence submitted still has to be probative, credible, and substantial.

Paragraph (d) of Sec. 773.25 provides for the review and revision of information in AVS to reflect determinations made by regulatory authorities in response to challenges of ownership or control links or the status of violations. Paragraph (d) provides that, following any determination by a State regulatory authority or other State agency, or following any decision by an administrative or judicial tribunal reviewing such determination, the State regulatory authority shall review the information in AVS to determine if the information in AVS is consistent with the determination or decision. If it is not consistent, the State regulatory authority is required to promptly inform OSM and request that the AVS information be revised to reflect the determination or decision.

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

Paragraph (c) of 30 CFR 778.14 is amended to require a permit applicant to disclose "all violation notices" received by the applicant within the preceding three years. In addition, the introductory language of the provision is amended to require the disclosure of all outstanding violation notices for any surface coal mining operation that is deemed or presumed to be owned or controlled by either the applicant or by any person who is deemed or presumed to own or control the applicant under definitions of "owned or controlled" or "owns or controls" under 30 CFR 773.5.

The regulation previously required the applicant to disclose violations of a number of various laws listed in 30 CFR 778.14(c). Use of the amended definition of "violation notice" adopted today as part of 30 CFR 773.5 obviates the need for listing each of these violations in 30 CFR 778.14.

The regulation also previously required that the applicant provide only a list of unabated cessation orders and unabated air and water quality violation notices received prior to the date of the application by any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant. With respect to this list, the previous regulation did not require that an applicant list notices of violation received or unpaid penalties or fees incurred by any surface coal mining operation owned or controlled by

the applicant or by any person who owns or controls the applicant.

Paragraph (c) of Sec. 778.14 is now amended to require an applicant to disclose all outstanding violation notices received by any surface coal mining operation that is deemed or presumed to own or control the applicant.

In addition, OSM has amended paragraph (c) of Sec. 778.14 to provide that for each notice of violation issued pursuant to 30 CFR 843.12 or under a Federal or State program for which the abatement period has not expired, the applicant must certify that such notice of violation is in the process of being abated to the satisfaction of the agency with jurisdiction over the violation.

PART 840-STATE REGULATORY AUTHORITY: INSPECTION AND ENFORCEMENT

Paragraph (b) of 30 CFR 840.13 is amended to include a reference to Sec. 843.23, a proposed rule. As has been explained previously, OSM has deferred action on adopting proposed Sec. 843.23 at this time. The reference, however, to that section has been placed in Sec. 840.13 in the event that proposed Sec. 843.23 is adopted. The use of such reference does not mean, however, that OSM will ultimately adopt proposed Sec. 843.23.

PART 843-FEDERAL ENFORCEMENT

OSM amends the Table of Contents of 30 CFR part 843 to add Sec. 843.24, oversight of State permitting decisions with respect to ownership or control of the status of violations.

Former Sec. 843.10 is deleted since part 843 did not contain any information collection requirements which require approval by the Office of Management and Budget under *44 U.S.C. 3507.* The references to Secs. 843.14(c) and 843.16 formerly in Sec. 843.10 did not represent information collection requirements. The requirement in Sec. 843.14(c) for OSM to furnish copies of notices and orders to the State regulatory authority and to any person having an interest did not require OMB approval because the obligation to provide the information is imposed upon OSM and not upon the State or upon a member of the public. Section 843.16 merely informs the public of the right to file an application for review and request a hearing under 43 CFR part 4.

Section 843.24 is a new section which provides standards for OSM's oversight of State permitting decisions with respect to ownership or control or the status of violations.

Paragraph (a) of Sec. 843.24 establishes the bases which require OSM to take action under the provisions of paragraphs (b) and (c) of proposed Sec. 843.24. Paragraph (a) provides that OSM is required to take action whenever it determines, through its oversight of the implementation of State programs, that a State has issued a permit without complying with the State program equivalents of proposed Secs. 773.22 (verification of ownership or control application information), 773.23 (review of ownership or control and violation information), 773.24 (procedures for challenging ownership or control links shown in AVS), 773.25 (standards for challenging ownership or control links and the status of violations), and Sec. 843.23. As has been explained previously, OSM has deferred action on adopting proposed Sec. 843.23 at this time. The reference, however, to that proposed rule has been placed in Sec. 843.24 in the event that Sec. 843.23 is adopted. The use of such reference does not mean, however, that OSM will ultimately adopt proposed Sec. 843.23.

If, as a result of determination made under paragraph (a) of Sec. 843.24, OSM has reason to believe that the State has issued a permit improvidently within the meaning of 30 CFR 773.20, paragraph (b) of Sec. 843.24 requires OSM to initiate action under 30 CFR 843.21.

Paragraph (c) of Sec. 843.24 provides for remedial actions by OSM against a State which knowingly fails to comply with the regulations relating to ownership or control and violation information during the permit application process.

B. GENERAL COMMENTS

Numerous comments were made which addressed various issues with respect to the overall rulemaking. While

such comments also invoked particular sections of the proposed rules, these comments asserted several central themes which went beyond particular sections of the rulemaking even through specific sections of the proposed rulemaking were referenced as areas of concern by the commenters. Accordingly, OSM has decided to address these central issues in this portion of the preamble. Within the context of such discussion, particular sections of the proposed and final rules will be referred to as necessary. Nevertheless, in these responses, OSM focuses upon central issues which appear to be of overarching concern to the commenters.

DUE PROCESS

Industry commenters asserted that the proposed rules violated due process and the underlying principles of the Act. These commenters further argued that OSM's proposed rules violated due process principles because they did not allow for a permit conditioned upon the outcome of an appeal of an ownership or control link, upon the challenge of the status of the violation, or upon the challenge of the existence of the violation at the time it was cited. They also asserted that because OSM did not allow for de novo challenges of the existence of violations by owners or controllers, the proposed rules violated due process principles.

OSM disagrees with these commenters' characterizations. The proposed rules and the rules which have been adopted today provide detailed procedures to assure that those wishing to contest ownership or control links and the status of violations may do so. Further, the proposed and final rules provide that decisions on these matters are made based upon credible evidence and fair processes. Those seeking to challenge the existence of violations have the opportunity to do so, incident to permit denial, in accordance with currently existing rules which predate this rulemaking. See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38885* ("Due Process Provided.") (October 3, 1988). In addition, today's final rules clarify that permittees may make such challenges within the context of the improvidently issued permit process. The procedures provided in today's final rules supplement current rules contained at 30 CFR part 773 to provide more than sufficient due process to protect the limited property interest a permit applicant has in the expectancy of a permit to engage in surface coal mining operations.

OSM does not believe that principles of due process mandate, as a necessary condition precedent to the denial of a permit to an owner or controller of a violator, that the agency provide a full, formal, de novo hearing on the merits of an ownership or control link, the existence of the violation at the time it was cited, and the status of the violation-followed by an exhaustive appeal on each of these matters to the court of last resort. Instead, the final rules adopted today provide due process commensurate with the limited interest of a permit applicant-the expectancy of permit issuance. OSM's position is consistent with the agency's earlier statements relating to the sufficiency of due process and the protection of property rights provided by the ownership and control rules and the AVS. See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38885* (October 3, 1988).

Moreover, in the cases of Pittston Co. v. Lujan, No. 92-1606 (4th Cir.) and No. 91-0006-A (W.D. Va.), National Wildlife Federation v. Lujan, No. 88-3117 (D.D.C.), and Save Our Cumberland Mountains, Inc. v. Lujan, No 81-2134 (D.D.C.), coal industry interests advanced similar due process arguments attacking the agency's ownership and control rules published at *53 FR 38868* et seq. on October 3, 1988, and the agency's implementation of AVS and those rules. In the briefs submitted by the Department of the Interior in those cases, the Department analyzed relevant case law and carefully explained why the due process criticisms were not well taken. Copies of these briefs are being placed in the Administrative Record of this rulemaking. To the extent relevant, OSM incorporates the arguments advanced by the Department in those briefs herein by reference.

Further, OSM disagrees with the commenters' view that due process requires that conditional permits be made available during the tendency of the appeal of an ownership or control link as a condition precedent to permit block. The final rules published today provide ample protection for an owner or controller by providing the opportunity for an owner or controller to challenge an ownership or control link. Further, the final rules provide for the Department's Office of Hearings and Appeals (OHA) to grant temporary relief from a permit block, where, inter alia, the challenger has a substantial likelihood of prevailing on the merits of the appeal. OHA is contemporaneously publishing final rules establishing procedures for the granting of temporary relief. Under OSM's final rules published today and the OHA rules, the likelihood of the erroneous deprivation of a permit due to an erroneous link is minimal.

An appellant with a meritorious claim can get relief. Conditional permits for all appellants, without regard to the merits of their claims, are unnecessary and unwarranted.

Moreover, the final rules published today provide a measure of protection commensurate with the very limited interest that a permit applicant has in his or her application for a permit. An applicant does not have a right to a permit to mine coal in the same way that he or she has title to real property or a leasehold interest in a mineral lease. A permit to mine coal is a privilege granted by the regulatory authority to those who have complied with the requirements of the Act and the applicable regulatory program, including the provisions of Section 510(c) of the Act and the provisions of 30 CFR part 773. Until an applicant has been found in compliance with the applicable provisions of the program; until the other provisions governing permit issuance have been satisfied; and until a permit has been issued, the applicant has, at most, an expectation which may or may not be reasonable, depending upon the circumstances, that he or she will qualify for permit issuance. Such an expectancy is highly speculative, continent, and limited. Investments based on an expectancy do not transform the expectancy into a presently vested property right. See generally *Jacobsen v. Hannifin, 627 F.2d 177, 179-80 (9th Cir. 1980).* "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legislation claim of entitlement to it." See also *Board of Regents v. Roth, 408 U.S. 564, 577 (1972).*

In contrast to this, the agency's interest in and responsibility for implementing Section 510(c) of the Act is substantial and must be balanced against the limited property interest of the permit applicant. OSM's ability to implement the provisions of Section 510(c) of the Act is critical to the agency's enforcement of the Act. Those provisions of the Act prevent violators from receiving new permits and, thus, from injuring the environment at new surface coal mining operations. Those provisions of the Act encourage abatement of violations and deter operators and their owners or controllers from committing violations. Potential applicants fear permit denial in the future. Therefore, such applicants are motivated to prevent or abate violations in the present. Thus, OSM has a substantial interest in the successful, credible implementation of Section 510(c) of the Act.

If conditional permits were allowed during the pendency of a prolonged appellate process challenging an ownership or control link, the agency's ability to enforce the provisions of section 510(c) of the Act and the ownership and control rules would be severely compromised. Rather than abate the violations of their owned or controlled operations, it is possible that some applicants would routinely appeal ownership or control links without regard to the strength of the link as demonstrated by a full proceeding on the merits. Such applicants would appeal merely for the purpose of gaining conditional permits. Depending upon how long the appeals process ran, an operator with a conditional permit could extract a significant portion of the coal in a permitted mine and would have no incentive to abate the violations of the surface coal mining operation to which he had been linked. The Act does not contemplate such a result; nor does the Constitution require it.

Further, such a result would provide an unfair competitive advantage to an unscrupulous operator to the detriment of the interests of the other members of the coal industry, the majority of whom take responsibility for environmental reclamation and are responsible corporate citizens.

Nevertheless, industry commenters have asserted that there is little likelihood of operators making frivolous or bad faith ownership or control appeals because they have significant investments in their surface coal mining operations. While OSM recognizes that this is probably true for the majority of operators, including those who have provided comments on the proposed rules, experience has shown that a small minority of irresponsible operators can create harm disproportionate to their numbers. In the process, such irresponsible operators do harm not just to OSM's effective implementation of the Act, but also to the reputation of the industry as well.

For instance, a marginal operator's significant investment in coal extraction equipment may mask his/her plan to avoid spending resources on reclamation. Indeed, there could be a serious economic temptation for such an operator to protect a significant investment by appealing, if such appeal would support the continuation of operations. Accordingly, OSM considers the extent of an applicant's investment in a surface coal mining operation to be an unreliable indicator of an applicant's motive in initiating an appeal. Thus, OSM declines to develop a process requiring the evaluation of operators' good faith based upon their comparative investments in surface coal mining operations.

OSM does recognize, however, that a permittee has an interest in his permit deserving of a higher level of protection than that of an applicant with respect to an application. A valid permit represents more than the mere expectancy represented by an application. A current, valid permit represents legal authorization to conduct surface coal mining operations in accordance with the terms of such permit. See section 506 of the Act. Further, a permit carries with it the right of successive renewal. See section 506(d)(1) of the Act; 30 CFR 774.15. Thus, a detailed process governing improvidently issued permits has been established which recognizes this interest. See 30 CFR 773.20; 773.21. In response to concerns asserted by industry with respect to due process, OSM has amended the regulations governing improvident permit issuance to provide that a permittee can challenge the existence of the violation at the time it was cited as part of the improvidently issued permit process. See 773.20(b)(2). OSM has done this in recognition of the more substantial interest that a permit represents in contrast to the limited interest represented by a permit application.

Industry commenters have further asserted that an owner or controller must be afforded the opportunity to challenge the validity of the existence of the violation at the time that it was cited as a condition precedent to the recommendation of a denial of a permit application for an owner or controller of the violation. These commenters argued that owners or controllers may not have had the opportunity to challenge the validity of the violation which forms the basis of the permit denial at the time it was cited. They argued that only the actual violators were cited at that time and that the owners or controllers would not have received notice in a timely manner to enable them to challenge the violation then. They further asserted that a right to contest the merits of a violation after permit denial is not sufficient to redress the harm caused by permit denial. Rather than face permit denial, they asserted that coal operators will be forced to pay the disputed fees or to reclaim land. Accordingly, they asserted that they should be allowed to challenge the violation prior to any permit denial.

OSM disagrees with those views. The rights of an owner or controller are well protected by the ability to challenge the link to the violation. If the ownership or control link is not well taken, then the violation is irrelevant as a basis for permit block. If the link is meritorious, the owner or controller would have been well-positioned to have had knowledge in fact of the citations, if he or she desired such knowledge, see, e.g., 30 CFR 843.15(d), and to have compelled the controlled surface coal mining operation to abate the violation or to challenge the violation in a timely manner. See, e.g., 30 CFR 843.16(a). Accordingly, if an ownership or control link is well taken, the owner or controller has already had an opportunity to challenge the violation or to abate the violation through the controlled entity. Under these circumstances, OSM does not believe that an owner or controller is entitled to an additional opportunity to challenge the existence of a violation before the regulatory authority can deny issuance of a permit.

Even so, the final rules promulgated today would not prohibit the challenge of the existence of the violation. Such a challenge, however, must be made at the time of permit denial, rather than before, by persons who are not bound by prior administrative or judicial proceedings with respect to the existence of the violation or who have not had a prior opportunity to challenge the existence of the violation. This is entirely consistent with OSM's position as expressed in the preamble to the ownership and control rules published in 1988. See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38885* (October 3, 1988).

Additionally, within the context of today's final provisions amending the regulations governing improvident permit issuance, OSM has made explicit that a permittee may challenge the existence of the violation at the time it was cited. A permittee may make such challenge if the challenge is not otherwise precluded by a permittee's previous failure to take advantage of a prior opportunity to challenge or by a prior administrative or judicial determination concerning the existence of the violation. See Secs. 773.20 and 773.25.

Nevertheless, the industry commenters questioned whether the ability to challenge a violation after permit denial is illusory because OSM may attempt to argue that the owner or controller failed to take advantage of a prior opportunity to challenge the violation at the time that it was issued or that the challenger was bound by a prior administrative or judicial determination. This is not OSM's intent. Each specific case must be evaluated on its merits. In general, a challenge would be precluded only when the facts indicate that a potential challenger has already had the opportunity to challenge and has squandered it, or when the potential challenger is bound by a prior determination. The purpose of this portion of the proposed rules and the final rules as adopted is to eliminate multiple repetitive opportunities for challenge for those who have already had a substantive opportunity to challenge,

either directly or through a controlled entity. It is not OSM's intention to assert these defenses to a challenge unless such defenses are supported by the facts of a particular case.

Industry commenters argued that a State's decision to deny a permit based upon violation information contained in AVS is also not subject to challenge. OSM disagrees. The existence of the violation at the time it was cited, along with any other bases for permit denial, may be challenged in a proceeding under 30 CFR part 775, or the equivalent State programs, subject to the defenses discussed above. To the extent that a regulatory authority has based its permit denial decision upon violation information contained in AVS, that information would be an integral part of the challenge proceeding. When administrative and judicial tribunals consider appeals of permit denials, it is probable that evidence related to violations which form the basis of a permit denial will be relevant to the tribunal. OSM will work with State regulatory authorities to provide supporting documentation if required for appeals of State permitting decisions. OSM anticipates that State regulatory authorities will similarly cooperate with OSM and with each other in making such evidence related to violation information available to administrative and judicial tribunals.

Industry commenters also asserted that the proposed rules, along with the ownership and control rules promulgated in 1988, deny due process in that they retroactively impose responsibilities for violations upon owners and controllers. Again, OSM must reject this characterization of the effect of the proposed rules and 1988 ownership and control rules. OSM must further reject this characterization with respect to the final regulations adopted today. The ownership and control rules published in 1988, the AVS-related proposed rules published in September, 1991, and the final rules published today subject the owners or controllers of violations to permit denial for currently outstanding violations, rather than past, abated violations. This obligation follows the clear mandate of section 510(c) of the Act which requires the denial of permits when "any surface coal mining operation owned or controlled by the applicant is currently in violation" of the Act or other laws cited.

Moreover, the presumptions of ownership and control provided by 30 CFR 773.5 and the final rules merely reflect the reality that owners or controllers have the authority, by reason of their control at the time that the violations are committed or during any period when the violations remained outstanding, to be aware of violations, to compel their controlled entities to undertake timely challenges of violations, and to compel their controlled entities to abate violations of the Act. Under these circumstances, there is no retroactive application of responsibility.

Moreover, the clear provisions of section 507(b)(4) of the Act require, in substance, that permit applicants identify most of those people who are considered owners or controllers for purposes of section 510(c) of the Act and 30 CFR 773.15 and 773.5. As OSM observed in the preamble to the ownership and control rules published in 1988:

The legislative history of section 507(b)(4) includes the statement that "[t]he information required by [section 507(b)(4)] is a key element of the operator's affirmative demonstration that the environmental protection provisions of the Act can be met as stipulated in Section 510 and includes: (1) Identification of all parties, corporations, and officials involved to allow identification of parties ultimately responsible * * *." H.R. Rep. No. 94-896, 94th Cong., 2nd Sess. 111 (1976). (Emphasis added.) See also S. Rep. No. 94-28, 94th Cong., 1st Sess. 206 (1975).

See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38875* (October 3, 1988).

With the ownership and control rules published in October of 1988 and with these final rules published today, OSM is simply implementing sections 510(c) and 507(b)(4) of the Act. None of these provisions impose retroactive responsibilities.

Finally, related to their due process concerns, industry commenters argued that the proposed rules also violate the Act by not providing conditional permits during the appeal of ownership or control links, the current status of the violation, or the existence of the violation at the time it was cited. They pointed to the provisions of current 30 CFR 773.15(b)(2) which allow for a permit to be conditioned upon a good faith, direct administrative or judicial appeal to contest the validity of the current violation as indicative of the agency's longstanding recognition that such an appeal is consistent with the Act.

OSM disagrees with the commenters' analysis and rejects the view that OSM's historic interpretation of the Act requires that owners or controllers be entitled to permits conditioned upon the appeals of ownership or control links, the status of the violation, or the existence of the violation at the time that it was cited.

OSM's regulation at 30 CFR 773.15(b)(2) does not constitute the agency's recognition that all appeals form the basis for conditional permits. Such a blanket interpretation would negate the clear mandate of the provisions of section 510(c) of the Act and of 30 CFR 773.15(b)(1) which require the denial of permits to applicants who own or control surface coal mining operations in current violation of the Act. As has been discussed previously in this preamble, the issuance of permits conditioned upon the appeal of ownership or control links thwarts the effective implementation of section 510(c) of the Act. OSM has never interpreted its regulations to allow for such a result.

Contrary to commenters' assertions, the regulation at 30 CFR 773.15(b)(2) only allows a limited exception for good faith, direct administrative or judicial appeals contesting the validity of the violation as the basis for conditional issuance. An appeal of an ownership or control link which tests a person's relationship to a violator or to a violation does not test the validity of the underlying violation. To the extent that the provisions of a State program allow for conditional issuance based upon the appeal of an ownership or control link, those provisions must be considered less effective than comparable Federal provisions. See 30 CFR parts 730 and 732.

Moreover, in many instances, the existence of ownership or control links in AVS may be readily discovered by the presumed controllers, and the accuracy of those links administratively challenged prior to the actual denial of a permit by a regulatory authority. An appeal challenging the current status of a violation does not constitute a direct challenge to the validity of the violation at the time that it was cited. Instead, it would test whether the violation is currently abated or not.

An appeal as to the existence of the violation at the time it was cited could constitute a challenge as to the validity of the violation. Nevertheless, there is nothing in the Act or OSM's regulations which requires that such an appeal, undertaken by an owner or controller of a violator after standard appeal times have run, be the basis for conditional issuance. Conditional issuance is particularly inappropriate when the controller's ability to compel the controlled entity to act is taken into account. A controller has the capacity to force the controlled entity to abate or to appeal and would have had such rights at the time that the violation was cited. Thus, a timely appeal of the violation, directly made through administrative or judicial tribunals, could have been made at that time.

One commenter argued that due process protection in the proposed rules should be enhanced. In substance, this commenter asserted that it is unfair to deny permits to applicants or to subject active permits to treatment as improvidently issued permits where the applicants or permittees are subjectively unaware of their ownership or control links to violators or of the import of such relationships. Accordingly, this commenter proposed that such persons should have extended opportunities for "corrections and questions" without the risk of permit denial or revocation.

OSM appreciates the commenter's suggestion, but does not believe that further proposed rules are needed or that amendments to the final rules should be made to reflect the commenter's proposal. The AVS Office will work with anyone at any time, including when there is no pending permitting action, to answer questions and make appropriate corrections to ownership and control information in the database. Data in the system is available on-line to any interested party, and the AVS Office will provide print-outs of AVS data on request. The AVS Office will also provide training to interested parties on the use of the system. The AVS Office routinely works with major companies to insure that their ownership and control information in the system is kept current. Given all these factors, there is no "risk of permit denial" necessarily involved in the resolution of an ownership and control link.

Furthermore, applicants and permittees are deemed to be aware of the law. The ownership and control rules were published in October, 1988. Since that time, applicants and permittees could reasonably be expected to be aware of the regulations and could have acted to cure any outstanding violations or to resolve any erroneous links in the AVS which would form the basis for a permit denial or revocation. Thus, any "unfair surprise" to applicants or permittees posited by the commenter is not an actual problem. Accordingly, it is entirely legitimate to deny permits to such applicants or permittees when they are linked to violations.

Further, permit applicants are required to provide full ownership and control information at the time of permit application. See 30 CFR 778.13; 778.14. Permittees are required to update relevant ownership and control information in a timely manner. See 30 CFR 774.17. Thus, the proposed remedy offered by the commenter is already

a requirement of the rules. Finally, in the unlikely event that a person has been unfairly subjected to permit denial by the process, that person could still seek temporary relief from OHA in accordance with procedures governing such relief provided by OHA's and OSM's regulations.

PRIMACY

Industry and State commenters asserted a number of concerns relating to the impact of the proposed rules upon the primacy of States.

In general, industry commenters argued that the proposed rules and the AVS itself impermissibly substitute Federal authority for State authority in the permitting process. They argued that, under the principle of State primacy, once a State's program has been approved by OSM, the State should have sole authority for making decisions with respect to permit issuance, including the determination of ownership and control matters. They asserted that requiring a State to query the AVS before making a permitting decision takes the decision out of the hands of the State and transfers substantive control of the decision to OSM which controls the content of the AVS. As evidence of this Federal control, industry commenters cited, with disapproval, provisions of the proposed rules which provide that challenges of ownership and control information on the AVS must be made to OSM.

OSM disagrees. First, in the cases of National Wildlife Federation v. Lujan, No. 88-3117 (D.D.C.), and Save Our Cumberland Mountains, Inc. v. Lujan, No. 81-2134 (D.D.C.), coal industry interests advanced similar primacy arguments attacking the agency's ownership and control rules published in 1988. OSM responded to those arguments in detail demonstrating that the ownership and control rules support State programs, rather than undermine them. Copies of these briefs are being placed in the Administrative Record of this rulemaking. OSM incorporates the arguments advanced by the Department in those briefs herein by reference.

Similarly, the purpose of AVS is to assist, rather than to undermine, the States in the exercise of their primary authority for the implementation of their approved programs. The provisions of section 510(c) of the Act require that the regulatory authority deny a permit to an applicant where "information available" to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation" of the Act or certain other governmental laws. See section 510(c) of the Act. In a State which has an approved program to regulate surface coal mining operations pursuant to section 503 of the Act, neither OSM nor AVS decides whether or not to issue a permit to an applicant in that State. The State regulatory authority is the decision maker.

Contrary to the commenter's assertions, however, the Federal government has an ongoing role in this system of State primacy. The Act and Federal regulations require that OSM assist the States in the implementation of their programs under the Act and that OSM provide oversight of the State regulatory authorities' activities. See sections 102(g), 201(c), 503, 504, 505, and 521 of the Act; 30 CFR parts 732, 733, and 842.

Consistent with the State's role as primary decision maker, the AVS is a tool, developed by the Federal government in concert with the States, which provides information in a convenient mode, readily accessible to State regulatory authorities. It is a source of relevant "information available" of the type which the State regulatory authority is required by the Act to consider when the State regulatory authority decides whether to issue a permit to conduct surface coal mining operations. Absent AVS, a State regulatory authority would have to laboriously contact other State regulatory authorities for violation and ownership and control information or would have to simply reply upon the voluntary disclosure of information supplied by applicants or by public-spirited citizens. That OSM has taken the lead in developing the AVS and in proposing to require to use of AVS through rulemaking is consistent with the Federal government's role to assist and to oversee the State regulatory authorities. Even then, the content of AVS is the product of the efforts of both State regulatory authorities and OSM working together to incorporate into AVS ownership and control and violation information developed through their regulatory programs.

Accordingly, a State's authority to make a decision with respect to a permit application is primary and is unimpaired by anything in the proposed rules and by the State's use of AVS. To the extent that the rules support OSM's oversight of the State's decisions, such oversight is mandated by and consistent with the provisions of the Act and the regulations cited above.

To the extent that the proposed rules provide that challenges of information already on AVS be made to OSM,

such provisions do not impair primacy. Instead, the rules recognize that the Federal government is uniquely situated to maintain the accuracy and integrity of a nationwide database that will be used by many States. To be sure, each of the State regulatory authorities has a valuable contribution to make to the quality of AVS information. Yet, the individual States may have differing perspectives on ownership and control issues. The potential for inconsistency is significant-particularly with respect to ownership and control decisions relating to multistate companies with complex organizational structures. Also, potential challengers of such information need, if possible, a single point at which they can challenge ownership or control information which will be used in many States and which, absent such a locus, could subject them to inconsistent outcomes. Such a role for OSM is consistent with the role for the agency envisioned by SMCRA. See sections 201(c)(9) and 201(c)(12) of SMCRA.

Further, it must be recognized that the decision to deny a permit because an operator is linked to a violation through ownership or control can be an unpopular one, subjecting a local economy to stress. An operator may claim that he "has been put out of business" by the State regulatory authority. This is one area where the Federal government can assist the States by accepting the responsibility of maintaining ownership and control information which may ultimately lead to permit denials in the various States. Federal acceptance of such a role helps to assure the integrity, consistency, and accuracy of ownership and control information on the AVS. It is also consistent with one of the purposes of the Act which is "to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards of coal mining operations within their borders." See section 101(g) of the Act.

Finally, even with the State using information on AVS as part of its information gathering incident to making a determination with respect to a permit application, the State retains the authority, subject to Federal oversight, to decide whether to issue the permit or not. Appeals of such a decision are made to the appropriate State reviewing tribunal, in accordance with the provisions of the State program. Also, the final rules published today make clear that the State regulatory authority which issues a permit has responsibility, subject to OSM's oversight, for determining the ownership or control relationships of the permit. See Sec. 773.25(b)(1)(ii). Contrary to commenters' assertions, the State's use of AVS does not transmute the process into a Federal proceeding.

To the extent that a State denies a permit based upon information in AVS indicating that the applicant is linked through ownership or control to an outstanding violation of the Act, such denial is made based upon the mandate of section 510(c) as implemented by the applicable State program, rather than some extraordinary Federal intervention in the State's process. A State regulatory authority denying a permit based upon ownership or control information shown in AVS would be obligated under the Act to take the same action based upon a phone call, letter, or other communication from another regulatory authority advising of an applicant's ownership or control of a surface coal mining operation in current violation of the Act.

Further, it must be emphasized that the cooperation of all regulatory authorities, including the States and OSM, is necessary to facilitate the implementation of section 510(c) of the Act. Information on violations wherever they have occurred is needed by each regulatory authority considering a permit application to ensure true compliance with the provisions of section 510(c) of the Act. It is unreasonable, ineffective, and inefficient for each regulatory authority to attempt to develop such information by itself. It is both reasonable and prudent for OSM to fulfill this role. See sections 201(c)(9) and 201(c)(12) of SMCRA.

Industry commenters further asserted that the proposed rules will have the effect of "Balkanizing" (i.e., dispersing) regulatory authorities' permitting decisions. They were especially concerned about the provisions of Sec. 773.26 of the proposed rules which allocated responsibility to particular regulatory authorities to make decisions with respect to ownership or control relationships.

Proposed Sec. 773.26 allocated responsibility among the respective regulatory authorities such that the regulatory authority before which an application is pending would have had authority for making decisions with respect to the ownership or control relationships of the applicant; the regulatory authority that issued a permit would have had authority for making decisions with respect to the ownership or control relationships of the permittee; the State regulatory authority that issued a State violation notice would have had authority for making decisions with respect to the ownership or control relationships of persons cited in the violation; and the regulatory authority that issued a violation notice, whether State or Federal, would have had authority for making decisions concerning the status of

the violation covered by the notice. The proposed rule provided that these allocations of authority were subject to OSM's oversight.

In substance, the industry commenters asserted that the provisions of this proposed section would impermissibly weaken the authority of the State regulatory authority before whom a permit application is pending. They asserted that the allocations of authority contained in the proposed rule would create confusion and delay in the permitting process.

OSM disagrees with these comments. The interaction between the Federal government and the States described above does not constitute a "balkanization" of the permit application process. Nor will such interaction lead to confusion in the permit application process. Such interaction is consistent with the mandate of SMCRA to implement section 510(c) within a context of State primacy supported by Federal oversight. The proposed rules and the final rules adopted today attempt to establish a road map which is consistent with SMCRA for the making of decisions with respect to ownership or control and for the development of information to be used in AVS.

First, the allocations of responsibility are consistent with the requirements of the Act. The provisions of section 510(c) of the Act mandate a separation of decision making in the permit application process which commenters might characterize as "balkanization." The provisions of section 510(c) of the Act are very explicit in stating that permits shall be denied to applicants who own or control surface coal mining operations with outstanding violations of the Act "until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation."

Thus, the Act contemplates that the State regulatory authority before which an application is pending could require information from another State regulatory authority with respect to violations issued by the other State regulatory authority before issuing a permit.

Further, the Act is equally specific in establishing a mandated role for the Federal government to oversee the States in the implementation of their State regulatory programs. See sections 201(c)(1); 503; 504; 505; and 521 of the Act. Thus, to the extent that the proposed rules and the final rules adopted today envision the exercise of Federal oversight, such a role is responsive to the provisions of SMCRA.

Moreover, while the proposed rule and the final rule, modified and renumbered as Sec. 773.25, will be compared and discussed in more detail below in this preamble, it is appropriate to offer some responses at this point since these critical comments refer to the issue of relationships between governments. These comments invoke issues of State primacy. Contrary to commenters' assertions, the rules in question allocate responsibility in a manner which is supportive of, and consistent with, State primacy.

For instance, the final rule provides that a State regulatory authority which issues a violation has responsibility, subject to OSM oversight, for identifying the ownership and control relationships of the violation. See 30 CFR 773.25(b)(1)(iii). The State regulatory authority which issues a violation has the greatest interest, among those regulatory authorities with an interest in the ownership and control relationships of that violation, in seeing that the persons responsible for the violation abate the violation. Such abatement directly improves the environmental quality of the State which issues the violation. Accordingly, the State which issued a violation should have the first opportunity, subject to Federal oversight, to identify the owners or controllers of the violation. Well before OSM made its proposals in September, 1991, which form the basis for today's final rules, both SMCRA and Federal regulations recognized that a violation had to be corrected to the satisfaction of the agency that has jurisdiction over the violation, before a permit could be issued by a regulatory authority. See section 510(c) of SMCRA; 30 CFR 773.15(b)(1)(i).

Moreover, today's final provisions further recognize the relative access to ownership and control information that the interested regulatory authorities have at each stage of the process. The regulatory authority which issued the violation is in the best position to investigate and to develop all of the relevant facts about the violation, including the identification of those responsible for the violation. The violation was committed within the jurisdiction of the regulatory authority which issued the violation. That regulatory authority has access to the actors on the ground at the

surface coal mining operation and would be able to question them to identify ownership and control information.

A similar analysis can be offered in support of affording the agency before which an application is pending responsibility for identifying the ownership and control of the application. This regulatory authority has the applicant before it and can inquire of the applicant directly with respect to any ownership and control information contained in the application. Thus, the regulatory authority before which an application is pending has responsibility, subject to Federal oversight, to decide the ownership and control relationships of the application. See 30 CFR 773.25(b)(1)(i).

A regulatory authority which has issued a permit has ongoing authority for the permittee's surface coal mining operations on the permitted site. Thus, this regulatory authority has responsibility, subject to Federal oversight, to decide the ownership and control relationships of the permit. See 30 CFR 773.25(b)(1)(ii).

Moreover, OSM recognizes that the industry commenters are deeply troubled by any use of the AVS in the permit application process and any application of OSM's ownership or control rules as contained at 30 CFR 773.5 and 773.15(b)(1). Nevertheless, OSM has accepted the mandate of Congress to develop and implement the AVS because "the AVS is essential to effective enforcement of the Surface Mining Control and Reclamation Act of 1977 [SMCRA]." See Report of the Senate Appropriations Committee, Senate Report No. 103-114, at page 47 (July 28, 1993). Thus, the allocation of responsibilities for the various regulatory authorities contained in the proposed rules and the final rules adopted today also attempt to reflect the pragmatic realities of implementing a national computer system.

Once a decision has been made to go forward with a national computer system to aid the enforcement of section 510(c) of SMCRA, certain pragmatic realities must be recognized. First, information will be coming to the computer system from many sources. As each State regulatory authority analyzes ownership and control information contained in permit applications and reports such information to AVS, such information is incorporated into AVS. A national computer system requires centralized management and maintenance to assure the accuracy and consistency of information. Centralized management provides a focus of responsibility when inaccuracies or technical problems are identified. Accordingly, the Federal government, acting through OSM, has responsibility for such system management. At the same time, the States are primary actors in the permit application process and critically important actors in the development and the support of AVS. With respect to AVS, the States play a critical role in using the computer system as an information resource in the permit application process and in supplying information to AVS gleaned from the permit application process and other research.

Consistent with the need for centralized management of the database, OSM has such a role with respect to the AVS and the information contained therein. As will be discussed below in the discussion of specific sections of the final rules, one of the changes made from the September, 1991, proposal was to place language in the final rule clarifying OSM's plenary role with respect to the content of ownership or control information in the AVS. See 30 CFR 773.25(b)(3)(i). OSM will also have sole responsibility over the ownership and control relationships incident to Federal violations. See 30 CFR 773.25(b)(2). Further, OSM will exercise oversight over State regulatory authorities' activities. See 30 CFR 773.25(b)(3)(ii). This role provided for OSM under the final rule, consistent with that proposed under the proposed rule, recognizes that, under the Act, while the States are subject to Federal oversight, OSM is not subject to the oversight of State regulatory authorities.

The industry commenters asserted that the proposed rules will create confusion and conflict among the States with the potential for conflicting decisions on ownership and control by multiple State regulatory authorities and OSM. Again, OSM disagrees with the commenters' characterization of the effect of the rules. As indicated above, the proposed rules and the final rules clearly allocate responsibility among the various regulatory agencies. The regulatory authority before which an application is pending decides whether or not to issue a permit.

OSM retains the authority to oversee the decision of the State. Indeed, OSM's role as controller of information already on AVS and as overseer of State ownership or control decisions will reduce, not create, confusion and conflict by establishing one final authority to make decisions in cases where disagreements among States might occur about information already on AVS.

Accordingly, the rules do not inappropriately disperse decision making among State and Federal regulatory

authorities with respect to ownership and control. Further, prior to the publication of these final rules, OSM's AVS Office and the States have worked well together to implement AVS and the ownership and control regulations promulgated in 1988. To the extent that there have been disagreements between OSM's AVS Office and the State regulatory counterparts, such disagreements have been addressed expeditiously and resolved in a collegial and cooperative manner.

Some commenters expressed concern that the proposed rules did not sufficiently address the issues of conflicts between the States and OSM and between the States themselves on matters of ownership and control. OSM believes that these issues will be addressed adequately by the provisions of 30 CFR 773.25. That section is based upon proposed Sec. 773.26 and establishes the relative responsibilities of agencies responsible for making ownership and control decisions. As noted previously, this regulation is discussed in detail below. Within the framework of State primacy, OSM will exercise its oversight role to review State ownership or control decisions, in response to citizen complaints or as otherwise appropriate, to assure the integrity of the AVS. See 30 CFR 773.12; 842.11; and 843.21.

One commenter asserted, in substance, that the proposed rules did not go far enough in imposing Federal responsibility. This commenter proposed that all matters relating to ownership and control under section 510(c) of the Act should be OSM's responsibility. While OSM appreciates the commenter's suggestion, OSM must reject this proposal. As OSM indicated above, the Act establishes a system of State primacy with Federal oversight and assistance to the States. While it is understandable that some persons would prefer that the entire responsibility for permit decision making be shouldered by the Federal government, such a system would require a significant restructuring of the statutory framework established by the Act. In contrast to this, today's final rules address the responsibilities established by section 510(c) of the Act in a manner more consistent with the statutory framework.

One commenter questioned whether OSM had given adequate consideration to the implications of the rules upon Federal and State relations. As the above discussion indicates, OSM has considered, in detail, the effect of AVS and these rules upon the relationship between OSM and the State regulatory authorities and believes that the rules are consistent with the framework for Federal and State relations established by the Act. Further, as indicated above, the working relationship between OSM's AVS Office and its State colleagues has been heretofore very productive and cooperative. OSM believes that State and Federal cooperation on AVS matters has been, overall, a significant success. Accordingly, OSM intends to continue to work closely and cooperatively with State regulatory authorities to resolve issues related to the implementation of AVS and section 510(c) of the Act.

CITIZEN PARTICIPATION

Commenters representing environmental groups criticized the proposed rules as not containing sufficient provision for citizen participation. They asserted that citizens should be afforded the opportunity to add ownership and control links to AVS. They further argued that citizens should have appeal rights when the regulatory authority denies their requests to add ownership or control links and that citizens should have rights of intervention when decisions are made to sever links. They also urged that citizens should have explicit rights to request enforcement action with respect to improvidently issued permits, with respect to other provisions of the rules relating to ownership and control, and with respect to the imposition of sanctions.

OSM strongly supports citizen participation and agrees that opportunities for citizen participation need to be addressed in the rules governing ownership and control. OSM further agrees that the proposed rules did not sufficiently address these issues in the September, 1991, proposal. Under the Administrative Procedure Act, however, the agency has a responsibility to propose regulations for public comment, prior to finalizing such regulations. The changes proposed by commenters would represent significant modifications of the September, 1991, proposals.

Thus, OSM does not consider it appropriate to incorporate commenters' proposals into today's final rules without first providing opportunity for comment to the regulated community, the States, and the public generally. While OSM could delay finalization of today's rules to allow for such proposal and for opportunity for comment, OSM does not believe that the public interest would be served by such delay.

Nevertheless, suggestions made by the commenters are worthy of further consideration. Accordingly, at some

future date, OSM may present proposals to respond to the concerns expressed by the commenters. Until such proposals are made, however, the interests of concerned citizens should be asserted pursuant to the provisions of 30 CFR 773.13, 842.11, 842.12, 843.21 and other regulations providing for citizen participation, as appropriate. In this respect, if citizens disagree with a decision of OSM finding that an ownership or control link does not exist, citizens can challenge such decision by demanding a Federal inspection of relevant permits affected by such decision in accordance with the current provisions of 30 CFR 842.12. If OSM rejects their demand to conduct an inspection, citizens can seek review of such rejection and the issues related thereto pursuant to 30 CFR 842.15 to the Director or his designee and, if necessary, to OHA in accordance with 43 CFR part 4.

Further, OSM's AVS Office will receive and consider ownership or control information from concerned citizens as part of OSM's ongoing research activities to incorporate ownership or control and violation information into the AVS database. Such information is relevant and will be used by the agency in the making of ownership or control determinations and for inclusion, upon verification by the agency, into AVS. OSM strongly encourages concerned citizens, environmental advocates, and members of the industry to come forward with information relevant to ownership or control matters. It is in everyone's interest for the AVS to contain the most complete, comprehensive, and accurate information possible.

C. DISCUSSION OF FINAL RULES

The following text, which describes the final rules and responds to the specific public comments that OSM received on the proposed rules, is organized by the part and section number of the affected provisions. Grammatical or stylistic changes that do not affect the substance of the final rules are generally not discussed.

1. PART 701-PERMANENT REGULATORY PROGRAM

SECTION 701.5-Definitions. In the proposed rule, OSM deleted the definition of "violation notice" previously contained in the regulations and transferred such definition in expanded form to Sec. 773.5. The final rule is identical to the proposed rule. As described below, the definition of "violation notice" refers to the types of violations of the Act or other laws which will form the basis for a regulatory authority to deny a permit application under the provisions of Sec. 773.15(b).

2. PART 773-REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

PART 773-THE TABLE OF CONTENTS. In the proposed rule, OSM had included an amendment to the Table of Contents to provide for a proposed rule governing procedures for the challenge of ownership or control links prior to entry in AVS. Since OSM has determined not to go forward with that portion of the proposal, that reference is not included in the final Table of Contents adopted today. Also, since OSM has deferred action with respect to the adoption of proposed Sec. 773.27 to a subsequent rulemaking, that reference has also been deleted. The final Table of Contents is adopted as described in Summary of Rules Adopted.

SECTION 773.5-DEFINITIONS. The proposed rule added certain definitions to Sec. 773.5. Such definitions included the terms "Applicant/Violator System or AVS," "Federal violation notice," "Ownership or control link," "State violation notice," and "Violation notice." Such definitions were necessary to an understanding of the proposed comprehensive regulations relating to the implementation of AVS.

Industry commenters objected that the proposed definition of "violation notice" contained in the regulation was too broad. They argued that the proposed definition, insofar as it applies to a "Federal violation notice" should be explicitly limited to violations of environmental laws. Further, they asserted that the definition inappropriately included written communications and demand letters as "violations."

OSM disagrees with the commenters' concern over the need for an explicit limitation for violations of environmental laws in the definition of a "Federal violation notice." Commenters conceded that such a limitation is already contained in the proposed definition of "violation notice." The definition of a Federal violation notice is modified by any limitations contained in the definition of a violation notice. Accordingly, there is no need for an explicit additional limitation to address commenters' concerns. It is already clear that it is limited to violations of

environmental laws. Thus, OSM has adopted the proposed definition of "Federal violation notice" as a final definition without modification.

Further, commenters asserted that the proposed rule inappropriately expanded the definition of violation notice to include various written communications and demand letters. They asserted that a demand letter could somehow preclude a permit applicant from pursuing a good faith appeal and that a person's ability to challenge the debt would depend on whether the agency attempted to collect the debt. In substance, commenters took exception to the prospect of a demand letter being the basis for a permit denial when the demand letter contains notice of a delinquent civil penalty and the applicable statute of limitations has expired precluding further action to collect the debt. They asserted that the proposed rule impermissibly expands the types of violations for which a person could be subject to permit block without affording the person a right of timely challenge.

Again, OSM disagrees with commenters' analysis. First, it must be emphasized that the type of document is less significant than the violation of which it provides notice. The document is merely a vehicle for communicating notice of the substantive violation. The documents listed in the proposed definition merely recount the possible types of documents providing notice and do not substantively expand the universe of violations which would be the basis for permit denial under section 510(c) of the Act and the provisions of 30 CFR 773.15(b). The substantive violation, rather than the type of document, forms the basis for a permit denial under the provisions of section 510(c) of the Act and 30 CFR 773.15(b)(1). Pursuant to those provisions, a regulatory authority is required to refuse permit issuance where available information indicates that any surface coal mining operation owned or controlled by an applicant is currently in violation of the Act or other indicated laws. Delinquent fees or penalties which have ripened to the level for which a demand letter is indicated constitute available information for which an applicant will be held accountable and which a regulatory authority must take into account in any permit decision. Contrary to commenters' assertions, the filing of a suit to collect delinquent reclamation fees or civil penalties is not a condition precedent to such debts being valid violations or a condition precedent to such debts being considered the bases for permit denial.

With respect to the commenters' concerns about rights of challenge incident to demand letters, OSM believes that current quality control procedures will prevent the entry of unripe violations into the system. Furthermore, with this final rule and with OHA's rule which is being contemporaneously published, OSM and OHA have acted to provide a means for applicants to obtain temporary relief from permit blocks where they are likely to prevail on the merits. Thus, if a violation has not actually ripened into the basis for a permit block, temporary relief could be sought. The discussion of these provisions of the final rule are contained at the discussion of 30 CFR 773.25 below in this preamble.

Industry commenters also objected to the prospect that a demand letter or other notice could contain notice of a delinquent civil penalty the collection of which is barred by the applicable statute of limitations. In substance, they argued that such a notice should not be the basis for a permit denial. OSM disagrees. In 1988, OSM addressed similar concerns expressed by commenters with respect to the ownership and control rules. OSM stated, in relevant part, as follows:

EFFECT OF STATUTE OF LIMITATIONS ON COLLECTION ACTIONS

A commenter asserted that permit blocking cannot occur for any civil penalty which has not been reduced to judgment within the applicable statute of limitations in *28 U.S.C. 2462* (barring an action, suit or proceeding for enforcement of any civil fine, penalty unless commenced within five years).

OSMRE disagree[s] with the commenter's position. Although the statute of limitations may provide a defense to suit for collection of money filed five years following the entry of a final order, it does not invalidate the final order or cancel the underlying debt, which will continue to be listed in the Applicant Violator System and will result in blocking the issuance of a permit.

See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38884* (October 3, 1988). The agency considers this position to be sound and has no intention of changing course. Accordingly, this criticism of the proposed definition is rejected.

A number of commenters representing industry interests asserted that the definition of violation contained in the rule was overbroad in that it potentially included violations of laws other than SMCRA as the basis for permit denial. These commenters proposed that the rule incorporate explicit limitations to the effect that only violations relevant to SMCRA or consistent with the environmental protection standards of SMCRA be the basis for permit denial.

OSM rejects the commenters' proposals as unnecessary. To the extent that the final definition of "violation notice" describes the type of violation for which the listed types of notice will be provided, the final rule is intended to track the language of section 510(c) of the Act. That provision of the Act states that the basis for permit denial includes violations of the Act "and any law, rule or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation * * *" (Emphasis added.)

Commenters' concerns are already addressed by the Act and the proposed and final definitions of "violation notice" which incorporate the above-emphasized language of the Act. This language requires that violations which support permit denial must be those pertaining to air or water environmental protection incurred in connection with any surface coal mining operation. Any air or water environmental protection violations incurred in connection with a surface coal mining operation would be of a type "relevant to SMCRA." If the violations are committed not in connection with a surface coal mining operation, they would not be a basis for the denial of a permit under section 510(c) of the Act. Thus, OSM does not believe that a change in the proposed rule language to reflect commenters' concern is needed.

A commenter representing certain State regulatory authorities also criticized the proposed definition of "violation notice" as being too broad and was concerned that such definition, when read with the provisions of 30 CFR 778.14(c), would lead to "nationwide gridlock" or undue delay in State regulatory authorities' processing of permit applications.

The proposed definition of "violation notice" is designed to incorporate the full range of violations which would form the basis for permit denial under section 510(c) of SMCRA. The definition is intended to implement the statutory definition, not expand such definition. A more limited definition would be an impermissible constraint upon the broad language of the Act. Accordingly, OSM rejects the view that the proposed definition is overbroad.

OSM further disagrees with commenter's view that applicants' reporting of such violation notices in accordance with the provisions of 30 CFR 778.14(c) will lead to undue delay in the processing of permit applications. Applicants must supply complete information with respect to outstanding violations to enable regulatory authorities to make informed decisions as to permit issuance as mandated by section 510(c) of the Act and 30 CFR 773.15(b)(1). The reporting of such information by an applicant may, indeed, lead to permit denial. That, however, constitutes with the mandates of the Act, not inappropriate delay or stalemate. OSM is confident that OSM and Sate regulatory authorities can evaluate and use the information provided by applicants with respect to outstanding violations in accordance with the definitions of "violation" and "violation notice" along with information contained in AVS to meet the requirements of the Act in a timely fashion.

The same commenter additionally urged that OSM retain the limited definition of "violation notice" previously contained in 30 CFR 701.5 because such definition is more "realistic" in its scope and because there is a need for such a definition across OSM's regulations, not just those contained in 30 CFR part 773.

Again, OSM disagrees with commenter's views. The definition of "violation notice" previously contained in the regulations did not identify the types of violations of the Act or other laws which would form the basis for a regulatory authority to deny a permit under 30 CFR 773.15(b)(1). A fuller definition of the term which would encompass these types of violations as mandated by section 510(c) of the Act was necessary for incorporation by reference into a proposed amended version of 30 CFR 773.15(b)(1). While commenter has asserted that there is a need for a general definition of the term "violation notice" across OSM's regulations, commenter has identified no urgent need for a universal definition of the term that would outweigh the need to clarify the provisions of 30 CFR part 773. Further, in the event that it becomes apparent that the implementation of other regulations have been somehow significantly compromised by the deletion of the general definition of "violation notice" contained in 30 CFR 701.5, OSM can address these issues as necessary. Accordingly, OSM must reject the commenter's position.

Further, a commenter urged that any violations be in a final, unappealable posture before they can be the basis for permit denial. OSM disagrees with the commenter's characterization of the current state of the law and with what the commenter believes ought to prevail.

First, Federal regulations which predate the proposed rules and today's final rules already provide that permits may be conditionally issued based upon a good faith, direct administrative or judicial appeal testing the validity of the underlying violation. See 30 CFR 773.15(b)(1)(ii)-(b)(2). Thus, contrary to commenter's implication, permits are not necessarily denied while violations are under appeal. The burden, however, is on a violator to assert appeal rights in good faith and in a timely manner. There is no legitimate reason to afford additional appeal rights to people who have squandered their opportunity to appeal. In the absence of a timely appeal, a violation should be the basis for denial of a permit, in accordance with the provisions of section 510(c). In this preamble under the topic captioned "Due Process," OSM has responded in detail to commenters who have asserted that permits should be conditioned upon the appeals of ownership or control links or upon the appeals of the existence of the violation asserted by owners or controllers of violations after standard appeal times for the violations have run. As stated in this preamble, OSM rejects these assertions.

To the extent that the commenter implied that permits should be issued unconditionally during the pendency of an appeal of a violation, OSM also rejects this proposal. Under this proposal, a violator could commit a violation at his or her surface coal mining operation; take a timely appeal; and then be approved unconditionally for permit issuance at another site. Following the failure of his or her appeal, he or she could continue to mine on the new site with no interruption or termination of his or her rights on the new site. This course of events violates the provisions of section 510(c) of the Act which mandate that regulatory authorities deny permits when applicants have current violations of the Act or other laws. Also, the commenter's proposal is inconsistent with the provisions of 30 CFR 773.15(b)(1)(ii)-(b)(2) cited above which allow only conditional issuance, rather than unconditional issuance, for permits issued to applicants who have appealed outstanding violations.

In that final rule, OSM has adopted the definitions of "Federal violation notice" and "violation notice" as proposed and without any of the changes requested by commenters.

In the proposed rule, the definition of "ownership or control link" included references to ownership or control "under paragraph (b)" of 30 CFR 773.5. Since the publication date of that proposal, OSM has proposed changes in the definitions of "owned or controlled" or "owns or controls" contained at 30 CFR 773.5. See Proposed Rule, Definitions and Procedures for Transfer, Assignment and Sale of Permit Rights; Definition of Ownership and Control, *58 FR 34652* et seq. (June 28, 1993). If some of those proposed changes are ultimately adopted, the reference to ownership or control as defined by "paragraph (b)" contained in the proposed definition of "ownership or control link" would be inappropriate.

Accordingly, to assure flexibility, OSM has deleted the reference to "paragraph (b)" of 30 CFR 773.5 from the final definition of "ownership or control link."

Also, the proposed definition of "ownership or control link" indicated that a link included presumptive ownership or control relationships which had not "been successfully rebutted under the provisions of Secs. 773.24 and 773.26 or Secs. 773.25 and 773.26 or under the provisions of part 775 of this chapter and Sec. 773.26 of this part." As is discussed below in this preamble, OSM has deleted proposed section 773.25, procedures for challenging ownership or control links prior to entry in AVS and has renumbered proposed Sec. 773.26 as final Sec. 773.25, standards for challenging ownership or control links and the status of violations. The final definition of "ownership or control link" has been amended to reflect these changes.

The final rules are adopted containing the provisions described in this preamble above at Summary of Rules Adopted.

SECTION 773.10-INFORMATION COLLECTION. The proposed rule would have revised Sec. 773.10 which contained a list of the existing information collection requirements in part 773 and also the OMB clearance number indicating OMB approval of the information collection requirements. The proposed rule revision would have

updated Sec. 773.10 by including the proposed AVS-related rules containing information collection requirements. The proposed revision provided an estimate of the average public reporting burden per response of three hours, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The proposed section also listed the addresses for OSM and the Office of Management and Budget (OMB) where comments on the information collection requirements may be sent.

Industry commenters asserted that the estimate of three hours to prepare an average response for the collection of information required was unrealistically low.

OSM disagrees with commenters' assertion. The three hours estimated burden was an estimated average, rather than a predicted figure for the burden of a single, typical response. The calculation of an "average" response means that there are some responses which may require larger amounts of time to prepare and that there are also some responses which may require significantly lesser amounts of time. It is entirely reasonable to expect that the reporting and information collection burden of these regulations may vary among entities depending upon the entities' size and structural complexity.

Further, once companies have researched and compiled their particular ownership or control information, they have done the basic research which can be used for future compliance. This basic ownership or control research will then be readily available to the company and the company only needs to update such research to reflect changes in ownership or control for future applications. Once entities and regulatory authorities develop experience in complying with the regulations, they will also develop experience in collecting, storing, retrieving, and reporting the necessary compliance information. A number of large companies have told OSM that they have already collected and stored their ownership or control information in a computerized database or are in the process of doing so. Once such information has been so stored, it would be readily accessible and easily retrieved for compliance purposes. Thus, the amount of time required to prepare a typical response under these regulations should diminish over time.

Nevertheless, in the final rule adopted today, OSM has recalculated the estimated time for compliance in accordance with standard procedures required by the OMB. OSM has concluded that the public reporting burden for the collection of information required by part 773 as amended by these final regulations is four and one half hours per response, rather than three hours. The final rule also has been modified to delete specific references to the particular sections of part 773 which are relevant for information collection purposes. Instead, OSM has provided a reference to the collection of information required by 30 CFR part 773, since this part encompasses all sections of part 773, including the final rules adopted today, which generate an information collection obligation.

SECTION 773.15-REVIEW OF PERMIT APPLICATIONS. In the proposed rule. OSM proposed to amend 30 CFR 773.15(b)(1) to refer to relevant amended definitions and AVS-related rules as the basis for a regulatory authority's analysis when reviewing a permit application.

The proposed regulation required the regulatory authority to review all reasonably available information concerning violation notices and ownership or control links involving the applicant.

Such information would include that obtained pursuant to Sec. 773.22 (verification of ownership or control application information); Sec. 773.23 (review of ownership or control and violation information); amended Sec. 778.13 (identification of interests); and amended Sec. 778.14 (violation information).

While those regulations will be discussed in detail later in this preamble, the net effect of referencing such provisions in Sec. 773.15(b)(1) was to assure that the regulatory authority makes a decision with respect to permit issuance or denial based upon complete information relating to ownership, control, and violations. Such compete information includes the mandated use of AVS.

The proposed rule would have further added a paragraph (b)(4) to 30 CFR 773.15. This provision would have provided that delinquent civil penalties for violations cited prior to October 3, 1988, not form the basis for a permit block against persons linked through ownership or control to such violations, where reclamation had been completed in accordance with the provisions of the applicable regulatory program and where, with respect to each cessation

order for which a delinquent civil penalty exists, such persons had paid $750 of the amount of such penalty to the regulatory authority which issued such cessation order. In substance, this regulation proposed a "safe harbor" with respect to owners or controllers of delinquent civil penalties cited prior to October 3, 1988.

In addition, the proposed amendments to 30 CFR 773.15(b)(1) would also have deleted the presumption contained in the then current version of that rule that allows a regulatory authority, in evaluating whether a surface coal mining operation owned or controlled by a permit applicant is currently in violation of the law, to presume, in the absence of a failure to abate cessation order (FTACO), that a notice of violation (NOV) has been or is being corrected, except where evidence to the contrary is set forth in the permit application, or where the notice of violation is issued for non-payment of abandoned mine reclamation fees or civil penalties.

Further, the proposed amendment to 30 CFR 773.15(b)(1) would have incorporated by reference the amended definition of "violation notice" and the proposed definition of "ownership or control link" contained in proposed Sec. 773.5 by requiring a regulatory authority to review "all reasonably available information concerning violation notices and ownership or control links involving the applicant." This proposed change would have eliminated the need for the detailed list contained in 30 CFR 773.15(b)(1) of the types of violation information which a regulatory authority must review as part of the application review process provided by 30 CFR 773.15(b)(1).

The two issues which generated the most significant comments were the proposed deletion of the presumption of NOV abatement and the proposed safe harbor for owners or controllers of surface coal mining operations with delinquent civil penalties for violations issued prior to October 3, 1988.

The first of these issues to be addressed is the proposed deletion of the presumption of NOV abatement. Commenters representing a number of State regulatory authorities strongly objected to the deletion of the presumption. They asserted that the elimination of the presumption would lead to "nationwide gridlock." They asserted that such a rule provision would lead to automatic appeals of all NOV's; that State regulatory authorities would have to expend significant resources tracking the course of NOV's and NOV appeals; that companies operating before multiple State regulatory authorities would never be able to definitively prove that NOV's were being abated such that they could be issued permits; and that such efforts would be a significant waste of State and Federal resources. They asserted that 80%-85% of all NOV's are resolved and never ripen into CO's in any event.

Also, commenters representing industry interests strongly criticized the proposed deletion of the NOV presumption as both impractical and counterproductive. They asserted that the proposed deletion of the presumption would be especially burdensome on large multi-state corporations. They questioned whether such entities would be able to keep track of the abatement status of the NOV's of their many operating subsidiaries and contract miners. They further asserted that most NOV's are routinely and timely abated. They argued that eliminating the NOV presumption would lead to information overload in the permit application process; to increased costs and delays in permit processing; and to increased errors in data collection. They argued that the deletion of the presumption would require the reallocation of personnel from enforcement to document processing.

In contrast to the positions of State regulatory authorities and the industry, one commenter representing environmental advocacy groups supported the deletion of the NOV presumption, asserting that the deletion of the presumption would lead to better tracking of the status of violations and to faster remediation of violations. Another commenter did concede, however, that it would be difficult for the OSM to keep AVS accurate and current with respect to violation information if the presumption of NOV abatement in the absence of an FTACO was eliminated.

OSM considers the arguments raised by the State regulatory authorities and by the industry to be persuasive. OSM must give particular consideration to the concerns expressed by the State regulatory authorities on this issue. These agencies have the responsibility of implementing the ownership and control process. If the State regulatory authorities believe that the complete elimination of the presumption of NOV abatement will impose a significantly increased burden upon them for limited environmental return, this position cannot be discounted. OSM recognizes that there may be a potential benefit in having multiple jurisdictions tracking the course of NOV's for purposes of permit issuance. Such multiple supervision could theoretically encourage prompt abatement. Nevertheless, the mechanics of implementing such a process through AVS and other means would be sufficiently complex so as to create significant uncertainty among permit applicants and regulatory authorities. Such uncertainty outweighs the

benefits of the complete elimination of the presumption of NOV abatement.

In response to the environmentalists' arguments, OSM recognizes that there is a theoretical, potential benefit in multiple regulatory authorities tracking the course of an NOV for purposes of permit issuance. Under this scenario, a State would deny a permit to an applicant based upon his or her being linked through ownership or control to an NOV in another State even though the abatement period for the NOV had not expired. The threat of permit denial could enhance the prospect for prompt abatement of that NOV.

Nevertheless, the mechanics of implementing this process with respect to AVS would be complex and would create such uncertainty as to outweigh the benefits. Assuming that NOV's whose abatement period had not yet expired and which had not yet generated FTACO's were loaded onto AVS, OSM would have to check the status of such NOV's and continually update such information on AVS. It is unclear whether OSM would be able to keep up with the changing status of NOV's and incorporate such information in a timely manner into AVS. This would add an additional element of uncertainty with respect to the currency of violation information in AVS. OSM believes it is more desirable to have information in AVS which is both current and reliable, so that State regulatory authorities may depend on the system during the permit application review process.

Further, OSM believes that the decision to retain at least a limited presumption of NOV abatement is consistent with positions taken by the Department of the Interior in previous litigation. In litigation relating to Sec. 773.15(b)(1) and related matters before the U.S. District Court of the District of Columbia, the Secretary advised the court that he had decided to reconsider the issue of whether, in the absence of an FTACO, the regulatory authority may presume that an NOV has been or is being corrected. The Secretary further advised the court that he would, if appropriate, engage in further rulemaking on the subject as expeditiously as possible. See National Wildlife Fed'n v. Lujan, No. 88-3117-AER (D.D.C.), Memorandum of Points and Authorities in Support of the Federal Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment, at pages 89-90.

As indicated in the preamble to the proposed rule, the proposed amendment to delete the presumption of NOV abatement represented the "further rulemaking" of which the court was advised. However, the Secretary committed only to reconsider the presumption of NOV abatement. The Secretary never committed to finalize any proposed rule. After receiving the States' and industry's comments cited above, OSM has determined that the complete deletion of the presumption would impose a significant burden upon the States and provide little enforcement benefit.

As indicated in the preamble to the September, 1991 proposed rule, it was, in fact, never OSM's intention to load NOV's (other than delinquent NOV civil penalties) into the AVS database, given the large volume of data entry that would be required to keep such violation information up to date. Id. Thus, even if OSM had completely deleted the presumption of NOV abatement by adopting the proposed modification to 30 CFR 773.15(b)(1), there would have been no immediate, direct impact upon the AVS database. If OSM had eliminated the presumption, there would have been, however, a significant indirect impact upon AVS. The States would have been required to spend scarce resources tracking other States' NOV's, including those whose abatement periods had not yet expired, for permit application purposes. The States would have had fewer resources available to focus upon the other information that AVS believes is more critical to the effective implementation of section 510(c) of the Act, including the development of complete information with respect to entities' ownership and control. Further, OSM is committed to making its best effort to provide, through the AVS, a complete list of violations which are required to be used as the basis for a permit block.

Accordingly, OSM has determined to retain a presumption of NOV abatement in 30 CFR 773.15(b)(1). The focus of State regulatory authorities' concern appears to be the uncertainty incident to NOV's with abatement periods which have not yet expired. In substance, where an NOV has been issued and the abatement period has not yet expired, it is uncertain whether the violation will be ultimately abated or will ripen into the basis for the issuance of a failure to abate cessation order. The State regulatory authorities and the coal industry argue that such uncertainty justifies unconditional permit issuance. The environmentalists argue that such uncertainty demands permit denial. While OSM recognizes the needs of the State regulatory authorities, OSM believes that environmental advocates have also asserted legitimate concerns about the consequences of a blanket presumption of abatement for all NOV's. OSM has therefore chosen a middle ground which will serve to reduce the uncertainty while balancing the concerns of the various interests.

In response to the comments made to its proposal, OSM has amended 30 CFR 773.15(b)(1) to provide that, in the absence of a failure-to-abate cessation order, a regulatory authority may presume that a notice of violation is being corrected to the satisfaction of the agency with jurisdiction over the violation where the abatement period for such notice of violation has not yet expired and where the permit applicant has provided certification in his or her permit application that such violation is in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation. Where OSM is regulatory authority, OSM will incorporate such certification into the statement of verification currently required in OSM's permit applications. Any permits issued incident to such certification will be conditionally issued based upon successful completion of the necessary abatement.

The above approach balances the concerns of the commenters. A blanket presumption of abatement for all NOV's-including those whose abatement period has expired-is inappropriate. It is entirely possible that there are NOV's with expired abatement periods for which cessation orders have not yet been written. To presume that such NOV's are abated is unjustified. At the same time, today's final rule recognizes that, until the abatement period has expired, diligent operators should have the opportunity to correct their NOV's in a timely manner without being subjected to permit denial during the period of abatement if they certify that such violations are in the process of abatement. State regulatory authorities can conserve limited resources by having the benefit of a reasonable presumption of NOV abatement which applies to those NOV's which are in a true state of uncertainty with respect to abatement. In considering whether a particular NOV should be the basis for permit denial, State regulatory authorities will also have the comfort of certification by the applicant and the protection of conditional issuance to assure that any representations made with respect to NOV abatement are actually fulfilled.

OSM recognizes that some large companies may not be aware of all NOV's whose abatement periods have not expired where such NOV's are cited against one or more of their many subsidiaries. Nevertheless, OSM expects that companies will make a good faith effort to track their NOV's and report such NOV's as part of permit applications. Where a company has developed a good faith NOV tracking procedure and, in the diligent exercise of such procedure, has inadvertently failed to report an NOV whose abatement period has not yet expired, such failure would not constitute willful nondisclosure by the company. On the other hand, where a company fails to set up a tracking procedure or where a company sets up a tracking procedure or corporate structure designed or intended to shield it from knowledge of NOV's or the ability to track NOV's this will not excuse a company's failure to accurately report NOV's in permit applications. Further, OSM expects that any certifications of ongoing correction provided with respect to NOV's be based upon truthful information and be submitted in good faith. To the extent that a company asserts that it cannot certify because it is not certain whether all violations have been identified, the presumption of NOV abatement would not apply. OSM recognizes that companies may assert this argument, but OSM considers the certification necessary to assure that violations are in the process of being corrected.

As indicated above, the second issue in the proposed rule which generated significant comments was the proposed safe harbor for the owners or controllers of delinquent civil penalties for violations issued prior to October 3, 1988.

Commenters from the coal industry and the States criticized the safe harbor proposal because it required, as a condition precedent for safe harbor treatment, that reclamation be completed within 120 days after the effective date of the rule. These commenters asserted that this proposed condition limiting the availability of safe harbor protection was inadequate and insufficiently flexible. They argued that the proposal did not take into account the time required to perform reclamation and the potential for reclamation to be effected by changing events and environmental conditions.

Moreover, commenters representing the environmental community also criticized the safe harbor provision. These commenters criticized the proposed $750 settlement amount as arbitrarily and artificially low. Commenters representing the State regulatory authorities asserted that the proposed penalty amount provided insufficient flexibility and that a State regulatory authority should be able to demand a greater penalty if the circumstances warrant.

While the industry and the States focused upon the limited window of time available to perform abatement and the environmentalists and the States questioned the limited penalty amount, all of these commenters seemed to share the view, subject to their particular and differing perspectives, that the proposed safe harbor provision was artificial

and unnecessarily rigid.

Upon consideration of the comments, OSM agrees that the proposal was unnecessarily rigid and has, therefore, not finalized the safe harbor proposal. Accordingly, regulatory authorities will have the discretion to review the totality of the facts on a case by case basis to determine whether a person who is linked, through ownership or control, to delinquent civil penalties may avoid permit block through payment of a portion of such penalties. OSM will review the adequacy of such settlements within the context of OSM's routine oversight of the State regulatory authorities under 30 CFR parts 732 and 733 and of case specific complaints and investigations under 30 CFR part 842.

Whether a settlement is adequate will be a function of the entire context of a particular case. Factors to be considered include, but are not limited to, whether the settling owner or controller has performed required reclamation to abate the violations other than the delinquent civil penalties in a timely manner. The regulatory authority should also consider the degree to which the facts indicate that the owner or controller had the authority to exercise control of the violator. If the owner or controller had such authority, whether it chose to exercise such authority or not, it is less credible for the owner or controller to argue that it was unaware of the activities and violations such that a significant discount in civil penalty amount is warranted for the owner or controller. In substance, with such authority, the owner or controller would have had the ability to be informed of violations in a timely manner if he or she had wanted to be so informed. The regulatory authority should also consider the size and solvency of the owner or controller and the impact that the payment of a reduced amount of the civil penalty will have upon the activities of that company and other companies similarly situated. Further, the regulatory authority should consider the impact of the settlement upon the integrity of the regulatory authority's enforcement program. In other words, will the proposed settlement encourage companies to conclude that there is an economic benefit in ignoring the civil penalties and violations of their owned or controlled entities until such companies are required to settle by regulatory authorities?

In accordance with the above discussion, OSM has not adopted the provisions of the proposed rule which would have deleted the presumption that NOV abatement currently contained in 30 CFR 773.15(b)(1) and which would have created a safe harbor for owners or controllers with respect to delinquent civil penalties for violations cited prior to October 3, 1988. In paragraph (b)(1) of the final rule, OSM has inserted language providing for a presumption of NOV abatement for NOV's whose abatement periods have not yet expired where the permit applicants have certified that such NOV's are in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation. In the final rule, OSM has also deleted the language contained in the proposed rule which would have provided the safe harbor for certain owners or controllers. OSM has otherwise adopted the provisions of the proposed rule as the final rule.

SECTION 773.20-IMPROVIDENTLY ISSUED PERMITS: GENERAL PROCEDURES. In the proposed rule, OSM proposed to amend paragraph (b)(1)(ii) of 30 CFR 773.20 to delete the reference to the presumption of NOV abatement contained in 30 CFR 773.15(b)(1). See Proposed Rule, Use of the Applicant/Violator Computer System in Surface Coal Mining and Reclamation Permit Approval, *56 FR 45780, 45784-45785* (September 6, 1991). The basis for such deletion was to assure consistency with the provisions of 30 CFR 773.15(b)(1) which were to be similarly amended.

In the final rule, OSM has reinserted language which addresses the situation which occurs when a permit is issued in reliance upon the presumption that an NOV is being abated in the absence of a cessation order and a cessation order is, in fact, issued with respect to the violation. In such an event, a regulatory authority is required to find that the permit has been improvidently issued. The September, 1991, proposed rule deleted this language to assure consistency with OSM's proposal to delete the presumption of NOV abatement from the permit review process of 30 CFR 773.15(b). As described in this preamble in the discussion relating to 30 CFR 773.15(b), OSM has decided to include a presumption of NOV abatement for that regulation. To assure consistency between the treatment of improvidently issued permits and permit applications, OSM has reinserted language which addresses the presumption of NOV abatement into 30 CFR 773.20(b)(1)(i)(B). The agency's reasons for retaining a presumption of NOV abatement are described fully in the preamble discussion with respect to 30 CFR 773.15(b)(1).

In the proposed rule, OSM also proposed to renumber certain provisions of the then current 30 CFR 773.20 such

that paragraph (b)(2) would become (b)(1)(ii), paragraph (b)(2)(i) would become (b)(1)(ii)(A), paragraph (b)(2)(ii) would become (b)(1)(ii)(B), and paragraph (b)(3) would become (b)(1)(iii). In the final rule, such renumbering is also adopted.

OSM also proposed to amend the then current 30 CFR 773.20 by inserting a new paragraph (b)(2), which would have made the provisions of proposed Sec. 773.26, standards for challenging ownership or control links and the status of violations, applicable when a regulatory authority makes determinations with respect to improvidently issued permits. Proposed Sec. 773.26 would have been applicable when a regulatory authority determines whether a violation, penalty, or fee remains unabated or delinquent, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, and whether any ownership or control link between the permittee and the person responsible for the violation, penalty, or fee existed, still exists, or has been severed.

The proposed insertion of the language referring to Sec. 773.26 would have had the effect of assuring that the standards, responsibilities, and procedures created by proposed Sec. 773.26 were consistently applied to permit issuance and to determinations regarding improvident permit issuance. OSM took such an approach in the belief that this would enhance the fairness of the permitting process and the prospect for the uniform enforcement of nationwide minimum standards.

In the final rule, this approach is adopted. The reference to Sec. 773.26 is changed, however, to Sec. 773.25 to reflect the renumbering of that section. Also, as has been indicated previously, OSM has inserted language in paragraph (b)(2) of final Sec. 773.20 to clarify that a challenge as to the existence of a violation at the time it was cited may be made within the context of the improvident permit issuance process.

OSM further proposed to renumber provisions of the regulation at 30 CFR 773.20(c), which relate to remedial measures for improvidently issued permits, so that then current paragraph (c) would become (c)(1), then current paragraph (c)(1) would become (c)(1)(i), then current paragraph (c)(2) would become (c)(1)(ii), then current paragraph (c)(3) would become (c)(1)(iii), and then current paragraph (c)(4) would become (c)(1)(iv). In the final rule, such renumbering is adopted.

Further, proposed renumbered paragraph (c)(1)(iv), which would authorize the regulatory authority to use rescission as one of the remedial measures for improvident permit issuance, would have deleted a specific reference contained in the former 30 CFR 773.20(c)(4) to the rescission procedures of 30 CFR 773.21.

The reason for such proposed deletion was that OSM sought to establish a prior notice and common appeal procedure for both permit suspensions and permit rescissions with respect to improvidently issued permits. The then current regulation governing permit suspensions at 30 CFR 773.20(c)(3) did not impose any specific requirements for prior notice, opportunity to be heard, or right of appeal for the permittee whose permit is to be suspended. See *54 FR 18450 (1989).* In contrast to this, then current regulations governing permit rescissions at 30 CFR 773.21 contained specific requirements for prior notice to a permittee and an explicit right of appeal. Accordingly, through its proposed rule, OSM sought to provide for greater consistency in its procedures governing suspension and rescission of permits. In the final rule, the proposed change has been adopted.

OSM further proposed to amend 30 CFR 773.20 to add a new paragraph (c)(2) which would have required that a regulatory authority which decides to suspend a permit must provide at least 30 days' prior written notice to the permittee. The proposed rule would have provided that, in the event that the regulatory authority decides to rescind a permit, it would provide notice in accordance with the provisions of 30 CFR 773.21. The proposed amendment further provided that a permittee would be given the opportunity to request administrative review of the notice under proposed OHA rules 43 CFR 4.1370 et seq., where OSM is the regulatory authority, or under the State program equivalent, where the State is the regulatory authority. In the absence of such temporary relief, the regulatory authority's decision would have remained in effect during the pendency of appeal.

OSM's proposed rule amendments made no change in the requirement contained at 30 CFR 773.20(b) that a regulatory authority analyze a potentially improvidently issued permit "[U]nder the violations review criteria of the regulatory program at the time that the permit was issued."

A commenter representing one of the State regulatory authorities criticized the provisions of the proposed rule

which would have required that the regulatory authority provide thirty days' written notice to the permittee, if the regulatory authority decides to suspend the permit. This commenter asserted that there may be circumstances which require the immediate suspension and, possibly, outright rescission of a permit. This commenter asserted that delay, in the interests of due process rights, may not serve the public interest.

OSM appreciates the commenter's concerns. It is entirely conceivable that a permittee could have been issued a permit even though the permittee was linked, through ownership or control, to a string of unabated violations at the time of permit issuance. The permittee could have willfully and fraudulently concealed such links through some clever scheme or artifice at the time of permit application. While AVS has reduced the potential for such a scenario to occur, it remains possible. Such a permit ought to be subject to immediate suspension.

Nevertheless, OSM must weigh the public interest in preventing violators from keeping permits against the public interest in assuring that permittees' due process rights are protected. The remedies of permit suspension and rescission are serious. Unlike an applicant who merely has an expectancy in his application to receive a permit to mine, a permittee has, in fact and as a matter of law, assumed the rights and responsibilities incident to the permit to engage in surface coal mining operations. Indeed, OSM's regulations provide that a valid permit carries with it the right of successive renewal. See 30 CFR 774.15(a). Thus, a permittee has an interest which is deserving of a higher level of protection than the interest of an applicant.

Further, the provisions of 30 CFR 773.21 previously provided for notice to the permittee only prior to a proposed permit suspension and rescission. Thus, a permittee got prior notice of a suspension only if the suspension was the precursor to a subsequent rescission. If the regulatory authority did not intend the suspension of a permit to be followed by the permit's rescission, there was no requirement for prior notice. Also, the provisions of 30 CFR 773.21 provided appeal rights for a notice of suspension and rescission. There were no similar appeal rights in 30 CFR 773.20 with respect to suspension. In substance, permit suspension had the potential of being a harsher punishment than permit rescission by reason of these procedural differences. These were anomalies that OSM wanted to correct.

Accordingly, the final version of 30 CFR 773.20(c)(2) provides for notice prior to permit suspension; for administrative review of the notice of suspension under 43 CFR 4.1370 et seq. or under the State program equivalent; for a common appeal procedure for both permit suspensions and permit rescissions with respect to improvidently issued permits and for the regulatory authority's decision to remain in effect during the pendency of an appeal, unless temporary relief has been granted in accordance with 43 CFR 4.1376 or the State program equivalent. States can be more stringent with respect to providing less prior notice, but they are responsible for the legal consequences of such actions.

Industry commenters objected to OSM's assertion of any role in revoking or setting aside improvidently issued permits based upon the totality of their objections to the AVS, the ownership and control rules, and the proposed rules. These reasons included the proposed rules' alleged deficiencies with respect to due process, State primacy, dispersion of authority for permit decision making, and all other objections asserted by industry commenters.

OSM disagrees with the commenters' views, including their view that OSM has no legitimate role in the improvidently issued permit process. OSM has an essential role to play, both as a regulatory authority and as an agency of the Federal government overseeing the States' programs. OSM incorporates by reference its previous responses to industry commenters in this preamble which address the commenters' concerns. Further, in the preamble to the rules governing improvidently issued permits, OSM has explained the legal basis for the improvidently issued permit rules and the rationale for OSM's role with respect to the implementation of such rules in relation to the States. See Preamble to 30 CFR 773.20, 773.21, and 843.21; Final Rule, *54 FR 18438* et seq., especially see pages 18458-18461 (April 28, 1989). OSM also incorporates these explanations by reference.

Environmentalist commenters criticized the portions of 30 CFR 773.20 which provide that the test for evaluating whether a permit was improvidently issued is "the violations review criteria of the regulatory program at the time the permit was issued." See 30 CFR 773.20(b). These commenters asserted that OSM should clearly spell out the violations review criteria, rather than rely upon the individual regulatory programs' criteria at the time of permit issuance as the applicable standards. These commenters criticized the provisions of OSM's regulations as being contrary to the Act and cited in support portions of their brief filed in the case of National Wildlife Federation v.

Lujan, No. 88-3117 (D.D.C.).

OSM disagrees with the commenters' position. As indicated above, OSM's proposed rule did not propose substantive changes to this provision of the regulation. In the preamble to the improvidently issued permit rules cited above, OSM explained its rationale for using the violations review criteria of the regulatory program at the time the permit was issued as the standard for improvident issuance. See Preamble to 30 CFR 773.20, 773.21, and 843.21; Final Rule, *54 FR 18438, 18440-18441* (April 28, 1989).

Further, in the case of National Wildlife Federation v. Lujan, No. 88-3117 (D.D.C.), and Save Our Cumberland Mountains, Inc. v. Lujan, No. 81-2134 (D.D.C.), environmental advocates advanced similar arguments with respect to the agency's improvidently issued permit rules and the provisions of the rules applying the violations review criteria of the regulatory program at the time of permit issuance. In the briefs submitted by the Department of the Interior in those cases, the Department analyzed relevant statutory language and legislative history and carefully explained why the environmental advocates' criticisms were not well taken. Copies of these briefs are being placed in the Administrative Record of this rulemaking. OSM incorporates the arguments advanced by the Department in those briefs herein by reference.

Environmental commenters also criticized other portions of 30 CFR 773.20 for which OSM did not propose any substantive amendments as part of the September, 1991, proposed rules. The commenters asserted that OSM should clarify that the remedial measures available to a regulatory authority to cure an improvidently issued permit require that the regulatory authority impose both an abatement plan and a permit condition incorporating such plan before an improvidently issued permit is considered resolved. They asserted that the provisions of 30 CFR 773.20(c) inappropriately allow the regulatory authority to choose whether to require a permit condition or an abatement plan.

OSM disagrees with the commenters that a rule amendment is needed. The provisions of the regulation require that the regulatory authority "use one or more" of the listed remedial measures including requiring the implementation of an abatement agreement; conditioning the permit upon abatement of outstanding violations within a reasonable period of time; suspension of the permit; or rescission of the permit. This provision affords the regulatory authority the opportunity to exercise discretion, in light of the circumstances, to make a reasoned choice as to the appropriate remedy. In the preamble to the improvidently issued permit rule, OSM stated, in relevant part, as follows:

This section * * * includes four alternative remedial measures because of the diversity of circumstances under which a regulatory authority might find that a permit was improvidently issued, and the resulting need to apply a remedy that not only is administratively appropriate, but also is fair and equitable to the permittee * * *.

OSMRE believes that the term ["improvidently issued"] reflects the severity of the problem involved when a regulatory authority should not have issued a permit, while at the same time not foreclosing reasonable flexibility in the adoption of appropriate remedial measures * * *.

[T]he rule affords the regulatory authority reasonable discretion to consider the circumstances involving a particular improvidently issued permit and to fashion an appropriate remedy * * *.

Although the rule does not require a regulatory authority to use any particular one of the four remedial measures, OSMRE intends that the measure or measures used will be commensurate with the circumstances under which a permit was improvidently issued.

(Emphasis added.) See *54 FR 18438, 18447-18448* (April 28, 1989). Certainly, it could be reasonable, depending upon particular circumstances, for a regulatory authority to require both a plan of abatement and a permit condition implementing such plan. The agency has previously rejected the view, however, that there is only one correct option or options from the alternative remedies provided in the improvidently issued permit rule which is or are appropriate for all circumstances. Id. The provisions of the regulation afford the regulatory authority the opportunity to tailor a remedy "package" appropriate for the particular circumstances under which a permit was improvidently issued. The goals of any such remedy are "to correct the defect in the permit and achieve a state of compliance." *Id., at 18447.* If either a permit condition or an abatement agreement could reasonably be expected to accomplish these goals under

the circumstances, then either would be sufficient to resolve the improvidently issued permit. In the event that it becomes apparent that selected remedial measures are not effective, each of the remedies affords leverage to the regulatory authority to compel compliance. Such choices are appropriately made by the regulatory authority, subject to OSM's oversight under 30 CFR 843.21. At this time, OSM sees no reason to amend the regulation to routinely require the use of both remedies in all circumstances where abatement of a violation is to be undertaken as a necessary part of the resolution of an improvidently issued permit.

SECTION 773.21-IMPROVIDENTLY ISSUED PERMITS: RESCISSION PROCEDURES. In the proposed rule, OSM proposed to amend the then current regulation at 30 CFR 773.21(a) to make the provisions of proposed Sec. 773.26, standards for challenging ownership or control links and the status of violations, applicable when a regulatory authority invokes the automatic suspension and rescission procedures of 30 CFR 773.21. The rationale for such amendment is the same as that discussed above with respect to similar language contained in Sec. 773.20. In substance, that was to assure that the standards, responsibilities, and procedures created by proposed Sec. 773.26 were consistently applied to permit issuance and to determinations regarding improvident permit issuance. OSM proposed such an approach in the belief that this would enhance the fairness of the permitting process and the prospect for the uniform enforcement of nationwide minimum standards.

Further, OSM proposed to delete paragraph (c) of then current 30 CFR 773.21 which provided for appeals of rescission notices. Under the proposal, rescission appeal procedures were to be incorporated in 30 CFR 773.20.

One commenter representing a State regulatory authority asserted that the States typically have provisions for the administrative review of a regulatory authority's decision to suspend or rescind a permit. Accordingly, this commenter questioned why OSM's proposed rules needed to include provisions for the appeals of permit rescissions due to improvidently issued permits.

The rationale for providing appeal procedures for permit rescissions incident to improvidently issued permits is essentially the same as the rationale for providing appeal procedures for permit suspensions. In substance, a permittee has, in fact and as a matter of law, assumed the rights and responsibilities incident to the permit to engage in surface coal mining operations. Indeed, OSM's regulation provides that a valid permit carries with it the right of successive renewal. See 30 CFR 774.15(a). Thus, a permittee has an interest which is deserving of protection. Thus, a permittee whose permit has been rescinded is entitled to a review of the decision to rescind.

Prior to the proposed amendment of September, 1991, then current 30 CFR 773.21 provided notice and appeal rights with respect to permit rescission incident to improvidently issued permits. By proposing to amend this rule to achieve a common set of procedural protections for permit suspensions and permit rescissions incident to improvidently issued permits, it was not OSM's intention to reduce the appellate rights previously provided by 30 CFR 773.21 or comparable State provisions. Instead, OSM wanted to assure that procedures of review were available for both permit suspensions and permit rescissions. The absence of such procedures for suspensions was a matter which OSM sought to address.

To the extent that State programs already have adequate appeals and notice procedures with respect to permit rescissions incident to improvidently issued permits, OSM believes that the proposed rules should impose little, if any, additional burden upon such States. Under the Act, OSM's responsibility is to establish minimum national standards which approved State programs are required to meet. Accordingly, individual State programs may exceed OSM's standards. A State which has such provisions may respond to any 732 letters OSM sends as a result of this rule by affirming that the State already interprets its program consistent with this Federal provision.

For the above reasons, the commenter's position is rejected.

OSM has decided to adopt the proposed changes as part of the final rules. In adopting the proposal, OSM has modified the provisions at paragraph (a) of 30 CFR 773.21 to make the provisions of Sec. 773.25, standards for challenging ownership or control links and the status of violation, applicable when a regulatory authority invokes the automatic suspension and rescission procedures of 30 CFR 773.21. The proposed rule contained a reference to Sec. 773.26. This change reflects that proposed Sec. 773.26 has been renumbered as final Sec. 773.25. OSM has made an additional non-substantive change to the introductory paragraph of Sec. 773.21 to reflect that Sec. 773.20(c)(4) has

been renumbered to be Sec. 773.20(c)(1)(iv). Further, OSM deletes former paragraph (c) of 30 CFR 773.21 which provides for appeals of rescission notices. As discussed above, rescission appeal procedures are incorporated in 30 CFR 773.20.

SECTION 773.22-VERIFICATION OF OWNERSHIP OR CONTROL APPLICATION INFORMATION. OSM proposed Sec. 773.22 to mandate an inquiry whose focus was to assure that the regulatory authority develops complete and accurate information as to the identification of the applicant and all owners or controllers of the applicant prior to making a determination on a permit application. Accordingly, the proposed section focused on verification of ownership or control application information. Such accurate and complete information would enable the regulatory authority to make an informed decision as to whether the applicant was linked to a surface coal mining and reclamation operation in violation of the Act or of any other environmental laws within the terms of 30 CFR 773.15(b)(1).

Paragraph (a) of proposed Sec. 773.22 would have imposed a duty upon a regulatory authority to review the information provided in the permit application, pursuant to 30 CFR 778.13(c) and 778.13(d), to determine whether the information provided, including the identification of the operator and all owners and controllers of the operator, was complete and accurate. In making such determination, the regulatory authority would have been required to compare information provided in the application with information contained in manual and automated data sources. Manual sources for review would have included the regulatory authority's own enforcement and inspection records and State corporation commission or tax records, to the extent they contain information concerning ownership or control links. Automated data sources would have included the regulatory authority's own computer systems, if any, and the AVS.

Paragraph (b) of proposed Sec. 773.22 would have provided that, if it appeared from information provided in the application pursuant to paragraphs (c) and (d) of Sec. 778.13 that none of the persons identified in the application has had any previous mining experience, the regulatory authority would have been required to inquire of the applicant whether anyone other than those persons identified in the application would own or control the mining operation as either an operator or as another type of owner or controller.

The proposed rule assumed that, given the complexity of modern coal mining operations, it was likely that most applicants would have at least someone in an ownership or control capacity who has had previous mining experience. If it appeared from the face of an application that that was not the case, the regulatory authority would have been required to contact the applicant to verify that the applicant had not omitted from the application an operator or other owner or controller who had such experience. The intent of this proposal was to ensure that the regulatory authority obtains information on other, experienced persons who may actually be running the operation and should therefore have been disclosed as part of the ownership and control data in a permit application, but were not.

Paragraph (c) of proposed Sec. 773.22 provided that if, after conducting the information review described above, the regulatory authority identified any potential omission, inaccuracy, or inconsistency in the ownership or control information provided in the application, it would be required to contact the applicant prior to making a final determination with respect to the application. The applicant would then be required to resolve the potential omission, inaccuracy, or inconsistency through submission of an amendment to the application or a satisfactory explanation which includes credible information sufficient to demonstrate that no actual omission, inaccuracy, or inconsistency existed. The regulatory authority was also required to take action in accordance with the provisions of proposed Sec. 843.23, sanctions for knowing omissions or inaccuracies in ownership or control and violation information, or the State program equivalent, where appropriate.

Paragraph (d) of proposed Sec. 773.22 would have required that, upon completion of the information review mandated by Sec. 773.22, the regulatory authority promptly enter all ownership or control information into AVS.

Industry commenters objected to the provision of the proposed rule requiring that the regulatory authority compare information provided in the permit application with sources such as State corporation commission or tax records. They asserted that such records are typically updated only on an annual basis and may be obviously inaccurate. They further asserted that requiring the applicant to explain discrepancies between information contained in the application and the State corporation commission or tax records will lead to inappropriate delays in the permit

process.

OSM disagrees with the commenters' criticisms of the proposed requirement. The proposed requirement was designed to assure that the regulatory authority reviewing an application has complete ownership and control information. Such information is necessary to enable the regulatory authority to determine whether the application should be issued in accordance with the provisions of section 510(c) of the Act and 30 CFR 773.15(b)(1).

Unfortunately, a regulatory authority cannot simply rely upon all applicants to supply complete ownership or control information. Some applicants may err in good faith, others may conceal information knowingly. Accordingly, the regulatory authority must look to other sources of information. The information contained in the records of State corporation commissions or taxing authorities is a good potential source of ownership or control information. Depending upon particular State requirements, such information may have been submitted under oath. Further, such information is submitted subject to the review of State corporation commissions and State taxing authorities. Thus, a State regulatory authority reviewing such information has the benefit of any efforts made by these other agencies to assure that information submitted to them is accurate and complete.

Moreover, such information is important because it provides a basis for inquiry and for comparison with information submitted in the permit application. If there are discrepancies between the ownership or control information in such records and that submitted in the permit application, the applicant should be able to readily explain such discrepancies. Thus, if any information previously submitted to State taxing authorities or corporation commission has become subsequently outdated, this can be explained with minimal inconvenience to an applicant and minimal delay in the permit application process. On the other hand, if important ownership or control information has been omitted from a permit application, the State taxing and corporation commission records may be the key to identifying such omissions. In any event, the benefits of such information to the regulatory authority outweigh the risks identified by the industry commenters.

A commenter representing State regulatory authorities also asserted that these records rarely provide information not contained in previous permit applications or in AVS. This commenter also indicated that these records are difficult to obtain because tax records are not typically available for review by State agencies other than the taxing authorities.

OSM disagrees with the view that these types of records merely contain information which is duplicative of information already available to the State regulatory authorities through permit applications or AVS. While OSM makes every effort to assure that AVS contains complete and accurate information with respect to ownership or control links, OSM has never asserted that AVS is perfect. Even if AVS were a perfectly complete source of such information, new corporations are being formed and new applications to conduct surface coal mining operations are submitted. AVS must be regularly updated. It is likely that there is relevant ownership or control information contained in corporation commission and tax records of the various States which is not yet reflected on AVS. Thus, there is a need for State regulatory authorities to review such information and compare such information with permit applications to identify accurate and complete ownership or control information. Such information can then be added to the AVS database.

With respect to commenter's concern about the availability of State tax and corporation commission records, OSM recognizes that particular State laws may limit a State regulatory authority's access to such records. The requirement of the proposed regulation was for the regulatory authority to review "reasonably available sources." Thus, if a State law explicitly forbids the regulatory authority's access to State tax information, the information would not be "reasonably available" for review. In the absence of such explicit prohibition, however, State regulatory authorities should review such information. OSM encourages State regulatory authorities to work with their sister tax and corporation commission agencies to develop information access arrangements to the extent permissible under applicable laws. Nevertheless, OSM rejects the view that the difficulty of obtaining the information justifies withdrawing or amending the proposing regulation.

The commenter representing State regulatory authorities further questioned the requirement contained in paragraph (c)(2) of proposed Sec. 773.22 that "credible information," rather that "credible evidence," support an applicant's satisfactory explanation of omissions, inaccuracies, or inconsistencies with respect to ownership or

control information in an application. OSM used the term "credible information," rather than "credible evidence" because this is a broader concept than credible evidence. This term would include credible evidence which would be admissible at trial. Nevertheless, an applicant might be able to provide a satisfactory explanation based upon information which would not necessarily be admissible at trial, but which is a reliable and believable basis to conclude that no actual omission, inaccuracy, or inconsistency exists. Accordingly, the language of the proposed regulation was intended to provide flexibility to the regulatory authority to consider such information, including credible evidence.

OSM has determined to adopt the proposed rule at Sec. 773.22 as a final rule with minor modifications which are now described.

As indicated above, paragraph (b) of the proposed rule would have required that, if it appeared from information provided in the application pursuant to paragraphs (c) and (d) of Sec. 778.13, that none of the persons identified in the application had any previous mining experience, the regulatory authority had to inquire of the applicant whether anyone other than those persons identified in the application would own or control the mining operation as either an operator or as another type of owner or controller. The final rule imposes the duty upon the regulatory authority to both inquire of the applicant and to investigate.

In the proposed rule, there may have been an implication that the regulatory authority could simply conclude its inquiry in reliance upon the applicant's explanation. Such an implication was not intended. Accordingly, OSM has added explicit language to paragraph (b) of final Sec. 773.22 to insure that, if none of the persons identified in the permit application has had any previous mining experience, the regulatory authority will not simply rely upon the applicant's explanations. Instead, the regulatory authority will go forward to investigate whether any persons other than those identified in the application will conduct the mining.

In the final version of Sec. 773.22, OSM has retained language from paragraph (c) of the proposed Sec. 773.22 requiring the regulatory authority to take action in accordance with the provisions of Sec. 843.23 or the State program equivalent. However, OSM has deferred action on the adoption of proposed Sec. 843.23 for a later rulemaking. See *58 FR 34652* et seq. (June 28, 1993). The reference to that rule has been left in final Sec. 773.22 in the event that a final version of Sec. 843.23 is adopted. The inclusion of such reference, however, does not prejudge whether OSM will ultimately adopt such a rule.

As indicated above, paragraph (d) of the proposed rule would have required that, upon completion of the information review mandated by Sec. 773.22, the regulatory authority promptly enter all ownership or control information into AVS. OSM has adopted the final version of this paragraph to require that, upon completion of its review, the regulatory authority enter ownership or control information "into" AVS. If such information is already on the system, the regulatory authority is required to "update" such information. Such changes have been made to provide better clarity to the rule language.

SECTION 773.23-REVIEW OF OWNERSHIP OR CONTROL AND VIOLATION INFORMATION. OSM proposed Sec. 773.23 as a new section which would delineate the regulatory authority's review obligations with respect to a permit application after the regulatory authority had completed the process of verifying ownership or control application information as described in Sec. 773.22.

The provisions of paragraph (a) of proposed Sec. 773.23 would have required the regulatory authority to review all reasonably available information concerning violation notices and ownership or control links involving the applicant to determine whether the application could be approved under the provisions of 30 CFR 773.15(b). With respect to ownership or control links involving the applicant, such information would have included all information obtained under 30 CFR 773.22 and 778.13. With respect to violation notices, such information would have included all information obtained under Sec. 778.14, information obtained from OSM, including information shown in the AVS, and information obtained from the regulatory authority's own records concerning violation notices.

In substance, the proposed regulation was designed to assure that the regulatory authority considers complete ownership, control, and violation information in making the decision required by 30 CFR 773.15(b)(1) with respect to a permit application.

The provisions of paragraph (b) of proposed Sec. 773.23 were proposed to provide the course of action which a regulatory authority would be required to take if the review conducted pursuant to paragraph (a) of the section disclosed any ownership or control link between the applicant and any person cited in a violation notice.

Thus, paragraph (b)(1) of proposed Sec. 773.23 would have required that the regulatory authority notify the applicant of such link and refer the applicant to the agency with jurisdiction over the violation notice.

Paragraph (b)(2) of proposed Sec. 773.23 would have required that the regulatory authority not approve the permit application unless and until it determined that all ownership or control links between the applicant and any person cited in a violation notice were erroneous or had been rebutted, or the regulatory authority determined that the violation to which the applicant had been linked had been corrected, was in the process of being corrected, or was the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1) or the State program equivalent. The determinations to be made by the regulatory authority under paragraph (b)(2) of the proposed regulation were to have been made in accordance with the provisions of proposed Sec. 773.24, procedures for challenging ownership or control links shown in AVS, and proposed Sec. 773.26, standards for challenging ownership or control links and the status of violations, or their State program equivalents.

Paragraph (c) of proposed Sec. 773.23 would have required that, following the regulatory authority's decision on the application or following the applicant's withdrawal of the application, the regulatory authority be required to promptly enter all relevant information related to the decision or withdrawal into AVS. The regulatory authority's decision could have included unconditional issuance, conditional issuance, or denial of the permit. The requirement that all relevant information be promptly entered into AVS was intended to insure that AVS was continually updated to reflect the most current information available with respect to permit applicants. A critical source of such information would be the regulatory authority.

Commenters representing members of the coal industry criticized the provisions of the proposed regulation as being unnecessarily duplicative of the provisions of proposed Sec. 773.22 and of 30 CFR 773.15(b). In support of this position, they pointed to the provisions of the proposed regulation which require the review of violation information and ownership or control links to determine whether an application could be approved. They questioned why the requirements of proposed Secs. 773.22 and 773.23 would be imposed as two separate stages, rather than as a single stage of the permit application process under 30 CFR 773.15(b)(1).

OSM disagrees with the view that the provisions of proposed Secs. 773.22 and 773.23 are duplicative or redundant to each other or with respect to the provisions of 30 CFR 773.15(b)(1). Further, OSM does not believe that these provisions should be consolidated with the provisions of 30 CFR 773.15(b)(1).

While each of the regulatory sections at issue are part of the permit application and review process, the two proposed Secs. 773.22 and 773.23 represent separate tasks for the regulatory authority. In implementing the provisions of proposed Sec. 773.22, the regulatory authority would be focusing upon information contained in the permit application and attempting to verify such information by comparing it with other readily available sources of information. The purpose of such activity is to identify complete and accurate information with respect to the application, including identification of the person or persons who will own or control the surface coal mining operation. In implementing the provisions of proposed Sec. 773.23, the regulatory authority takes the information gleaned from its research on the application and then evaluates whether there are any ownership or control links between the applicant and any person cited in a violation notice. In this stage, the focus of inquiry is to determine whether the permit can be approved in accordance with the provisions of 30 CFR 773.15(b).

While both of these stages involve the use of AVS, this does not mean that such stages are redundant or duplicative. The AVS should be consulted throughout the permit application process to assure that the regulatory authority has the most current ownership or control and violation information available from OSM and other State regulatory authorities. The AVS is an evolving information system which is routinely supplemented with new information. The use of AVS in the earlier stage, proposed Sec. 773.22, provides an information resource for comparison with application ownership or control information and a basis for inquiry with the applicant. During the later stage, proposed Sec. 773.23, the regulatory authority takes previously developed ownership or control information and compares such information with outstanding violation information in deciding whether or not to

issue the permit. The use of AVS in this stage enables the regulatory authority to have the benefit of any information which may have been subsequently added to AVS by OSM or other State regulatory authorities.

Further, neither of the provisions of proposed sections are redundant with 30 CFR 773.15(b)(1). The provisions of 30 CFR 773.15(b)(1) do not delineate the means by which a regulatory authority may comply with the mandates of section 510(c) of the Act or 30 CFR 773.15(b)(1). Proposed Secs. 773.22 and 773.23 fill this need. These proposed sections provide the specific steps to be taken by a regulatory authority to achieve compliance with the provisions of 30 CFR 773.15(b)(1).

One industry commenter suggested that all of these provisions should be consolidated into a single violations review provision. While this is a reasonable alternative, OSM is convinced that the approach contained in the proposed rules is a better alternative. The placement of the required tasks in separate sections of the regulations, with appropriate cross references, better highlights the particular duties necessary at each stage of the permit application review process in a way which is more likely to support compliance. Also, as the above discussion demonstrates, the tasks are sufficiently separable that they lend themselves to separate regulatory sections. Such separation, however, does not mean that there must be unnecessary delays. A regulatory authority can move forward methodically through each required task in a timely manner.

A commenter representing State regulatory authorities criticized the provisions of paragraph (b)(2)(ii) of proposed Sec. 773.23 because such provision would prohibit the issuance of a permit if there are outstanding violations. He asserted that these provisions would significantly increase the burden on applicants, because the provisions did not incorporate the presumption that an NOV is considered abated unless an FTACO has been issued.

In this preamble, OSM has already addressed the matter of the presumption of NOV abatement within the discussion of the amendments to 30 CFR 773.15(b)(1) which have been adopted today. As indicated, OSM has determined to retain a presumption of NOV abatement where the abatement period for the NOV has not expired and the applicant has provided certification that the violation is in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation. Since the provisions of proposed Sec. 773.23 incorporate the provisions of 30 CFR 773.15(b)(1), such presumption would be similarly applied as part of proposed Sec. 773.23. Thus, the substance of commenter's concern has been addressed.

Commenters representing environmental advocacy groups urged that paragraph (a) of proposed Sec. 773.23 be clarified with respect to the regulatory authority's duty to review the accuracy of ownership or control information. They pointed out that there are many additional sources of ownership or control information beyond those listed in the regulation which a regulatory authority could review. They asserted that the regulatory authority should be required to review the sources listed in the regulation, the AVS and the regulatory authority's own records, at a minimum.

OSM agrees that there are many potential sources of ownership or control information and that the sources for review listed in the proposed regulation are those which the regulatory authority should be required to review, at a minimum. OSM disagrees, however, that the proposed regulation needs to be further clarified or modified. There is already language in the proposed regulation which meets the substance of commenters' concerns. In paragraph (a) of proposed Sec. 773.23, the regulatory authority is required to "review all reasonably available information concerning violation notices and ownership or control links involving the applicant * * *." (Emphasis added.) In addition, the language makes clear that "[s]uch information shall include" the listed items which follow in paragraphs (a)(1-2) of the proposed regulation. The clear meaning of this proposed language is that the listed examples are those sources which the regulatory authority must review. In addition, the regulatory authority can choose to review other sources.

Commenters representing environmental advocacy groups also urged OSM to incorporate standards to demonstrate whether an outstanding violation has been corrected or is in the process of being corrected to the satisfaction of the agency with jurisdiction over such violation. OSM believes that the regulatory authority which issued the violation can effectively define the status of such violation with additional standards. This regulatory authority is well positioned to determine whether the violation which it has issued has been abated or is in the process of being abated to its satisfaction. A regulatory authority before which a permit application is pending should consult the regulatory authority which issued the violation to ascertain the status of any violation to which an

applicant has been linked through ownership or control.

OSM has determined to adopt the proposed rule as a final rule with a small modification which is now described. In adopting the proposal, OSM has modified the provisions of paragraph (b)(2) of section 773.23 to make the provisions of Secs. 773.25, standards for challenging ownership or control links and the status of violations, along with those contained in Sec. 773.24, applicable when a regulatory authority makes a determination whether to approve a permit. The proposed rule contained a reference to proposed section 773.26. This change reflects that proposed section 773.26 has been renumbered as final Sec. 773.25. The rule is otherwise adopted as proposed.

SECTION 773.24-PROCEDURES FOR CHALLENGING OWNERSHIP OR CONTROL LINKS SHOWN IN AVS. OSM proposed Sec. 773.24 to establish the procedures to be followed in the event that the AVS showed an ownership or control link between a person and any person cited in a violation notice. The proposed section would have provided procedures for direct appeals of such links to OSM by persons who had been so linked. The proposed section would also have provided for challenges concerning the status of violations to which persons shown on AVS had been linked. The proposed section would have further provided the opportunity for those persons making a challenge to have obtained temporary relief from any adverse use of the challenged link or violation information during the pendency of such challenge.

Paragraph (a)(1) of proposed Sec. 773.24 would have provided that an applicant or anyone else shown in AVS in an ownership or control link to any person cited in a Federal or State violation could have challenged such a link in accordance with the provisions of paragraphs (b) through (d) of proposed Sec. 773.24 and in accordance with the provisions of proposed Sec. 773.26, standards for challenging ownership or control links and the status of violations. Paragraph (a)(1) of proposed Sec. 773.24 would have provided, however, that such challenge would not be available if the challenger was bound by a prior administrative or judicial decision with respect to the link.

In substance, paragraph (a)(1) of proposed Sec. 773.24 would have provided that challenges of ownership or control links shown on AVS be made before OSM. The theory of the proposed regulation was that, once information with respect to particular ownership or control links has become part of the AVS and accessible to regulatory authorities across the country, the responsibility for the maintenance of such information would be a Federal responsibility. Accordingly, the process for challenging such information would be a Federal process.

Paragraph (a)(2) of proposed Sec. 773.24 would have provided that an applicant or anyone else shown in AVS in an ownership or control link to a person cited in a Federal violation notice would have challenged the status of such violation in accordance with the provisions of paragraphs (b) through (d) of proposed Sec. 773.24 and in accordance with the provisions of proposed Sec. 773.26, standards for challenging ownership or control links and the status of violations. The procedures applicable would have been similar to those described in paragraph (a)(1) of proposed Sec. 773.24.

Paragraph (a)(2) of proposed Sec. 773.24 would have provided, in language similar to that contained in paragraph (a)(1) of the proposed regulation, that the opportunity to challenge the status of a violation would not be available to any person who was bound by a prior administrative or judicial determination concerning the status of the violation.

The "status of the violation" would have meant whether the violation remained outstanding, had been corrected, was in the process of being corrected, or was the subject of a good faith, direct administrative or judicial appeal to contest the validity of the violation. See 30 CFR 773.15(b)(1)(i)-(ii). This usage was to have been carried forward into the provisions of proposed Sec. 773.26, standards for challenging ownership or control links and the status of violations. Further, the provisions of proposed Sec. 773.26 would have limited challenges make to the status of violations under proposed Sec. 773.24 to prevent challenges of the existence of the violation at the time that it was cited. Again, the process for challenging the status of a Federal violation was to have been a Federal process. Challenges would have been made before OSM.

Paragraph (a)(3) of proposed Sec. 773.24 would have provided that any applicant or person shown in AVS to have been linked by ownership or control to a person cited in a State violation notice could challenge the status of such violation before the State that issued the violation notice. Such challenge would have to have been made in accordance with that State's program equivalents to paragraphs (b) through (d) of proposed Sec. 773.24 and

proposed Sec. 773.26. Again, the provisions of proposed section 773.26 would have been incorporated under proposed Sec. 773.24 to prevent challenges as to the existence of the violation at the time that it was cited.

Paragraph (a)(3) of proposed Sec. 773.24 would have provided, in language similar to that contained in paragraph (a)(2) of the proposed regulation, that the opportunity to challenge the status of a violation before a State program would not be available to any person who was bound by a prior administrative or judicial determination concerning the status of the violation.

Paragraph (b) of proposed Sec. 773.24 would have required that a person seeking to challenge ownership or control links shown in AVS or the status of Federal violations submit to OSM a written explanation of the basis for his or her challenge and provide relevant evidentiary materials and supporting documents. The proposed regulation would have required that such information be submitted to the Chief of OSM's AVS Office in Washington, DC.

Paragraph (c) of proposed Sec. 773.24 would have required that OSM make a written determination with respect to the ownership or control link and/or with respect to the status of the violation. The proposal required that, if an ownership or control link had been challenged, OSM would then determine whether the link had been shown to be erroneous or had been rebutted.

Paragraph (d)(1) of proposed Sec. 773.24 would have provided that, if OSM had determined that the ownership or control link had been shown to be erroneous or had been rebutted and/or that the violation covered by the violation notice had been corrected, appropriately appealed, or otherwise resolved within the terms of 30 CFR 773.15(b)(1) (i)-(ii), OSM would be required to have provided notice of its determination to the permit applicant or other person challenging the link or the status of the violation. Under the proposed regulation, if an application was pending, OSM would also have to notify the regulatory authority before which the application was pending. Further, OSM would have been required to correct information contained in AVS to reflect the determination which had been made.

Paragraph (d)(2) of proposed Sec. 773.24 would have provided that, if OSM had determined that the challenged ownership or control link had not been shown to be erroneous and had not been rebutted, and that the violation remained outstanding, OSM would have been required to provide notice of its determination to the permit applicant or other person challenging the link or the status of the violation. Under the proposed regulation, if an application was pending, OSM would have also been required to notify the regulatory authority before whom the application was pending. Further, OSM would have been required to update information contained in AVS, if necessary, to reflect OSM's determinations.

Paragraph (d)(2)(i) of proposed Sec. 773.24 would have provided that OSM be required to serve a copy of its decision with respect to a challenge upon the applicant or other challenger by U.S. certified mail or by any other means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure.

Paragraph (d)(2)(ii) of proposed Sec. 773.24 would have provided that the applicant or other challenger could have appealed OSM's decision to the Department of the Interior's Office of Hearings and Appeals (OHA) within 30 days of such decision in accordance with proposed OHA regulations at 43 CFR 4.1380 et seq. Paragraph (d)(2)(ii) would have further provided that OSM's decision remained in effect unless temporary relief was granted in accordance with OHA regulations at 43 CFR 4.1386.

Paragraph (d)(2)(ii) of proposed Sec. 773.24 would have further provided for temporary relief from OSM's decision, if OHA granted such relief in accordance with proposed OHA regulations at 43 CFR 4.1386. Under the proposed regulation, OSM's decision would have remained in effect during the pendency of appeal, unless temporary relief was granted.

Commenters representing the coal industry took exception to the provisions of paragraph (a)(2) of the proposed section which would preclude an applicant or other person from challenging the status of a violation if he or she was "bound by a prior administrative or judicial determination concerning" the status of the violation. The commenters asserted that determining whether a person was "bound" by a prior determination was vague and susceptible to

conflicting interpretations. They further asserted that if, by this proposed language, OSM intended to apply the doctrines of res judicata or collateral estoppel, there was no need to include such language in the proposed regulation, since these doctrines would be available as legal defenses to OSM in any event. The commenters indicated that their objection to this language also applied to the other portions of the proposed regulations where similar language imposing such a limit on challenges was incorporated.

OSM disagrees with the commenters' characterization of the rule language. The proposed rule language is clear in standing for the principle that a person is entitled to his or her challenge opportunity before an administrative or judicial tribunal. Nevertheless, a person is not entitled to the multiple relitigation of issues which he or she has already litigated to conclusion. Accordingly, the proposed rule is explicit in requiring that a person who is bound by a prior administrative or judicial determination with respect to the status of a violation may not relitigate such issue. In determining whether a person is bound by a prior determination, traditional principles of res judicata and collateral estoppel will apply. Contrary to commenters' view, however, it is insufficient to assume that such principles will apply as a matter of law and that there is no need to provide an explicit limitation in the regulation. Such a limitation is necessary to eliminate any ambiguity in the regulation with respect to this issue and to assure that judicial and administrative tribunals are not clogged with duplicative, repetitive claims by persons who have already litigated such claims. The limiting language provides a clear statement of OSM's intent and will be adopted as part of the final rule.

Commenters representing environmental advocacy groups indicated approval of the provisions of the proposed regulation which would have limited challenges of the existence of the violation at the time it was cited. Such commenters did indicate concern, however, that the proposed regulation did not provide an explicit time limit for OSM to make its decision with respect to a challenge. They urged that the regulation incorporate an explicit time limit of 30 days for OSM to make a decision to avoid undue delay with respect to the permit application process.

OSM disagrees with the view that the regulation needs to contain an explicit time limit for the agency to make a decision with respect to challenges of ownership or control links or the status of violations. While OSM makes every effort to decide these issues in an expeditious manner, the review and determination of an ownership or control link can be a complex endeavor, requiring the review of significant amounts of complex documentary material. Such a process typically involves a dialogue involving the exchange of numerous documents and testimony between the agency and the challenger. Such issues may require extensive research and investigation by trained specialists. The imposition of artificial time limits on the process could create a risk that decisions will be inaccurate and that investigations will be incomplete.

Further, there is no risk to the environment during the period of challenge. During the period of challenge, the permit is not issued. Once a presumption of ownership or control has been established pursuant to 30 CFR 773.5 and such presumption is shown on AVS, the burden is upon an applicant to rebut the presumption. The regulatory authority should not issue the permit until the presumption has been rebutted. While an expeditious process is encouraged, the regulatory authority should not be rushed in making such a decision. It should conduct a thorough investigation and review all of the relevant evidence presented. Some challenges can be resolved within 30 days. Other challenges may require six months. Imposing an absolute time limit disregards the differences that particular cases have with respect to factual and legal complexity. Accordingly, OSM must reject the commenters' suggestion that a time limit should be incorporated into the proposed regulation.

A commenter representing State regulatory authorities criticized the provisions of proposed Sec. 773.24 which would require that challenges of ownership or control links shown on AVS be heard before OSM. In substance, the commenter was concerned that, for such challenges to be meaningfully addressed, OSM would need copies of supporting documentation from the States and challengers would be referred to the States to review various documents with respect to ownership or control relationships and with respect to violations. The commenter asserted that the States would have an "unnecessary burden" to provide duplicate copies of documents to OSM and other participants.

While OSM appreciates commenter's concern, OSM disagrees that the process provided in the proposed rule will impose an unnecessary burden upon the States. Under the proposed regulation, OSM is assuming the responsibility to entertain challenges to ownership or control information shown on AVS. In the absence of OSM's assumption of

such responsibility, the States would have to hear such challenges. Further, regardless of which party assumes responsibility for addressing such challenges, that party would have to obtain complete documentation from all other parties which might have relevant records. Thus, each State would have to provide copies of essential documentation to the participants and to whichever regulatory authority was reviewing the case, be it OSM or a specific State, to enable the challenges to be fairly considered and resolved. It is in the interests of all concerned with the process-including OSM, the States, the challengers, and the public-that determinations of such challenges are based upon a complete administrative record. OSM is confident that the cooperative relationship between OSM and the States which has characterized the development and implementation of AVS would be carried forward with respect to challenges of ownership or control information on AVS made before OSM.

Commenters representing State regulatory authorities also questioned whether proposed Sec. 773.24 was inconsistent with other provisions of the proposed rules which would allocate responsibility to State regulatory authorities to make ownership or control decisions. In support of these positions, the commenters cited the provisions of proposed Sec. 773.26(b) which they considered to be inconsistent with proposed Sec. 773.24. As is noted elsewhere in this preamble, proposed Sec. 773.26 is being modified, renumbered, and adopted today as final Sec. 773.25. The commenters were concerned that there would be confusion in the permit application process if OSM would be the deciding agency with respect to ownership or control information on AVS.

OSM disagrees with the commenters' analysis. The provisions of proposed Sec. 773.24 were designed to avoid confusion. In substance, the proposed rule would provide challengers with a single forum, OSM, before which they could contest ownership or control information shown on AVS. The alternative to the proposed rule's approach would be for challengers to challenge ownership or control links shown on AVS before the various States. There is a greater likelihood of inconsistent results with multiple jurisdictions making such decisions as opposed to a single agency making such decisions. Further, the content of AVS would be subject to such inconsistency, since the resolution of challenges would have to be reflected in the AVS database. Given that AVS is a national database which is used across State lines, there is a need for consistency in the decision making which forms the content of AVS. Moreover, the approach provided in proposed Sec. 773.24 is consistent with that provided in proposed Sec. 773.26(b).

Paragraph (b)(1)(i) of proposed Sec. 773.26 would provide that the regulatory authority before which an application is pending has authority for making decisions with respect to the ownership or control of the applicant. Paragraph (b)(1)(ii) of proposed Sec. 773.26 would provide that the regulatory authority that issued a permit would have authority for making decisions with respect to the ownership or control of the permittee. As will be discussed below in detail, OSM's final regulation adopted as final Sec. 773.25 modifies this language to refer to ownership or control of applications, permits, and violations, rather than ownership or control of applicants, permittees, and violators.

Under paragraph (b) of proposed Sec. 773.26, the authority of the regulatory authority is initial authority, subject to OSM's oversight. Under that paragraph of proposed Sec. 773.26, a regulatory authority would analyze the facts and make an initial decision with respect to the ownership or control links of an applicant or a permittee. Such decision would be subject to OSM's oversight. Then, the regulatory authority would enter such information into AVS, to the extent necessary to update the system. The entry of such information into AVS would also be subject to OSM's oversight. Since OSM has ultimate authority, through the exercise of oversight, as to the content of the ownership or control information on AVS, it is consistent for OSM to be the single forum for the challenge of ownership or control information shown on AVS as provided by proposed Sec. 773.24. If OSM later amends the AVS to reflect a different conclusion with respect to a particular ownership or control link than that reached by a State regulatory authority, that reflects OSM's exercise of its oversight authority and its responsibility for the ownership or control information contained in AVS. If a regulatory authority would then consider a subsequent application, it would be required to review AVS and to factor the information shown in AVS, as amended by OSM, into the regulatory authority's decision with respect to the later permit application. Thus, proposed Secs. 773.24 and 773.26 are consistent with each other and will not lead to confusion in the permit application process.

A commenter representing State regulatory authorities also proposed a revision of proposed Sec. 773.24 such that OSM's decisions made under the proposed regulation would be considered preliminary decisions which would become final within 30 days thereafter if the person challenging the link could show no valid reason why the decision

should not become final. The commenter asserted that such a provision would enable the challenger to provide supplemental information which could lead to a corrected final decision and, thus, obviate the need for an appeal to OHA.

OSM appreciates the commenter's suggestion. OSM believes, however, that persons should have the opportunity to seek review of the agency's decision by OHA as soon as possible upon the agency's determination that they are linked, through ownership or control, to violations. In the absence of a final agency decision, such review by OHA would not be routinely available. Accordingly, the proposed regulation provides for a final agency decision which may then be appealed to OHA by a challenger. If a challenger has new information which would lead OHA to conclude that the challenger is likely to win a reversal of OSM's decision, then such information would support temporary relief with respect to the decision. On the other hand, where OSM has reviewed information submitted and concluded that an ownership or control link has been severed, OSM may choose to reserve the right to reopen such decision in the event that new information or evidence comes to light subsequently. Such reservation of the right to reopen by the agency would be necessary to assure that the agency can correct its mistakes and assure the accuracy of the AVS. Thus, OSM can supplement the record with information discovered subsequent to any decision. Accordingly, OSM has determined not to adopt the commenter's proposal.

In accordance with the above discussion, OSM has decided to adopt a final version of Sec. 773.24 which is substantively similar to the proposed version. OSM has, however, made some minor modifications to the proposed rule which are now described.

In paragraph (a)(1) of the proposed rule, the rule provided for the challenge of links by persons linked to any person cited in a Federal or State violation notice. At the time that this proposal was published in September, 1991, OSM expected that most challenges would be by persons seeking to challenge links to violators to avoid permit blocks. In actuality, members of the regulated community have also routinely come before OSM seeking to challenge ownership or control links to persons who are not violators. The language of the proposal did not reflect this reality and was, therefore, too narrow. Further, the language was potentially inconsistent with language contained in the 1988 preamble to OSM's ownership and control rules. In that preamble, OSM stated, in relevant part, as follows:

PROCEDURES TO AMEND APPLICANT VIOLATOR SYSTEM INFORMATION. In addition to the procedures described above, both individuals and organizations may seek to amend the information in the Applicant Violator System, independent of the existence of a permit application if they believe that the records are not accurate, relevant, timely or complete.

See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38879* (October 3, 1988). Accordingly, the final rule broadens the proposed language to provide that "[a]ny applicant or other person shown in AVS in an ownership or control link to any person may challenge such link" even if the link is to persons who are not violators. OSM intends to protect due process rights and provide an efficient avenue to challenge information shown on AVS. The substance of paragraph (a)(1) of the rule proposed in September, 1991 is otherwise retained.

Proposed Sec. 773.24 has been further modified to delete references in paragraphs (a)(2) and (a)(3) to proposed Sec. 773.26 and substitute references to final Sec. 773.25 in the place of the deleted section references. This reflects OSM's renumbering of the sections of the proposed rule. No substantive change in the rule has been made by such modification.

Paragraph (b) of proposed Sec. 773.24 would have required that a person seeking to challenge ownership or control links or the status of Federal violations submit to OSM a written explanation of the basis for his or her challenge and provide relevant evidentiary materials and supporting documents. Proposed paragraph (b) did not explicitly state that the process of challenge described in this paragraph applied to links shown in AVS. That was OSM's intent, however, as stated in the preamble to the proposed rule. Accordingly, OSM has corrected the oversight in the rule language by explicitly incorporating this language into this final rule.

Paragraph (c) of proposed Sec. 773.24 has been adopted as proposed. This provision requires OSM to make a written determination with respect to the ownership or control link and/or with respect to the status of the violation.

The provision of the rule requires that, if an ownership or control link is challenged, OSM then determines whether the link has been shown to be erroneous or has been rebutted. While no change has been made to the proposed rule, OSM believes that the following explanation will be helpful in clarifying the operation of the rule.

Under the rule, a determination that a link is "erroneous" means that the facts in the case show that no ownership or control relationship set forth in 30 CFR 773.5 ever existed. Thus, if an individual is shown on AVS as being linked to a corporation by virtue of his or her position as an officer of such corporation, see 30 CFR 773.5(b)(1), evidence demonstrating that such individual is not and has never been an officer of the corporation would support a determination that an ownership or control link based upon such a relationship is erroneous.

A determination that a link has been "rebutted" means that, while the facts in the case show that a presumed ownership or control relationship as set forth in 30 CFR 773.5(b) exists or existed, sufficient evidence has been presented to demonstrate that the "person subject to the presumption [did] * * * not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation [was] conducted * * *." See 30 CFR 773.5(b).

Accordingly, if the individual in the preceding example was, in fact, an officer of the corporation, but did not have authority or demonstrated control over the conduct of the surface coal mining operation, the presumption of ownership or control would be rebutted.

The provisions of paragraph (d) of the proposed rule have been adopted as proposed. Paragraph (d)(2)(i) of Sec. 773.24 provides that OSM is required to serve a copy of its decision with respect to a challenge upon the applicant or other challenger by U.S. certified mail or by any other means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure.

The date of service of the decision will set a date certain from which the time for appeals will begin to run. The regulation provides that service is complete upon tender of the notice or of the mail and is not deemed incomplete by virtue of a challenger's refusal to accept the notice or mail. The theory of this provision is to assure that a challenger is not able to delay the running of the time for appeal by avoiding or refusing service of OSM's decision and then claiming that he or she was never served.

Paragraph (d)(2)(ii) of Sec. 773.24 has been adopted as proposed. As provided in the proposed rule, the final version of this paragraph provides that the applicant or other challenger can appeal OSM's decision to OHA within 30 days of such decision in accordance with OHA regulations at 43 CFR 4.1380 et seq.

As provided in the proposed rule, paragraph (d)(2)(ii) of the final regulation provides all challengers to an OSM decision in these matters with the opportunity to appeal the decision to OHA.

The preamble to the ownership or control rules published in 1988 provided that appeals by individuals from OSM decisions with respect to information contained in AVS were made to the Department's Assistant Secretary-Policy, Management, and Budget under procedures developed under the Privacy Act of 1974. Appeals by entities other than individuals were made to OHA. See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38879* ("Procedures to Amend Applicant Violator System Information") (October 3, 1988).

In 1993, pursuant to a delegation from the Department's Assistant Secretary-Policy, Management and Budget, the authority to decide appeals with respect to information contained in AVS was delegated to OHA. Consistent with such delegation, OSM believes that a single process of appeal for both individuals and entities will promote consistency for both the public and the regulated community and that such appeal process should be explicitly contained in the final rule. As provided in the proposed rule, paragraph (d)(2)(ii) of the final rule provides that OSM's decision would remain in effect unless temporary relief were granted in accordance with OHA regulations at 43 CFR 4.1386.

Paragraph (d)(2)(ii) of Sec. 773.24 provides for temporary relief from OSM's decision, if OHA grants such relief in accordance with OHA regulations at 43 CFR part 4. Under the final regulation, the period during which a person

may file a notice of appeal or the actual filing of an appeal will not automatically suspend the use of the information in AVS during the pendency of such appeal. The challenger will have to explicitly seek such relief in appeal proceedings before OHA and be granted such relief. See also 43 CFR 4.21(a).

In considering a request for temporary relief, OHA will apply the criteria of Section 525(c) of the Act, *30 U.S.C. 1275*(c), to determine whether such relief is warranted. See OHA regulations at 43 CFR 4.1386. To grant temporary relief under such criteria, OHA will have to find that the challenger has a substantial likelihood of prevailing in his appeal of the OSM decision and that temporary relief, if granted, will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

In determining whether the granting of temporary relief would cause significant, imminent environmental harm, OHA will not attempt to decide whether a denial of temporary relief will compel the applicant or other challenger to abate a violation posing such harm. It is not the intent of these rules to force a person to abate a violation even if he or she is able to show a substantial likelihood that he or she had no ownership or control over the operation that is in violation.

Instead, OHA will focus its attention upon the compliance history of those persons who do appear to have had ownership or control over operations in violation, to determine whether the granting of temporary relief would pose a risk of significant, imminent environmental harm at sites for which new permits could be issued during the pendency of the appeal process.

In accordance with the above discussion, the provisions of the proposed rule are adopted with the modifications noted.

Withdrawal of former proposed Sec. 773.25 which would have provided procedures for challenging ownership or control links prior to entry in AVS. In the September, 1991 proposal, OSM proposed a rule to provide procedures for challenging ownership or control links prior to entry in AVS. That proposal which was numbered as proposed Sec. 773.25 represented OSM's attempt to go beyond the Constitutional requirements of due process. The proposal would have prospectively required OSM or a State regulatory authority to provide notice to those persons who were actively involved in surface coal mining operations and who were linked to a violation through ownership or control before such link information would be used to subject them to permit denial through AVS. Such persons would then have had an opportunity to challenge such information. Upon further consideration, OSM has decided to withdraw the proposed regulation.

OSM believes that adequate due process rights to notice and an opportunity to be heard are afforded by current practices which permit a challenge to ownership or control and violation information after it is incorporated into AVS. Such challenges can be made currently both within the context of a permit application and independent of such an application. OSM believes that these opportunities suffice to pass constitutional muster. See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38885* ("Due Process Provided") and at page 38879 ("Procedures to Amend Applicant Violator System Information") (October 3, 1988).

Further, the Department's OHA is contemporaneously adopting a rule providing for temporary relief from an ownership or control link, under specified conditions. Such a rule significantly enhances the already available due process protections available to the members of the regulated community. The risk that someone will be inappropriately subjected to a permit block due to an erroneous link is substantially mitigated by the temporary relief procedures available before OHA.

Moreover, the proposed rule would have subjected OSM and State regulatory authorities to a substantial paperwork morass as a condition precedent to implementing the provisions of Sec. 510(c) of the Act. OSM, which has been utilizing procedures similar to those proposed in the September, 1991, rule, discovered that the process was taking substantial amounts of time and resources to implement. The dialogue and paper exchange between the agency and persons debating the proposed ownership or control link was a prolonged exercise lasting, in some cases, for many months. Also, OSM was finding that most of these debates made no difference in the ultimate outcome, except where entities refuted the facts which would invoke a link. Typically, the ownership or control link was found

to be well taken. The prolonged debate was preventing accurate information from being incorporated into AVS. During the period of the dialogue, the individual or entity subject to the ownership or control link was not relieved of the cloud of the potential link and the agency was not able to directly implement the link. Neither OSM nor the person challenging the link benefitted by this course of events.

Further, industry, environmental advocates, and representatives of State regulatory authorities were dissatisfied with the proposed rule. Industry commenters condemned the proposed rule as providing insufficient due process for challengers of ownership or control links. Environmental advocates criticized the proposal as deficient in not providing a set time frame for OSM to bring ownership or control decisions to closure and to incorporate such decisions into AVS. A commenter representing State regulatory authorities asserted that the proposed rules should either provide for no challenge of an ownership or control link prior to permit denial or for conditional issuance of a permit pending full challenge of an ownership or control link. As is stated above in the portion of this preamble captioned "Due Process," OSM is unwilling, for a number of significant reasons, to accept that permits may be conditioned upon the appeal of ownership or control links. Nevertheless, the criticisms of the commenter representing the State regulatory authorities, the industry commenters, and the environmental advocacy groups also caused OSM to reconsider the proposed rules.

Given that the incorporation of accurate and complete information into AVS in a timely manner is critical to the development and implementation of AVS, OSM believes that the needs of these constituent groups are addressed more effectively by the provisions of the OHA rule. OSM remains committed to developing complete and accurate information for entry into AVS, and as part of this process will of course consider information submitted by any party which would establish or refute facts relevant to an ownership or control link. To the extent that a person is injured by an erroneous ownership or control link, the OHA temporary relief procedure quickly and effectively neutralizes such injury in a timely manner. The availability of such a process enables OSM to go forward in an expeditious manner to utilize its resources to develop information, rather than engage in prolonged paper exchanges; to avoid delay in incorporating information into AVS, thus responding to the concerns of environmental advocates; and to address effectively the concerns of the industry which can invoke an administrative process outside of OSM for quick relief if the claims of injury are meritorious. Additionally, by enabling challengers to go to OHA more quickly, the focus of the challenge procedures shifts to OHA, a forum created to address such challenges of agency decisions. Finally, OSM can meet the terms of its continuing mandate from Congress to develop and implement the AVS. See Report of the Senate Appropriations Committee, Senate Report No. 103-114, at page 47 (July 28, 1993).

In appropriate cases, OSM may engage in a dialogue and exchange of documents with persons subject to a proposed ownership or control link prior to incorporating an ownership or control link into AVS. OSM will do this, however, only when OSM believes it needs additional information concerning the proposed ownership or control link. In that case, such a dialogue would enhance OSM's investigative process and assist in the development of relevant information.

In accordance with the above, OSM has withdrawn this portion of the September, 1991, proposal and is renumbering the remaining provisions of the final rules presented today to reflect the deletion of former proposed Sec. 773.25.

SECTION 773.25-STANDARDS FOR CHALLENGING OWNERSHIP OR CONTROL LINKS AND THE STATUS OF VIOLATIONS. Proposed section 773.26 would have established standards for challenges to ownership or control links and for challenges to the status of violations. The proposed section would have allocated responsibilities between OSM and State regulatory authorities for resolving issues related to ownership and control and would have provided the substantive criteria for resolving such issues. In recognition of OSM's withdrawal of former proposed Sec. 773.25, proposed Sec. 773.26 has been renumbered as final rule Sec. 773.25. For the reasons discussed below, the final rule also has been modified to delete the substantive criteria to resolve ownership or control issues previously contained in the proposed rule.

Paragraph (a) of proposed Sec. 773.26 provided that its provisions would have been applicable to any challenge concerning an ownership or control link or the status of a violation when such challenge was made under the provisions of 30 CFR 773.20 and 30 CFR 773.21 (improvidently issued permits); proposed Sec. 773.23 (the regulatory authority's review of ownership or control and violation information), proposed Sec. 773.24 (procedures

for challenging ownership or control links shown in AVS), and proposed Sec. 773.25 (procedures for challenging ownership or control links prior to entry in AVS); or 30 CFR part 775 (administrative and judicial review of permitting decisions).

Paragraph (b) of proposed Sec. 773.26 would have provided the basic allocation of authority among regulatory authorities to make decisions with respect to ownership or control and with respect to the status of violations.

Paragraph (b)(1)(i) of proposed Sec. 773.26 would have provided that the regulatory authority before which an application was pending would have had authority for making decisions with respect to the ownership or control of the applicant. Such regulatory authority would have had responsibility for reviewing information submitted by the applicant and other available information to ensure the complete identification of the applicant's ownership or control links.

Paragraph (b)(1)(ii) of proposed Sec. 773.26 would have provided that the regulatory authority that issued a permit would have had authority for making decisions with respect to the ownership or control of the permittee. Such decisions would be necessary in determining whether the permit was improvidently issued, pursuant to 30 CFR 773.20. The regulatory authority which issued a permit would have done so based upon a complete review of ownership or control information.

Paragraph (b)(1)(iii) of proposed Sec. 773.26 would have provided that the State regulatory authority that issued a State violation notice would have had authority for making decisions with respect to the ownership or control of any person cited in the notice.

Paragraph (b)(1)(iv) of proposed Sec. 773.26 would have provided that the regulatory authority that issued a violation notice, whether State or Federal, would have had authority for making decisions concerning the status of the violation covered by the notice. The "status" of the violation meant whether the violation remained outstanding, had been corrected, was in the process of being corrected, or was the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1).

Paragraph (b)(2) of proposed Sec. 773.26 would have provided that OSM would have authority for making decisions with respect to the ownership or control of any person cited in a Federal violation notice.

Under the allocation principles set forth in paragraphs (b)(1) and (b)(2) of the proposed rule, a regulatory authority that was deciding whether a permit application should be granted or whether a permit had been improvidently issued would have determined for itself the ownership or control of the applicant or permittee, but it would have deferred to the regulatory authority that issued a violation notice for a determination of the ownership or control of the violator. The application would be blocked or the permit would be found improvidently issued if any owner or controller of the applicant or permittee were also an owner or controller of a violator, as determined by the respective regulatory authorities.

Paragraph (b)(3) of proposed Sec. 773.26 would have provided that the authority of State regulatory authorities to make decisions with respect to ownership or control links or the status of violations would have been subject to OSM's oversight authority under 30 CFR parts 733, 842, and 843. Under paragraph (b)(3) of proposed Sec. 773.26, when OSM disagreed with a decision of a State regulatory authority, it would have taken action, as appropriate, under proposed Sec. 843.24, oversight of State permitting decisions with respect to ownership or control of the status of violations.

Paragraph (c) of proposed Sec. 773.26 would have established evidentiary standards applicable to the formal and informal review of ownership or control links and the status of violations.

Paragraph (c)(1) of proposed Sec. 773.26 would have provided that in any formal or informal review of an ownership or control link or of the status of a violation, the agency responsible for making a decision would be required to make first a prima facie determination or showing that the link exists or that the violation remains outstanding.

Under paragraph (c) of proposed Sec. 773.26, a challenger of a link to a violation would have had to prove at least one of three proposed conclusions by a preponderance of the evidence to succeed in his or her challenge.

First, under paragraph (c)(1)(i) of proposed Sec. 773.26, a challenger could have proven that the facts relied upon by the responsible agency to establish ownership or control within the terms of 30 CFR 773.5(a) or to establish a presumption of ownership or control under 30 CFR 773.5(b) do not or did not exist.

Paragraph (c)(1)(ii) of proposed Sec. 773.26 provided that a person subject to a presumption of ownership or control under 30 CFR 773.5(b) could have rebutted such presumption by demonstrating that he or she does not or did not in fact have the authority directly or indirectly to determine the manner in which surface coal mining operations are or were conducted. Such demonstration would have been made in accordance with the provisions of paragraph (d) of proposed Sec. 773.26.

Paragraph (c)(1)(iii) of proposed Sec. 773.26 provided that a challenger could have proven that the violation covered by a violation notice did not exist, had been corrected, was in the process of being corrected, or was the subject of a good faith appeal within the meaning of 30 CFR 773.15(b)(1).

Paragraph (c)(2) of proposed section 773.26 described the type of evidence that a person challenging an ownership or control link or the status of a violation would have had to present to meet the burden of proof by a preponderance of the evidence. The proposed regulation provided that the evidence presented would have had to have been probative, reliable, and substantial. See *5 U.S.C. 556*(d).

Paragraph (c)(2)(i)(A) of proposed Sec. 773.26 provided that a challenger could have submitted affidavits setting forth specific facts concerning the scope of responsibility of the various owners or controllers of an applicant, a permittee, or any person cited in a violation notice; the duties actually performed by such owners or controllers; the beginning and ending dates of such owners' or controllers' affiliation with the applicant, permittee, or person cited in a violation notice; and the nature and details of any transaction creating or severing an ownership or control link; or specific facts concerning the status of the violation.

Paragraphs (c)(2)(i)(B) and (c)(2)(i)(C) of proposed Sec. 773.26 looked to official certification as the basis for the reliability of a submitted document. Paragraph (c)(2)(i)(B) would have allowed for the submission of certified copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records. Paragraph (c)(2)(i)(C) would have allowed for the submission of certified copies of documents filed with or issued by any State, municipal, or Federal governmental agency.

Paragraph (c)(2)(i)(D) of proposed Sec. 773.26 provided for a challenger's submission of an opinion of counsel in support of his or her position. Under the proposed rule, such opinion would have been appropriate for submission when it was supported by evidentiary materials and when it was rendered by an attorney who certified that he or she had personally and diligently investigated the facts of the matter and that he or she was qualified to render the opinion.

Paragraph (c)(2)(ii) of proposed Sec. 773.26 provided that, when the decision of the responsible agency was reviewed by an administrative or judicial tribunal, the challenger could have presented any evidence to such tribunal which was admissible under the rules of the tribunal. Under the proposed regulation, however, the evidence submitted would still have to have been probative, credible, and substantial.

Paragraph (d) of proposed Sec. 773.26 represented OSM's attempt to offer substantive standards which would have established what must be proved by those seeking to rebut the presumptions of ownership or control contained in current Sec. 773.5(b) of this title. Proof of the facts set forth in the proposed regulation would have established that the presumed owner or controller did not, in fact, have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation was conducted, under the provisions of 30 CFR 773.5(b).

In general, the proposed standards contained in paragraph (d) of proposed Sec. 773.26 would have allowed a presumed owner or controller to demonstrate that he or she lacked control over a surface coal mining operation by

presenting evidence that he or she actually lacked authority directly or indirectly to determine the manner in which the relevant surface coal mining operation would be conducted. In the alternative, with respect to a presumed owner or controller of a violator, the proposed standards would have allowed a person to present evidence that he or she took all reasonable steps within his or her authority to cause the violation to be abated and that such abatement was prevented by those in actual control of the mining operation.

Paragraph (e) of proposed Sec. 773.26 would have provided for the review and revision of information in AVS to reflect determinations made by regulatory authorities in response to challenges of ownership or control links or the status of violations. The proposed provision would have provided that, following any determination by a State regulatory authority or other State agency, or following any decision by an administrative or judicial tribunal reviewing such determination, the State regulatory authority would have been required to review the information in AVS to determine if such information was consistent with the determination or decision. If it were not consistent, the State regulatory authority would have been required to promptly inform OSM and to request that the AVS information be revised to reflect the determination or decision.

Industry commenters criticized the provisions of paragraphs (a) and (b) of proposed Sec. 773.26 as violating due process by not providing an owner or controller with the opportunity to challenge the existence of the violation at the time it was cited. They further criticized the provisions of the proposed rule as violating State primacy. In substance, they asserted that the proposed rule "balkanized" the permit application process by allowing the regulatory authority that issued a violation to identify the ownership or control links to the violation. They asserted that this provision impermissibly allowed such regulatory authority to play a role in the permit application process. They further argued that the regulatory authority before which an application was pending should be the sole decision maker.

OSM disagrees with these views. OSM has already addressed these issues in detail in previous sections of this preamble captioned "Due Process" and "Primacy." Further, OSM has clarified that a permittee may, within the context of the improvident permit issuance process, challenge the existence of the violation at the time it was cited. See discussion above in this preamble, "Section 773.20-Improvidently Issued Permits: General Procedures."

A commenter representing State regulatory authorities took exception to the provisions of paragraph (b)(3) of proposed Sec. 773.26 which would have provided that State determinations of ownership or control challenges be subject to OSM's oversight authority. The commenter asserted that those provisions were duplicative of other provisions of current regulations which provide for OSM's oversight of the States such as 30 CFR parts 733, 842, and 843. He further asserted that the Act established OSM's oversight power over the States and that such power required no reiteration by the proposed regulation.

In addition, commenters representing State regulatory authorities argued that, under a system of State primacy, OSM has no authority to act, on a case by case basis, with respect to a particular permit decision by a State regulatory program, other than revoking the State's approved regulatory program. Thus, they questioned OSM's authority to review a State's decision with respect to ownership or control. They also argued that, if OSM review of State ownership or control decisions was done, this would lead to duplication and disruption in the permit application process.

While these commenters asserted that the provisions of the proposed regulation should be deleted, they proposed that, if OSM insisted on going forward with the proposed provision or a similar rule providing for OSM oversight of State decisions, the final rule should make explicit that the initial decision of a State regulatory authority with respect to an ownership or control issue would be considered presumptively correct. They also proposed that a standard such as "gross inadequacy" should be the standard for OSM to apply to the review of the State decision.

OSM disagrees with the commenters' analysis. First, OSM rejects the commenters' view that the proposed regulation is unnecessary since the Act and regulations already provide for OSM's oversight of the States. The provisions of SMCRA such as sections 201, 503, 504, 505, and 521, and the provisions of the Federal regulations at 30 CFR parts 733, 842, and 843 do establish a system of State primacy subject to Federal oversight. Nevertheless, such provisions do not explicitly address every question which could arise in the implementation of the relationship between OSM and the States with respect to Sec. 510(c) of the Act which, as has been previously discussed in this preamble, invokes significant issues of State primacy and Federal oversight. Further, the implementation of the AVS

also invokes issues of State primacy and Federal oversight. Multiple State regulatory authorities and OSM will be making ownership or control decisions at various stages which are relevant to issues arising under section 510(c) of the Act. While the proposed regulation is consistent with the Act and with OSM's existing regulations, the proposed regulation's allocation of responsibilities among the regulatory authorities who will be making ownership or control decisions relevant to section 510(c) of the Act has not been previously part of the Federal regulations. The allocation of responsibilities provides necessary clarification to the regulated community, to regulatory authorities, and to the public. Accordingly, OSM must reject the view that the proposed regulation is duplicative of current regulations.

OSM further rejects the view that, under a system of State primacy, OSM has no authority to act, on a case by case basis, with respect to a particular permit decision by a State regulatory program, other than revoking the State's approved regulatory program. A number of provisions of the Federal regulations, including 30 CFR 842.11 and 843.21, are very explicit in providing that OSM can exercise necessary oversight authority with respect to a particular permit without revoking a State's entire regulatory program. These other provisions are consistent with the system of State primacy established by SMCRA. The proposed regulation is similarly consistent.

Moreover, OSM has a particularly strong interest in working to assure that ownership or control decisions are made correctly because the fruits of such decision making will be incorporated into AVS. As has been previously discussed, AVS is used across State lines by the various State regulatory authorities and by OSM itself. Accordingly, a decision made with respect to an ownership or control link by one State regulatory authority has the potential to effect the outcomes of permit decisions by many regulatory authorities. Without consistency, there would be chaos. Federal oversight in these matters supports consistency among the various States in the application of the ownership or control rules and the outcomes of the decisions on ownership or control issues. Since these State decisions are ultimately incorporated into AVS, OSM's oversight supports the quality of the AVS.

Also, there is no reason to conclude that the exercise of Federal oversight, pursuant to the provisions of the proposed regulation, will lead to disruption in the permit application process. Paragraph (b)(1) of proposed Sec. 773.26 and the provisions of the final regulation discussed below are designed to avoid such disruption by allocating responsibilities among the various regulatory authorities who each have a legitimate interest in the outcome of an ownership or control issue. The oversight provisions of paragraph (b)(3) of proposed Sec. 773.26 are designed to support such allocation of responsibilities in a way that is consistent with SMCRA and OSM's implementing regulations.

OSM further believes that the commenter's proposal that a final rule should make explicit that the initial decision of a State regulatory authority with respect to an ownership or control issue will be considered presumptively correct is adequately addressed. In substance, the provisions of paragraph (b)(3) of final Sec. 773.25 discussed below already provide that State regulatory authorities who are issuing violations, considering permit applications, and issuing permits with the first opportunity to decide the owners or controllers of, respectively, violations, applications, and permits. While the first opportunity to make a particular decision is not equivalent to a legal presumption in favor of the decision, such an opportunity does give a State regulatory authority the chance to define the status quo which would be subject to oversight review. OSM declines, however, to convert such initial decision making opportunity into a presumption. The need for consistency with respect to ownership or control decisions and with respect to AVS require that OSM conduct oversight reviews of such State decisions as are necessary without the application of a presumption favoring the affirmance of such decisions.

OSM also declines to incorporate a standard such as "gross inadequacy" or some other criterion as the basis for Federal oversight of State ownership or control decisions under paragraph (b)(3) of proposed Sec. 773.26. The application of such a standard would limit OSM's ability to review State decisions for purposes of protecting the consistency and accuracy of information in the AVS. As will be discussed with respect to the final rule Sec. 773.25 below, OSM has made modifications to proposed Sec. 773.26 to reflect OSM's responsibility for the ownership or control information shown on AVS and to enable OSM to act to maintain the integrity of the AVS database. With respect to oversight incident to particular applications, permits, and violations, paragraph (b)(3) of proposed Sec. 773.26 already contains references to 30 CFR parts 733, 842, and 843. Final rule Sec. 773.25 contains identical references. Each of these parts of Title 30 of the Code of Federal Regulations contains provisions which have explicit criteria and triggering standards for OSM's review and action with respect to State decisions. Such criteria and standards are incorporated by reference in paragraph (b)(3) of proposed Sec. 773.26 and would be applied, as

appropriate, by OSM. Accordingly, there is no need for additional review criteria in OSM's oversight under the proposed regulation. As discussed below, final rule Sec. 773.25 adopts the same approach.

A commenter representing environmental advocacy groups questioned whether the provisions of paragraph (b) of proposed Sec. 773.26 sufficiently explained the allocation of responsibilities between OSM and State regulatory authorities. The commenter questioned the provision of the proposal contained at paragraph (b)(3) which provided that State regulatory authorities' authority to make ownership or control decisions would be subject to OSM's review as an element of State program oversight. The commenter asserted that this provision required further clarification as to the respective roles of OSM and the State regulatory authorities in the making of ownership or control decisions.

OSM agrees with the commenter's observation that further clarification is in order with respect to the allocation of responsibilities and authority contained in paragraph (b)(3) of proposed Sec. 773.26. Accordingly, OSM has made a change to the final rule to clarify that, with respect to information shown on AVS, State responsibilities to make decisions with respect to ownership or control are subject to OSM's plenary authority.

Thus, under the final rule, once ownership or control information is entered into AVS, OSM will assume control of such data. If OSM reviews such information and concludes that it is incorrect, OSM will act to correct such ownership or control information and will incorporate such corrected information into AVS. The rationale for OSM's plenary authority is that AVS is used across State lines by all of the State regulatory authorities and the Federal government must act to protect the accuracy and integrity of AVS. With respect to the State regulatory authority's decision underlying such ownership or control information, OSM will further act pursuant to the provisions of final Sec. 843.24, which is described in detail below.

Nevertheless, OSM must reject the view that, because ownership or control issues are invoked, OSM must be initially involved in every permit application decision made by a State regulatory authority. The primary responsibility and authority for making a decision whether to issue or deny a permit is with the regulatory authority before which an application is pending. The primary responsibility and authority under a State regulatory program for issuing a violation is with that State's regulatory authority. The primary responsibility for the ongoing supervision of a permit is with the State regulatory authority which issued the permit. Accordingly, while OSM has changed some of the terminology in the final rule for reasons which are discussed below, OSM has not changed the basic conceptual framework contained in paragraph (b)(3) of proposed section 773.26. That framework is that the regulatory authority which is considering an application, which has issued a permit, or which has issued a violation has initial authority for making decisions with respect to the ownership or control relationships respectively invoked by the application, the permit, and the violation. OSM has program oversight authority of such decisions under 30 CFR parts 733, 842, and 843.

This commenter further indicated that the provisions of paragraph (b)(3) of the proposed section allocated the authority to review State decisions with respect to permit applications to OSM, but that OSM could exercise such authority only after a permit had been issued, in accordance with proposed Sec. 843.24, and that this would cause friction between OSM and the States. The commenter proposed that, if OSM believed that an ownership or control link had not been made or had been severed improperly by a State regulatory authority considering a permit application, the permit should not be issued until OSM and the State regulatory authority resolved their dispute.

OSM appreciates the commenter's concern. In any system involving Federal oversight of the States, there is the potential for disagreements between the States and the Federal government. SMCRA is no exception. For instance, the invocation of the improvidently issued permit process by OSM, pursuant to 30 CFR 843.21, subjects the State's permit application review process to close scrutiny with respect to the permit in question. This is one of the remedies provided in proposed Sec. 843.24 which paragraph (b)(3) of proposed Sec. 773.26 would make applicable. There is potential for stress in this process. To help avoid to improvident issuance of permits, however, OSM, through its AVS Office, has attempted to be accessible to the States and to work with the States have the benefit of OSM's most current opinions with respect to particular ownership or control situations. Whether a State regulatory authority chooses to avail itself of this service is a matter within the discretion of the State regulatory authority which has the primary authority to decide whether to issue a permit. Principles of State primacy make it inappropriate, however, to mandate such consultations with respect to every permit application. Accordingly, OSM declines to modify the rule to mandate that OSM intervene in the State permit application process to require that the State not issue a permit if

OSM disagrees with the State's resolution of an ownership or control issue.

Industry commenters criticized the provisions of paragraph (c)(1) of proposed Sec. 773.26. They questioned the requirement contained in the proposed regulation that a regulatory authority make a prima facie determination whether an ownership or control link exists to a violation and that such violation remains "outstanding." They asserted that the provisions of section 510(c) of the Act require the denial of permits for "unabated" violations only, not "outstanding" violations.

OSM disagrees with the commenters' analysis. The provisions of section 510(c) of the Act require that a regulatory authority not issue a permit if information available to it indicates that "any surface coal mining operation owned or controlled by the applicant is currently in violation of the Act" or other laws specified. (Emphasis added.) Paragraph (c)(1) of proposed Sec. 773.26 requires a prima facie determination whether the violation covered by a violation notice "remains outstanding." A violation which "remains outstanding" is one which is "current." The plain meaning of these phrases is the same. Further, by the use of the words "remains outstanding" in the proposed regulation, OSM did not intend to change the standard established by section 510(c) of the Act. Instead, OSM merely sought, as the Federal agency charged with implementing SMCRA, to provide a workable phrase defining a current violation.

Industry commenters further objected to paragraph (c)(1) of proposed Sec. 773.26 insofar as such proposal required an applicant to demonstrate, by a preponderance of the evidence, that the applicant did not own or control the violator within the meaning of the regulations. The commenters asserted that the imposition of such a burden of proof upon the applicant was inconsistent with section 510(c) of the Act and that the use of such an evidentiary burden was only appropriate for formal proceedings before tribunals, rather than informal proceedings before State regulatory authorities.

OSM disagrees with commenters' objections. The imposition of such a burden of proof is entirely consistent with the provisions of section 510(c) of the Act which require that, when available information indicates that a surface coal mining operation "owned or controlled by the applicant" is in current violation of the Act or other laws listed, the permit not be issued "until the applicant submits proof that such violation has been corrected or is in the process of being corrected."

Moreover, the statute is silent as to how an applicant may demonstrate that he or she does not own or control a surface coal mining operation. Under the Act, it is the duty of OSM, the administrative agency charged with implementing the Act, to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of * * * [the] Act." See section 201(c)(2) of the Act.

Thus, OSM proposed, and today is finalizing, a regulation which carries out the purposes of section 510(c) of the Act and places the burden of evidence production and persuasion upon the person challenging an ownership or control link to a current violation. This is consistent with the provisions of that section of the Act which clearly place the burden of going forward with proof that a violation has been corrected or is in the process of correction upon the applicant who owns or controls a surface coal mining operation which is in violation of the Act.

Moreover, in the absence of some means of showing that he or she does not own or control a particular surface coal mining operation which is in violation of the Act, an applicant who owned or controlled such an operation would only be able to receive a permit if he or she could produce proof that the current violation was corrected or was in the process of correction. As indicated above, consistent with its statutory role to propose regulations, OSM has provided the "means" for an applicant to show that he or she does not control a surface coal mining operation by establishing the burden of proof and evidentiary standards contained in paragraph (c) of proposed Sec. 773.26.

Finally, OSM must reject the notion that the burden of proof contained in the proposed regulation is inappropriate for use by State regulatory authorities. Burdens of proof are used in formal litigation before tribunals because they are helpful to the resolution of such litigation. Such burdens establish the parameters of what parties to litigation must do to prevail in their claims. Similarly, challengers of ownership or control links need to know what parameters they need to meet in proceedings before regulatory authorities to challenge such links. Also, in making decisions with respect to ownership or control or with respect to the status of violations, regulatory authorities need guidance in assisting their decision making process. In the absence of guidance establishing burdens of proof and evidentiary

standards, the resulting decisions made may be inconsistent and based upon uncertain standards. For instance, one regulatory authority may believe the any quantity of evidence, including a mere scintilla, is sufficient to successfully challenge an ownership or control link to a violation. Another regulatory authority may believe that a successful challenge requires a challenger to demonstrate that an ownership or control link is rebutted beyond any reasonable doubt.

Thus, OSM's proposed rule has provided a single standard of persuasion and production, a preponderance of the evidence, to be required for the successful challenge of an ownership or control link. OSM believes that such a standard represents a prudent middle ground between the possible extremes of burdens of proof requiring a mere scintilla of evidence and those requiring proof beyond a reasonable doubt. OSM is confident that State regulatory authorities will be able to implement such a standard and that it will prove helpful. Accordingly, OSM rejects the commenters' assertion that the use of the evidentiary burden of production contained in the proposed rule is inappropriate for State regulatory authorities.

Industry commenters further criticized paragraph (c)(1) of proposed Sec. 773.26 for requiring, as one of the bases to rebut a presumption of ownership or control, proof that the facts relied upon to establish such presumption do not or did not exist. The commenters asserted that such a test may foreclose a demonstration that the regulatory authority which established such presumption reached the wrong legal conclusion, notwithstanding the truth of the facts. Further, the commenters asserted, in substance, that the provisions of the proposed section imply that the challenger would have to disprove all of the facts which were considered by the agency which established the presumption of ownership or control, not just the relevant facts which support the presumption.

OSM does not agree with commenters' assertions. Paragraph (c)(1) of proposed Sec. 773.26 was intended to provide the parameters as to what factual demonstration must be made by a challenger of an ownership or control link. Accordingly, paragraph (c)(1)(i) of proposed Sec. 773.26 provision provides for the challenge of a link by proof that the facts necessary to invoke the presumption of ownership or control did not or do not exist. Nothing in such proof of facts precludes legal arguments which could be made, including those questioning the application of the presumption under the operative facts. Further, facts relevant to that legal issue could be presented under the provisions of paragraph (c)(1)(ii) of proposed Sec. 773.26 which provides that a person could demonstrate that he or she does not or did not have authority directly or indirectly to determine the manner in which surface coal mining operations are or were conducted.

Moreover, under the provisions of the proposed regulation, challengers would only have to present proof with respect to factual issues which are relevant to the invocation of the presumption of ownership or control. If the presumption turns upon certain key factual issues, these are the issues upon which the challenge will focus. Challengers will not be required to disprove irrelevant facts which may have been included in the administrative record of the agency which initially established the presumption of ownership or control.

The industry commenters further objected to paragraph (c)(1)(ii) of proposed Sec. 773.26 which provides that a person seeking to challenge a presumption could demonstrate that he or she did not have authority directly or indirectly to determine the manner in which surface coal mining operations were conducted. The commenters questioned whether the requirement that a person prove that he or she did not have such indirect authority was an attempt by OSM to impermissibly extend the reach of the ownership or control regulations to cover persons remote from surface coal mining operations.

OSM denies that the proposed provision represents an attempt to impermissibly extend the reach of the ownership or control regulations. In fact, the proposed standard was taken from currently operative ownership and control regulations. The provisions of paragraph (b) of 30 CFR 773.5, which have been effective since November 2, 1988, state that a person subject to one or more of the presumptions contained in paragraph (b) of that regulation is presumed to be an owner or controller unless there is a demonstration that "the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted." (Emphasis added.) This is the same standard which is also contained in paragraph (a)(3) of 30 CFR 773.5. The purpose of this standard is to enable:

"the regulatory authority * * * [to] examine any relationships and the facts surrounding them, such as informal

agreements, personal relationships, and the mining history of the parties in question to determine if the relationship results in control over a surface coal mining operation. The regulatory authority may also consider any of the circumstances surrounding a surface coal mining operation to determine control. Such circumstances might include, for example, the fact that a person has financed the operation, or owns the equipment or the rights to the coal, or directs on-site operations."

See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38870* (October 3, 1988). Further, whether a person is "remote" in a corporate chain of command is not the issue under the standard. The issue is whether the totality of the circumstances indicate that the person had the authority to exercise control over the relevant surface coal mining operation. Such "authority" includes control or the power to control. *Id., at pages 38870-38871.* The resolution of such issues is necessary for the regulatory authority's analysis of an ownership or control challenge. Accordingly, requiring a person challenging a presumption of ownership or control to make such demonstration is appropriate.

Industry commenters proposed that paragraph (c) of proposed Sec. 773.26 be modified to provide that a person challenging the presumption be able to prove that the agency relied upon incorrect facts to support its determination of ownership or control; that the person subject to the presumption did not have knowledge of the violation, did not authorize the activity that led to the violation, or did not have direct authority to determine the manner in which surface coal mining operations were conducted; or that the ownership or control link has been severed.

OSM appreciates the commenters' proposal. Nevertheless, OSM will not adopt the commenters' proposed modifications for the following reasons.

The provisions of paragraph (c)(1)(i) of proposed Sec. 773.26 already contain language providing for a challenger's proof that the facts relied upon by regulatory authority to make a determination of ownership or control did not or do not exist. Such language is inclusive of the commenters' proposal that a challenger be allowed to submit proof that the agency relied upon incorrect facts to support its determination of ownership or control.

Further, the language contained in OSM's proposed regulation would also encompass the commenters' proposal that a challenger be able to provide proof that an ownership or control link has been severed. Under paragraph (c)(1)(i) of the proposed regulation, such proof would be included as evidence that the facts relied upon by the regulatory authority to establish ownership or control or a presumption of ownership or control did not or do not exist. Whether such proof is sufficient to support a successful challenge to an ownership or control link will depend upon the facts of each case. OSM must reject the implication of commenters' proposal that the severance of a current ownership or control link to a violator would relieve a person from permit block in all cases. For instance, if a person was an owner or controller of a violator during the period in which the violation was committed, severance of his or her current ownership or control relationship with the company would not relieve him or her of responsibility created through the prior ownership or control link.

OSM must further reject commenters' proposal to the extent that it would establish a standard which would enable a challenger of an ownership or control link to a violation to challenge the link by proof that he lacked knowledge of the violation; that he did not authorize the activity which led to the violation; or that he did not have direct authority to determine the manner in which surface coal mining operations were conducted. Commenters' proposal must be rejected because it ignores the control which stems from indirect authority.

OSM agrees that all of commenters' proposed standards invoke factual matters which may be relevant when a regulatory authority considers an ownership or control link to a violation. As such, proof of each of these matters could be presented within the context of the presentation of facts made under paragraph (c) of proposed Sec. 773.26. For instance, proof presented that a person had no knowledge of a violation; that he or she did not actually authorize a violation; or that he or she did not have direct authority for the surface coal mining operation may well reflect on the contours of the person's responsibilities with a presumptively owned or controlled entity. Nevertheless, such facts may also constitute a false shield which has been created to conceal the substantive, indirect control that the person has over a surface coal mining operation. Commenters' proposal is flawed, therefore, because it would enable a challenger to successfully challenge an ownership or control link by simply proving lack of actual knowledge, actual authority, or direct control, without requiring proof that a presumed owner or controller also lacked indirect authority

over the surface coal mining operation.

Industry commenters further proposed a modification to paragraph (c)(1)(iii) of proposed Sec. 773.26. In OSM's proposal, that paragraph prohibited a challenge as to the existence of the violation within the context of a challenge to an ownership or control link or a challenge to the status of the violation. Commenters proposed changes to allow a challenge as to the existence of the violation at the time it was cited. For the reasons discussed with respect to this issue in the section of this preamble captioned "Due Process" and in the previous discussion of changes made to final Sec. 773.20, OSM has generally rejected commenters' proposal but has accepted such proposal with respect to the improvident permit issuance process. Also, at the time of permit denial, a permit applicant can appeal any reason for such denial including the existence of a violation assuming that the applicant is not bound by a prior administrative or judicial determination or has not had a prior opportunity to challenge the existence of the violation. Accordingly, OSM has amended paragraph (c)(1)(iii) of final rule Sec. 773.25 to clarify that a challenge may be made by a permittee acting within the context of the improvident permit issuance process under Secs. 773.20-773.21. This is in recognition of the more significant interest that a permittee has in a permit compared to the limited interest that an applicant has in a permit application. A permittee's ability to assert such a challenge will be limited, however, if he or she had a prior opportunity to challenge the violation notice and failed to do so in a timely manner or if he or she is bound by a prior administrative or judicial determination concerning the existence of the violation.

A commenter representing State regulatory authorities indicated concern that paragraph (c) of proposed Sec. 773.26 contained legal terms such as "prima facie determination," proof "by a preponderance of the evidence," and "probative, reliable, and substantial evidence" without providing definitions of such terms. The commenter indicated that all of these terms have "particular legal meanings." He urged that the proposed regulation be amended to incorporate definitions of such terms, "consistent with their common legal meanings."

OSM appreciates the commenter's proposal. OSM disagrees, however, with commenter's view that the cited terms need formal definition in the proposed regulation. As commenter has correctly noted, each of the cited terms has a traditional, common legal meaning. In a proceeding to challenge an ownership or control link or the status of a violation, such terms would have their traditional legal meanings. It is anticipated that such meanings will further evolve on a case by case basis over time. Finally, with respect to the terms "probative, reliable, and substantial" as such terms describe evidence, paragraph (c)(2) of proposed Sec. 773.26 provides some examples of this type of evidence.

A commenter representing a State regulatory authority criticized the provisions of paragraph (c)(2)(ii) of the proposed regulation because such provisions would potentially allow a challenger of an ownership or control link to present evidence to a tribunal reviewing a decision of a regulatory authority which had not previously been presented to the regulatory authority. The commenter proposed a modification to the regulation such that any evidence presented on appeal by a challenger be limited to that which was presented to the regulatory authority at the time when the decision being reviewed was made. The commenter proposed that evidence which was not reasonably available to the challenger at the time of the regulatory authority's decision could, however, be presented for the consideration of the reviewing tribunal.

OSM appreciates the commenter's proposal. One legitimate approach to the process of such challenges might be to limit the presentation of evidence on review to that which had been previously presented to the regulatory authority which made the decision which has been subjected to review. OSM believes, however, that the better approach is to allow the presentation of any evidence admissible under the rules of the reviewing tribunal, including evidence which was not previously presented to the regulatory authority. This will assure that the review of the decision with respect to the ownership or control link or the status of a violation is based upon the most complete evidence available to all parties participating in the review process. Such a review will help assure that all parties have the opportunity to present their complete proof with respect to their respective positions in what is, substantively, a de novo proceeding. Such complete evidence presentation and review may aid the legitimacy and acceptance of any final decision made incident to such review.

Further, OSM disagrees with the view that such a process might encourage a challenger to withhold relevant evidence for surprise presentation at a subsequent review proceeding. A challenger will have sufficient incentive to overcome a presumed ownership or control link at the earliest possible time because he or she will want to avoid

permit blocks or further litigation. Accordingly, he or she can be expected to present the best evidence available to make the case in favor of overcoming the presumed ownership or control link. Thus, OSM must reject the commenter's suggested modification to the proposed regulation.

A number of commenters criticized paragraph (c)(2) of the proposed regulation for allowing the use of affidavits in support of a challenge to an ownership or control link or to the status of a violation. The commenters asserted that such materials contain self-serving statements and are unreliable. The commenters further asserted that affidavits should not be the basis to overcome a presumption, in the absence of additional evidence supporting such affidavits. The commenters proposed various modifications to the proposed rule which would require the submission of additional information when affidavits are presented in support of a challenge to an ownership or control link. In this respect, one commenter proposed a "best evidence" rule which would not allow the presentation of affidavits when there was "better" documentary evidence available, such as official copies of corporate records previously filed with State corporation commissions.

OSM appreciates the commenters' concern with respect to affidavits. Nevertheless, affidavits do have certain indicators of reliability. They are made under oath before a government official licensed to witness such oaths, a notary public. Further, affidavits are recognized as evidence sufficient to support a motion for summary judgment in civil litigation. See Rule 56 of the Federal Rules of Civil Procedure. Accordingly, OSM continues to consider affidavits as appropriate evidence for a regulatory authority's review in the evaluation of a challenge to an ownership or control link.

Nevertheless, OSM agrees that, in most cases, an affidavit unsupported by other evidence may be insufficient to overcome a presumption of ownership or control. There could be rare circumstances, however, where an affidavit by itself could be the basis for rebuttal, given the totality of the circumstances involved. Such matters are appropriately addressed on a case by case basis, rather than through a rule. Under the proposed rule, challengers are encouraged to submit additional evidence along with affidavits.

Accordingly, OSM will not modify the proposed regulation to delete the use of affidavits or to require that affidavits only be allowed as proof if accompanied by other supporting evidence in every case. Also, while OSM agrees that State corporation commissions may be a good source of relevant ownership or control information, OSM declines to adopt a "best evidence" test which would prevent the submission of affidavits when documents have been filed with State corporation commissions.

One commenter representing environmental advocacy groups criticized paragraph (c)(2)(i)(D) of proposed Sec. 773.26 insofar as the provisions allowed for the submission of an opinion of counsel in support of a challenge with respect to an ownership or control link or with respect to the status of a violation. In substance, the commenter asserted that such opinions present no factual evidence for the regulatory authority. Such opinions of counsel represent legal opinions with respect to ownership or control and invade the province of the decision maker, the regulatory authority.

OSM agrees that an opinion of counsel should not, in itself, be considered "evidence." Indeed, opinions of counsel constitute legal analysis based upon factual information. Both proposed and final regulations require that such opinions "be supported by evidentiary materials."

Nevertheless, OSM must disagree that such opinions should be excluded. By providing an opportunity for the submission of such opinions, OSM is seeking to encourage counsel to conduct a diligent investigation of the facts and to assist regulatory authorities by presenting the fruits of such investigation-the factual materials-along with counsel's legal opinions as to the import of such evidence. The decision as to the weight to be given to the evidentiary materials and the persuasiveness of the counsel's opinions remain with the regulatory authority considering the challenge to the ownership or control link. Lawyers routinely argue their clients' positions to triers of fact and law. Such argument does not invade the province of the decision maker which retains the authority to make the decision.

OSM has decided to allow for a challenger's submission of an opinion of counsel in support of his or her position as part of final Sec. 773.25. Such opinion would be appropriate for submission when it is supported by evidentiary

materials; when it is rendered by an attorney who certifies that he or she is qualified to render an opinion of law; and when counsel states that he or she has personally and diligently investigated the facts of the matter or where counsel states that such opinion is based upon information which has been supplied to counsel and which is assumed to be true.

Whereas the proposed rule only provided for such opinion when counsel made a personal investigation of the facts, the final rule incorporates language to provide for opinions where such investigation has not been made. The basis for this change is to reflect that, under certain circumstances, attorneys might not choose to conduct a complete personal investigation of the factual representations made within the opinion. See Formal Opinion 346 (Revised), Tax Law Opinions in Tax Shelter Investment Offerings, Standing Committee on Ethics and Professional Responsibility, American Bar Association (January 29, 1982).

Such opinion is similar in type to that provided by counsel to an adversary party as to title, tax issues, or environmental compliance in real estate transactions. The indicator of reliability in this document is that the attorney is offering his or her opinion subject to professional standards provided by national and local bar associations and possible sanctions for the violations of such standards which may be imposed by applicable rules of conduct governing attorneys. In addition, under the final regulation, the attorney's opinion by itself is not enough to challenge an ownership or control link. Evidentiary materials need to be submitted along with such opinion.

In addition to the substantive change noted above, OSM has made non-substantive changes to the provision which clarify the requirements of the final rule provision. Accordingly, OSM has adopted the proposed rule with the changes noted as paragraph (c)(2)(i)(D) of final Sec. 773.25.

As described above, paragraph (d) of proposed Sec. 773.26, required proof for the rebuttal of ownership or control presumptions, represented OSM's attempt to offer substantive standards which would have established what must be proved by those seeking to rebut the presumptions of ownership or control contained in current Sec. 773.5(b) of this title. Proof of the type of facts set forth in the proposed regulations would have established that the presumed owner or controller did not, in fact, have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation was conducted, under the provisions of 30 CFR 773.5(b).

OSM has determined not to go forward with paragraph (d) of proposed Sec. 773.26 and has, therefore, withdrawn that portion of the proposed rule. In substance, OSM believes that ownership and control determinations are inherently a case specific process. Each ownership or control matter turns on the totality of circumstances in a given case and whether the evidence presented demonstrates that the presumed owner or controller does not or did not, in fact, have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation was conducted. See 30 CFR 773.5(b)(1). The pragmatic focus of such an inquiry will continue to be whether a presumed controller actually exercised control over an entity or had the substantive power to exercise control over an entity, even if he or she chose not to actually exercise such power. As OSM has stated previously in the preamble to 30 CFR Sec. 773.5(b), "To the extent that a coal company controls or can exercise control over a contract operator, it should be held responsible for any outstanding violations of the Act which it should have prevented or corrected." (Emphasis added.) See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38877* (October 3, 1988). In effect, a person challenging a presumption of control must demonstrate, by a preponderance of the evidence, that neither of these two circumstances is applicable.

While it might be initially attractive for the agency to create a standard containing three or four elements, the proof of which automatically rebuts a presumption, OSM is unwilling to impose such potentially rigid substantive tests upon the process of analyzing ownership or control cases. OSM believes that such rigid standards do not serve the interests of the States, industry, or OSM, because they might be taken to preclude consideration of other rebuttal evidence not listed or, conversely, might force a State regulatory authority to accept a rebuttal which conforms substantially to OSM's model but which, in the opinion of the regulatory authority, does not in fact rebut the presumption. OSM's experience has taught that each ownership or control rebuttal requires an analysis of the presumed relationship within the complete factual context.

Accordingly, in analyzing the ownership or control profile of an entity, OSM will look to the totality of

circumstances-with the view to understanding how a particular entity operates and operated-to determine the true owners or controllers of a surface coal mining operation.

Commenters representing environmental advocacy groups asserted that the rules should provide that any documents submitted by persons challenging presumptions of ownership or control be considered part of the public record and part of the permit file. On the other hand, industry commenters argued that the rules are deficient because they do not contain a provision by which documentation submitted could be held confidential. They further asserted that there was no means for a challenger to obtain a protective order with respect to confidential materials submitted in support of a challenge.

OSM agrees that documents submitted in support of a challenge to an ownership or control link or in support of a challenge to the status or the existence of a violation should normally be considered part of the public record. The public has a legitimate interest in knowing and understanding the basis for a regulatory authority's decisions in these matters. In a democracy, it is unreasonable for a governmental agency to make such decisions based upon secret information. Further, the credibility of the regulatory authority and the integrity of its decision making process require that its decisions be supported by an adequate record.

At the same time, OSM also recognizes that there may be valid competitive reasons why industry operators believe that certain information needs to be kept confidential. For instance, a person may not wish to reveal the price which he or she has paid for the coal extracted by a mine contractor for fear that other contractors or competitors will learn of this information and change their prices or bids to the disadvantage of the person revealing the information. A person concerned about such disclosure may be reluctant to submit a copy of the relevant contract because it contains the agreed price. OSM disagrees, however, that these industry concerns require special provisions in the rules to seal documents or to otherwise protect confidentiality.

In balancing the concerns of the public and the coal industry with respect to public access to the submitted documents, OSM will be guided by the principles of the Freedom of Information Act, *5 U.S.C. 552* (FOIA), and the Departmental regulations implementing FOIA. See 43 CFR 2.11-2.22. Upon request by a member of the public, OSM will ordinarily make available to the requestor documents provided by challengers of ownership or control links, the status of violations, and the existence of violations. To the extent that a person submitting information to OSM asserts that the materials should be kept confidential, OSM will evaluate that request in accordance with the applicable provisions of FOIA.

In accordance with the above analysis, OSM has determined that the interests of the commenters can be addressed under current law and that the rule does not need to be modified.

In accordance with the above discussion, OSM has determined to adopt a final version of the proposed rule. The final rule has been renumbered as Sec. 773.25 to reflect the withdrawal of proposed Sec. 773.25, procedures for challenging ownership or control links prior to entry in AVS. As indicated above, OSM has modified the provisions of the proposal to allow for the submission of an opinion of counsel based upon evidence developed through counsel's personal investigation or based upon facts which have been supplied to counsel in support of a challenge of an ownership or control presumption. As further discussed above, OSM has inserted language in paragraph (c)(1)(iii) to clarify that a permittee may challenge the existence of the violation at the time it was cited within the context of improvident permit issuance as provided by Secs. 773.20 and 773.21. OSM has also withdrawn paragraph (d) of the proposed rule, required proof for the rebuttal of ownership or control presumptions, described above. The final rule contains no other substantive changes from proposed rule Sec. 773.26. The final rule contains certain other non-substantive modifications as described below.

Paragraph (a) of final Sec. 773.25 provides that provisions of Sec. 773.25 are applicable to any challenge concerning an ownership or control link or the status of a violation when such challenge is made under the provisions of 30 CFR 773.20 and 30 CFR 773.21 (improvidently issued permits); Secs. 773.23 (the regulatory authority's review of ownership or control and violation information), and 773.24 (procedures for challenging ownership or control links shown in AVS); or under 30 CFR part 775 (administrative and judicial review of permitting decisions).

Paragraph (a) of the final rule differs from the proposed rule in that references to proposed Sec. 773.25, procedures for challenging ownership or control links prior to entry in AVS, have been deleted. A further change in

this paragraph from the proposed rule provides that the provisions of final Sec. 773.25 apply to challenges of an ownership or control "link to any person" rather than only to a "link to any person in a violation notice." The purpose of this change is to clarify that the provisions of the section apply to challenges of ownership or control links including those which do not generate a current link to an outstanding violation. OSM's experience has demonstrated that members of the regulated community have, in many cases, sought proactively to challenge ownership or control links to other persons, without regard to whether there were outstanding violations. Such challenges have been asserted, among other reasons, to avoid the risk of being linked to future violations through such ownership or control relationships. OSM recognizes that this is a legitimate concern. Accordingly, the change in the final rule allows the challenge of ownership or control links without regard to whether there are outstanding violations.

Paragraph (a)(2) of final Sec. 773.25 contains a further change from the proposed rule in that the regulation provides that the provisions of the rule apply to challenges of "the status of any violation covered by a notice." (Emphasis added.) The comparable section of the proposed regulation provided that the regulation applied to the status of "the violation covered by such notice." The purpose of the change is to recognize that there may be multiple violations, rather than a single violation, to which a person is linked through ownership or control. A person may wish to challenge the status of each of these violations, rather than only the violation contained in a single notice. If so, the provisions of final Sec. 773.25 apply to such challenges. Consistent with this change, "such notice" is changed to "a notice."

Paragraph (b) of final Sec. 773.25 provides the basic allocation of responsibility among regulatory authorities to make decisions with respect to ownership or control and with respect to the status of violations. State regulatory authorities are expected to have procedures in place to address challenges made in accordance with these rules, including in situations where there are ongoing State proceedings in other jurisdictions on permit applications.

Paragraph (b)(1)(i) if final Sec. 773.25 provides that the regulatory authority before which an application is pending has "responsibility" for making decisions with respect to the "ownership or control relationships of the application." This represents a change of terminology from the comparable provision of the proposed rule which provided that the regulatory authority would have "authority for making decisions with respect to the ownership or control of the applicant."

First, the use of the word "responsibility," rather than "authority," more accurately describes the regulatory authority's mandate under this regulation. "Responsibility" encompasses both authority, the power to act, and the obligation to act.

Further, paragraph (b)(1)(i) of final Sec. 773.25 speaks of "ownership or control relationships of the application," rather than of the "ownership or control of the applicant," as provided in the proposed rule. This change clarifies that the regulatory authority before which an application is pending will evaluate and make decisions with respect to the ownership and control issues with respect to an entire application, rather than just the particular applicant, consistent with this regulatory authority's primary responsibility for the application. This regulatory authority has responsibility for revising ownership or control information submitted as part of the permit application and other available information to ensure the complete identification of ownership or control relationships relevant to the decision to be made with respect to the application. The word "relationships" has been added to the regulation because it better explains the focus of this process.

Paragraph (b)(1)(ii) of final Sec. 773.25 provides that the regulatory authority that issued a permit has responsibility for making decisions with respect to the ownership or control relationships of the permit. The regulatory authority which issued a permit would have done so based upon a complete review of ownership or control information as required by the regulations. In the event that the improvidently issued permit regulations of 30 CFR 773.20 and 773.21 are invoked, this regulatory authority will have to decide whether such permit has been improvidently issued and whether, if the basis for such improvident issuance was an ownership or control link to a violator, whether such improvident issuance has been remedied. Accordingly, that regulatory authority must make decisions with respect to ownership or control relationships incident to the permit.

In paragraph (b)(1)(ii) of final Sec. 773.25, "responsibility" has replaced the word "authority" contained in the proposed rule. The reasoning provided with respect to the changes made to paragraph (b)(1)(i) of the final rule is

applicable here. Again, the regulatory authority will be making decisions "with respect to the ownership or control relationships of the permit, "rather than with respect to the ownership or control of the permittee," as provided in the proposed rule. This reflects that regulatory authority's primary responsibility for the permit which it has issued.

Paragraph (b)(1)(iii) of final Sec. 773.25 provides that the State regulatory authority that issued a State violation notice has responsibility for making decisions with respect to the ownership or control relationships of the violation. The State regulatory authority issuing the violation is in the best position to be aware, in the first instance, of operative facts which identify those owners or controllers who have the "authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted" and who can thus cause the abatement of the violation. See 30 CFR 773.5(b).

As in paragraph (b)(1)(i) of final Sec. 773.25, "responsibility" has replaced the word "authority" contained in the proposed rule. The reasoning provided with respect to these changes in paragraph (b)(1)(i) of the final rule is applicable here. Again, the regulatory authority will be making decisions "with respect to the ownership or control relationships of the violation," rather than "with respect to the ownership or control of any person cited in such notice [of violation]," as provided in the proposed rule.

Paragraph (b)(1)(iv) of the final Sec. 773.25 provides that the regulatory authority that issued a violation notice, whether State or Federal, would have responsibility for making decisions concerning the status of the violation covered by the notice. As in paragraph (b)(1)(i) of the final rule, "responsibility" has replaced the word "authority" previously contained in the proposed rule. The reasoning provided with respect to the similar change in paragraph (b)(1)(i) of this final rule is applicable here.

As in the proposed rule, the "status" of the violation means whether the violation remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1). This approach is consistent with the provisions of section 510(c) of SMCRA which require that a regulatory authority considering a permit application look to the "agency that has jurisdiction over such violation" to determine whether a violation "has been or is in the process of being corrected."

Paragraph (b)(2) of final Sec. 773.25 provides that OSM has responsibility for making decisions with respect to the ownership or control relationships of a Federal violation notice.

As in paragraph (b)(1)(i) of final Sec. 773.25, "responsibility" has replaced the word "authority" contained in the proposed rule. The reasoning provided with respect to this change in paragraph (b)(1)(i) is applicable here.

Paragraph (b)(2) of final Sec. 773.25 is essentially a Federal counterpart to paragraph (b)(1)(iii) and the same basic rationale applies here, as well. This provision differs from (b)(1)(iii), however, in that OSM's authority to decide the ownership and control relationships of a Federal violation notice is not initial responsibility as the State's responsibility is in (b)(1)(iii). Instead, OSM's responsibility is final. This difference recognizes that State regulatory authorities are subject to oversight by OSM. OSM is not subject to similar oversight by the States.

Under the allocation principles set forth in paragraphs (b)(1) and (b)(2) of final Sec. 773.25, a regulatory authority deciding whether a permit application should be granted or whether a permit has been improvidently issued determines for itself the ownership or control relationships of the application or permit, but it defers to the regulatory authority that issued a violation notice for a determination of the ownership or control relationships of the violation. The application is then denied or the permit subject to treatment under the regulations governing improvident issuance if any owner or controller of the applicant or permittee is also an owner or controller of a violator, as determined by the respective regulatory authorities.

Paragraph (b)(3)(i) of final Sec. 773.25 provides that with respect to information shown on AVS, the responsibility of State regulatory authorities to make decisions concerning ownership or control links will be subject to the plenary authority of OSM. This represents a change from the comparable provision of the proposed rule which provided that the authority of regulatory authorities to make ownership or control decisions with respect to applicants, permittees, and persons cited in violation notices and decisions with respect to the status of violations would be subject to OSM's review as an element of State program oversight under parts 733, 842, and 843.

The rationale for this change is simply that OSM is ultimately responsible for the maintenance and content of the AVS with respect to ownership or control information. OSM believes that the quality of ownership or control information is the core of AVS. OSM must closely monitor such information to maintain the accuracy of such information and the integrity of AVS. The need to protect the integrity of the AVS dictates that OSM have the ability to review the underlying basis supporting any ownership or control link shown on the system and to change information with respect to any ownership or control link or all such links, if necessary. Accordingly, the final rule provides that OSM's authority will be plenary with respect to ownership or control information shown on AVS.

Thus, once ownership or control information is entered into AVS, OSM will assume control of such data. If OSM reviews such information and concludes that it is incorrect, OSM will act to correct such ownership or control information and incorporate such corrected information into AVS. OSM intends to coordinate any such changes with the regulatory authority responsible for initial entry of the data in question.

Under paragraph (b)(3)(ii) of final Sec. 773.25, with respect to information shown on AVS relating to the status of a violation and with respect to ownership or control information which has not been entered into AVS by a State, the authority of a State regulatory authority will be subject to OSM's program oversight authority under 30 CFR parts 733, 842, and 843. OSM relies primarily upon the States to determine whether State violations have been abated or not. SMCRA section 510(c) explicitly states that an applicant must demonstrate that any current violation "has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation * * *" See also 30 CFR 773.15(b)(1).

Further, where State ownership or control information has not yet become part of AVS, the information has not yet entered the Federal information stream and has not yet become OSM's immediate responsibility. Such information is, in effect, still the primary responsibility of the State regulatory authority and potentially subject to correction through procedures of the State regulatory program. If correct information fails to enter the AVS, that may represent a weakness of the regulatory authority's decision making process. Accordingly, that process may require review. With respect to the State's decision making process, principles of primacy require that OSM review State actions in these matters in accordance with OSM's program oversight under parts 733, 842, and 843. In the exercise of program oversight however, it is also probable that OSM would review particular decisions with a view to determining whether the State regulatory authority complied with the provisions of its approved program. Accordingly, in the event that a State determines not to enter an ownership or control link into AVS, OSM will review such decision when it has reason to believe, through information provided in a citizen's complaint or otherwise, that the State's ownership or control decision is arbitrary, capricious, or an abuse of discretion under the State program.

In final Sec. 773.25, OSM has deleted language contained in the proposed rule which would have provided that when OSM disagreed with the decisions of State regulatory authorities, OSM would take action, as appropriate, under Sec. 843.24, oversight of State permitting decisions with respect to ownership or control or the status of violations. This language has been deleted for two reasons. First, the proposed language was redundant. Paragraph (b)(3)(ii) of final Sec. 773.25 already provides that State regulatory authorities' decisions are subject to OSM's oversight under parts 733, 842, and 843 of 30 CFR. As a section of part 843, the provisions of final Sec. 843.24 would thus be applicable under appropriate circumstances. Further, the agency was concerned that additional language specifically requiring OSM to take action under final Sec. 843.24 could somehow be construed as a limiting factor on OSM's authority to take action under parts 733 or 842 or under other sections of part 843 as provided by previous paragraph (b)(3)(ii) or 773.25.

Paragraph (c) of final Sec. 773.25 establishes evidentiary standards applicable to the formal and informal review of ownership or control links and the status of violations. The provisions of the final section are substantively similar to the provisions of the comparable provisions of the proposed rule. Certain minor changes described below have been made to the proposal.

Paragraph (c)(1) of final Sec. 773.25 provides that in any formal or informal review of an ownership or control link or of the status of a violation covered by a violation notice, the agency responsible for making a decision is required to first make a prima facie determination or showing that the link exists, existed during the relevant period,

and/or that the violation remains outstanding. The language "existed during the relevant period" has been added to the final rule to clarify that, even when a person is not a current owner or controller of a surface coal mining operation, a previous ownership or control link to that operation may be the basis for permit denial where the surface coal mining operation has an outstanding violation and that violation had its inception during the previous period of ownership or control. The requirement of a prima facie determination or prima facie showing is satisfied by evidence presented establishing a presumption of ownership or control. A prima facie determination is made when the agency is reviewing the evidence itself, in an informal process; a prima facie showing is made when the agency's determination is the subject of a formal administrative or judicial review process. When the agency makes such a determination or showing, the person seeking to challenge the link or the status of the violation than has the burden of proving the necessary elements of his or her challenge to the link or to the status of the violation by a preponderance of the evidence.

Also, in the comparable provision of the proposed rule, the rule language referred to the evidentiary standards applicable to the review of ownership or control links "to a person cited in a violation notice." The final rule has been changed to reflect that these standards will be applicable to the review of an ownership or control link, without regard to whether such relationship involves a link to an outstanding violation. The rationale for such a change has been explained previously in this preamble in the discussion of a similar change made in paragraph (a)(1) of this final rule section. As in the proposed rule, where there is a link to a violation, these evidentiary standards will apply to the review of the status of a violation.

Paragraph (c)(1) of final Sec. 773.25, requires a challenger of an ownership or control link to prove at least one of three proposed conclusions by a preponderance of the evidence to succeed in his or her challenge.

Under paragraph (c)(1)(i) of final Sec. 773.25, a challenger can demonstrate that the facts relied upon by the responsible agency to prove ownership or control under the definitions of "owned or controlled" or "owns or controls" contained in 30 CFR 773.5 do not or did not exist. The final regulation differs from the comparable provision of the proposed regulation in that while the final regulation refers to 30 CFR 773.5, it does not specifically cite particular paragraphs of 30 CFR 773.5 defining presumed and deemed relationships of ownership or control. On June 28, 1993, OSM proposed rules which, if adopted, would modify the organization of regulatory language in 30 CFR 773.5. See Proposed Rule, *58 Fed. Reg. 34652* (June 28, 1993). By changing the language in paragraph (c)(1)(i) of final Sec. 773.25 to delete references to the current paragraph organization of 30 CFR 773.5, OSM retains the flexibility to adopt or reject its rule proposal of June 28, 1993, without having to further modify final Sec. 773.25.

Paragraph (c)(1)(ii) of final Sec. 773.25 provides that a person challenging a presumption of ownership or control can prove that the person subject to the presumption does not and did not have authority directly or indirectly to determine the manner in which surface coal mining operations were conducted. The final rule deletes a reference contained in the proposed rule to the paragraph (d) of the proposed rule which provided the required proof for the rebuttal of ownership or control presumptions. As indicated above, that portion of the proposed rule has been withdrawn.

Paragraph (c)(1)(iii) of final Sec. 773.25 provides that a challenger can prove that the violation covered by a violation notice did not exist, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal within the meaning of 30 CFR 773.15(b)(1). The final rule provides that a person challenging the status of a violation under Sec. 773.24 will not be able to challenge the existence of the violation at the time it was cited unless such challenge is made by a permittee within the context of Secs. 773.20-773.21 of this part. As indicated previously, the proposed rule did not explicitly allow challenge of the existence of the violation by a permittee within the context of improvident permit issuance. The proposed rule also did not include the words "at the time it was cited" with respect to the concept "existence of the violation." The final rule has provided such clarification. Also, references to proposed Sec. 773.25, procedures for challenging ownership or control links prior to entry in AVS, have been deleted. In addition, while no further substantive change has been made to the text of paragraph (c)(1)(iii) of final Sec. 773.25, some editing has been done to clarify the parallel construction of the regulatory text.

Under the provisions of final Sec. 773.25, the existence of the violation at the time it was cited could also be challenged in a proceeding under 30 CFR part 775 (involving administrative or judicial appeals of permitting

decisions), unless the challenger has failed to take timely advantage of a prior opportunity to litigate the violation or is bound by a previous administrative or judicial determination concerning the existence of the violation.

In addition, certain minimal changes have been made to the proposed rule with respect to the submission of documents in the proof of challenges. Paragraphs (c)(2)(i)(B) and (c)(2)(i)(C) of proposed Sec. 773.26 provided that certified copies of corporate documents and certified copies of documents filed with or issued by State, Municipal, or Federal government agencies could be submitted. Paragraphs (c)(2)(i)(B) and (c)(2)(i)(C) of final Sec. 773.25 clarify that copies of such documents can be submitted only "if certified."

Paragraph (c)(2)(i)(D) of final Sec. 773.25 provides for a challenger's submission of an opinion of counsel in support of his or her position. Such opinion would be appropriate for submission when it is supported by evidentiary materials; when it is rendered by an attorney who certifies that he or she is qualified to render an opinion of law; and when counsel states that he or she has personally and diligently investigated the facts of the matter or where counsel states that such opinion is based upon information which has been supplied to counsel and which is assumed to be true.

In accordance with the discussion above, the proposed rule has been renumbered as final rule Sec. 773.25 and adopted as modified.

Deferral of action on proposed Sec. 773.27-Periodic Check of Ownership or Control Information. In the September, 1991 proposed rule package, OSM proposed this section which would have required that the regulatory authority engage in periodic review of a permitted site to assure that basic ownership and control information contained in the current official record of the permit was and remains complete and accurate. Subsequent to the publication of that proposal, OSM published a modified version of such proposal as part of a comprehensive rule proposal designed to address permit information requirements; ownership or control; and the transfer, assignment and sale of permit rights. See *58 FR 34652, 34666* (June 28, 1993). OSM intends to address the proposed rule within the context of the subsequent rulemaking. Accordingly, OSM defers any decision with respect to this proposed rule.

3. PART 778-PERMIT APPLICATIONS-MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION

Deferral of action on proposed Sec. 778.13-Identification of Interests. In the September, 1991 proposal, OSM proposed to revise the provisions of paragraphs (c) and (d) of then current 30 CFR 778.13 to clarify that permit applicants would be required to disclose relevant information with respect to both "deemed" and "presumed" owners or controllers within the meaning of the definitions of "owned or controlled" and "owns or controls" under 30 CFR 773.5 (a) and (b), respectively.

Subsequent to the publication of that proposal, OSM published a new proposed amendment to 30 CFR 778.13 as part of the comprehensive rule proposal cited above which was designed to address permit information requirements; ownership or control; and the transfer, assignment and sale of permit rights. See *58 FR 34652, 34668* (June 28, 1993). Accordingly, OSM hereby defers any decision with respect to the amendments proposed to 30 CFR 778.13 in today's rulemaking. Instead, OSM will address proposed amendments to 30 CFR 778.13 within the context of that subsequent proposal.

SECTION 778.14-VIOLATION INFORMATION. The proposed amendment would have provided that the introductory language in paragraph (c) of 30 CFR 778.14 be amended to require a permit applicant to disclose all violation notices received by the applicant within the preceding three years. In addition, such introductory language would have been amended to require the disclosure of all outstanding violation notices for any surface coal mining operation that is deemed or presumed to be owned or controlled by either the applicant or by any person who is deemed or presumed to own or control the applicant under definitions of "owned or controlled" or "owns or controls" under 30 CFR 773.5.

The regulation to be amended required the applicant to disclose violations of various laws listed in 30 CFR 778.14(c). Use of the proposed amended definition of "violation notice" from 30 CFR 773.5 would have obviated the need for such a list.

The regulation to be amended further required that the applicant provide only a list of unabated cessation orders and unabated air and water quality violation notices received prior to the date of the application by any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant. With respect to this second list, that regulation did not require that an applicant list notices of violation received or unpaid penalties or fees incurred by any surface coal mining operation owned or controlled by the applicant or by any person who owns or controls the applicant.

Moreover, in litigation relating to Secs. 778.14, 773.15(b)(1), and related matters before the U.S. District Court of the District of Columbia, the Secretary advised the court that he had decided to reconsider Sec. 778.14(c). The Secretary stated that he intended to propose a regulation "which considers the extent to which violation information should be reported concerning owners and controllers of applicants as well as entities owned or controlled by the applicant." See National Wildlife Fed'n v. Lujan, No. 88-3117-AER (D.D.C.), Memorandum of Points and Authorities in Support of the Federal Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment, footnote 33, at page 90.

Consistent with the representation made to the court, the proposed amendment to paragraph (c) of Sec. 778.14 would have required an applicant to disclose all outstanding violation notices received by any surface coal mining operation that was deemed or presumed to be owned or controlled by either the applicant or any person who was deemed or presumed to own or control the applicant.

Commenters representing members of the coal industry expressed concern over the proposed amendment to 30 CFR 778.14(c) for essentially three reasons. They asserted that the proposed amendment impermissibly expanded the types of violations which must be reported by an applicant by incorporating the newly amended definition of "violation notice" as the basis for reporting; that the proposal inappropriately expanded the definition of "owners or controllers" which must be reported; and that the proposal inappropriately expanded the type of information required for operations linked through ownership or control.

OSM disagrees with the commenters' assertions. First, the proposed regulation does incorporate the new definition of the term "violation notice" which had been proposed, and has now been adopted, in Sec. 773.5. The new definition of violation notice, however, is not overly broad. In this preamble, OSM has already responded to similar comments made with respect to this definition in the section of this preamble captioned "Section 773.5-Definitions."

By incorporating the amended definition of "violation notice," the proposed amendment to paragraph (c) of Sec. 778.14 would have incorporated the list and types of violations which are relevant to a regulatory authority's decision whether to issue a permit under section 510(c) of the Act and under the provisions of 30 CFR 773.15(b)(1). In contrast to this, the unamended version of the regulation did not require that an applicant list unpaid penalties or fees incurred by any surface coal mining operation owned or controlled by the applicant or by any person who owns or controls the applicant. Accordingly, the proposed amendment would expand what has to be reported to enable the regulatory authority to have necessary information to make its decision. It is entirely appropriate to require that a permit applicant report such information to the regulatory authority so that the regulatory authority can make an informed decision.

As indicated above, commenters further asserted that the proposal inappropriately expanded the definition of "owners or controllers" by requiring the reporting of all outstanding violations received prior to the date of permit applications by surface coal mining operations deemed or presumed to be owned or controlled by the applicant or by any person who owns or controls the applicant. The commenters asserted that this placed the applicant in an untenable position. OSM disagrees with this assertion.

Even if 30 CFR 778.14(c) would not be amended by the proposal, the regulation already required the reporting of violations of surface coal mining operations which the applicant is deemed or presumed to own or control under the provisions of 30 CFR 773.5. Such reporting is required even if the applicant believes that he or she can rebut the presumption of ownership or control. The permit application is not forced to admit ownership or control. On the contrary, such reporting can be done by an applicant who, at the same time, reserves his or her rights to deny

ownership or control. Even under current law, the applicant must disclose violations incident to the presumed ownership or control relationship so that the regulatory authority can evaluate this information. Thus, the amendment would just clarify what the regulation already does. Therefore, the amendment has not inappropriately expanded the definition of what constitutes surface coal mining operations owned or controlled by the applicant.

Commenters further asserted that the proposal inappropriately expanded the type of information required for operations linked through ownership or control. In substance, the commenters argued that the proposed regulation is overbroad and vague in requiring the reporting of "all outstanding violation notices" received prior to the date of application which are linked, through ownership or control, to the applicant. Again, OSM disagrees with the commenters.

As discussed previously in this preamble with respect to Sec. 773.25 of the final rule, an "outstanding violation" is one which is currently in violation of the Act or of other laws specified in Sec. 510(c) of the Act. Under the proposed amendment to 30 CFR 778.14(d), an "outstanding violation notice" is a written notification from a governmental entity advising of a violation which remains uncorrected. Such violations are the basis for permit denial unless an applicant can demonstrate that the violation is in the process of being corrected or is the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1). It is reasonable to require, prior to the date of application, that a permit applicant disclose such violations to the regulatory authority with respect to surface coal mining operations to which it is linked through ownership or control.

One commenter suggested that the proposed amendment should be modified to require only the reporting of violations which would subject an applicant to permit block. OSM considers this proposal to be too restrictive. For instance, under commenter's proposal, an applicant correcting a violation to the satisfaction of the agency which has jurisdiction over such violation would not report such violation at the time of application. Nevertheless, any permit to be issued should be conditioned upon the performance of the corrective work being accomplished. Absent the reporting of such violation by the applicant, a regulatory authority might overlook the violation and issue the permit unconditioned upon such performance. The same rationale would apply with respect to the reporting of violations which are the subject of good faith appeal, within the meaning of 30 CFR 773.15(b)(1). Accordingly, OSM must reject the proposed change.

In addition, commenters asserted that requiring such disclosure by large companies with multiple affiliates and multiple surface coal mining operations is overly burdensome. OSM believes that companies which own or control surface coal mining operations should be aware of the compliance status of such operations. If companies choose to engage in surface coal mining operations, they should also have the capability of monitoring such operations. It is reasonable to require the disclosure of outstanding violations. Thus, OSM disagrees with the commenters' assertion.

Nevertheless, OSM intends to further address the issues of compliance under 30 CFR 778.13 and 778.14. In a recently proposed rule package of June 28, 1993, OSM proposed the streamlining of companies' reporting under 30 CFR 778.13 and 778.14 through the use of information already incorporated into AVS. See *58 FR 34652* et seq. (June 28, 1993). Further, OSM's AVS Office stands ready to work with companies in the development of methods to report such companies' ownership or control relationships and to track the compliance of surface coal mining operations.

As indicated previously in the preamble discussion of final section 773.15, OSM has decided to retain a limited presumption that notices of violation are in the process of being abated for purposes of a regulatory authority's review of a permit application. OSM made this decision as result of comments received in response to its proposed rules. Accordingly, OSM has amended paragraph (b)(1) of final Sec. 773.15 to provide that a regulatory authority may presume, in the absence of a cessation order, that a notice of violation is in the process of abatement if certain conditions are present. These conditions include that the abatement period for the notice of violation has not yet expired and that the applicant has provided certification that such violation is in the process of being corrected to the agency with jurisdiction over the violation as part of the violation information provided pursuant to Sec. 778.14. In accordance with that change made to final Sec. 773.15, OSM has added language to paragraph (c) of final Sec. 778.14 requiring that an applicant provide such certification along with his or her disclosure of violations.

In accordance with the above discussion, OSM has determined to adopt, with the modification noted, the proposed amendment to 30 CFR 778.14(c) as a final rule.

4. PART 840-STATE REGULATORY AUTHORITY: INSPECTION AND ENFORCEMENT

SECTION 840.13-ENFORCEMENT AUTHORITY. The proposed rule provided that paragraph (b) of 30 CFR 840.13 be amended to include a reference to proposed Sec. 843.23 as an enforcement provision whose stringency must be matched by State programs. As has been stated previously in this preamble, OSM has deferred action on the adoption of proposed Sec. 843.23 for a later rulemaking. See Proposed Rule, *58 FR 34652* et seq. (June 28, 1993). While OSM has adopted the reference to 843.23 for inclusion in paragraph (b) of 30 CFR 840.13, the adoption of such reference does not prejudge whether OSM will ultimately adopt proposed Sec. 843.23 as a final rule.

5. PART 843-FEDERAL ENFORCEMENT

PART 843-TABLE OF CONTENTS. In the September, 1991, proposal, OSM proposed to amend the Table of Contents of 30 CFR part 843 to add, in numerical order, the proposed regulations for the Federal enforcement of the proposed AVS-related regulations. The proposed additions would have included Sec. 843.23, sanctions for knowing omissions or inaccuracies in ownership or control and violation information, and Sec. 843.24, oversight of State permitting decisions with respect to ownership or control of the status of violations.

Subsequent to the publication of the proposed additions to the Table of Contents, OSM proposed a modified version of 843.23 as part of a separate rulemaking. See Proposed Rule, *58 FR 34652* et seq. (June 28, 1993). OSM has deferred action on the adoption of proposed Sec. 843.23 for that later rulemaking. Since action on proposed Sec. 843.23 has been deferred, OSM will not adopt a reference to Sec. 843.23 for inclusion in the Table of Contents at this time. If a final version of 843.23 is adopted, a reference to the section will be added to the Table of Contents.

OSM has adopted the proposed reference to 843.24, oversight of State permitting decisions with respect to ownership or control or the status of violations, for inclusion in the Table of Contents.

SECTION 843.10-INFORMATION COLLECTION. The September, 1991, proposal would have removed existing section 843.10 since part 843 did not contain any information collection requirements which required the approval by the Office of Management and Budget under *44 U.S.C. 3507.* The references to Sec. 843.14(c) and 843.16 in existing 843.10 did not represent information collection requirements. The requirements in Sec. 843.14(c) for OSM to furnish copies of notices and orders to the State regulatory authority and to any person having an interest did not require OMB approval because the obligation to provide the information was imposed upon OSM and not upon the State or upon a member of the public. Section 843.16 merely informed the public of the right to file an application for review and request a hearing under 43 CFR part 4.

In accordance with the proposal, OSM has deleted section 843.10.

Deferral of decision with respect to proposed Sec. 843.23-Sanctions for knowing omissions or inaccuracies in ownership or control and violation information. Proposed Sec. 843.23 was designed to respond to those circumstances in which there had been a knowing failure to provide the regulatory authority with complete and accurate ownership and control or violation information in an application or other document submitted pursuant to parts 773 and 778 of Title 30.

Proposed Sec. 843.23 was designed "to carry out the purposes" of sections 507(b)(4), 510(b), 510(c), and 518(g) of SMCRA. The proposed section was designed to deter and punish the intentional failure to provide the complete and accurate ownership and control information required by sections 507(b)(4) and 510 (b)-(c) of the Act. It would have further implemented the criminal provisions of section 518(g) where appropriate.

Subsequently, OSM again proposed this rule with certain modifications. See *58 FR 34652* et seq. (June 28, 1993).

At this time, OSM has determined to defer further action on the proposed rule. OSM will address the proposed rule within the context of the subsequent rulemaking initiated on June 28, 1993.

As has been discussed previously in this preamble, OSM has allowed references to Sec. 843.23 to remain in

various sections of some of the other final rules adopted today in the event that a final Sec. 843.23 is adopted. That such references have been allowed to remain, however, does not constitute a prejudgment by OSM to ultimately adopt proposed Sec. 843.23 or some version of that rule. Any decision of this type will be made within the context of the subsequent rulemaking.

SECTION 843.24-OVERSIGHT OF STATE PERMITTING DECISIONS WITH RESPECT TO OWNERSHIP OR CONTROL OR THE STATUS OF VIOLATIONS. Proposed Sec. 843.24 would have provided standards for OSM's oversight of State permitting decisions with respect to ownership or control or the status of violations.

Paragraph (a) of proposed Sec. 843.24 would have established the bases which would have required OSM to have taken action under the provisions of paragraphs (b) and (c) of proposed Sec. 843.24.

Paragraph (a)(1) of proposed Sec. 843.24 would have provided that OSM would have been required to take action whenever it determined, through its oversight of the implementation of State programs, that a State had issued a permit without complying with the State program equivalents of proposed Secs. 773.22 (verification of ownership or control application information), 773.23 (review of ownership or control and violation information), 773.24 (procedures for challenging ownership or control links in AVS), 773.26 (standards for challenging ownership or control links and the status of violations), and 843.23 (sanctions for knowing omissions or inaccuracies in ownership or control and violation information).

Paragraph (a)(2) of proposed Sec. 843.24 would have provided that OSM would have been required to take action whenever it had determined, through its oversight of the implementation of State programs, that a State had failed in a systemic manner to comply with the State program equivalent of proposed Sec. 773.27 (periodic check of ownership or control information).

Paragraph (a)(2) of proposed Sec. 843.24 would have defined "failure to comply in a systemic manner" to include a continuing pattern of noncompliance by a State, or one of more instances of noncompliance that result from or evidence a legal or policy decision which the State intended to apply to similar cases.

Under paragraph (a) of proposed Sec. 843.24, a State's isolated failure to comply with proposed Sec. 773.27 (periodic check of ownership and control information) would have been treated differently from isolated failures to comply with the proposed regulations listed in paragraph (a)(1) of proposed Sec. 843.24.

Paragraph (b) of proposed Sec. 843.24 would have required OSM to initiate action under 30 CFR 843.21 if, as a result of the determination made under paragraph (a) of the proposed section, OSM had reason to believe that the State had issued a permit improvidently within the meaning of 30 CFR 773.20.

Paragraph (c) of proposed Sec. 843.24 would have provided for remedial actions by OSM against a State which did not comply with the proposed regulations relating to ownership or control and violation information during the permit application process. Such actions would have been applied where the State had knowingly failed to comply with the State program equivalents of sections 773.22 (verification of ownership or control application information), 773.23 (review of ownership or control and violation information), 773.24 (procedures for challenging ownership or control links in AVS), 773.26 (standards for challenging ownership or control links and the status of violations), or 843.23 (sanctions for knowing omissions or inaccuracies in ownership or control and violation information), or where the State had failed in a systemic manner to comply with Sec. 773.27 (periodic check of ownership and control information).

Under the proposed regulation, the remedial actions against a non-complying State could have included grant reduction or termination under 30 CFR 735.21 or 30 CFR 886.18 and the substitution of Federal enforcement or other action pursuant to 30 CFR 733.12(b). Such remedial actions would not have been used where the State's actions were mandated by court order or where the State had not knowingly failed to comply.

A commenter representing environmental advocacy groups expressed concern that proposed Sec. 843.24 did not expressly provide that citizens could petition OSM to take enforcement action where they had reason to believe that violations of the sections subject to Sec. 843.24 exist. OSM recognizes commenter's concern about citizen participation and has addressed that issue in some detail above in this preamble in the section captioned "Citizen

Participation." The analysis in that section of the preamble is generally applicable to proposed Sec. 843.24. For reasons similar to those expressed in that section of the preamble, OSM must reject commenter's proposal to explicitly modify the proposed rule at this time.

Until these matters are addressed directly by further proposal of the agency, citizens could, however, assert their rights in a number of ways in accordance with the provisions of proposed Sec. 843.24. With respect to specific permits under paragraph (b) of proposed Sec. 843.24, concerned citizens could assert their complaints within the context of 30 CFR 842.11, 842.12, 842.15, and 843.21. With respect to more global remedies such as the reduction of State grants or the termination or the substitution of Federal enforcement provided by paragraph (c) of proposed Sec. 843.24, OSM could accept and review information submitted by citizens with a view to determining whether such remedies were appropriate under the circumstances.

The commenter also took issue with the provision of paragraph (b) of proposed Sec. 843.24 in that such provision would have provided that OSM take action under the provisions of 30 CFR 843.21 if OSM had reason to believe that a State had issued a permit improvidently within the meaning of 30 CFR 773.20. The commenter questioned the legality of 30 CFR 773.20 and 843.21 and asserted that these improvidently issued permit rules violated SMCRA. OSM disagrees with commenter's criticisms. OSM considers these rules to be legal. OSM incorporates by reference the arguments that the Department has made defending such rules in briefs filed in the case of National Wildlife Federation v. Lujan, No. 88-3117 (D.D.C.), and Save Our Cumberland Mountains, Inc., v. Lujan, No. 81-2134 (D.D.C.). As indicated previously, copies of these briefs are being placed in the Administrative Record of this rulemaking.

A commenter representing State regulatory authorities questioned the provision of paragraph (c) of proposed Sec. 843.24 which stated that a State regulatory authority would be excused from a failure to comply with the State program equivalents of the AVS-related regulations if such non-compliance was the result of a "mandatory injunction." The commenter asked for clarification of this term.

Under the proposed regulation, a mandatory injunction would be an order to a regulatory authority by a court with jurisdiction over which the regulatory authority has no control. Such an order would have the effect of ordering or otherwise preventing the regulatory authority from complying with the provisions of the regulations cited in paragraph (c) of proposed Sec. 843.24.

A commenter representing a State regulatory authority indicated approval of the requirement contained in paragraph (c) of proposed Sec. 843.24 that a State's failure to comply with proposed Secs. 773.22, 773.23, 773.24, 773.26, and 843.23 be a "knowing" failure, before sanctions could be imposed.

OSM agrees with commenter and has retained the "knowing" standard in paragraph (c) of the final rule adopted as described below. The determination of what constitutes a State's "knowing" behavior would be made based upon a full consideration of the facts. In substance, the issue would be whether the State knew or had reason to know that its actions constituted a failure to comply with the regulations.

OSM has determined to adopt the proposed rule, with certain modifications, as final rule Sec. 843.24. The final rule and the rationale behind such modifications are now described.

First, in paragraph (a) of the proposed rule, a reference to proposed Sec. 773.26 has been deleted from among the list of regulations with which a State must comply to avoid action by OSM. As discussed previously, proposed Sec. 773.26 has been renumbered and adopted as final Sec. 773.25. Accordingly, a reference to Sec. 773.25 has been substituted in paragraph (a) of final Sec. 843.24. A similar substitution has also been made in paragraph (c) of the final rule.

Second, OSM has deleted subparagraph (a)(2) of proposed Sec. 843.24. The proposed section would have required action by OSM when OSM determined that a State had systemically failed to comply with proposed Sec. 773.27, periodic check of ownership or control information. As has been discussed previously, OSM is deferring action on proposed Sec. 773.27 as part of a subsequent rulemaking. See *58 FR 34652* et seq.

In dealing with a similar deferral with respect to proposed Sec. 843.23 described above in this preamble, OSM was able to allow references to proposed Sec. 843.23 to remain in other final rules in the event of the ultimate adoption of 843.23. If Sec. 843.23 is ultimately not adopted, the references in the final rules to it will be mere surplusage.

Unlike those other references to proposed Sec. 843.23, the references to proposed Sec. 773.27 contained in final Sec. 843.24 are presented within a context of defining and applying a special standard, systemic noncompliance, applicable only to a State's failure to comply with Sec. 773.27. The rationale for adopting the particular standard of systemic noncompliance is inextricably linked to the issue of whether the adoption of proposed Sec. 773.27 is appropriate. Accordingly, both issues will be appropriately addressed together in the separate rulemaking. Thus, OSM has deleted all of subparagraph (a)(2) of proposed Sec. 843.24.

Further, the provisions of paragraph (c) of proposed Sec. 843.24 would have required OSM to initiate action under Secs. 735.21 or 886.18 and/or Sec. 733.12 if OSM determined that a State had failed to comply in a systemic manner with the State program equivalent to Sec. 773.27. In the final Sec. 843.24, OSM has deleted such language for the reasons justifying a similar deletion of subparagraph (a)(2) of the proposed rule.

OSM emphasizes that the deletion of this language does not indicate that OSM has made a prejudgment with respect to the ultimate adoption of proposed Sec. 773.27 or with respect to the issue of systemic noncompliance with respect to such proposed section. These matters will be addressed in the subsequent rulemaking.

In accordance with the above discussion, Sec. 843.24 is adopted as modified.

III. PROCEDURAL MATTERS

Effect of the Rule in Federal Program States and on Indian Lands

This rule will apply, through cross-referencing, in those States with Federal programs: California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The rule will also apply through cross-referencing to Indian lands as provided in 30 CFR part 750. No comments were received concerning unique conditions in any of these Federal program states or on Indian lands which would require changes to the national rules or as specific amendments to any or all of the Federal programs or the Indian lands program.

Effect of the Rule on State Programs

The provisions of section 503(a)(1) of the Act require that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of the Act. Further, section 503(a)(7) of the Act requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to the Act.

These terms are defined at Sec. 730.5 of title 30 of the Code of Federal Regulations to require that State programs contain procedures which are, with respect to the Act, no less stringent than the Act; and with respect to the Secretary's regulations, no less effective than the Secretary's regulations in meeting the requirements of the Act.

Following promulgation of this final rule, OSM will evaluate State programs to determine whether any changes in these programs will be necessary. If the Director determines that any State program provisions should be amended to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

Federal Paperwork Reduction Act

The collection of information contained in this rule has been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance numbers 1029-0034, 1029-0041, and 1029-0051.

Executive Order 12778; Civil Justice Reform Certification

This rule has been reviewed under the applicable standards of Section 2(b)(2) of Executive Order 12778, Civil

Justice Reform *(56 FR 55195)*. In general, the requirements of Section 2(b)(2) of Executive Order 12778 are covered by the preamble discussion of this rule. Additional remarks follow concerning individual elements of the Executive Order:

A. What is the Preemptive Effect, if any, to be Given to the Regulation?

The rule would have the same preemptive effect as other standards adopted pursuant to SMCRA. To retain primacy, States have to adopt and apply standards for their regulatory programs that are no less effective than those set forth in OSM's rules. Any State law that is inconsistent with, or that would preclude implementation of this proposed rule would be subject to preemption under SMCRA section 505 and implementing regulations at 30 CFR 730.11. To the extent that the rules would result in preemption of State law, the provisions of SMCRA are intended to preclude inconsistent State laws and regulations. This approach is established in SMCRA, and has been judicially affirmed. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981).*

B. What is the Effect on Existing Federal Law or Regulation, if any, Including all Provisions Repealed or Modified?

This rule modifies the implementation of SMCRA as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the Federal regulatory provisions that are affected by this rule.

C. Does the Rule Provide a Clear and Certain Legal Standard for Affected Conduct Rather than a General Standard, While Promoting Simplification and Burden Reduction?

The standard established by this rule are as clear and certain as practicable, given the complexity of topics covered and the mandates of SMCRA.

D. What is the Retroactive Effect, if any, to be Given to the Regulation?

This rule is not intended to have retroactive effect.

E. Are Administrative Proceedings Required Before Parties may File Suit in Court? Which Proceedings Apply? Is the Exhaustion of Administrative Remedies Required?

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, *30 U.S.C. 1276*(a)

Prior to any judicial challenge to the application of the rule, however, administrative procedures must be exhausted. In situations involving OSM application of the rule, applicable administrative procedures may be found at 43 CFR part 4. In situations involving State regulatory authority application of provisions equivalent to those contained in this rule, applicable administrative procedures are set forth in the particular State program.

F. Does the Rule Define Key Terms, Either Explicitly or by Reference to Other Regulations or Statutes That Explicitly Define Those Items?

Terms which are important to the understanding of this rule are set forth in 30 CFR 700.5 and 701.5.

G. Does the Rule Address Other Important Issues Affecting Clarity and General Draftsmanship of Regulations set Forth by the Attorney General, With the Concurrence of the Director of the Office of Management and Budget, That are Determined to be in Accordance With the Purposes of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

Regulatory Flexibility Act

The Department of the Interior has determined that this final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. et seq. The final rule will not

change costs to industry or to the Federal, State, or local governments. Furthermore, the rules produce no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

Executive Order 12866

The final rule has been reviewed under Executive Order 12866.

National Environmental Policy Act (NEPA)

OSM has prepared a final environmental assessment (EA) of this rule and has made a finding that the rules adopted in this rulemaking will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332*(2)(C). A finding of no significant impact (FONSI) has been approved for the final rule in accordance with OSM procedures under NEPA. The EA is on file in the OSM Administrative Record, room 660, 800 North Capitol St., NW., Washington, DC.

Author: The principal author of this final rule is Harvey P. Blank, Attorney-Adviser, Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior, 1849 C Street, NW, Washington, DC 20240. Inquiries, however, with respect to the rule should be directed to Russell Frum at the address and telephone number specified in FOR FURTHER INFORMATION CONTACT.

LIST OF SUBJECTS

30 CFR Part 701

Law enforcement, Surface mining, Underground mining.

30 CFR Part 773

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

30 CFR Part 778

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 840

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 843

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

Dated: July 18, 1994.
Bob Armstrong, Assistant Secretary, Land and Minerals Management.

Accordingly, 30 CFR Parts 701, 773, 778, 840, and 843 are amended as set forth below:

PART 701-PERMANENT REGULATORY PROGRAM

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

Authority: Pub. L. 95-87 *(30 U.S.C. 1201* et seq.), and Pub. L. 100-34.

SEC. 701.5 -- [Amended]

2. Section 701.5 is amended by deleting the definition of "Violation notice."

PART 773-REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

3. and 4. 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. 1531* 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., *16 U.S.C. 470aa* et seq., and Pub. L. 100-34.

5. Section 773.5 is amended by adding the definitions of "Applicant/Violator System or AVS," "Federal violation notice," "Ownership or control link," "State violation notice," and "Violation notice," in alphabetical order as follows:

SEC. 773.5 -- DEFINITIONS.

* * * * *

APPLICANT/VIOLATOR SYSTEM OR AVS means the computer system maintained by OSM to identify ownership or control links involving permit applicants, permittees, and persons cited in violation notices.

FEDERAL VIOLATION NOTICE means a violation notice issued by OSM or by another agency or instrumentality of the United States.

* * * * *

OWNERSHIP OR CONTROL LINK means any relationship included in the definition of "owned or controlled" or "owns or controls" in this section or in the violations review provisions of Sec. 773.15(b) of this part. It includes any relationship presumed to constitute ownership or control under the definition of "owned or controlled" or "owns or controls" in this section, unless such presumption has been successfully rebutted under the provisions of Secs. 773.24 and 773.25 of this part or under the provisions of part 775 of this chapter and Sec. 773.25.

STATE VIOLATION NOTICE means a violation notice issued by a State regulatory authority or by another agency or instrumentality of State government.

VIOLATION NOTICE means any written notification from a governmental entity, whether by letter, memorandum, judicial or administrative pleading, or other written communication, of a violation of the Act; any Federal rule or regulation promulgated pursuant thereto; a State program; or any Federal or State law, rule, or regulation pertaining to air or water environmental protection in connection with a surface coal mining operation. It includes, but is not limited to, a notice of violation; an imminent harm cessation order; a failure-to-abate cessation order; a final order, bill, or demand letter pertaining to a delinquent civil penalty; a bill or demand letter pertaining to delinquent abandoned mine reclamation fees; and a notice of bond forfeiture, where one or more violations upon which the forfeiture was based have not been corrected.

6. Section 773.10 is revised to read as follows:

SEC. 773.10 -- INFORMATION COLLECTION.

(a) The collections of information contained in 30 CFR part 773 have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0041. The information will be used by the regulatory authorities in processing applications. Response is required to obtain a benefit in accordance with *30 U.S.C. 1201* et seq.

(b) Public reporting burden for this collection of information is estimated to average four and one-half hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to *OSM Information Collection Clearance Officer, Room 640 NC, 1951* Constitution Ave., Washington, DC 20240; and the Office of Management and Budget, Paperwork Reduction Project (1029-0041), Washington, DC 20503.

7. Section 773.15 is amended by revising paragraphs (b)(1) introductory text and (b)(2) as follows:

SEC. 773.15 -- REVIEW OF PERMIT APPLICATIONS.

* * * * *

(b) Review of violations.

(1) Based on a review of all reasonably available information concerning violation notices and ownership or control links involving the applicant, including information obtained pursuant to Secs. 773.22, 773.23, 778.13, and 778.14 of this chapter, the regulatory authority shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act, any Federal rule or regulation promulgated pursuant thereto, a State program, or any Federal or State law, rule, or regulation pertaining to air or water environmental protection. In the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation issued pursuant to Sec. 843.12 of this chapter or under a Federal or State program is being corrected to the satisfaction of the agency with jurisdiction over the violation where the abatement period for such notice of violation has not yet expired and where, as part of the violation information provided pursuant to Sec. 778.14 of this chapter, the applicant has provided certification that such violation is in the process of being so corrected. Such presumption shall not apply where evidence to the contrary is set forth in the permit application, or where the notice of violation is issued for nonpayment of abandoned mine land reclamation fees or civil penalties. If a current violation exists, the regulatory authority shall require the applicant or person who owns or controls the applicant, before the issuance of the permit, to either-

* * * * *

(2) Any permit that is issued on the basis of a presumption supported by certification under Sec. 778.14 of this chapter that a violation is in the process of being corrected, on the basis of proof submitted under paragraph (b)(1)(i) of this section that a violation is in the process of being corrected, or pending the outcome of an appeal described in paragraph (b)(1)(ii) of this section, shall be conditionally issued.

* * * * *

8. Section 773.20 is amended by revising paragraphs (b) and (c) to read as follows:

SEC. 773.20 -- IMPROVIDENTLY ISSUED PERMITS: GENERAL PROCEDURES.

* * * * *

(b) Review criteria.

(1) A regulatory authority shall find that a surface coal mining and reclamation permit was improvidently issued if-

(i) Under the violations review criteria of the regulatory program at the time the permit was issued:

(A) The regulatory authority should not have issued the permit because of an unabated violation or a delinquent penalty or fee; or

(B) The permit was issued on the presumption that a notice of violation was in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation, but a cessation order subsequently was issued; and

(ii) The violation, penalty, or fee:

(A) Remains unabated or delinquent; and

(B) Is not the subject of a good faith appeal, or of an abatement plan or payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency; and

(iii) Where the permittee was linked to the violation, penalty, or fee through ownership or control under the violations review criteria of the regulatory program at the time the permit was issued, an ownership or control link between the permittee and the person responsible for the violation, penalty, or fee still exists, or where the link has been severed, the permittee continues to be responsible for the violation, penalty, or fee.

(2) The provisions of Sec. 773.25 of this part shall be applicable when a regulatory authority determines:

(i) Whether a violation, penalty, or fee existed at the time that it was cited, remains unabated or delinquent, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, and

(ii) Whether any ownership or control link between the permittee and the person responsible for the violation, penalty, or fee existed, still exists, or has been severed.

(c) Remedial measures.

(1) A regulatory authority which, under paragraph (b) of this section, finds that because of an unabated violation or a delinquent penalty or fee a permit was improvidently issued shall use one or more of the following remedial measures:

(i) Implement, with the cooperation of the permittee or other person responsible, and of the responsible agency, a plan for abatement of the violation or a schedule for payment of the penalty or fee;

(ii) Impose on the permit a condition requiring that in a reasonable time the permittee or other person responsible abate the violation or pay the penalty or fee;

(iii) Suspend the permit until the violation is abated or the penalty or fee is paid; or

(iv) Rescind the permit.

(2) If the regulatory authority decides to suspend the permit, it shall afford at least 30 days' written notice to the permittee. If the regulatory authority decides to rescind the permit, it shall issue a notice in accordance with Sec. 773.21 of this part. In either case, the permittee shall be given the opportunity to request administrative review of the notice under 43 CFR 4.1370 through 4.1377, where OSM is the regulatory authority, or under the State program equivalent, where a State is the regulatory authority. The regulatory authority's decision shall remain in effect during the pendency of the appeal, unless temporary relief is granted in accordance with 43 CFR 4.1376 or the State program equivalent.

9. Section 773.21 is amended by replacing the reference to "Sec. 773.20(c)(4)" in the introductory paragraph with "Sec. 773.20(c)(1)(iv)" and by revising the introductory language contained in paragraph (a) to read as follows:

SEC. 773.21 -- IMPROVIDENTLY ISSUED PERMITS: RESCISSION PROCEDURES.

* * * * *

(a) Automatic suspension and rescission. After a specified period of time not to exceed 90 days the permit automatically will become suspended, and not to exceed 90 days thereafter rescinded, unless within those periods the permittee submits proof, and the regulatory authority finds, consistent with the provisions of Sec. 773.25 of this part, that-

* * * * *

10. Section 773.21 is further amended by deleting paragraph (c).

11. Section 773.22 is added as follows:

SEC. 773.22 -- VERIFICATION OF OWNERSHIP OR CONTROL APPLICATION INFORMATION.

(a) In accordance with Sec. 773.15(c)(1) of this part, prior to the issuance of a permit, the regulatory authority shall review the information in the application provided pursuant to Sec. 778.13 of this chapter to determine that such information, including the identification of the operator and all owners and controllers of the operator, is complete and accurate. In making such determination, the regulatory authority shall compare the information provided in the application with information from other reasonably available sources, including-

(1) Manual data sources within the State in which the regulatory authority exercises jurisdiction, including:

(i) The regulatory authority's inspection and enforcement records and (ii) State corporation commission or tax records, to the extent they contain information concerning ownership or control links; and

(2) Automated data sources, including:

(i) The regulatory authority's own computer systems and

(ii) the Applicant/Violator System.

(b) If it appears from the information provided in the application pursuant to Sec. 778.13(c) through (d) of this chapter that none of the persons identified in the application has had any previous mining experience, the regulatory authority shall inquire of the applicant and investigate whether any person other than those identified in the application will own or control the operation (as either an operator or other owner or controller).

(c) If, as a result of the review conducted under paragraphs (a) and (b) of this section, the regulatory authority identifies any potential omission, inaccuracy, or inconsistency in the ownership or control information provided in the application, it shall, prior to making a final determination with regard to the application, contact the applicant and require that the matter be resolved through submission of (1) An amendment to the application or (2) a satisfactory explanation which includes credible information sufficient to demonstrate that no actual omission, inaccuracy, or inconsistency exists. The regulatory authority shall also take action in accordance with the provisions of Sec. 843.23 of this chapter (or the State program equivalent), where appropriate.

(d) Upon completion of the review conducted under this section, the regulatory authority shall promptly enter into or update all ownership or control information on AVS.

12. Section 773.23 is added as follows:

SEC. 773.23 -- REVIEW OF OWNERSHIP OR CONTROL AND VIOLATION INFORMATION.

(a) Following the verification of ownership or control information pursuant to Sec. 773.22(b) of this part, the regulatory authority shall review all reasonably available information concerning violation notices and ownership or control links involving the applicant to determine whether the application can be approved under Sec. 773.15(b) of this part. Such information shall include-

(1) With respect to ownership or control links involving the applicant, all information obtained under Secs. 773.22 and 778.13 of this chapter; and

(2) With respect to violation notices, all information obtained under Sec. 778.14 of this chapter, information obtained from OSM, including information shown in the AVS, and information from the regulatory authority's own records concerning violation notices.

(b) If the review conducted under paragraph (a) of this section discloses any ownership or control link between the applicant and any person cited in a violation notice-

(1) The regulatory authority shall so notify the applicant and shall refer the applicant to the agency with jurisdiction over such violation notice; and

(2) The regulatory authority shall not approve the application unless and until it determines, in accordance with the provisions of Secs. 773.24 and 773.25 of this part (or the State program equivalent), (i) That all ownership or control links between the applicant and any person cited in a violation notice are erroneous or have been rebutted, or (ii) that the violation has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, within the meaning of Sec. 773.15(b)(1) of this part (or the State program equivalent).

(c) Following the regulatory authority's decision on the application (including unconditional issuance, conditional issuance, or denial of the permit) or following the applicant's withdrawal of the application, the regulatory authority shall promptly enter all relevant information related to such decision or withdrawal into AVS.

13. Section 773.24 is added as follows:

SEC. 773.24 -- PROCEDURES FOR CHALLENGING OWNERSHIP OR CONTROL LINKS SHOWN IN AVS.

(a)(1) Any applicant or other person shown in AVS in an ownership or control link to any person may challenge such link in accordance with the provisions of paragraphs (b) through (d) of this section and Sec. 773.25 of this part, unless such applicant or other person is bound by a prior administrative or judicial determination concerning the link.

(2) Any applicant or other person shown in AVS in an ownership or control link to any person cited in a Federal violation notice may challenge the status of the violation covered by such notice in accordance with the provisions of paragraphs (b) through (d) of this section and Sec. 773.25 of this part, unless such applicant or other person is bound by a prior administrative or judicial determination concerning the status of the violation.

(3) Any applicant or other person shown in AVS in an ownership or control link to any person cited in a State violation notice may challenge the status of the violation covered by such notice in accordance with the State program equivalents to paragraphs (b) through (d) of this section and Sec. 773.25 of this part for the State that issued the violation notice, unless such applicant or other person is bound by a prior administrative or judicial determination concerning the status of the violation.

(b) Any applicant or other person who wishes to challenge an ownership or control link shown in AVS or the status of a Federal violation, and who is eligible to do so under the provisions of paragraphs (a)(1) or (a)(2) of this section, shall submit a written explanation of the basis for the challenge, along with any relevant evidentiary materials and supporting documents, to OSM, addressed to the Chief of the AVS Office, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, Washington, D.C. 20240.

(c) OSM shall review any information submitted under paragraph (b) of this section and shall make a written decision whether or not the ownership or control link has been shown to be erroneous or has been rebutted and/or whether the violation covered by the notice remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal within the meaning of Sec. 773.15(b)(1) of this part.

(d)(1) If, as a result of the decision reached under paragraph (c) of this section, OSM determines that the ownership or control link has been shown to be erroneous or has been rebutted and/or that the violation covered by the notice has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, OSM shall so notify the applicant or other person and, if an application is pending, the regulatory authority, and shall correct the information in AVS.

(2) If, as a result of the decision reached under paragraph (c) of this section, OSM determines that the ownership or control link has not been shown to be erroneous and has not been rebutted and that the violation covered by the notice remains outstanding, OSM shall so notify the applicant or other person and, if an application is pending, the regulatory authority, and shall update the information in AVS, if necessary.

(i) OSM shall serve a copy of the decision on the applicant or other person by certified mail, or by any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure. Service shall be complete upon tender of the notice or of the mail and shall not be deemed incomplete because of a refusal to accept.

(ii) The applicant or other person may appeal OSM's decision to the Department of the Interior's Office of Hearings and Appeals within 30 days of service of the decision in accordance with 43 CFR 4.1380 through 4.1387. OSM's decision shall remain in effect during the pendency of the appeal, unless temporary relief is granted in accordance with 43 CFR 4.1386.

14. Section 773.25 is added as follows:

SEC. 773.25 -- STANDARDS FOR CHALLENGING OWNERSHIP OR CONTROL LINKS AND THE STATUS OF VIOLATIONS.

(a) The provisions of this section shall apply whenever a person has and exercises a right, under the provisions of Secs. 773.20, 773.21, 773.23, or 773.24 of this part or under the provisions of part 775 of this chapter, to challenge (1) an ownership or control link to any person and/or (2) the status of any violation covered by a notice.

(b) Agencies responsible.

(1) Except as provided in paragraph (b)(3) of this section-

(i) The regulatory authority before which an application is pending shall have responsibility for making decisions with respect to ownership or control relationships of the application.

(ii) The regulatory authority that issued a permit shall have responsibility for making decisions with respect to the ownership or control relationships of the permit.

(iii) The State regulatory authority for the State that issued a State violation notice shall have responsibility for making decisions with respect to the ownership or control relationships of the violation.

(iv) The regulatory agency that issued a violation notice, whether State or Federal, shall have responsibility for making decisions concerning the status of the violation covered by such notice, i.e., whether the violation remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good

faith appeal, within the meaning of Sec. 773.15(b)(1) of this part.

(2) OSM shall have responsibility for making decisions with respect to the ownership or control relationships of a Federal violation notice.

(3)(i) With respect to information shown on AVS, the responsibilities referred to in paragraph (b)(1) of this section shall be subject to the plenary authority of OSM to review any State regulatory authority decision regarding an ownership or control link.

(ii) With respect to ownership or control information which has not been entered into AVS by a State and with respect to information shown on AVS relating to the status of a violation, State regulatory authorities' determinations are subject to OSM's program authority oversight under parts 733, 842, and 843 of this chapter.

(c) Evidentiary standards.

(1) In any formal or informal review of an ownership or control link or of the status of a violation covered by a violation notice, the responsible agency shall make a prima facie determination or showing that such link exists, existed during the relevant period, and/or that the violation covered by such notice remains outstanding. Once such a prima facie determination or showing has been made, the person challenging such link or the status of the violation shall have the burden of proving by a preponderance of the evidence, with respect to any relevant time period-

(i) That the facts relied upon by the responsible agency to establish: (A) Ownership or control under the definition of "owned or controlled" or "owns or controls" in Sec. 773.5 of this part or (B) a presumption of ownership or control under the definition of "owned or controlled" or "owns or controls" in Sec. 773.5 of this part, do not or did not exist;

(ii) That a person subject to a presumption of ownership or control under the definition of "owned or controlled" or "owns or controls" in Sec. 773.5 of this part, does not or did not in fact have the authority directly or indirectly to determine the manner in which surface coal mining operations are or were conducted, or

(iii) That the violation covered by the violation notice did not exist, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal within the meaning of Sec. 773.15(b)(1) of this part; provided that the existence of the violation at the time it was cited may not be challenged under the provisions Sec. 773.24 of this part: (A) By a permittee, unless such challenge is made by the permittee within the context of Secs. 773.20 through 773.21 of this part; (B) by any person who had a prior opportunity to challenge the violation notice and who failed to do so in a timely manner; or (C) by any person who is bound by a prior administrative or judicial determination concerning the existence of the violation.

(2) In meeting the burden of proof set forth in paragraph (c)(1) of this section, the person challenging the ownership or control link or the status of the violation shall present probative, reliable, and substantial evidence and any supporting explanatory materials, which may include-

(i) Before the responsible agency-

(A) Affidavits setting forth specific facts concerning the scope of responsibility of the various owners or controllers of an applicant, permittee, or any person cited in a violation notice; the duties actually performed by such owners or controllers; the beginning and ending dates of such owners' or controllers' affiliation with the applicant, permittee, or person cited in a violation notice; and the nature and details of any transaction creating or severing an ownership or control link; or specific facts concerning the status of the violation;

(B) If certified, copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records;

(C) If certified, copies of documents filed with or issued by any State, Municipal, or Federal governmental agency.

(D) An opinion of counsel, when supported by (1) Evidentiary materials; (2) a statement by counsel that he or she is qualified to render the opinion; and (3) a statement that counsel has personally and diligently investigated the facts of the matter or, where counsel has not so investigated the facts, a statement that such opinion is based upon information which has been supplied to counsel and which is assumed to be true.

(ii) Before any administrative or judicial tribunal reviewing the decision of the responsible agency, any evidence admissible under the rules of such tribunal.

(d) Following any determination by a State regulatory authority or other State agency, or any decision by an administrative or judicial tribunal reviewing such determination, the State regulatory authority shall review the information in AVS to determine if it is consistent with the determination or decision. If it is not, the State regulatory authority shall promptly inform OSM and request that the AVS information be revised to reflect the determination or decision.

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

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

Authority: Public Law 95-87, *30 U.S.C. 1201* et seq., and Public Law 100-34.

16. Section 778.14 is amended by revising the introductory language in paragraph (c) to read as follows:

SEC. 778.14 -- VIOLATION INFORMATION.

* * * * *

(c) A list of all violation notices received by the applicant during the three-year period preceding the application date, and a list of all outstanding violation notices received prior to the date of the application by any surface coal mining operation that is deemed or presumed to be owned or controlled by either the applicant or any person who is deemed or presumed to own or control the applicant under the definition of "owned or controlled" and "owns or controls" in Sec. 773.5 of this chapter. For each notice of violation issued pursuant to Sec. 843.12 of this chapter or under a Federal or State program for which the abatement period has not expired, the applicant shall certify that such notice of violation is in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation. For each violation notice reported, the list shall include the following information, as applicable:

* * * * *

PART 840-STATE REGULATORY AUTHORITY: INSPECTION AND ENFORCEMENT

17. The authority citation for Part 840 continues to read as follows:

Authority: Public Law 95-87, *30 U.S.C. 1201* et seq., and Public Law 100-34, unless otherwise noted.

18. Section 840.13 is amended by revising paragraph (b) to read as follows:

SEC. 840.13 -- ENFORCEMENT AUTHORITY.

* * * * *

(b) The enforcement provisions of each State program shall contain sanctions which are no less stringent than those set forth in section 521 of the Act and shall be consistent with Secs. 843.11, 843.12, 843.13, and 843.23 and subchapters G and J of this chapter.

PART 843-FEDERAL ENFORCEMENT

19. and 20. The authority citation for part 843 continues to read as follows:

Authority: *30 U.S.C. 1201* et seq., as amended; and Pub. L. 100-34.

SEC. 843.10 -- [Removed]

21. Section 843.10 is removed.

22. Section 843.24 is added as follows:

SEC. 843.24 -- OVERSIGHT OF STATE PERMITTING DECISIONS WITH RESPECT TO OWNERSHIP OR CONTROL OR THE STATUS OF VIOLATIONS.

(a) The Office shall take action pursuant to paragraphs (b) and (c) of this section whenever it determines, through its oversight of the implementation of State programs, that a State has issued a permit without complying with the State program equivalents of Secs. 773.22, 773.23, 773.24, 773.25, and 843.23 of this chapter.
(b) If, as a result of its determination that a State has failed to comply with the provisions set forth in paragraph (a) of this section, the Office has reason to believe that the State has issued a permit improvidently within the meaning of Sec. 773.20 of this chapter, the Office shall initiate action under the provisions of Sec. 843.21 of this part.

(c) If the Office determines that a State's failure to comply with the State program equivalents of Secs. 773.22, 773.23, 773.24, 773.25, and 843.23 of this chapter was knowing, it shall initiate action under Secs. 735.21 or 886.18 (as allowed by law) and/or Sec. 733.12(b) of this chapter, unless the State's action was the result of a mandatory injunction of a court of competent jurisdiction.

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Tuesday,
December 19, 2000

Part III

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 724, et al.

Application and Permit Information Requirements; Permit Eligibility; Definitions of Owership and Control; the Applicant/Violator System; Alternative Enforcement; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 724, 750, 773, 774, 775, 778, 785, 795, 817, 840, 842, 843, 846, 847, 874, 875, 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947

RIN 1029–AB94

Application and Permit Information Requirements; Permit Eligibility; Definitions of Ownership and Control; the Applicant/Violator System; Alternative Enforcement

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 final rules to amend application and permit information requirements and to redesign permit eligibility criteria under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), as amended. In this final rule, we are also amending related provisions in our regulations to incorporate changes for internal consistency. This rule fulfills our April 21, 1997, commitment to undertake new rulemaking, including public notice and comment, on ownership and control and related regulatory issues in the wake of the January 31, 1997, decision of the United States Court of Appeals for the District of Columbia Circuit.

This final rule also reflects the findings in another decision of the United States Court of Appeals. On May 28, 1999, the appeals court issued a ruling shortly after the initial close of the comment period for the proposed rule upon which this final rulemaking is based. We later found it advisable to reopen and extend the comment period in order to seek public comment on the effects of the May 1999 decision. As a result, we modified the provisions in this final rule in order to be consistent with the 1999 decision. Thus, this final rule is fully consistent with both court decisions.

EFFECTIVE DATE: January 18, 2001.

FOR FURTHER INFORMATION CONTACT: Earl D. Bandy, Jr., Office of Surface Mining Reclamation and Enforcement, Applicant/Violator System (AVS) Office, 2679 Regency Road, Lexington, Kentucky 40503. Telephone: (859) 260–8427 or (800) 643–9748. Electronic Mail: *ebandy@osmre.gov*. 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 AVS Office's Internet home page (Internet address: *http://www.avs.osmre.gov*).

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I. What Events Precipitated This Rulemaking?

The National Mining Association (NMA) and the National Wildlife Federation filed suit challenging the validity of three of OSM's rules implementing section 510(c) of SMCRA, 30 U.S.C. 1260(c). These rules are generally known as the 1988 ownership and control rule, the 1989 permit information rules and the 1989 improvidently issued permits rule, which is also referred to as the permit rescission rule. In separate decisions dated August 31, 1995, the U.S. District Court for the District of Columbia upheld the three challenged rules in their entirety. *See National Wildlife Federation* v. *Babbitt*, Nos. 88–3117, 88–3464, 88–3470 (consolidated) (D.D.C. Aug. 31, 1995); *National Wildlife Federation* v. *Babbitt*, Nos. 89–1130, 89–1167 (consolidated) (D.D.C. Aug. 31, 1995); *National Wildlife Federation* v. *Babbitt*, Nos. 89–1751, 89–1811 (consolidated) (D.D.C. Aug. 31, 1995).

NMA appealed the rulings and, on January 31, 1997, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's decisions and invalidated the three sets of rules on narrow grounds. *See National Mining Association* v. *U.S. Department of the Interior*, 105 F.3d 691 (D.C. Cir. 1997) (*NMA* v. *DOI I*). The appeals court held that the clear language of section 510(c) of SMCRA, 30 U.S.C. 1260(c), authorizes regulatory authorities to deny a permit only on the basis of violations of "any surface coal mining operation owned or controlled by the applicant." *NMA* v. *DOI I*, 105 F.3d at 693–94. Because OSM's 1988 ownership and control rule also allowed regulatory authorities to deny a permit on the basis of violations of any person who owned or controlled the applicant, the appeals court invalidated that rule in its entirety. In addition, the court held that because OSM's permit information and permit rescission rules

were "centered on the ownership and control rule * * *, they too must fall." *Id.* at 696.

While the court of appeals identified only one specific defect with the 1988 and 1989 rules, it nonetheless invalidated the three sets of rules in their entirety. This had the effect of invalidating many provisions of the regulations to which the court expressed no specific objection. At the same time, nothing in the court's decision eliminated the responsibility of OSM and State regulatory authorities to implement the permit eligibility requirements of section 510(c), 30 U.S.C. 1260(c). This meant that OSM and the States faced making permitting decisions required by the Act without any regulations to flesh out the statutory directive. The appeals court's action created a gap in the regulatory program and a great deal of uncertainty among State regulatory authorities about how to continue to meet their responsibilities to determine who was eligible to receive a permit under section 510(c), 30 U.S.C. 1260(c).

Following the appeals court's decision, we made adjustments in our process for responding to regulatory authorities' requests for permitting recommendations from our Applicant/Violator System (AVS). In each case, before we offered a permitting recommendation to support the system recommendation, we determined if the recommendation would be consistent with the court's decision. In those cases where it would have been inconsistent, *i.e.*, where the recommendation would be based on the violations of those who owned or controlled the applicant, we informed the regulatory authority that we could no longer recommend that it deny the permit.

As an initial regulatory step to remove the uncertainty created by the decision and to ensure there would be no lapse in permitting provisions under approved State programs, we published an interim final rule (IFR) on an emergency basis on April 21, 1997. See 62 FR 19451 (1997). We published the IFR to implement the Court of Appeals' decision in *NMA* v. *DOI I* and to close the regulatory gap created by that decision. In the IFR, we removed the portions of the 1988 and 1989 rules which were inconsistent with the appeals court's interpretation of SMCRA in *NMA* v. *DOI I*. Most significantly, the IFR did not authorize OSM to deny permits based on outstanding violations of an applicant's owners and controllers. Because the emergency publication of the IFR did not include public notice and opportunity for comment, we stated in the preamble to the IFR that we intended to replace the IFR through rulemaking conducted in accordance with standard notice and comment procedures under the Administrative Procedure Act. In honoring this commitment, we published proposed rules on December 21, 1998. See 63 FR 70580 (1998).

In June 1997, NMA filed suit in the U.S. District Court for the District of Columbia, challenging the IFR on broad grounds. On June 15, 1998, the district court issued a decision upholding the IFR in its entirety. *National Mining Association* v. *Babbitt*, No. 97–1418 (AER) (D.D.C. June 15, 1998).

On May 28, 1999, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in NMA's appeal of the district court's ruling. *National Mining Association*. v. *U.S. Department of the Interior*, 177 F.3d 1 (D.C. Cir. 1999) (*NMA* v. *DOI II*). The court agreed with OSM that section 510(c) of SMCRA, 30 U.S.C. 1260(c), allows an applicant to be held accountable for violations cited at operations that the applicant owns or controls, including "limitless downstream violations" at operations indirectly owned or controlled by an applicant through intermediary entities. *Id.* at 4–5. The court agreed with NMA, however, that "[f]or violations of an operation that the applicant 'has controlled' but no longer does, * * * the Congress authorized permit-blocking only if there is 'a demonstrated pattern of willful violations' " under section 510(c) of SMCRA. *Id.* at 5.

Next, the court addressed NMA's challenge to certain of the IFR's presumptions of ownership or control. At 30 CFR 773.5(b)(1) through (6), the IFR contains six separate presumptions of ownership or control. If subject to one of the presumptions, the applicant (or other person subject to the presumption) could attempt to rebut the presumption by demonstrating that he or she "does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted." 30 CFR 773.5(b). NMA challenged four of these presumptions, which applied when a person: (1) was an officer or director of an entity (§ 773.5(b)(1)); (2) had the ability to commit the financial or real property assets or working resources of an entity (§ 773.5(b)(3)); (3) was a general partner in a partnership (§ 773.5(b)(4)); or (4) owned 10 through 50 percent of an entity (§ 773.5(b)(5)). NMA did not challenge the presumptions pertaining to being the operator of a surface coal mining operation (§ 773.5(b)(2)) or owning or controlling coal to be mined by another person and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation (§ 773.5(b)(6)). Therefore, the court did not rule on their validity. *NMA* v. *DOI II*, 177 F.3d at 6 n.6.

In addressing NMA's challenge to the presumptions, the court described a general standard for evaluating the validity of rebuttable presumptions and then applied that standard to the four rebuttable presumptions challenged by NMA. The court found two of the challenged ownership or control presumptions—having the ability to control the assets of an entity and being a general partner in a partnership—to be "well-grounded." *Id.* at 7. However, the court agreed with NMA that OSM cannot presume that officers and directors or 10 through 50 percent shareholders are controllers of mining operations. *Id.* at 6.

On the applicability of the 5-year statute of limitations at 28 U.S.C. 2462, the court agreed with OSM that the section 2462 limitations period does not apply to violations when determining permit eligibility under section 510(c) of SMCRA, 30 U.S.C. 1260(c). *Id.* at 7–8. However, the court agreed with NMA that the rule was impermissibly retroactive in its effect to the extent it authorized permit denials based on indirect control in cases where *both* the assumption of indirect control and the violation occurred before November 2, 1988, the effective date of OSM's 1988 ownership and control rule. *Id.* at 8.

NMA also challenged the IFR's permit application information provisions, which required like our previous rules, an applicant to submit information in addition to the information expressly required by sections 507 and 510(c) of SMCRA, 30 U.S.C. 1257 and 1260(c). The court agreed with OSM that SMCRA's information requirements "are not exhaustive" and that OSM can require the submission of additional information "needed to ensure compliance with the Act." *Id.* at 9.

Finally, on NMA's challenge to the IFR's suspension and rescission provisions relative to improvidently issued permits, the court agreed with OSM that section 201(c) of SMCRA, 30 U.S.C. 1211(c), expressly authorizes OSM to suspend or rescind improvidently issued permits. In addition to that express authority, the court also found that OSM retained "implied" authority to suspend or rescind improvidently issued permits "because of its express authority to deny permits in the first instance." *Id.* at 9. However, the court decided that OSM

may only order cessation of State-permitted operations in accordance with the procedures established under section 521 of SMCRA, 30 U.S.C. 1271. Specifically, OSM may order immediate cessation of a State-permitted operation if the operation poses an "imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm * * *" SMCRA section 521(a)(2), 30 U.S.C. 1271(a)(2). Absent these circumstances, OSM may order cessation of a State-permitted operation only in accordance with section 521(a)(3), which includes the requirements to: (1) Provide a notice of violation to the permittee or his agent; (2) establish an abatement period; (3) provide opportunity for a public hearing; and (4) make a written finding that abatement of the violation has not occurred within the abatement period. *Id.* at 9–10; SMCRA at section 521(a)(3), 30 U.S.C. 1271(a)(3).

II. How Did We Obtain and Consider Public Input To Assist in Developing This Final Rule?

In June of 1997, a team of Department of the Interior employees met with State regulatory authorities to discuss rulemaking options. We also sought input from citizens and the regulated industry. Subsequently, we decided to reevaluate all aspects of our regulations pertaining to ownership and control and related issues.

On October 29, 1997, we published an Advance Notice of Proposed Rulemaking in the **Federal Register**. In the notice, we committed to hold public meetings and solicit comments from all interested parties on a wide range of topics related to ownership and control, with the ultimate goal of proposing new rules. See 62 FR 56139 (1997).

We conducted outreach from October 29, 1997, through January 16, 1998. We invited approximately 900 people and organizations to participate in the outreach effort. We provided them with an issue paper to use as the basis to elicit ideas, comments, and suggestions on potential regulatory topics and issues. Seventy people attended seven public meetings held in different locations throughout the United States. We also received written comments from some parties. During the outreach period, we offered to meet separately with any person or group wanting such a meeting. As a result of our offer, members of the team also met with an industry association and held individual discussions with several environmental advocates.

At the conclusion of the outreach, the team began to develop rulemaking options on many regulatory provisions related to ownership and control. The team continued its discussions with State regulatory authorities to keep them informed of our progress. A meeting with the States was held January 28 through 30, 1998, to discuss the results of the outreach.

We published a proposed rule for public review and comment on December 21, 1998 (63 FR 70580). We originally scheduled the comment period to close on February 19, 1999. In response to requests, we reopened the comment period from February 23, 1999 to March 25, 1999 (64 FR 8763); from March 31, 1999 to April 15, 1999 (64 FR 15322); and from May 4, 1999 to May 10, 1999 (64 FR 23811). On June 7, 2000, we reopened and extended the comment period to July 7, 2000 (65 FR 36097) in order to obtain input from the public on the effects of *NMA* v. *DOI II*.

During the comment period, we received separate requests from two State associations, an industry association, and representatives of several environmental organizations to meet with the team to ask questions about the proposal. We met with representatives of the two State associations, the industry association, and the representatives from environmental organizations (via a telephone conference call). A summary of each meeting is recorded in the Administrative Record for this rulemaking.

We received 103 comment documents specific to the proposed rule: 18 from private citizens, 36 from companies and associations affiliated with the coal mining industry, 31 from environmental advocates and organizations, and 18 from Federal, State, and local government entities and associations. Since no one requested a public hearing, we did not hold a hearing. In developing the final rule, we considered all comments that were germane to the proposed rule. In this preamble, we discuss how we modified certain concepts and provisions in response to comments and the *NMA* v. *DOI II* decision. We also explain the disposition of those comments that did not result in a change from the proposed rule.

III. How Does the Final Rule Differ Stylistically From the Proposed Rule?

On June 1, 1998, the President issued an Executive Memorandum requiring the use of plain language in all proposed and final rulemaking documents published after January 1, 1999. The memorandum provides the following description of plain language.

Plain language requirements vary from one document to another, depending on the intended audience. Plain language documents have logical organization, easy-to-read design features, and use:

- Common, everyday words, except for necessary technical terms;
- You and other pronouns;
- The active voice; and
- Short sentences.

On June 10, 1998, the Office of the Secretary of the Interior issued a memorandum requiring the immediate use of plain language in proposed and final rulemaking documents. We met this requirement by incorporating plain language principles to an even greater extent in this final rule than in the proposed rule.

The plain language principles, to the extent they were used in the proposed rule, generated a substantial number of comments. We address two of the comments here regarding the use of pronouns. One commenter asked, regarding proposed § 846.1, if "we" means only OSM, and whether this means the States do not have to use alternative enforcement or only have to use it on Federal lands. Another commenter asked, regarding proposed § 774.13(e), does "us" mean OSM if a State has not yet adopted a counterpart? In this preamble, "we", "our", and "us" refer to OSM, unless otherwise stated. In our rule language the pronouns "we", "our" and "us" refer to both the Federal and State regulatory authorities, or whichever one applies in the specific situation, generally OSM for Federal programs or the State regulatory authority for an approved State program, unless otherwise indicated.

We also note that we use several terms with respect to the temporal aspect of this rulemaking. In this rulemaking, we refer to "previous," "existing," "proposed," and "final" rules and regulations. "Previous" regulations are those that, once this rulemaking is effective, will no longer exist. "Existing" regulations are those that are unaffected by this rulemaking. "Proposed" regulations are those provisions we published in our December 21, 1998, proposed rule. "Final" rule and "final" regulations refer to this rulemaking, including existing regulations that are redesignated in this rulemaking.

The rest of the comments we received on plain language issues are discussed in section V.E. of this preamble.

IV. Derivation Tables

Following are the Derivation Tables for this final rule. The Derivation Tables provide a useful tool for ascertaining in

which sections our final provisions were proposed (if applicable) and where our previous, analogous provisions existed (if applicable). When two asterisks (**) appear in the "proposed rule" column, it means we retained an existing section or provision, verbatim (or nearly verbatim if only plain language principles were applied), but redesignated the section or provision in this final rule for organizational purposes. Three asterisks (***) in the "proposed rule" column means the final provision was not proposed, but that we added the provision: (1) In response to comments, or (2) in response to the decision in *NMA* v. *DOI II*, or (3) because a provision proposed to be removed is continued in this final rulemaking, or (4) because the provision is needed for *internally consistency* with other adopted provisions.

PART 701

Final rule	Proposed rule	Previous regulations
§ 701.5	§ [as indicated below]	§ [as indicated below].
Applicant/Violator System or AVS	§ 701.5 Applicant/Violator System or AVS	§ 773.5 Applicant/Violator System or AVS.
Control or controller	§ 778.5(a)(1) through (a)(8) and 778.5(b)(2) Control.	§ 773.5 Owned or controlled and Owns or controls.
Knowing or knowingly	§ 701.5 Knowing or knowingly	§ 724.5 and 846.5 Knowingly.
Own, owner, or ownership	§ 778.5(b)(1) Ownership	§ 773.5 Owned or controlled and Owns or controls.
Successor in interest*	§ 701.5 Successor in interest	§ 701.5 Successor in interest.
Violation	§ 701.5 Violation notice	§ 773.5 Violation notice.
Violation, failure or refusal	§ 846.5 Violation, failure, or refusal	§ 724.5 and 846.5 Violation, failure or refusal.
Violation notice	§ 701.5 Violation notice	§ 773.5 Violation notice.
Willful or willfully	§ 701.5 Willful or willfully	§ 724.5 and 846.5 Willfully.
Willful violation is removed	Willful violation proposed to be removed	§ 701.5 Willful violation.

* Successor in interest is unchanged from the previous definition.

FINAL PART 724

Final rule	Proposed rule	Previous regulations
§ 724.5 is removed	§ [as indicated below]	§ 724.5 Definitions.
	§ 701.5 Knowing or knowingly	Knowingly.
	§ 846.5 Violation, failure, or refusal.	Violation, failure, or refusal
	§ 701.5 Willful or willfully	Willfully.

FINAL PART 773

Final rule	Proposed rule	Previous regulation
§ 773.3	§ 773.10	§ 773.10.
(a)	(a)	(a).
(b)	(b)	(b).
§ 773.4	(**)	§ 773.11.
§ 773.5	(**)	§ 773.12.
§ 773.6	(**)	§ 773.13.
§ 773.7	(**)	§ 773.15.
(a)	(**)	§ 773.15(a)(1).
(b)	(**)	§ 773.15(a)(2).
§ 773.8	(***)	
(a)	§§ 773.15(b)(1), (b)(2) and (b)(3)	
(b)	§ 773.15(b)(1)	§ 773.22(d).
(b)(1)	§ 773.15(b)(1)	§ 773.22(d).
(b)(2)	§ 773.22(c)	§ 773.23(a)(2).
(c)	§ 773.22(c)	§ 773.22(d).
§ 773.9	§ 773.15(b)	§ 773.22.
(a)	§ 773.15(b)(1)	§ 773.22(a).
(b)	§ 773.15(a)(3)	
§ 773.10	§ 773.15(b)(2)	§ 773.22(a).
(a)	§ 773.15(b)(2)(i)	§ 773.22(a).
(b)	§§ 773.15(a)(3) and (b)(2)(ii)	§ 773.22(b).
(c)	§ 773.15(b)(2)(iii)	§ 773.22(b).
§ 773.11	§ 773.15(b)(3)	§ 773.23.
(a)	§ 773.15(b)(3)	§ 773.23(a).
(a)(1)	§ 773.(b)(3)(i)(A)	§ 773.23(a)(1).
(a)(2)	§ 773.15(b)(3)(i)(A)	§ 773.23(a).
(a)(3)	§ 773.15(b)(3)(i)(A)	§§ 773.23(a)(1) and (b).
(a)(4)	§ 773.15(b)(3)(i)(A)	§§ 773.159(b)(1) and 773.23(a).
(b)	§§ 773.15(a)(3) and (b)(3)(i)(A)	§ 773.23(a).
§ 773.12	§ 773.16	§ 773.15(b).
(a)	§ 773.16(a)	§ 773.15(b)(1).
(a)(1)	§ 773.15(b)(3)(i)(B)	§ 773.15(b)(1).

FINAL PART 773—Continued

Final rule	Proposed rule	Previous regulation
(a)(2)	(***)	
(a)(3)	(***)	
(b)	(***)	
(c)	§773.15(b)(i)(D)	§773.15(b)(3).
(d)	§773.15(e)	§773.15(e).
(e)	§773.16(a)(2)	
§773.13	(**)	§773.15(b)(4).
(a)	(**)	§§773.15(b)(4) and (b)(4)(i)(B).
(a)(1)	(**)	§773.15(b)(4)(i)(A).
(a)(2)	(**)	§773.15(b)(4)(i)(C).
(a)(2)(i)	instruction #8.d	§773.15(b)(4)(i)(C)(*1*).
(a)(2)(ii)	(**)	§773.15(b)(4)(i)(C)(*2*).
(b)	(**)	§773.15(b)(4)(ii).
(b)(1)	(**)	§773.15(b)(4)(ii)(A).
(b)(2)	(**)	§773.15(b)(4)(ii)(B).
(b)(3)	(**)	§773.15(b)(4)(ii)(C).
§773.14	§773.16(b)	§§773.15(b)(1) and (b)(2).
(a)	§773.16(b)	§§773.15(b)(1) and (b)(2).
(a)(1)	§§773.16(b) and (b)(1)(ii)	§§773.15(b)(1) and (b)(2).
(a)(2)	§773.15(b)(3)(i)(C)	
(b)	§§773.16(b)	§773.15(b)(2).
(b)(1)	(***)	§773.15(b)(2).
(b)(2)	§§773.16(b)(3) and 773.15(b)(3)(i)(B)(*1*)	
(b)(3)	(***)	
(b)(3)(i)	(***)	
(b)(3)(ii)	(***)	
(b)(4)	§773.15(b)(3)(i)(B)(*2*)	§773.15(b)(1)(ii).
(c)	§773.20(b)	§773.20(a) and (b).
(c)(1)	§773.16(b)(2)(iii)	§773.20(b)(1)(ii)(A).
(c)(2)	§§773.20(b)(2)(ii) and (b)(3)	§773.20(b)(1)(ii)(B).
(c)(3)	§773.15(b)(3)(i)(B)(*2*)	§773.15(b)(1)(ii).
(c)(4)	(***)	
§773.15	(**)	§773.15(c).
(a)	(**)	§773.15(c)(1).
(n)	§773.15(a)(3)	
§773.21	§773.20	§773.20.
(a)	§§773.20(a) and (b)(1)	§§773.20(a) and (b)(1)(i).
(b)	§773.20(b)	§773.20(b).
(b)(1)	§773.20(b)(3)	§773.20(b)(2)(ii).
(b)(2)	§773.20(b)(2)(i)	§773.20(b)(1)(ii)(A).
(b)(3)	§773.20(b)(2)(i)	§773.20(b)(1)(ii)(A).
(c)	§773.21	§773.21.
(c)(1)	§773.21	§773.21.
(c)(2)	(***)	
(d)	§§773.21(a)(1) thru (a)(5)	§§773.21(a) and (a)(1) thru (a)(4).
(e)	(***)	§§773.20(b)(2) and (b)(2)(i).
§773.22	§§773.20 and 773.21	§§773.20 and 773.21.
(a)	§773.21	§773.20(c)(2).
(a)(1)	§773.21(a)	§773.20(a).
(a)(2)	(***)	
(b)	§773.21(a)	§773.21(a).
(c)	§773.21(a)	§773.21(a).
(d)	(***)	
(e)	§773.20(c)(2)	§773.20(c)(2).
(f)	§773.20(c)(2)	§773.21.
(g)	(***)	
(h)	§773.20(c)(2)	§773.20(c)(2).
§773.23	§773.21(a)	§773.21(a)(2).
(a)	§773.21(a)(2)	§773.21(a)(4).
(a)(1)	§773.21(a)(4)	§773.21(a)(1).
(a)(2)	§773.21(a)(1)	§773.21(a)(3).
(a)(3)	§773.21(a)(3)	§773.21(a)(3).
(a)(4)	§773.21(a)(3)	§773.21(b).
(a)(5)	§773.21(b)	§773.21(b).
(a)(6)	§773.21(a)(5)	
(b)	(***)	
(c)	§773.21(b)	§773.21(b).
(c)(1)	§773.21(b)	§773.21(b).
(c)(2)	(***)	
(d)	§773.20(c)(2)	§773.20(c)(2).
§773.24 is removed	§773.24	§773.24.
§773.25	§773.24(a)	§773.24(a)(1).

FINAL PART 773—Continued

Final rule	Proposed rule	Previous regulation
(a)	§ 773.24(a)	§ 773.24(a)(1).
(b)	§ 773.24(a)	
(c)	§ 773.24(a)	§ 773.24(a)(1).
§ 773.26	§ 773.24(b)	§ 773.24(b).
(a)	§ 773.24(b)	§ 773.24(b).
(a)(1)	§ 773.25(b)(2)	§ 773.24(b).
(a)(2)	§ 773.25(b)(3)	§ 773.24(b).
(b)	§ 773.24(d)	
(c)	§§ 773.25(b)(1) and (b)(2)	§§ 773.25(b)(1) and (ii).
(d)	(***)	
§ 773.27	§ 773.25(c)	§ 773.25(c)(1).
(a)	§ 773.25(c)(2)	§ 773.25(c)(1)
(a)(1)	§ 773.25(c)(2)	§ 773.25(c)(1)(i)
(a)(2)	§ 773.25(c)(2)	§ 773.25(c)(1)(i).
(b)	§ 773.25(c)(3)	§ 773.25(c)(2).
(c)	§ 773.25(c)(3)(i)	§ 773.25(c)(2).
(c)(1)	§ 773.25(c)(i)(A)	§ 773.25(c)(2)(i)(A).
(c)(2)	§ 773.25(c)(i)(B)	§ 773.25(c)(2)(i)(B).
(c)(3)	§ 773.25(c)(3)(i)(C)	§ 773.25(c)(2)(i)(C).
(c)(4)	§ 773.25(c)(3)(i)(D)	§ 773.25(c)(2)(i)(D).
(c)(4)(i)	§ 773.25(c)(3)(i)(D)	§ 773.25(c)(2)(i)(D).
(c)(4)(ii)	§ 773.25(c)(3)(i)(D)	§ 773.25(c)(2)(i)(D).
(c)(4)(iii)	§ 773.25(c)(3)(i)(D)	§ 773.25(c)(2)(i)(D).
§ 773.28	§ 773.24(c)	§ 773.24(c).
(a)	§ 773.24(c)(1)	§ 773.24(c).
(b)	§ 773.24(c)(2)	§ 773.24(d)(2)(i).
(b)(1)	§ 773.24(c)(2)	§ 773.24(d)(2)(i).
(b)(12	§ 773.24(c)(2)	§ 773.24(d)(2)(i).
(c)	§ 773.24(c)(2)	§ 773.24(d)(2)(i).
(d)	(***)	
(e)	§ 773.24(c)(3)	§ 773.24(d)(2)(ii).
(f)	§ 773.25(d)	§ 773.24(d).

** Section/provision redesignation only. This section was not redesignated in the proposed rule.
*** This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of section IV.B. of this preamble.

FINAL PART 774

Final rule	Proposed rule	Previous regulation
§ 774.1	***	§ 774.1.
§ 774.9	§ 774.10	§ 774.10.
(a)	(a)	(a).
(b)	(b)	(b).
§ 774.10	(**)	§ 774.11.
§ 774.11	§ 773.22	
(a)	§ 773.22(d)	§ 773.15(b)(1).
(a)(1)	§ 773.15(b)(2)(i)	§ 773.15(b)(1).
(a)(2)	§ 773.22(c)	§ 773.15(b)(1).
(a)(3)	§§ 774.13(e) and 774.17(a)(2)	§§ 773.15(b)(1) and 773.22(d).
(a)(4)	§ 773.22(c)	§ 773.15(b)(1).
(b)	§§ 773.22(a) and 773.25(d)	§ 773.22(d).
(c)	§ 773.15(b)(3)(i)(D)	§ 773.15(b)(3).
(c)(1)	§ 773.15(b)(3)(i)(D)(*1*)	§ 773.15(b)(3).
(c)(2)	§ 773.15(b)(3)(i)(D)(*2*)	§ 773.15(b)(3).
(d)	§ 773.15(b)(3)(i)(E)	§ 773.15(b)(3).
(e)	§§ 773.17(k) and 773.25(d)	§ 773.25(d).
(f)	§§ 773.15(b)(1)(i), (b)(1)(i)(A), (b)(1)(i)(B), and 773.17(k).	
(f)(1)	§ 773.17(k)	
(f)(2)	§§ 773.25(d)	§ 773.25(d).
(f)(3)	§ 778.13(c)(3)	§ 778.13(c).
(f)(3)(i)	§ 778.13(c)(3)	§ 778.13(c).
(f)(3)(ii)	§§ 773.17(k) and 778.13(m)	
(g)	§§ 773.17(k) and 773.24	
§ 774.12	§§ 773.17(h), and 774.13(e)	§ 773.17(h).
(a)	§ 773.17(h)	§ 773.17(h).
(b)	***	
(c)	§§ 774.13(e) and 774.17(a)(2)	§ 774.17(a).
(c)(1)	§§ 774.13(e) and 774.17(a)(2)	§ 774.17(a).

FINAL PART 774—Continued

Final rule	Proposed rule	Previous regulation
(c)(2)	§§ 774.13(e), 774.17(a)(2), and 778.13(c)(1)(iii)	§ 778.13(c)(3).

** Section/provision redesignation only. This section/provision was not redesignated in the proposed rule.
***This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

FINAL PART 778

Final rule	Proposed rule	Previous regulation
§ 778.8	§ 778.10	§ 778.10.
(a)	§ 778.10(a)	§ 778.19(a).
(b)	§ 778.10(b)	§ 778.10(b).
§ 778.9	§ 778.13(o)	
(a)	§ 778.13(o)	
(a)(1)	§ 778.13(o)	
(a)(2)	§ 778.13(o)	
(a)(3)	§ 778.13(o)	
(b)	(***)	
(c)	§ 778.13(p)	
(d)	§§ 778.13(1) and 778.14(d)	§§ 778.13(k) and 778.14(d).
§ 778.11	§ 778.13	778.13.
(a)	§ 778.13	§ 778.13.
(a)(1)	§ 778.13(a)	§ 778.13(a).
(a)(2)	§§ 778.13(b)(1) and (b)(3)	§ 778.13(b).
(b)	§ 778.13(b)	§ 778.13(b).
(b)(1)	§ 778.13(b)(1)	§ 778.13(b)(1)
(b)(2)	§ 778.13(b)(2)	§ 778.13(b)(2).
(b)(3)	§ 778.13(b)(3)	
(b)(4)	§ 778.13(b)(4)	§ 778.13(b)(3).
(c)	§ 778.13(c)(3)	§ 778.13(c).
(c)(1)	§ 778.13(c)(3)(i)	§ 778.13(c).
(c)(2)	§ 778.13(c)(3)(ii)	§ 778.13(c).
(c)(3)	§ 778.13(c)(3)(iii)	§ 778.13(c).
(c)(4)	§ 778.13(c)(3)(v)	§ 778.13(c)
(c)(5)	§ 778.13(c)(3)(iv)	§ 778.13(c).
(d)	§ 778.13(m)	
(e)	§ 778.13(c)(1)	§ 778.13(c).
(e)(1)	§ 778.13(c)(1)(i)	§ 778.13(c)(1).
(e)(2)	§§ 778.13(c)(1)(ii) and (iii)	§§ 778.13(c)(2) and (c)(3).
(e)(3)	§ 778.13(c)(1)(iii)	§ 778.13(c)(3).
§ 778.12	§§ 778.13(e), (f), and (g)	§§ 778.13(d), (e), and (f).
(a)	§ 778.13(e)	§ 778.13(d).
(b)	§ 778.13(f)	§ 778.13(e).
(c)	§ 778.13(g)	§ 778.13(d) and (f).
(c)(1)	§ 778.13(g)	§ 778.13(f)(1).
(c)(2)	§ 778.13(g)	§ 778.13(f)(1).
(c)(3)	§ 778.13(g)	§ 778.13(f)(1).
(c)(4)	§ 778.13(g)	§ 778.13(f)(1).
(c)(5)	778.13(g)	§ 778.13(f)(2).
§ 778.13	§ 778.13(h), (i), (j), and (k)	§§ 778.13(g), (h), (i), and (j).
(a)	§ 778.13(h)	§ 778.13(g).
(a)(1)	§ 778.13(h)	§ 778.13(g).
(a)(2)	§ 778.13(h)	§ 778.13(g).
(a)(3)	§ 778.13(h)	§ 778.13(g).
(b)	§ 778.13(i)	§ 778.13(h).
(c)	§ 778.13(k)	§ 778.13(j)
(d)	§ 778.13(j)	§ 778.13(i).
§ 778.14	§ 778.14	§ 778.14.
(a)	§§ 778.14 and 778.14(a)	§§ 778.14 and 778.14(a).
(a)(1)	§ 778.14(a)(1)	§ 778.14(a)(1)
(a)(2)	§ 778.14(a)(2)	§ 778.14(a)(2).
(b)	§ 778.14(b)	§ 778.14(b).
(b)(1)	§ 778.14(b)(1)	§ 778.14(b)(1).
(b)(2)	§§ 778.14(b)(1) and (b)(4)	§§ 778.14(b)(1) and (b)(4).
(b)(3)	§ 778.14(b)(2)	§ 778.14(b)(2).
(b)(4)	§ 778.14(b)(3)	§ 778.14(b)(3).
(b)(5)	§§ 778.14(b)(4) and (b)(5)	§§ 778.14(b)(4) and (b)(5).
(c)	§ 778.14(c)	§ 778.14(c).
(c)(1)	§ 778.14(c)(1)	§ 778.14(c)(1).
(c)(2)	§ 778.14(c)(1)	§ 778.14(c)(1).
(c)(3)	§ 778.14(c)(1)	§ 778.14(c)(1).

FINAL PART 778—Continued

Final rule	Proposed rule	Previous regulation
(c)(4)	§ 778.14(c)(1)	§ 778.14(c)(1).
(c)(5)	§ 778.14(c)(2)	§ 778.14(c)(2).
(c)(6)	§ 778.14(c)(3)	§ 778.14(c)(3).
(c)(7)	* * *	§ 778.14(c).
(c)(8)	§ 778.14(c)(5)	§ 778.14(c)(5).

** Section/provision redesignation only. This section/provision was not redesignated in the proposed rule.
*** This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

FINAL PART 842

Final rule	Proposed rule	Previous regulation
§ 842.11:		
(e)(3)(i)	proposed to be removed	§ 842.11(e)(3)(i).

FINAL PART 843

Final rule	Proposed rule	Previous regulation
§ 843.5	proposed to be removed	§ 843.5.
§ 843.11		
(g)	§ 843.11(g)	§ 843.11(g).
§ 843.13	proposed as § 846.14	§ 843.13.
§ 843.21	§ 843.21	§ 843.21.
(a)	§ 843.21(a)	§ 843.21(a).
(a)(1)	§ 843.21(a)	§ 843.21(a).
(a)(2)	(***).	
(b)	§ 843.21(b)	§ 843.21(b).
(b)(1)	§ 843.21(b)(1)	§ 843.21(b)(1).
(b)(2)	§ 843.21(b)(2)	§ 843.21(b)(2).
(b)(3)	§§ 843.21(d)(1)(ii) and (d)(4)	§ 843.21(d).
(c)	§ 843.21(c)	§ 843.21(c).
(c)(1)	§ 843.21(c)	§ 843.21(c)(1).
(c)(2)	(***).	
(c)(3)	(***).	
(d)	§§ 843.21(d) and (d)(1)(i)	§ 843.21(b).
(e)	§ 843.21(d)(1)	§ 843.21(d).
(e)(1)	§ 843.21(d)(2)	§ 843.21(d).
(e)(2)	§ 843.21(d)(2)(i)	§ 843.21(d).
(f)	§ 843.21(e)	§ 843.21(e).
(f)(1)	§ 843.21(e)(1)	§ 843.21(e)(1).
(f)(2)	§ 843.21(e)(2)	§ 843.21(e)(2).
(f)(2)(i)	§ 843.21(e)(2)(i)	§ 843.21(e)(2)(i).
(f)(2)(ii)	(***).	
(f)(2)(iii)	§ 843.21(e)(2)(ii)	§ 843.21(e)(2)(ii).
(f)(2)(iv)	§ 843.21(e)(2)(ii)	§ 843.21(e)(2)(ii).
(f)(2)(v)	(***).	
(g)	§ 843.21(f)	§ 843.21(f).

*** This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

FINAL PART 846

Final rule	Proposed rule	Previous regulation
§ 846.1 is unchanged	§ 846.1	§ 846.1.
§ 846.5 is removed	§ 846.5	§ 846.5.
§ 846.12 is unchanged	§ 846.12(a)	§ 846.12.
§ 846.14 is unchanged	§ 846.12(b)	§ 846.14.
§ 846.17 is unchanged	§ 846.12(c)	§ 846.17.
§ 846.18 is unchanged	§ 846.12(d)	§ 846.18.

FINAL PART 847

Final rule	Proposed rule	Previous regulation
Part 847	(***).	
§ 847.1	§ 846.1.	

FINAL PART 847—Continued

Final rule	Proposed rule	Previous regulation
§ 847.2	(***).	
(a)	§ 846.1.	
(b)	§ 773.22(d).	
(c)	(***).	
(d)	(***).	
§ 847.11	§§ 846.11 and 846.11(a).	
(a)	§ 846.11(a)(1).	
(b)	§ 846.11(a)(2).	
(b)(1)	§ 846.11(a)(2)(i).	
(b)(2)	§ 846.11(a)(2)(ii).	
(c)	§ 846.11(a)(3).	
§ 847.16	§ 846.16.	
(a)	§ 846.16(a).	
(a)(1)	§ 846.16(a)(1)(i).	
(a)(2)	§ 846.16(a)(1)(ii).	
(a)(3)	§ 846.16(a)(1)(iii).	
(a)(4)	§ 846.16(a)(1)(iv).	
(a)(5)	§ 846.16(a)(1)(v).	
(a)(6)	§ 846.16(a)(1)(vi).	
(b)	§ 846.16(a)(2).	
(c)	§ 846.16(b).	
(d)	§ 846.16(c).	

** Section/provision redesignation only. This section/provision was not redesignated in the proposed rule.
*** This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

V. What General Comments Did We Receive on the Proposed Rule and How Have We Addressed These Comments in This Final Rule?

A. Withdraw the Proposal

Several commenters suggested that we withdraw the proposed rule and rewrite it using the "precise language" of the Act. We appreciate the concerns of these commenters. However, section 501(b) of the Act requires that we adopt regulations that not only implement the Act, but also "are written in plain, understandable language." Furthermore, the courts have held in previous litigation concerning SMCRA that we have a duty to either flesh out the requirements or explain why it is unnecessary to do so.

A commenter recommended withdrawing the proposed rule because "the added burdens are not justified by the rate of non-compliance, which OSM's own figures show is low." The commenter said we should "simplify, rather than complicate, the permitting process and the limited non-compliance problems that do exist." The low rate of noncompliance is partially the result of the ownership and control and AVS-related regulations that have been in force since 1988. Moreover, in this final rule we are simplifying the permitting process to clarify the scope of the review and who is eligible for a permit under section 510(c) of the Act, 30 U.S.C. 1260(c).

A commenter said the proposed rule must be withdrawn because it does not adequately respond to or incorporate comments provided in response to the Advance Notice of Proposed Rulemaking. The commenter said two organizations sent comments to OSM urging that OSM retain the requirement that imputes primary responsibility for compliance on those entities which own or control permit applicants and have outstanding unresolved violations of SMCRA or other environmental laws. The commenter said the agency's response to these comments has been wholly unsatisfactory.

We disagree. The commenter asks that we devise a compliance and permit eligibility scheme that the court has ruled to be unlawful. Under *NMA* v. *DOI I*, we cannot "block" applicants under section 510(c) based upon the outstanding violations of an applicant's owners and controllers. However, we can and must determine responsibility for outstanding violations and use all enforcement provisions available under the Act to achieve compliance from persons responsible for outstanding violations. Nothing in *NMA* v. *DOI I* or *NMA* v. *DOI II* changes this statutory requirement.

The same commenter also said the proposed rule fails to require that States (and OSM in Federal program states) use common law mechanisms to disregard corporate forms where applicants seek to apply for permits on behalf of owners and controllers who would be barred in their own right. Common law mechanisms exist independently from the enforcement provisions under SMCRA and are always available for a regulatory authority's use when circumstances warrant.

The same commenter also said the proposed rule fails to address coal exploration operations. We included coal exploration among the subjects in our solicitation for ideas and suggestions to be considered in the development of the proposed rule. States opposed requiring review under section 510(c) of SMCRA, 30 U.S.C. 1260(c), for coal exploration permits. These comments persuaded us not to address coal exploration, in the context of section 510(c), in this rulemaking.

B. Compliance With the Administrative Procedure Act

One commenter claimed that we provided no explanations for the proposed rule and that we thus had violated the Administrative Procedure Act (APA) by denying interested parties the opportunity to provide meaningful comments. Other commenters, expressed similar APA concerns.

We disagree with the various criticisms of our proposed rule with respect to the APA. First, the proposed rule did not deny interested parties the opportunity to provide meaningful comment. We provided the proposed rule language and an extensive preamble, explaining the subjects and issues involved. We received 103 written comments on the proposed rule, totaling over 800 pages of comments. We extended the comment period four

times in response to requests for extensions, including a reopening to accept comments on the effects of the *NMA* v. *DOI II* decision. See section II of this preamble. Before the development of the proposed rule, we provided public notice of our intent to propose a rule. We conducted both informal outreach and an extensive formal public outreach to gather ideas, suggestions, and concepts to consider in the development of the proposed rule. We hosted and attended meetings with the major groups of parties interested in this rulemaking. Taken together, these activities provided more than sufficient opportunity for input into this rulemaking. Not only have we fully complied with the APA, we actively reached out to bring all affected parties into this rulemaking process.

Commenters said the proposed rule is a radical departure from past ownership and control rules. They also said the 60-day comment period was "woefully inadequate" to allow meaningful public participation, and that OSM's advance pronouncement that no extensions of the comment period would be considered was arbitrary and capricious. In fact, we extended the comment period on the proposed rule three times in response to requests for extensions and reopened the comment period to allow for comments on the effects of *NMA* v. *DOI II* on the proposed rule. The final comment period totaled 140 days.

C. Public Participation

Several commenters suggested that citizens should have rights in the permitting process and related matters. These commenters also said OSM should expressly allow citizens to petition the agency to take enforcement action where citizens have a reason to believe that a violation exists, whether or not the State regulatory authority has taken action. Another commenter also expressed concerns about the citizen complaint process, and said it is important that citizens continue to be part of the SMCRA process so that they can voice concerns about inadequate data collection and tracking of violators by OSM.

We support public participation in regulatory processes, as required by the Act. Citizens have the right to voice their concerns regarding any aspect of a regulatory program. This final rule strengthens public participation in processes related to permit eligibility determinations. We further address public participation as it applies to this rulemaking, in our responses to comments received on specific sections of the proposed rule. See, *e.g.*, sections VI.M. and Y. of this preamble.

Further, our existing regulations emphasize the role of the public under SMCRA. The provisions for public participation in permit processing were found at previous 30 CFR 773.13 and existing 30 CFR part 775, which includes the ability of persons who have an interest which is or may be adversely affected to raise ownership and control issues during the permitting process and to request a hearing on the reasons for a permitting decision. Previous 30 CFR 773.13 is redesignated 30 CFR 773.6 in this final rule. Additional provisions pertaining to public participation and access to public records are found at existing 30 CFR 842.11, 842.12, and 842.16 and final § 843.21.

We also made AVS available to the public to increase public access to the computer system. AVS software is provided free of charge and can be ordered from the AVS Office in Lexington, Kentucky, by calling, toll-free, 1–800–643–9748. The software can also be downloaded from the AVS Office's Internet home page (Internet address: *http://www.avs.osmre.gov*). Citizens may also use the traditional method of visiting Federal and State offices to view application, permit, violation, ownership and control challenge, and enforcement records.

A commenter said that the public often has important information concerning ownership and control and that the Congress was very clear in demanding a public role in administrative and judicial processes, including the permitting process. According to the commenter, the proposed rule reflects a limited, insular, two-way relationship between the regulatory authority (we) and the applicant (you) that excludes affected citizens (us) because there is no pronoun for the general public.

We have and will continue to ensure that public participation is considered in all facets of the regulatory program. We heard very clearly the concerns expressed during the public outreach regarding citizen participation in regulatory processes. To the extent possible, we address those concerns in this rulemaking. We are always willing to accept information from citizens which may bear upon our responsibilities, or the responsibilities of the regulated industry, under the Act. Both our existing regulations and the provisions we adopt today expressly require us to consider information provided by the public, when appropriate.

D. Oversight

A commenter said that the proposal has serious implications for the States in terms of OSM's oversight of permitting decisions and all facets of the regulatory program. The commenter said States are most concerned about oversight expectations in the quantity of application information and the level of detail that should be devoted to investigations. Two commenters asked what oversight States can expect since AVS will not make permitting recommendations. The same commenters asked if oversight will be consistent and whether States will be "taken to task" over their permitting decisions during oversight. In contrast, another commenter said the proposed rule will result in inadequate oversight because OSM plans to cease providing permitting recommendations. Other commenters said oversight should be consistent and that OSM should adopt uniform review criteria. Two commenters asked whether the oversight reviews required for this final rule would be left to the OSM regional offices. These commenters suggested that the determinations required under the proposed rule would require OSM to give discretion and flexibility to States.

Our oversight obligations under the Act and regulations will not diminish as a result of these rules. To facilitate oversight of AVS, OSM's Directive REG–8, "Oversight of State Regulatory Programs," provides that OSM will monitor States' responses to complaints and requests for assistance and services and each year will review a sample of one or more specified State activities, including permit eligibility determinations. We prepare an oversight findings report for each review and the findings report is summarized in the annual report for each State.

Concerning the level of detail that should be devoted to investigation, in this final rule we leave that decision principally to the regulatory authorities. We are not adopting specific references to investigations in part 773 in these final rules. However, we expect that regulatory authorities will investigate when circumstances warrant.

We previously provided permit eligibility recommendations to, among other things, assist in expediting the States' permitting processes. We are aware that the purpose of the recommendations was sometimes misinterpreted as a mandate. We also know that many States benefitted from the recommendations and some expressed their appreciation. However, the States now possess sufficient technology as well as familiarity with

the uses of the information in the computer system that they no longer require permitting recommendations. See further discussion of this point in section VI.E. of this preamble.

E. Plain Language

"Shall" Is the Language of the Act

We received numerous comments on the use of plain language principles in the proposed rule and our failure to use the word "shall." Some commenters argued that the word "shall" is the language of the Act and that no other word is sufficient as the language of command. However, the guidance on plain language principles prohibits use of "shall" in rulemaking. The Department has provided two guidance documents on plain language, *Writing User-Friendly Regulations* and *Writing Readable Regulations,* by Thomas A. Murakowski. The regulations in this final rule are consistent with plain language principles. We use "must" instead of "shall" as the language of command. Where the Act or regulations provides for a mandatory action, we use "must." Where previous regulations used "shall" to indicate a future action, we use "will." When an action is not mandatory, we use "may," except that the use of "may not," is equivalent to a mandatory prohibition.

Changing "shall" to "may" Undermines Mandatory Enforcement of the Act

Many commenters said that changing "shall" to "may" undermines mandatory enforcement under the Act and that "may" is an unacceptable substitute. Some of the commenters said the change gives regulatory authorities the option not to enforce the regulations.

The absence of the word "shall" does not compromise obligations under our regulations or the obligations of the States and the industry to comply with the Act and regulatory requirements. To the contrary, we believe using the word "shall" creates confusion in the minds of readers. We are not alone in this belief. In his book, *Plain English for Lawyers,* Richard C. Wydick, Professor of Law at the University of California at Davis, has this to say about the word "shall":

> When you draft rules * * * be precise in using words of authority.* * * The biggest troublemaker is *shall.* Sometimes lawyers use it to impose a duty: "The defendant *shall* file an answer within 30 days.* * *" Other times lawyers use it to express future action ("the lease shall terminate * * *") or even an entitlement ("the landlord shall have the right to inspect * * *"). Drafting experts have identified several additional shades of meaning *shall* can carry. To make matters worse, many lawyers do not realize how slippery shall is, so they use it freely, unaware of the booby traps they are laying for their readers * * *. In recent years * * * many U.S. drafting authorities have come around to the British Commonwealth view: don't use shall for any purpose—it is simply too unreliable.[1]

In the proposed rule, we used the words "must," "will," and "may." We were cognizant of the effect of these words in each instance they were used. In this final rule, we consistently employed the following principles with respect to "must," "will," and "may."

We use the word * * *	to indicate that * * *
must	an action is mandatory.
will	an action will occur in the future.
may	an action could occur, but is not mandatory.
may not	not taking the specified action is mandatory.

Any change in meaning that the reader may perceive because we used the words in the table is due solely to the former use of the imprecise word "shall" to indicate that an action must, will, or may occur.

Plain Language Attempt is Unsuccessful

Several commenters said our attempt to use plain language principles in the proposed rule was unsuccessful and inconsistent with President Clinton's June 1, 1998, memorandum. The commenters also claimed that we failed to follow the recommendations of the **Federal Register** *Document Drafting Handbook* because we used more than three paragraph levels within a section. The commenters said we should create more sections instead of using more than three paragraph levels.

Our use of plain language principles in the proposed rule was consistent with the President's June 1, 1998, memorandum. However, we acknowledge that the proposed rule did not fully conform with plain language principles. This final rule, more fully uses plain language principles.

Most notably, in this final rule, we reorganized parts 773 and portions of parts 774 and 778 to accommodate fuller use of plain language principles. We divided lengthy sections into smaller, more numerous but more concise, sections; eliminated duplicate provisions; streamlined provisions, incorporated tables; and eliminated excessive paragraph levels within sections. The guidance provided to us regarding plain language is not optional. Rather, we are expected to adhere to the guidance, unless specific circumstances allow for variance within the rule language structure.

Use of Pronouns

Several commenters expressed concern over our use of pronouns in the proposed rule. Some of these commenters said that the use of "we" and "you" is confusing. These commenters also said that "you" should always mean the person to whom the regulation applies because industry will claim that "you" only means the applicant and that all other uses of "you" are irrelevant. Other commenters said the use of plain language implies that there are only two sides represented in the regulations—industry and regulators—and that there is no pronoun used to represent citizens.

The guidance documents on plain language that we previously cited in this section of the preamble provide explicit instructions on the use of personal pronouns. According to the guidance, the use of personal pronouns "straightens out sentences and saves words." As with the preferred use of "shall," we must use pronouns in our regulations unless we are avoiding a grammatical fracture or redundancy, or to make a distinction between or among the subjects that make up "we" or "you."

We acknowledge that our use of pronouns in the proposed rule sometimes may have been confusing. We eliminate that confusion in this final rule. Within the Department's restrictions, we always use "we" to mean OSM and the State regulatory authorities, unless otherwise stated. We always use "you" to mean whoever must comply with the regulation. Therefore, "you" almost always means an applicant or permittee, as applicable. For example, when we use the phrase, "you, the applicant," it clarifies that "you" means "the applicant" whenever "you" appears in the provisions of that section.

We elected not to define "we" or "you" generically in these regulations because the antecedent for these pronouns varies in our regulations. Instead, we specified the meaning of "we" or "you" in each section of this final rule. As more of our regulations are converted to plain language, we will incorporate greater use of "we" and "you."

A commenter called the use of pronouns an informal, quasi-conversational style. This commenter

[1] Richard C. Wydick, *Plain English for Lawyers,* Durham, 1998, pp. 66–67.

also said our use of "you" and "we" does not conform to the guidance in the *Federal Register Document Drafting Handbook*.

Our use of "we" and "you" conforms to the guidance in the *Federal Register Document Drafting Handbook*. For example, the *Handbook* says we must use "you" to designate "whoever must comply." (October 1998 Revision at MRR–1) This is how we used "you" in the proposed rule and how we use it in this final rule.

F. Other General Comments

A commenter expressed concern that the proposed rule will result in permit-specific eligibility determinations instead of entity or company-specific eligibility determinations and that this result is a step backward. Permit eligibility is inherently application or permit specific because violations are specific to a particular operation. The permit block sanction of section 510(c) applies only to the extent that a person remains responsible for that violation.

A commenter claimed that the proposed rules establish complex processes for determining eligibility and meeting information disclosure requirements. The commenter also claimed that "owners" and "controllers" are newly created categories that would be targeted for novel enforcement tools such as "blocking permits where a permit applicant is an owner or controller of an operation with an outstanding violation," "permanent ineligibility" for a permit, "special permit conditions," and "joint and several liability for violations of permits to an extent not contemplated by the Act."

The review process and eligibility determination are not complex and, in fact, have been simplified in this final rule. A regulatory authority will review applicant, operator, and ownership or control information; permit history information; and compliance information to arrive at an eligibility determination under section 510(c) of the Act, 30 U.S.C. 1260(c). A finding of permit eligibility is the end-product of a regulatory authority's review under section 510(c) of the Act, 30 U.S.C. 1260(c). This final rule also attempts to make information disclosure requirements clearer by organizing the requirements for providing applicant, operator, and ownership and control information; permit history; property interests; and violation information into separate, more easily understood sections. An applicant also may certify as to which parts of this information already in AVS are accurate and complete. See final § 778.9(a).

We disagree that "owners" and "controllers" are newly created categories. These designations are clearly anticipated under section 510(c) of SMCRA, 30 U.S.C. 1260(c), which uses the phrase "owned or controlled." We also disagree that the final rule creates "novel enforcement tools." We are not adopting the provisions concerning joint and several liability or special permit conditions. Under the final rule, the section 510(c) permit block sanction applies only to the extent authorized under *NMA* v. *DOI I* and *NMA* v. *DOI II*.

Commenters said they agreed with OSM that "scofflaws" should not be allowed to abandon one mining operation with uncorrected violations and uncompleted reclamation only to obtain permits for new operations "through subterfuge or abusive manipulation of corporate entities." However, the commenters said, AVS relied upon massive information-gathering and mechanical name-linking and that this approach caused paperwork delays for legitimate operators. The commenters claimed the proposed rule would not reduce the burdens for legitimate operators "to any significant level" and that it "does violence" to a number of established legal principles and threatens new confusion, delays, and litigation.

We disagree that our regulations cause either massive information-gathering or delays in permitting for legitimate operators. Further, in *NMA* v. *DOI II*, the court ruled that we and the States may require information from permit applicants in excess of the information requirements specifically stated in the Act so long as the information is necessary to ensure compliance with the Act. *Id.*, 177 F.3d at 9. The information requirements in this final rule are, necessary to ensure compliance with the Act, including the permit block sanction of section 510(c).

A commenter expressed appreciation for OSM's efforts to propose regulations that are consistent with *NMA* v. *DOI I*. However, the commenter said the proposed rule appears more cumbersome and burdensome than the previous regulations, would require much additional effort to administer, and may detract from ensuring good reclamation in the field.

Our principal goal in this rulemaking is to adopt revised or new regulations that improve our implementation of SMCRA and with *NMA* v. *DOI I* and *NMA* v. *DOI II*. We have streamlined procedures and reduced burdens to the extent that we could do so while still retaining our ability to fully implement the permit block sanction of section 510(c). We relied upon the input of many sources, including our State partners, in developing the proposed and final rules. We disagree that the changes in our regulations, will detract from or inhibit good reclamation. On the contrary, we believe the provisions that allow a regulatory authority to better know an applicant will contribute to a more accurate forecast of whether an applicant, as a permittee, will be able to complete its reclamation and other statutory and program obligations.

Several commenters expressed concern that the changes in the proposed rule represent a weakening of the Federal rules and appeared to give unauthorized options to regulatory authorities relative to required enforcement actions. Some opposed the proposed rule changes because, they said, SMCRA requires OSM and the States to take enforcement action against every violation, that is, "when you see a violation, you write a violation." These commenters asserted that SMCRA has a mandatory enforcement system that does not allow discretion when considering enforcement actions. We agree that violations, when known to a regulatory authority, must be cited. Nothing in this rulemaking alters that principle.

Several commenters asserted that the proposed rule weakens Federal protections, undercuts those State requirements that may exceed Federal requirements, and allows owners and controllers to engage in sham business arrangements to contravene section 510(c) of SMCRA. We believe this final rule strengthens the ability of regulatory authorities to take a variety of actions both inside and outside the permitting process to ensure compliance with SMCRA. The rule strengthens the information disclosure requirements for applicants and operators. It also clarifies the post-permit issuance obligations of regulatory authorities and permittees with respect to submitting new information, updating AVS, and other matters. It also emphasizes other enforcement provisions that may be used if applicants, permittees, operators, and other persons subject to the regulations fail to comply. Taken together, these revisions not only clarify and emphasize our ability to enforce section 510(c), 30 U.S.C. 1260(c), but other SMCRA provisions as well.

Another commenter said the proposed rule would not adequately address the regulatory gap left by the appeals court decision in *NMA* v. *DOI I*. The commenter claimed the industry has used the gap to continue to profit from past non-compliance of contract miners. The commenter said the proposed rule

would not require States to use all available procedures to bar owners and controllers from receiving new permits or to prosecute them. We disagree. The permit eligibility criteria and related procedures in the final rule are as restrictive as the rationale in the *NMA* v. *DOI I* and *II* decisions will allow.

A commenter said the proposal fails to address how to prevent new permit-related damage by entities who are owned or controlled by violators since section 510(c) of SMCRA can no longer be used. The commenter stated that, instead of lowering compliance requirements, regulatory authorities should adjust performance bonds to address the risk of default on reclamation obligations. This final rule does not reduce compliance requirements. Furthermore, section 509(a) of the Act and 30 CFR 800.14(b) already require that the amount of the bond be sufficient to assure completion of the reclamation plan if the work has to be performed by the regulatory authority in the event of forfeiture.

VI. In What Sections Did We Propose Revisions, What Specific Comments Did We Receive on Them, and How Have We Addressed These Comments in This Final Rule?

A. Section 701.5—Definitions

We proposed to make several changes to our regulatory definitions. We intended that the proposed changes would result in clearer and more useful regulatory definitions. One commenter said the definitions were satisfactory as proposed. Based upon our review of the comments and further deliberation, we modify most of the proposed definitions in this final rule. Each proposed definition is discussed below. Comments on a proposed definition and modifications adopted in this final rule are included in the discussion of each proposed definition.

Applicant/Violator System or AVS

We proposed to revise the definition for *Applicant/Violator System* or *AVS* and to move the definition to § 701.5. We received no comments on the proposed definition. The final rule modifies the proposed definition to clarify that AVS assists in implementing the Act. It is clearly not the only tool we use to implement the purposes of the Act. AVS is among several automated systems and other mechanisms that we rely upon to assist in implementing the Act. We modified the final definition to remove any potential confusion on this point.

"Control or controller" and "Own, Owner, or Ownership"

Section 510(c) of SMCRA, 30 U.S.C. 1260(c), provides that a surface coal mining permit will not be issued when a surface coal mining operation "owned or controlled by the applicant" is currently in violation of SMCRA or other laws pertaining to air or water quality. However, the Act does not define the phrase "owned or controlled." We first defined the phrase in the 1988 "ownership or control" rule. 53 FR 38868 (October 3, 1988). In that rule, the concepts of ownership and control were defined together through a series of statuses or relationships under which OSM would either "deem" or "presume" ownership or control. *See, e.g.,* previous § 773.5. In the proposal underlying this final rule, we proposed to define "ownership" and "control" separately, eliminate presumptions of ownership or control, and provide examples to support the proposed definitions of ownership and control. *See* proposed §§ 778.5(a) and (b).

After the close of the comment period for the proposed rule, the D.C. Circuit issued its decision in *NMA* v. *DOI II.* 177 F.3d 1 (D.C. Cir. 1999). The court struck down two of the six presumptions of ownership or control in our previous ownership or control definitions at 30 CFR 773.5, and upheld two of the six. The court did not address the remaining two presumptions or the categories of "deemed" ownership or control, since these provisions were not challenged. The court's ruling on presumptions had no direct effect on our proposed definitions of ownership and control, since we had already proposed to eliminate all presumptions of ownership or control, including those invalidated by the court. Like the proposal, this final rule does not contain rebuttable presumptions.

The court also upheld our ability to deny permits based on *indirect* ownership or control. We retained a similar provision in this final rule. However, since the ability to deny permits based on indirect ownership or control, or "downstream" relationships, pertains more to how the definitions are applied than to the definitions themselves, we addressed the applicability of the court's holding in the discussion of permit eligibility determinations in section VI.E. of this preamble. At this point, however, we note that this final rule continues our prior ability to deny permits based on both direct ownership or control and indirect ownership or control through intermediary entities. We also retained the ability to ascertain ownership or control at all levels of a corporate chain through any combination of relationships establishing ownership or control under the definitions we adopt today. For example, if Company A owns Company B under our definition of ownership, Company A also owns all entities and operations which Company B owns or controls, and so on.

In this final rule, we retained the basic approach and substance of the proposed rule. However, based on comments, guidance from the court, and further deliberation, we made certain modifications which clarify the scope and applicability of the definitions and examples.

We moved the definitions and examples from proposed § 778.5 to final § 701.5. This will improve the organization by having all of our definitions in one section; this modification also emphasizes the general applicability of the definitions throughout 30 CFR parts 773, 774, and 778 and § 843.21 of our regulations (except as noted otherwise). We also modified the defined terms, from "ownership" and "control" to "*own, owner,* or *ownership*" and "*control* or *controller*", to clarify that the definitions encompass all forms of the words "own" and "control," including both the verb and noun forms.

We retained the approach of defining ownership and control separately, to emphasize that section 510(c) uses the disjunctive phrase "owned or controlled." This is significant in that section 510(c) requires permit denials when the applicant either owns *or* controls an operation with current violations. We moved the proposed examples of ownership or control to follow one of the categories of control—*see* final paragraph (5) of the definition—since the examples are more appropriately viewed as examples of control, rather than ownership. In this final rule, the examples are used to indicate when a person may, but does not necessarily, have "the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted." Since the focus of the inquiry is on who controls an entity or mining operation, in this preamble we use the phrase "examples of control" to refer to this regulatory provision. Thus, our final definition of control contains categories of "deemed" control (paragraphs (1) through (5)) and examples of control (paragraphs (5)(i) through (5)(vi)).

Our final definition of "*own, owner,* or *ownership*" is largely the same as our proposed definition of "ownership," except that we moved the "general

partner" criterion from this definition to the definition of "*control* or *controller*" in final § 701.5 and eliminated the phrase "or having the right to use, enjoy, or transmit to others the rights granted under a permit." We also added language to clarify that the final definition does not apply to ownership of real property, such as under final § 778.13 of this rule and 30 CFR § 778.15 of the existing rule. The final definition of "*own, owner,* or *ownership*" includes being a sole proprietor or possessing or controlling in excess of 50 percent of the voting securities or other instruments of ownership of an entity (*i.e.,* majority ownership). 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. Under this definition, if the predicate facts are present—*i.e.,* a person is a sole proprietor or majority shareholder—then the person is an owner. Our rationale for the greater than 50 percent threshold is explained below in our responses to comments. Also, while a sole proprietor is subsumed within the category of majority ownership, we decided to retain that criterion for the sake of clarity. We also reiterate that the definition we adopt today encompasses both direct ownership and indirect ownership through intermediary entities. Thus, if Company A owns 51 percent of Company B, and Company B owns 51 percent of Company C, Company A owns Company C. However, if Company A owns 49 percent of Company B, and Company B owns 51 percent of Company C, Company A *does not* own Company C, since Company A does not own Company B. In summary, if an entity owns another entity, it also owns all entities the other entity owns or controls.

We defined "*control* or *controller*" in terms of a series of specific relationships and statuses, which are individually enumerated, rather than the more general definition of control in the proposal. In our experience, since we first promulgated definitions of ownership and control in 1988, the relationships and statuses identified in the "deemed" portion of the definition (paragraphs (1) through (5)) will always constitute control, assuming the predicate facts are true. For example, if someone is a permittee, that fact alone, without further inquiry, demonstrates control under the definition. By contrast, in the examples of control listed in paragraphs (5)(i) through (5)(vi) of the definition, even if the predicate facts are true, that person may or may not be a controller, depending on the particular circumstances. Thus, a 20 percent shareholder of a corporation may be a controller, but only if that person also has "the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted." *See* final paragraph (5) of the definition. We provide the examples to identify statuses and relationships which, in our experience since 1988, often indicate actual control. Regulatory authorities and the regulated industry should consider the examples, and any other relevant factors or information, in meeting their responsibilities under this final rule. However, we stress that these examples do not give rise to a presumption of control and do not necessarily constitute control. Finally, as with our definition of "*own, owner,* or *ownership*", the definition of "*control* or *controller*" we adopt today encompasses both direct control and indirect control through intermediary entities. For example, if Company A controls Company B, Company A also controls all entities which Company B owns or controls.

Consistent with the view expressed in the preceding paragraph, we incorporated some of the proposed examples into the deemed categories of control because the person will always be a controller if the predicate facts are true. For example, we decided to move the examples encompassing permittees and operators from the proposed examples to the "deemed" portion of the final definition. We also moved the "general partner in a partnership" criterion from the proposed definition of "ownership" to the final definition of "*control* or *controller*." Finally, based on comments, guidance from the court decisions, and further deliberation, we added two new examples of control. *See* final examples (5)(iii) and (5)(iv).

One other general point we emphasize is that our definition of "*control* or *controller*" includes the *ability* to control as well as the exercise of control. The reason is simple: The failure to exercise one's ability to control in order to prevent or to abate violations is as damaging to the environment or as dangerous to the public as actively causing violations. As such, paragraph (5) of the definition specifically provides that those who have the *ability* to determine the manner in which a surface coal mining operation is conducted, not just those who actually exercise control, are encompassed within our final definition of "*control* or *controller*." When we use the term "actual control" in this preamble, we are referring to both the exercise of control and the ability to control.

Comments on the Proposed Definition of "Ownership"

A commenter said the Congress intended that new permits should not be issued to an applicant who has an ownership relationship to a violation. The commenter said the proposed rule appears to make ownership irrelevant. The commenter suggested that all references to control should also include references to ownership. The thrust of the comment is that "ownership alone, or control alone, are sufficient to impute responsibility." Another commenter said that proposed §§ 778.5(b)(1) and (b)(2) refer to "owner" and "controller" separately as though they have different meanings, while proposed § 778.5(a) defines "owner or controller" without distinguishing between the two.

We agree that an applicant's ownership of an operation with a current violation, standing alone, renders the applicant ineligible for a permit under section 510(c) of the Act, 30 U.S.C. 1260(c). As explained above, because section 510(c) uses the disjunctive phrase "owned *or* controlled" (emphasis added), we retained our proposed approach of defining ownership and control separately to give independent meaning to the two terms. This is significant in that section 510(c) requires permit denials when the applicant either owns *or* controls an operation with current violations. In the proposal, we made it clear that either ownership or control of operations with violations could form the basis of a permit denial. *See, e.g.,* proposed §§ 773.15(b)(3)(i)(A) and (B); 773.16(a). When appropriate, this final rule references ownership and control concepts together to emphasize the statutory requirement of section 510(c). Also, we clarified that the examples pertain to control, and not to ownership.

This final rule emphasizes that the scope of permit denials under section 510(c) does not depend solely on the presence of control. Mere ownership, without control, can provide a basis for a permit denial. As such, a person who is an owner under the definition we adopt today cannot successfully challenge such ownership by demonstrating a lack of ability to control. The only way to successfully challenge ownership is to demonstrate that the predicate facts indicating

ownership are not true, *i.e.*, the person is not a sole proprietor or majority shareholder.

The same commenter said that the 10 percent threshold of ownership in section 507 of the Act, 30 U.S.C. 1257, should also be the threshold of ownership under our definition because, under certain circumstances, 10 percent ownership "gives effective control to an entity." Another commenter agreed, making the same argument relative to section 507 of the Act, 30 U.S.C. 1257. The commenter claims, in substance: (1) The greater than 50 percent threshold is "too restrictive for any meaningful application" of SMCRA provisions; (2) few, if any, coal companies have a 50 percent owner; and (3) owners of substantial means in the company should be on notice of their ownership obligations to encourage compliance.

We disagree that the greater than 50 percent threshold is too restrictive and that the 10 percent threshold referenced in section 507 of the Act, 30 U.S.C. 1260(c), is appropriate. As noted, the Act does not define the term "owned." Congress, in using that term, did not indicate if it meant partially owned or wholly owned. Thus, arguments can be made that as little as a few shares of stock all the way to 100 percent ownership, or anywhere in between, should constitute ownership. We adopted the greater than 50 percent threshold because greater than 50 percent ownership will usually confer control. However, we emphasize that a regulatory authority need not demonstrate actual control to deny a permit based on our definition of ownership.

We agree that even as little as 10 percent ownership may constitute effective control of an entity. Indeed, in striking down our previous presumption of ownership or control based on 10 through 50 percent ownership of an entity, the court of appeals, in *NMA* v. *DOI II*, noted that as little as 10 percent ownership "may, under specific circumstances, confer control.* * * " 177 F.3d at 6–7. As such, we adopted the 10 through 50 percent criterion as an example which *may* constitute control. *See* final paragraph (5)(iii). For ownership of 50 percent or less, it is appropriate to tie such ownership to control. Under paragraph (5) of the definition of "*control* or *controller*," a regulatory authority attempting to sustain a finding of control based on 10 through 50 percent ownership must also demonstrate that that person has the ability to determine the manner in which mining is conducted. At paragraph (5)(iii), we also introduced the concept of "relative percentage" of ownership as an example of possible control. For example, a person may own only 20 percent of an entity, but may nonetheless be the greatest single owner of the entity. In that context, what may seem like a relatively small percentage of ownership may in fact confer actual control. Finally, while we note that less than 10 percent ownership is not likely to confer control, if a 10 percent shareholder does in fact control an entity, the applicant is required to identify the person in a permit application. Also, in identifying owners or controllers which are not disclosed by the applicant, a regulatory authority has leeway under paragraph (5) of the control definition to establish that even such minimal ownership constitutes control.

A commenter suggested that we change the portion of the proposed definition of "ownership" regarding percentage of ownership to "more than 50 percent or controlling interest in the stock." In substance, this commenter believes that a controlling interest of less than 50 percent is sufficient to impute ownership.

We disagree. The final definition of ownership includes "possessing or controlling in excess of 50 percent of the voting securities or other instruments of ownership of an entity." A person must own or control greater than 50 percent of the instruments of ownership in order to fall within our definition of ownership. If a person is the greatest single owner, but owns less than 50 percent, that is an indicator of actual control under paragraph (5)(iii) of our definition of *control* or *controller*, but it does not constitute ownership under this final rule.

Several commenters suggested that we delete the last part of the proposed definition: "or having the right to use, enjoy, or transmit to others the rights granted under a permit." These commenters said that the phrase could "result in improper interpretations" by regulatory authorities. Alternatively, they agreed that it is unnecessary because it is clear that an owner possesses these rights. We agree with the latter comment. Therefore, we removed the phrase from the final definition of "*own, owner,* or *ownership*."

A commenter said that the proposed definition of ownership was "without any consistent context," and that, "[f]or the purposes of section 510(c), ownership means one thing—ownership of the mine operation." The commenter continued: "The definition here does not even reference [a] mine operation." Another commenter said: "[t]hese paragraphs do not specify 'owner or controller' of what: no operation is referred to in this section, only violations."

We disagree that the proposed definition was without consistent context. However, we modified the proposed definition of "ownership" for the sake of simplification. Our definitions of ownership and control are not restricted to the implementation of section 510(c); rather, as explained above, the definitions also relate to the permit application requirements of section 507 and its implementing regulations. As such, while the definitions are of obvious importance to our implementation of section 510(c), we see no particular reason to define ownership or control exclusively in terms of that one section of the Act. At the same time, our definition of ownership is fully consistent with section 510(c).

As explained in more detail in section VI.F. of this preamble, we disagree with the argument that ownership of an entity does not equate to ownership of that entity's surface coal mining operations. Indeed, this argument was advanced and rejected in *NMA* v. *DOI II*. Under this final rule, as well as our previous rules, if a parent company owns or controls a subsidiary, the parent company is also a *de facto* owner or controller of the subsidiary's operations. The commenter's statement that under section 510(c) ownership means ownership of the mine operation begs the question: What does "ownership" mean? We answered that question by adopting a definition of "*own, owner,* or *ownership*" in this final rule. We chose to define the term and apply it in a manner which encompasses both direct ownership and indirect ownership through intermediary entities.

Finally, a commenter suggested, in substance, that we add "may" to the definition of "ownership" to clarify that the proposed factors do not always constitute ownership. We decline to adopt this commenter's suggestion. Our final definition of "*own, owner,* or *ownership*" comprises only two specific circumstances, which always constitute ownership. If the predicate facts are true, then the person is an owner. As such, there is no need to add "may" to the definition.

Comments on the Proposed Definition of "Control"

Our final definition of control includes five categories of persons who are deemed to be controllers. Four of the five categories were proposed as examples of ownership or control; we

will address comments on the proposed examples in the relevant section below.

The one category that was not proposed as an example is paragraph (5) of the final control definition, which identifies as controllers those persons "having the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted." We modified and adopted this criterion from paragraph (b)(2) of the definition of control in proposed § 778.5. This provision is carried forward, in substance, from the "deemed" portion of our definition at previous § 773.5. In addition to the specific factors establishing control—*e.g.*, being a permittee, operator, etc.—it is important to retain a general category which allows regulatory authorities and the regulated industry to identify persons who have the ability to control a surface coal mining operation, regardless of their official title, label, or status. This will also allow regulatory authorities to consider specific facts pertaining to a relationship—such as the existence of personal relationships, informal agreements, and the mining histories of the parties in question—in determining whether control is present. In the absence of such a provision, persons could easily use creative titles or business arrangements to evade regulation.

Several commenters objected to the repeated use of the term "controller" in the proposed rule language. They said the use of the term "controller" is a new term or concept that represents an expansion of OSM's authority under section 510(c) of SMCRA, 30 U.S.C. 1260(c). Two of these commenters asked that we define "controller" in § 701.5 or stop using the term in the regulations. Other commenters noted that the proposed rule uses the terms "ownership" and "control" several times before defining them in § 778.5. Several of these commenters preferred that the term be eliminated but said that if it is used, it should only refer to an applicant.

We agree that "control" should be defined in § 701.5; for the reasons stated above we adopted this modification. Also, while the proposed definition of "control" encompassed the noun form of the word—"controller"—we modified the defined term to *control* or *controller* to remove any confusion. The modifications we adopted add to the clarity of the definition.

The term "controller," as used in the proposal and this final rule, is not a new term or concept. The statuses and relationships which constituted control and the examples of control in the proposed rule were largely imported from the valid portions of our previous regulations. This final rule carries forward many of the control concepts contained in the valid portions of our previous regulations and the proposal. Further, as previously noted, since "control" is not defined in the Act, it is important for us to define the term so that we may adequately implement section 510(c) and other sections of the Act. We also disagree that "controller" should be used to refer only to an applicant. Persons other than applicants routinely own or control mining operations. To arbitrarily restrict the definition only to applicants would circumvent the plain meaning and intent of the Act.

Various commenters said the proposed definition of "control" was inconsistently used, over-broad, ambiguous, and inherently contradictory. These commenters also said the proposed definition contradicted the proposed definition of "ownership," expanded the base for assignment of potential liabilities, and exceeded statutory authority. These and other commenters also suggest that the proposed definition was vague, and that the final definition should be clear and concise. One commenter said the vagueness of the proposal dooms its application as unlawful because it fails to provide fair notice of what is expected prior to any sanctions or deprivation of rights. Another commenter echoed the objection stating that because the proposed definition of "control" is vague, it could mean delays in permitting, as well as penalties and other sanctions, for failure to disclose all controllers in applications. The commenter said: "Before the applicant is subjected to this sanction, it should be afforded an ample and complete opportunity to understand, clearly and concisely, the types of entities and relationships that OSM expects to be disclosed when the applicant submits its application."

We disagree with these commenters. First, we are well within our statutory authority to define the terms ownership and control, which are not defined in the Act. Our final definition of "*control* or *controller*" is reasonable and fully consistent with section 510(c) of the Act, 30 U.S.C. 1260(c), as well as the two rulings of the D.C. Circuit in the *NMA* litigation. Second, as stated previously, the definition is logical, consistent, and well supported by our experience implementing SMCRA since its enactment in 1977. Also, this final rule substantially improves upon the proposal in terms of conciseness and clarity. We find nothing "inherently contradictory" about either the proposal or the final rule.

Also, this final rule does not expand "the base for assignment of potential liabilities," as the commenters assert. As we stress throughout this preamble, the ownership or control definitions and permit eligibility aspects of this rule do not purport to hold a person personally liable for another person's violations. Rather, the definitions of ownership or control are relevant to, among other things, the information submission requirements for applicants and permittees, the section 510(c) compliance review obligations of regulatory authorities, regulatory authorities' findings of ownership and control, and challenges to ownership or control listings or findings. Despite the view of some commenters, denial of a permit does not equate to personal liability. True, the ownership and control information we receive may assist us in initiating enforcement actions under SMCRA, but that is entirely consistent with and appropriate under the Act. Indeed, the *NMA* v. *DOI II* court expressly upheld our right to require submission of information "needed to ensure compliance with the Act." 177 F.3d at 9.

One of the commenters said the proposed definition of "control" is inconsistent with the way control information is used to determine permit eligibility. The commenter also asked whether a controller controls the operation as a whole, or just a part of an operation.

There is no precise correlation between the permit information disclosure requirements of the final rule and the section 510(c) permit eligibility determination required under final § 773.12. That is, the Act and our regulations require the submission of specific information, which the D.C. Circuit has ruled cannot form the basis of our permit eligibility determinations. For example, while we must still require certain information pertaining to persons who own or control the applicant, we may no longer routinely consider that information in the section 510(c) permit eligibility process. However, we have no authority to delete information disclosure requirements imposed by other sections of the Act. Furthermore, the information required by the Act and this final rule is pertinent to other statutory obligations beyond permit eligibility determinations, such as enforcement actions, including individual civil penalty assessments.

With regard to whether a controller controls the entire operation, or just a portion thereof, the answer is twofold.

For the most part, the persons identified in the deemed portion of the definition (paragraphs (1) through (5)), as well as the examples of control in paragraphs (5)(i) through (vi), will control the entire operation. However, we recognize that some persons will have control over a significant aspect of an operation, but not necessarily the entire operation. In light of this reality, and in response to several comments, we modified the proposal in key respects. As to the information submission requirements in final § 778.11(c)(5), we now allow applicants to identify the "portion or aspect of the surface coal mining operation" which their owners and controllers own or control. Further, in the final challenge procedures at §§ 773.25 through 773.28, we allow persons to challenge their alleged ownership or control "of an entire surface coal mining operation, or any portion or aspect thereof." These requirements and procedures will allow regulatory authorities to link the proper persons to violations, as intended by section 510(c), and allow persons to challenge an ownership or control listing or finding by demonstrating that they do not own or control a particular portion or aspect of the operation. In our view, this approach properly takes into account the reality of ownership and control relationships in the coal mining industry.

Another commenter said the central focus in identifying control relationships should remain "the capability of an entity to direct or affect the compliance status of the operations and activities of the nominal applicant, *i.e.*, to direct which reserves are to be mined, to design or control the manner of operation, to direct the flow of coal, etc." We agree that these are important factors in determining control; they are encompassed in paragraph (5) of the final definition of control.

A commenter noted that the proposed definition included those who "own, manage, or supervise" and asked if it is our "intent to require the listing of mine management personnel responsible for day-to-day operating decisions at a mine." The commenter said that "these are the people most often responsible for the causation and abatement of violations."

The final definition of "*control* or *controller*" does not include the phrase, "own, manage, or supervise." We also did not adopt the proposed example relating to persons who direct the day-to-day business of the surface coal mining operation. *See* proposed § 778.5(a)(2). If these persons are controllers, they will be covered under final paragraph (5) of the definition. We do not necessarily disagree with the commenter that mine management personnel are "the people most often responsible for the causation and abatement of violations." However, these persons may not always be controllers of a surface coal mining operation. Instead, the controllers may be the persons who direct mine management personnel. Nonetheless, depending on the size of a company, the number of operators and employees at a site, or the delegation of authority within a company, mine management or other personnel may in fact have the ability to determine the manner in which a surface coal mining operation is conducted. The initial onus is on the applicant to identify its owners or controllers, consistent with the final definitions. *See* final § 778.11(c)(5). Regulatory authorities then have the authority to identify owners or controllers who might not have been disclosed. *See* final § 774.11(f).

A commenter objected to what the commenter called an "ability to control standard." The commenter suggested that the standard should be actual control and not ability to control or influence. As explained above, we retained the "ability to control" concept at paragraph (5) of the final definition of "*control* or *controller*." In our view, it is the power or authority to control, and not the exercise of control, which is the primary determinant of "actual control." As previously explained, when we use the term "actual control" in this preamble, we are referring to both the exercise of control and the ability to control. The failure to exercise one's ability to control, when such control could be exercised, in order to prevent or to abate violations is of the same nature as an action causing a violation.

We also note that we removed the term "influence" from the definition of control. However, one of the examples of control refers to persons who contribute capital or other working resources and substantially influence the conduct of a surface coal mining operation. This example is discussed below.

The same commenter also said that the ability to control should be limited to the elements of an agency relationship "established between the applicant and other persons." We disagree that "control" should be so narrowly defined. The definition we adopt today includes relevant agents of an applicant or permittee and all other persons who can determine the manner in which a surface coal mining operation is conducted. Our definition is reasonable and consistent with section 510(c) of SMCRA, 30 U.S.C. 1260(c).

A commenter suggested, in substance, that we add "may" to the definition of "control" to clarify that the factors in the proposed definition do not always constitute control. As stated above, our final definition of "*control* or *controller*" consists of a series of statuses or relationships which *always* constitute control (paragraphs (1) through (5)), and a series of examples in paragraphs (5)(i) through (5)(vi) which *may* constitute control. Use of the word "may" is appropriate when referring to the examples of control in paragraph (5), but it would be inappropriate in the other portions of the definition, since the identified statuses and relationships will, and do, constitute control in all cases.

Comments on the Proposed Examples of (Ownership or) Control

The proposed rule provided examples of ownership or control. *See* proposed § 778.5(a). In this final rule, we modified the proposed examples and moved them to the definition of "*control* or *controller*" to emphasize that they are more properly viewed as examples of control, not ownership. The examples now pertain only to paragraph (5) of the definition, which refers to a "person having the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted." With respect to the conduct of surface coal mining operations, this criterion is the essence of "control." Thus, when we refer to "examples of control," we are referring to the examples enumerated in paragraphs (5)(i) through 5(vi) of the final control definition. The list of examples is not exhaustive; a regulatory authority retains flexibility to consider any and all facts or circumstances which may indicate that a control relationship exists.

General Comments on the Proposed Examples of Control

A commenter suggested that we adopt the first sentence in proposed paragraph (a): "This part applies to any person who engages in or carries out mining operations as an owner or controller," but not adopt any of the eight proposed examples. The commenter said we should eliminate the examples and, "in the spirit of primacy," leave it up to the regulatory authorities to determine who is an owner or controller. The commenter said the list of examples contains broad, vague, and potentially confusing definitions, and that "definitions for 'ownership' and

'control' at [proposed] § 778.5(b)(1) and (2) provide [regulatory authorities with] sufficient guidance."

We agree that the definitions of *"own, owner,* or *ownership"* and *"control* or *controller"* stand alone, but the examples are useful for both the regulated industry and regulatory authorities to consider in determining who may be controllers under paragraph (5) of the final definition of control. We derived the examples from our experience in implementing SMCRA since 1977 and from comments received on the proposed rule. We see no reason not to pass on the benefit of our experience, via the examples of control, to persons who have responsibilities under this final rule. We also note that regulatory authorities providing comments on the proposed examples of control did not raise concerns regarding State primacy.

A commenter said that OSM proposed eight categories of "conclusively deemed 'owners or controllers.'" The commenter argued that "no manager or supervisor other than the mine manager [should] be considered a controller." Finally, the commenter also asserted that requiring permittees to notify the regulatory authority under proposed § 774.13(e) each time there was a change in personnel or in the ownership or control structure would impose a significant burden.

As explained above, we clarified that the examples at paragraphs (5)(i) through (vi) of the final control definition do not conclusively establish control. In addition, we did not adopt proposed § 774.13(e), which would have required updates of certain information, including changes of officers and directors, under the requirements for permit revisions. Instead, we adopted a notification-only process in final § 774.12 that is not subject to the application, notice, and public participation requirements for permit revisions. We disagree with the commenter's assessment that only a mine manager should be considered a controller; other managers and supervisors may well be controllers, depending on their responsibilities and conduct. Neither do we agree that the mine manager is always a controller. The definition we adopt today reasonably identifies persons who control a surface coal mining operation.

The same commenter expressed concern regarding OSM's attempt to distinguish between employees of mining operations and those who engage in or carry out mining operations. The commenter said its own "participatory management style" has "'pushed down' responsibility for many activities, including reclamation and environmental compliance, to the lowest possible level."

A business entity is free to adopt any management model it desires. However, persons meeting the definition of ownership or control cannot escape their responsibilities under the Act simply because they choose unique management styles or "push down" their responsibilities to lower management levels. As explained above, the lower level employees to whom the commenter refers will not routinely be "controllers" under the regulatory definition. However, if these employees do in fact have the ability to determine the manner in which mining is conducted, then they have the authority and responsibility normally accorded to higher level managers. In such cases, they should be held accountable to exercise their authority and execute their responsibilities in ensuring that mining and reclamation are conducted in accordance with the requirements of the permit. However, the fact that subordinate employees may exercise control does not allow higher level managers, who have the ability to control those employees, to escape their status as controllers.

A commenter said that "the 'control' parameters exceed the scope of SMCRA and violate the spirit, if not the letter, of (*NMA* v. *DOI I*), by allowing OSM to expand 'ownership and control' beyond the plain meaning and common legal interpretation of those terms."

We disagree. We adopted limited and succinct definitions of *"control* or *controller"* and *"own, owner,* or *ownership,"* which are consistent with section 510(c) and other provisions of the Act. Also, neither the final definition of *"control* or *controller"* nor the supporting examples violates the D.C. Circuit's rulings in *NMA* v. *DOI I* or *NMA* v. *DOI II*. In *NMA* v. *DOI I*, the court did not invalidate the definition of ownership or control itself, just the application of the definition in the permit eligibility context. *NMA* v. *DOI I*, 105 F.3d at 694. The *NMA* v. *DOI II* court did rule specifically on our previous definition, but only in terms of our use of rebuttable presumptions. *NMA* v. *DOI II*, 177 F.3d at 5–7. In this final rule, we eliminated the use of rebuttable presumptions. Further, the court did not rule on any of the deemed categories of ownership or control, including paragraph (a)(3) of the definition at previous § 773.5, which defined ownership or control, among other things, as: "[h]aving any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations." We retained the substance of the previous (a)(3) category in paragraph (5) of the final definition of *"control* or *controller."*

A commenter said that the proposed rule: (1) Created newly defined persons and entities, (2) identified them as "owners" and "controllers" and (3) created "novel enforcement tools" that focus on the owners and controllers. The commenter also said OSM lacks the authority to extend the use of the terms "owner" and "controller" beyond section 510(c) of SMCRA, 30 U.S.C. 1260(c). We disagree. Neither the proposed rule, nor this final rule, creates newly defined persons or entities. Rather, we define *"own, owner,* or *ownership"* and *"control* or *controller"* in a manner which is fully consistent with section 510(c) of the Act (30 U.S.C. 1260(c)), the decisions of the D.C. Circuit in the *NMA* litigation, and fundamental tenets of corporate law. Also, we did not create "novel enforcement tools." The enforcement provisions we adopt today at final part 847 are derived from the plain language of, and are fully consistent with, the Act. Finally, we also disagree that "owner" and "controller" are terms that must be confined to section 510(c), 30 U.S.C. 1260(c). As the D.C. Circuit expressly held, SMCRA's information requirements at section 507(b), 30 U.S.C. 1257(b), "are not exhaustive," and OSM may require the submission of additional information "needed to ensure compliance with the Act." *NMA* v. *DOI II*, 177 F.3d at 9. Under this rationale, the court upheld our previous information disclosure requirements, which required applicants to disclose information—including ownership and control information—beyond the requirements expressly set out in section 507, 30 U.S.C. 1257; this final rule carries forward much of our previous information provisions. As explained elsewhere in this preamble, the ownership and control information we require applicants to submit pursuant to final § 778.11(c)(5), (d), and (e) is necessary to enforce both section 510(c), and other provisions of the Act.

Several commenters claim that the proposed rule disregards the corporate form to impose personal liability on officers, directors, and shareholders (including parent corporations) of a corporation. Several of these commenters cited the decision in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), in support of their contention.

We disagree. Nothing in the permit eligibility provisions of this rule or in section 510(c) of the Act renders a

person legally liable or responsible for another person's outstanding violations. A finding of ownership or control under section 510(c) and this rule *does not* require a person subject to the finding to abate any violations (though he or she may be directly liable for abatement under other provisions of the Act). The permit eligibility aspect of this rule is not a direct enforcement mechanism brought to bear against owners or controllers since the permit eligibility provisions, which rely on the definitions of "*own, owner, or ownership*" and "*control* or *controller*," cannot lead to an injunction or judgment against owners or controllers. They may, however, result in permit ineligibility pursuant to section 510(c)'s mandate that a permit "shall not be issued" if an operation owned or controlled by the applicant is currently in violation of the Act or other applicable laws. We also stress that owners or controllers may be subject to direct enforcement actions, as appropriate, under other provisions of the Act and our regulations.

United States v. *Bestfoods* assessed the standards to determine the financial liability of parent companies for the actions of their subsidiaries under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Unlike the provisions at issue in *Bestfoods*, our definition and the associated rules do not impose personal financial liability on officers, directors, or shareholders. It instead, determines when persons are eligible to receive permits under section 510(c) of SMCRA. Being ineligible to receive a permit based on ownership or control of operations with outstanding violations is not the same as being personally liable for the debts or wrongs of a corporation. As such, *Bestfoods* is simply not applicable to this rulemaking. Indeed, in *NMA* v. *DOI II*, which was decided *after* the decision in *Bestfoods*, the court upheld rules which allowed parent companies to be denied permits based on the violations of their subsidiaries. *NMA* v. *DOI II*, 177 F.3d at 4–5. The final rule adheres to this principle.

In a similar vein, two commenters said it is a misconception that persons who own or control a corporate permittee or operator thereby "engage in or carry out" the surface coal mining operations owned by that permittee or operator. In substance, these commenters believe that, under *Bestfoods*, ownership or control of an entity does not equate to ownership or control of the entity's operations.

Again, we disagree. This argument was presented and rejected in *NMA v. DOI II*, which was decided *after* the decision in *Bestfoods*. The court expressly upheld our previous regulations, which allowed for permit denials when an applicant indirectly owned or controlled "downstream" operations through ownership or control of "intermediary entities." As such, the court expressly endorsed rules which allowed for permit denials based on ownership or control of entities, rather than direct ownership or control of operations. *NMA* v. *DOI II*, 177 F.3d at 4–5. The final rule adheres to this principle.

A commenter said that "any suggestion that section 506 and section 510(c) together allow the agency to attribute the responsibilities of one who holds a permit (the "permittee") to anyone the agency deems as an owner or controller of mining operations is simply arbitrary." The permit eligibility aspects of this rule do not impose personal liability or responsibility on owners or controllers to abate or correct violations at operations they own or control, although they may be liable for abatement under other provisions of the Act and our implementing regulations. The preamble to this rule and the underlying proposed rule explain the rationale for each category of ownership and control.

A commenter asked the meaning of "engages in or carries out." The commenter said that the language of the proposed rule does not distinguish between employees and those "who OSM describes, under the amorphous phrase, as persons 'who engage in or carry out mining operations.'" In an effort to simplify and clarify our final ownership and control definitions, we are not adopting the phrase "engages in or carries out" in the final regulatory language. The final definitions identify those persons who must be disclosed in permit applications as owners or controllers of the applicant.

Another commenter said that the proposed examples capture people who do not engage in or carry out surface coal mining operations, and thus fall outside the jurisdictional reach of SMCRA. The commenter said our definition should focus on actual control. The definition we adopt today does focus on actual control, which includes both the ability to control and the exercise of control.

Elimination of the Rebuttable Presumption for Ownership or Control

Paragraph (b) of our prior definition of ownership or control listed six relationships which were "presumed to constitute ownership or control." 30 CFR 773.5 (1997). The presumption could have been rebutted if the person subject to the presumption could demonstrate that he/she in fact "does not have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted." *Id.* Once a regulatory authority made a *prima facie* showing that the presumption applied because the person fit into one of the enumerated categories, the burden shifted to the person to disprove that he or she was an owner or controller. Our rationale for shifting the burden rested on our belief that the person subject to the presumption was most likely to have access to the information regarding the nature of the relationship and thus should bear the burden of producing evidence demonstrating a lack of control.

In our 1998 proposed rule, we proposed to eliminate rebuttable presumptions from our ownership and control definitions. See 63 FR 70604 for an explanation of our rationale. After the proposal was published, the *NMA* v. *DOI II* court struck down two of the previous rule's presumptions pertaining to officers and directors and 10 through 50 percent owners of entities. This ruling provided further impetus to move forward with our proposed elimination of presumptions.

Our final rule emphasizes that applicants have the burden to identify all owners or controllers in a permit application (see final § 778.11(c)(5)), which must be accurate and complete before a permit can be issued. SMCRA section 510(b)(1), 30 U.S.C. 1257(b)(1); final 30 CFR §§ 778.9(b) and 777.15(a). Further, if we find that there has been a knowing withholding of information required under 30 CFR part 778, including ownership or control information, we will refer the evidence to the Attorney General for prosecution under final 30 CFR 847.11(a)(3) and section 518(g) of the Act, 30 U.S.C. 1268(g). *See also* final 30 CFR 773.9(d). Also, regulatory authorities have the ability to later identify owners or controllers who were not disclosed in the permit application. The proposed provisions, taken together, will ensure that all owners and controllers are properly identified.

A commenter opposed eliminating the rebuttable presumptions, noting that rebuttable presumptions are an evidentiary tool used to shift the burden of producing information to the individual or individuals most likely to have access to information. The commenter also said OSM had not sufficiently justified eliminating the presumptions "since the underlying questions of whether control exists or

not, and whether ownership exists or not, will still be required to be adjudicated." According to the commenter, the absence of presumptions of ownership or control would increase the burden on the agency to demonstrate the existence of the relationship. The commenter stated that the permit applicant should bear that responsibility under section 507(b) of the Act.

Consistent with the commenter's observation that persons subject to our previous presumptions were most likely to have access to pertinent information, applicants are also most likely to possess the knowledge and information necessary to determine their owners and controllers. Thus, this rule requires applicants to identify all owners and controllers and list them in the permit application. As explained above, the information submitted by applicants must be accurate and complete. If applicants properly identify all owners and controllers in a permit application, there is no additional burden on regulatory authorities. However, if an applicant fails to disclose an owner or controller, and a regulatory authority attempts to identify an owner or controller under final § 774.11(f), the regulatory authority will appropriately bear the initial burden of establishing the existence of the ownership or control relationship. The rule does not alter the burdens and responsibilities that section 507 of the Act assigns to permit applicants.

Another commenter stated that we should not eliminate the two presumptions that were not challenged by the National Mining Association, or the two presumptions on which we prevailed. The commenter suggested that as to the two presumptions which were invalidated, the court of appeals did not preclude regulatory authorities from making a finding that a 10 through 50 percent shareholder, officer, or director in fact owns or controls a violating entity.

The commenter presented no new arguments in favor of retaining the presumptions. Therefore, for the reasons set forth in the preamble to the proposed rule, the final rule does not include presumptions. However, we agree with the commenter that the court of appeals did not preclude regulatory authorities from making findings of fact with regard to persons covered by the invalidated presumptions. Nothing in the final rule precludes regulatory authorities from doing so. We also added final § 774.11(f) to allow regulatory authorities to make findings of ownership or control if the applicant fails to disclose all required ownership or control information in its application, or to update the information as necessary.

Proposed § 778.5(a)

Proposed § 778.5(a) stated that "this part applies to any person who engages in or carries out mining operations as an owner or controller," and provided examples of owners or controllers to support the definitions of "ownership" and "control" at proposed § 778.5(b). Several commenters said that we should clarify that the persons identified in the examples "are not automatically considered owners and controllers." We agree. As explained above, this final rule clarifies that the categories at paragraphs (5)(i) through (vi) of the final definition of "*control* or *controller*" are merely examples of those persons who could have control, they are not deemed categories of control.

Proposed § 778.5(a)(1)—Officers, Directors, and Agents

Our first example of owners or controllers was "the president, other officers, directors, agents or persons performing functions similar to a director." We retained the substance of this provision as an example of control at paragraph (5)(i) of our final definition of "*control* or *controller*." While we anticipate that the president of a business entity will almost always control the entity, a president will not necessarily do so in every instance. Therefore, we included presidents as an example of persons who may control an entity rather than classify presidents as "deemed" controllers.

Two commenters said that our statement in the preamble to the proposed rule that we do not intend for all employees to be identified in a permit application is inconsistent with our proposal "to define 'owner or controller' to include agents" and our "acknowledg[ment] that all employees are 'agents.'" According to the commenters, if agents are owners or controllers, and if all employees are agents, then the proposal would have required all employees to be identified in the application as owners or controllers. These commenters also said that "the class of employees who actually engage in mining operations would include the very employees with the least ability to control the permittee's decisions concerning mining operations: equipment operators, pumpers, truck drivers, drillers, etc."

We did not intend for every employee to be identified in an application. The final definition of "*control* or *controller*" lists agents are an example of persons who *may* have actual control. This rule does not require all agents or employees to be disclosed in a permit application, only those agents and employees who meet our final definition. As a general matter, our final definition does not encompass the specific employees identified by the commenters—"equipment operators, pumpers, truck drivers, drillers, etc."—since these individuals typically do not have the ability to determine the manner in which a surface coal mining operation is conducted. Rather, these employees are typically under the supervision of, or take orders from, management personnel who do possess the ability to control the operation. However, should the responsibilities, duties, or actions of these employees meet the definition of "*control* or *controller*," then they must be disclosed as, or may be found to be, controllers under final §§ 778.11(c)(5) and 774.11(f), respectively.

A commenter asked for an explanation of the phrase "functions similar to a director." A corporate board of directors controls and manages the business affairs of the corporation in accordance with applicable State law, articles of incorporation, and corporate by-laws. The board of directors has ultimate decision-making authority with respect to significant corporate matters. The will of the board is usually manifested by a majority vote of the directors. A person, such as a director, cannot escape being a controller under this final rule by asserting that he or she is a member of a group, *e.g.*, a board of directors, and can only exercise authority collectively with the group. At final paragraph (5), we clarify that a controller is a person who has the ability, *alone or in concert with others*, to determine the manner in which a surface coal mining operation is conducted. Thus, if a director votes with the majority of the board, we cannot foresee an instance in which that director is not a controller of that particular aspect of the corporation's operations. However, a director who dissents with regard to a particular course of action—or can otherwise prove that he or she took meaningful actions to prevent or abate a violation—likely is not a controller as to that aspect of the operation.

The phrase "functions similar to a director," which we borrow from section 507(b)(4) of the Act, 30 U.S.C. 1257(b)(4), clarifies that a person may have the functional power, but not the official title, of a director. In essence, a person who, alone in or concert with others, exercises final managerial control or authority over the affairs of a business entity—be it a corporation or

other entity—performs a function similar to a director.

Proposed § 778.5(a)(2)—Day-to-Day Activities

Our second example pertained to those "persons who have the ability to direct the day-to-day business of the surface coal mining operation." We are not adopting this example because it is subsumed within final paragraph (5) of the control definition.

Proposed § 778.5(a)(3)—Permittees and Operators

Our third example encompassed permittees and operators. We decided to include permittees and operators in the deemed portion of the final control definition at paragraphs (1) and (2), respectively. There is no time when a permittee does not control its entire surface coal mining and reclamation operation. In addition, experience has demonstrated that there is no time when an operator does not control its own conduct on a surface coal mining and reclamation operation. However, we recognize that non-permittee operators will not necessarily control the entire operation. The final challenge procedures at §§ 773.25 through 773.28 allow persons, including operators who are listed as or found to be controllers, to challenge their alleged ownership or control "of an entire surface coal mining operation, or any portion or aspect thereof." There were no specific comments on the proposed third example.

Proposed § 778.5(a)(4)—Partnerships and Limited Liability Companies

Our fourth example pertained to "[p]artners in a partnership, the general partner in a limited partnership, or the participants, members, or managers of a limited liability company." Based in part on guidance from the D.C. Circuit in *NMA* v. *DOI II*, we moved the general partner in a partnership criterion to the deemed portion of the control definition at final paragraph (3). We retained the remainder of the proposed provision as an example of control at final paragraph (5)(ii).

With regard to our previous definition identifying general partners in a partnership as presumptive owners or controllers, the D.C. Circuit stated: "As for subsection (4)'s presumption that control vests in each general partner, it naturally flows from 'the tenet of partnership law that a general partner has control of partnership affairs as against the outside world.'" *NMA* v. *DOI II*, 177 F.3d at 7 (citations omitted). While the court was ruling in terms of a presumption of control, and not a category of deemed control, the court's statement clearly supports our inclusion of general partners of a partnership in the deemed portion of our control definition. Our experience in administering SMCRA also bears out this reality.

On the other hand, partners in a partnership and participants, members, or managers of a limited liability corporation will not always control the business entity, though they certainly might. Therefore, we included these persons as examples of potential controllers in paragraph (5)(ii) of the final definition.

A commenter said limited liability companies should not be treated in the same manner as limited partnerships, since, unlike limited partners, the individuals in a limited liability company do not retain the capability to make decisions. The commenter also said OSM should "re-evaluate the historic policy of allowing new permits to be issued based only on the evaluation of the general partner in a partnership." Another commenter suggested that members of a limited liability company are often passive investors who "have little to do with the functional operation of any company, let alone a mining company" and "know little or nothing about the mining industry, let alone having any control over an operation."

The final rule defines owners or controllers of business entities or mining operations without any regard to the particular form of the business entity. Hence, we treat partners in a partnership and members of a limited liability company similarly to the extent that we include them as examples of persons who may control an entity. Under paragraph (5) of our final definition, control determinations rest upon a person's ability to determine the manner in which a surface coal mining operation is conducted, not the type of business entity or the person's title. It is incorrect to say that OSM's "historic policy" included only an examination of general partners in a partnership. While not specifically mentioned in a deemed or presumed category of ownership or control, regulatory authorities certainly had flexibility to determine whether other persons had authority to determine the manner in which a surface coal mining operation was conducted. *See* previous § 773.5, at paragraph (a)(3) of the ownership or control definition. Finally, we do not fully agree with the commenter's generalization that the members, managers, or participants in limited liability companies are merely passive investors with little involvement with a company's operations and little or no knowledge of the mining industry. If that statement is true in a given instance, then the person is highly unlikely to be a controller under our definition any way.

Proposed § 778.5(a)(5)—Contract Mining

Our fifth example pertained to "persons owning the coal (through lease, assignment, or other agreement) and retaining the right to receive or direct delivery of the coal." We retained the substance of this provision as an example at paragraph (5)(v) of the final control definition. Under the final rule, persons who own or control the coal to be mined by another person through lease, assignment, or other agreement and have the right to receive or direct delivery of the coal after mining are potential controllers. The circumstance described in this example is generally referred to as "contract mining," wherein an entity (generally referred to as a "contract miner" or "captive contractor") obtains a SMCRA permit in its own name, mines the coal belonging to another person (the owner or lessor), and must deliver the mined coal to that person or pursuant to that person's directions. The obligation to deliver the coal to the owner/lessor is often referred to as a "captive coal supply contract." Generally, persons who have the ability to control contract miners are controllers who should be barred from receiving new permits under section 510(c) of the Act, 30 U.S.C. 1260(c), if they fail to prevent or correct violations. Further, most coal lessors who retain the right to receive the mined coal will be controllers because they have typically chosen to structure their relationship with an operator so as to retain the ability to control the mining operation.

Several judicial and administrative decisions support our inclusion of the contract mining example. For example, in *United States* v. *Rapoca Energy Co.*, 613 F. Supp. 1161 (1985) ("*Rapoca*"), OSM sued under section 402(a) of the Act, 30 U.S.C. 1232(a), to collect reclamation fees from the Rapoca Energy Company, which had contracted with others to mine the coal it owned. The issue was "whether a large coal company that contracts with independent companies to produce coal that it owns or leases is an 'operator' responsible for the payment of [such] fees." *Id.* at 1163. Finding that Rapoca was liable for payment of the fees, the court stated:

> Because of the degree of control which Rapoca Energy Company exerts over the mining companies with respect to crucial aspects of the mining process, along with the

corresponding lack of freedom regarding the mining companies ability to sell to anyone other than Rapoca, this court must conclude that the "independent contractors" are no more than Rapoca's agents.

Id. at 1164.

Similarly, in *S & M Coal Co. and Jewell Smokeless Coal Co.* v. *Office of Surface Mining Reclamation and Enforcement*, 79 IBLA 350 (1984) ("*S & M Coal*"), the Department of the Interior's Office of Hearings and Appeals ("OHA") held a lessor of coal liable for violations at a mining site even though the coal produced at that site was mined by another party pursuant to an oral contract. In reaching its decision, OHA noted that the lessor's employees took an active part in the planning and engineering functions in support of the mining operations. OHA also held that while the amount of control actually exercised is indicative of the relationship between the owner of the coal and the company or individual extracting the coal, the determination regarding exercise of control should not solely be based on past exercise of control and that it is important to determine the extent that a party can exercise control.

Several commenters said that the example should be deleted because it is "unfair and discriminates against a coal company simply because it owns minerals, leases them, and happens to be in the business of selling coal." These and other commenters said, in substance, that retaining a right of first refusal to purchase coal from a third party, in an arm's length transaction, is not sufficient to establish control. Another commenter supported the example, agreeing that entities with an economic interest in the coal should be considered controllers to the extent that the entity does or can exercise control over, or derive benefits from, the mining operation.

We did not delete the contract mining example. Because owners or lessors of coal are not always "controllers" of contract mining operations, we included contract mining as an example of control in paragraph (5)(v) of the definition, rather than incorporating it into the deemed portion of the final definition of "control or controller." However, when an owner or lessor of coal controls salient features of an operation performed by a contractor, a determination of control over the coal mining operation is justified and should be established. Our extensive experience evaluating and analyzing contract mining arrangements supports a conclusion that leasing coal combined with the right to receive or direct delivery of the coal generally establishes control. As to rights of first refusal, we agree that retaining such a right, in an arm's length transaction based on market conditions, will not, in and of itself, always establish control. However, a regulatory authority certainly has the authority to examine the particular circumstances to ascertain whether there are other indicators of control.

Another commenter said that:

rights sold to mining companies specifically describe the rights of each party. It's exceedingly presumptuous to state that those who happen to own the coal also have control over compliance with regulations when the coal is mined. Those rights generally stay with the entity mining the coal.

We disagree. The terms of a contract may establish the rights of the parties among themselves, but these terms are not a conclusive determination of the responsibilities of the parties under SMCRA. A contract in which an owner or lessor of coal purports to contract away the obligation to comply with SMCRA does not mean that the owner or lessor is not a controller under section 510(c) of the Act, 30 U.S.C. 1260(c). Again, what is relevant under this rule is whether the owner or lessor has the ability to determine the manner in which a surface coal mining operation is conducted.

Proposed § 778.5(a)(6)—Contribution of Capital or Other Resources

Our sixth example pertained to "[p]ersons who make the mining operations possible by contribution (to the permittee or operator) of capital or other resources necessary for mining to commence or for operations to continue at the site" We retained the substance of this provision as an example at paragraph (5)(vi) of our final definition of "control or controller." Under this final rule, persons who contribute 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 are potential controllers. We agree with commenters who suggested that influence is not equivalent to control; however, contribution of capital or other resources, coupled with substantial influence over the manner in which the surface coal mining operation is conducted, may be tantamount to control.

Numerous commenters said that OSM should not "extend the 'ownership or controller' definition to utilities that have a captive coal supply contract." We deleted direct reference to captive coal supply contracts in this example. However, if a utility has a captive coal supply contract whereby it contributes capital to the operation, substantially influences the conduct of the operation, and can direct delivery of the coal, the utility is, in all likelihood, a controller under paragraph (5) of the final definition. That paragraph includes all persons and entities with the ability to control the manner in which the surface coal mining operation is conducted. A captive coal supply contract is typically indicative of a contract mining scenario, and may be covered under the contract mining example, which we discuss more fully above.

Numerous commenters said that OSM should not "extend the 'ownership or controller' definition to mining equipment rental and leasing companies." One asked if equipment dealers who provide credit in exchange for a security interest are controllers of the mining operation. Another said that equipment leasing is a valid arm's-length contract.

We adopted a subparagraph within the final example to clarify that providing mining equipment in exchange for the coal to be extracted is a factor which may indicate control. However, under paragraph (5)(vi)(A) of the final definition, equipment dealers who sell or lease equipment in arm's length transactions, but do not receive the mined coal, will not be routinely encompassed within the definition of "*control* or *controller*." To be classified as a controller, the person must have the ability to determine the manner in which the surface coal mining operation is conducted.

Three commenters said a family member or friend who provides a personal guarantee to obtain a reclamation bond should not be considered an owner or controller. Depending upon the circumstances of the guarantee, and the nature of the guarantor's relationship to the surface coal mining operation, a family member or friend may in fact be a controller. Again, the focus is on that person's ability to determine the manner in which the relevant surface coal mining operation is conducted.

Taking an opposing view, another commenter said that, in addition to personal guarantees to obtain a reclamation bond, the provision should also include "any type of guarantor on an indemnity agreement to get a reclamation bond." The commenter also said any person "or other entity who guarantees a bond should be listed under this provision." We decline to specifically add the language suggested by the commenter because persons who guarantee a bond generally do not have

the ability to determine the manner in which a surface coal mining operation is conducted. However, final paragraph (5)(vi) could encompass such persons, provided that they also substantially influence the conduct of the mining operation.

One commenter said this example should be deleted because none of the circumstances in the example "necessarily mean[s] that an entity can exercise control over the day-to-day operations at a mine site." We agree that the examples do not constitute *de facto* control. The persons identified in the examples will only be controllers if, in addition to meeting the criteria in the examples, they also have the ability to determine the conduct of the mining operation.

A commenter asked if banks, other lending institutions, third parties that have never been to the mine, construction companies who lease equipment, limited liability partners in a leasing company, and utilities that receive 100 percent of a mine's production are all controllers. The commenter expressed concern that if all these entities are controllers, they all would then be required "to submit signed, notarized certifications stating that they assume personal financial and criminal liability for a mine's transgressions." Other commenters said OSM should not "extend the 'ownership or controller' definition to banks or any other lending institutions or to some individual who makes an arm's-length loan to a coal operator without any other 'control'."

As to banks, lending institutions, and individuals who make arm's length loans, we revised the example in paragraph (5)(vi) of the final definition to include only these persons who contribute capital or other working resources under conditions that allow that person to substantially influence the manner in which the mining operation is conducted. Therefore, the mere act of lending money will not render a person a controller. Our previous discussion of other comments addresses the other scenarios posited by the commenters. Neither the proposed rule nor this final rule requires controllers to certify to personal financial or criminal liability.

Proposed § 778.5(a)(7)—Persons Who Can Commit Financial or Real Property Assets

Our seventh example pertained to persons "who control the cash flow or can cause the financial or real property assets of a corporate permittee or operator to be employed in the mining operation or distributed to creditors." We retained the substance of this provision and, based in part on guidance from the D.C. Circuit in *NMA* v. *DOI II*, moved it to the deemed portion of the definition of "*control* or *controller*" at paragraph (4). Final paragraph (4) includes as controllers persons having the ability to, directly or indirectly, commit the financial or real property assets or working resources of an applicant, permittee, or operator. This language largely mirrors one of our previous rebuttable presumptions of control. With regard to that presumption, the D.C. Circuit said:

> There is nothing strained about section (3)'s presumption that one "[h]aving the ability to commit the financial or real property assets or working resources of an entity" controls it. The ability to control assets goes hand-in-hand with control and is typically entrusted, along with general managerial authority, to a single officer, often the president.

NMA v. *DOI II*, 177 F.3d at 7 (citations omitted). While the court was ruling in terms of a presumption of control, and not a category of deemed control, the court's statement clearly supports our decision to include these persons in the deemed portion of our final control definition. Our experience in administering SMCRA also supports this action.

One commenter said the proposed example was vague. We disagree. The language in this final rule closely resembles and is consistent with the provision upheld by the D.C. Circuit, which found "nothing strained" about that provision.

A commenter asked if, under the proposed example, the following persons are "controllers": chief accountant; payroll clerk; customers, by virtue of paying their bills; coal company customers; a bankruptcy court "authorized to disperse the assets of a company"; or a land agent who secures leases. As previously discussed, under paragraph (5)(vi) of the final definition, none of the listed persons would be considered controllers unless they have the ability to determine the manner in which a surface coal mining operation is conducted. The relevant inquiry is whether the person in question has the ability to commit the assets of a business entity in furtherance of the mining operation.

Proposed § 778.5(a)(8)

Our final proposed example pertained to "[p]ersons who cause operations to be conducted in anticipation of their desires or who are the animating force behind the conduct of operations." We received many comments that said proposed § 778.5(a)(8) was "difficult to understand and would be difficult to implement." We did not adopt this example because the concepts that we intended to convey in the proposed example are adequately captured in paragraph (5) of the final definition of "*control* or *controller*."

Final Paragraphs (5)(iii) and (5)(iv)—10 Through 50 Percent Ownership, Interlocking Directorates and Commonality of Officers

As explained above, we added two examples of control to this final rule. We addressed the first of these examples—10 through 50 percent ownership of an entity—in our responses to comments on our proposed definition of ownership. We added the second example—"an entity with officers or directors in common with another entity, depending upon the extent of overlap"—since interlocking directorates and commonality of officers tend to indicate that a control relationship may exist between two entities. However, as with our other examples, the mere existence of the factual scenario—*e.g.*, interlocking directorates—does not necessarily mean there is a control relationship. A person is not a controller under paragraph (5) of the final definition unless that person has the ability to determine the manner in which a surface coal mining operation is conducted.

"Federal Violation Notice" and "State Violation Notice"

We proposed to revise the definitions of *Federal violation notice* and *State violation notice*. Several commenters said *Federal violation notice* should specifically mean a Federal surface coal mining violation notice and that *State violation notice* should specifically mean a surface coal mining violation notice.

Upon further review, we determined that there is no need to define these terms. The definitions of "violation" and "violation notice" adopted in 30 CFR 701.5 of this final rule are sufficient. The commenters' concern is addressed in the context of the rules in which these terms are used. They include only violations in connection with a surface coal mining operation. Therefore, we are not adopting definitions for *Federal violation notice* or *State violation notice* and will remove these terms from our regulations.

Knowing or Knowingly

We proposed to replace the definition of *knowingly* in §§ 724.5 and 846.5 with a new definition of "*knowing* or *knowingly*" in 30 CFR 701.5. The final

definition of "*knowing* or *knowingly*" reflects the proposed rule, although we revised the text of the definition to read: "*knowing* or *knowingly*" means "that a person who authorized, ordered, or carried out an act or omission knew or had reason to know that the act or omission would result in either a violation or a failure to abate or correct a violation."

We revised the definition to ensure that its applicability would not be restricted to "violation, failure or refusal" as that term is defined in 30 CFR 701.5. We removed redundant language. In addition, we replaced the word "individual" with "person." The Act and our regulations define *person* in a manner that includes both individuals and business entities, as is appropriate in the context in which the Act and regulations employ this term. *See* 30 CFR 700.5 and SMCRA at section 701(19), 30 U.S.C. 1291(19).

Two commenters addressed the proposed definition. Both objected to the "knowing" standard being applied to "administrative" violations, violations which the commenters describe as those that do not cause environmental harm. One of the commenters observed that "knowingly" and "willfully" were originally associated with the issuance of individual civil penalties to the officers and directors of corporate entities.

The "knowing" standard appears in sections 518(e), 518(f), and 518(g) of the Act, 30 U.S.C. 1268(e), 1268(f), and 1268(g). There is nothing in any of these sections that would support a regulatory authority's use of this criterion to distinguish among violations when applying the "knowing" standard. Nor do we perceive the need to make such a distinction among violations of the Act and our regulations.

We agree that the "knowing" standard has been more visibly associated with individual civil penalties and corporate permittees. On February 8, 1988, at 53 FR 3664 *et seq.*, we adopted initial and permanent regulatory program provisions for individual civil penalties at 30 CFR parts 724 and 846. These regulations included definitions for "knowingly" and "willfully." However, the "knowing" standard is employed in sections 518(e) and (g) of the Act, 30 U.S.C. 1268(e) and (g), not just in the individual civil penalty provisions of section 518(f), 30 U.S.C. 1268(f). Hence, the final rule broadens the applicability of the "knowing" standard because the standard is not exclusive to an individual civil penalty that may be assessed under section 518(f) of the Act, 30 U.S.C. 1268(f).

Link To a Violation

We proposed to add a definition of *link to a violation* to § 701.5. After considering the comments on the proposed definition and upon further deliberation, we are not adopting the proposed definition because the term is too closely associated with a previously defined term, *ownership or control link*, and the previous concept of presumptive ownership or control. The final rule does not use the term "links" and it eliminates the concept of presumptions.

Outstanding Violation

We proposed to add a definition for *outstanding violation*. Commenters expressed confusion about the meaning of this term and questioned its consistency with section 510(c) of the Act, 30 U.S.C. 1260(c). Upon further deliberation, we are not adopting the definition in this rulemaking.

Instead, when expiration of an abatement or correction period has significance, we use the phrase, "violation that is unabated or uncorrected beyond its abatement or correction period." Under this final rule, the phrases "outstanding violation" and "unabated or uncorrected violations" are used interchangeably. The term "outstanding violation" means any violation that is unabated or uncorrected.

Successful Environmental Compliance

We proposed to add a definition of *successful environmental compliance*. However, we are not adopting the proposed rules that would have used this term. Since the term *successful environmental compliance* does not appear in the final rule, we are not adopting this proposed definition.

Successor in Interest

We proposed to revise the definition for *successor in interest*. A commenter said the term should be more thoroughly defined in terms of what is required in proposed § 774.17. Another commenter argued that, "[t]he proposed definition fails to capture the language or the intent of the term used in the Act and the Congressional Record." The same commenter also said the definition alters the expressed intent of the Congress that there should be a brief but reasonable opportunity for a successor to continue the active mining operation while becoming the permittee.

After considering the comments on our proposed revision of § 774.17, we decided that transfer, assignment, or sale of permit rights and successor in interest issues require further study. As a result, we are not adopting either the proposed changes to those provisions, or the proposed revision of the definition of *successor in interest*.

Violation and Violation Notice

We proposed to revise the definition of *violation notice*. The proposed revision included a notice of bond forfeiture when the cost of reclamation exceeded the amount forfeited, or in States with bond pools, a determination that additional reclamation or reimbursement is required.

After considering the comments we received and the changes we made to other provisions of the proposed rule, we decided to adopt definitions of both *violation* and *violation notice*. We moved most elements of our previous and proposed definitions of *violation notice* to the new definition of *violation*.

In this final rule, we redefine *violation notice* to mean "any written notification from a regulatory authority or other governmental entity, as specified in the definition of *violation* in this section."

The final rule defines *violation* as that term is used in the context of the permit application information or permit eligibility requirements of sections 507 and 510(c) of the Act, 30 U.S.C. 1257 and 1260(c), and related regulations. The definition specifies that the term *violation* includes: (1) A failure to comply with an applicable provision of a Federal or State law or regulation pertaining to air or water environmental protection, as evidenced by a written notification from a governmental entity to the responsible person, and (2) a noncompliance for which OSM or a State regulatory authority has provided one or more of the following types of notices: (i) A notice of violation under 30 CFR 843.12; (ii) a cessation order under 30 CFR 843.11; (iii) a final order, bill, or demand letter pertaining to a delinquent civil penalty assessed under 30 CFR part 845 or 846; (iv) a bill or demand letter pertaining to delinquent reclamation fees owed under 30 CFR part 870; or (v) a notice of bond forfeiture under 30 CFR 800.50 when (A) one or more violations upon which the forfeiture was based have not been abated or corrected; (B) the amount forfeited and collected is insufficient for full reclamation under 30 CFR 800.50(d)(1), the regulatory authority orders reimbursement of the additional reclamation costs, and the person has not complied with the reimbursement order; or (C) the site is covered by an alternative bonding system approved under 30 CFR 800.11(e), that system requires reimbursement of any reclamation costs incurred by the system above those covered by any site-

specific bond, and the person has not complied with the reimbursement requirement or paid any associated penalties.

With respect to notices of bond forfeiture, we recognize that the violation review criteria in the preamble to the previous rule at 54 FR 18440–41, (April 28, 1989) states that OSM and most States would only consider the first situation to be a violation notice. That is, there would have to be an unabated or uncorrected violation underlying a bond forfeiture before a notice of bond forfeiture could be considered a violation or a violation notice. However, the two new conditions under which a notice of bond forfeiture will be considered a violation or violation notice are appropriate because each of these situations involves (1) a failure to comply with requirements of the Act or regulatory program, and (2) a separate notification to the person who forfeited the bond or defaulted on the reclamation obligations.

Several commenters suggested that references to bond forfeitures, State bond pools, and cost of reclamation should be removed from the examples. For the reasons discussed above, we do not find adopting this suggestion to be appropriate. We revised these portions of the definition for clarity.

A commenter said the definition should include permit revocation orders and bond forfeiture notices in situations in which someone other than the permittee or its controllers ultimately abates or corrects the violation. The commenter said that abatement by a third party should not clear those responsible for the violation.

We agree only to the extent that an unabated or uncorrected violation (including unpaid fees or penalties) still exists or that a person has failed to comply with a cost reimbursement order from a regulatory authority. In terms of permit eligibility under section 510(c) of the Act, 30 U.S.C. 1260(c), the critical element is whether some type of violation remains unabated or uncorrected. In this context, the Act provides no basis for making distinctions based on the party completing the reclamation or abating or correcting the violation.

A commenter said that including bond forfeitures in the proposed definition of *violation notice* blurs what constitutes a notice of violation. For the reasons discussed above, we do not agree.

Another commenter argued that "if there is an unanticipated change in circumstances, no 'violation' is involved until there has been a refusal or failure to comply with the notice." We disagree. The Act does not make the distinction that the commenter advocates. Furthermore, except for remining operations under section 510(e), the Act's permit eligibility requirements do not distinguish between violations resulting from unanticipated changes in circumstances and violations resulting from other situations.

Several commenters said the proposed definition of *violation notice* was too broad, and that orders, bills or demand letters for penalties and notices of bond forfeiture are already defined and have sanctions for failure to abate. We revised the definition to add more specificity and to restrict SMCRA-related violations to the circumstances under which a person receives the types of notice listed in the second paragraph of the definition.

One commenter agreed that the definition should not include bills or demand letters for delinquent reclamation fees. The commenter stated that OSM sometimes issues these bills and letters in error and that the Act does not mandate that we classify delinquencies as violations. Delinquent payment of reclamation fees is a statutory violation under section 402 of the Act, 30 U.S.C. 1232. Timely payment of reclamation fees and the penalty for delinquent payment is provided for under section 402(e) of the Act, 30 U.S.C. 1232(e). In addition, 30 CFR 773.17(g) establishes payment of reclamation fees owed under 30 CFR part 870 as a condition of permit issuance. We see no reason to treat this type of violation in a manner that differs from the treatment afforded to other violations.

A commenter also said that including unliquidated debt as a "violation notice" without requiring a notice of violation "blurs State obligations and raises potential due process claims regarding notice of the remaining debt and opportunity-to-defend, that are better left avoided." As discussed at length in the preamble to the previous definition of "violation notice" published on October 28, 1994 (59 FR 54352), we disagree. No due process issues are raised in the definition of *violation* or *violation notice*. Everyone who receives one of the notifications listed in the definition of *violation* has the opportunity to take action to seek administrative or judicial review of the violation at that time.

This final rule demonstrates our enhanced emphasis on accurate and complete information. However, the final definition of *violation* does not include the failure to provide accurate and complete information, as originally proposed. We address this problem in other ways. For example, we will not grant a permit to an applicant who fails to provide accurate and complete information in an application. The applicant also may be subject to alternative enforcement action under section 518(g) of the Act, 30 U.S.C. 1268(g). In addition, when we discover a failure of this nature after a permit is issued, we may issue a notice of violation or, as appropriate, initiate other actions that may ultimately result in permit suspension or rescission.

Violation, Failure or Refusal

We originally proposed to retain the existing definition of *violation, failure or refusal* in § 846.5. We received no comments on this proposal.

In this final rule, for organizational reasons, we are moving the definition of *violation, failure or refusal* from §§ 724.5 and 846.5 to § 701.5 to consolidate our definitions. We are revising the language of the definition to confine its applicability to parts 724 and 846, as it is in the existing rules. We are also making a few non-substantive changes in wording to improve syntax and clarity and to remove redundant verbiage.

Willful or Willfully

We proposed to replace the definition of *willful* in §§ 724.5 and 846.5 with a similarly worded definition of "*willful* or *willfully*" in 30 CFR 701.5. The final rule reflects the proposed rule, with the changes discussed below. We are defining "*willful* or *willfully*" to mean "that a person who authorized, ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation acted: (1) intentionally, voluntarily, or consciously; and (2) with intentional disregard or plain indifference to legal requirements."

We revised the text of the definition for clarity and consistency with the term's broader applicability under the proposed and final rules. Most significantly, we replaced the phrase "a violation of the Act, or a failure or refusal to comply with the Act," which could have been interpreted as limiting the scope of the definition to a violation, failure or refusal, as that term is defined in 30 CFR 701.5, with the phrase, "a violation or the failure to abate or correct a violation." In addition, we replaced the word "individual" with "person." The Act and our regulations define *person* in a manner that includes both individuals and business entities, as is appropriate in the context in which the Act and regulations employ this

term. See 30 CFR 700.5 and section 701(19) of SMCRA, 30 U.S.C. 1291(19).

Several commenters said that the definition should recognize but not apply to "administrative" violations, which, the commenters said, do not cause environmental harm. One said administrative violations must not be considered "willful" when determining a pattern of violations.

The "willful" standard appears in sections 510(c), 518(e), 518(f), and 521(a)(4) of the Act; 30 U.S.C. 1260(c), 1268(e), 1268(f), and 1271(a)(4). There is nothing in any of these sections that would support a regulatory authority's use of this criterion to distinguish among violations when applying the "willful" standard. Nor do we perceive the need to make such a distinction among violations of the Act and our regulations.

A commenter objected to the phrase "or any Federal or State law or regulation applicable to surface coal mining operations" in the proposed rule. In this final rule, we replaced the phrase "or any Federal or State law or regulation applicable to surface coal mining operations" with language that refers to a violation or the failure to abate or correct a violation. The context in which the term is used will determine the meaning of "violation" and the scope of the definition.

The same commenter further asserted that the proposed definition is inconsistent with section 518 of SMCRA, 30 U.S.C. 1268, which, according to the commenter, does not encompass every failure or refusal to comply with the Act or any Federal or State law or regulation applicable to surface coal mining operations. We do not agree with the commenter's characterization of the scope of section 518 of the Act. Furthermore, as discussed above, the Act also uses this term in sections 510(c) and 521(a)(4), 30 U.S.C. 1260(c) and 1271(a)(4). Section 510(c), specifically includes State violations.

Willful Violation

We proposed to remove the definition of *willful violation* from §§ 701.5 and 843.5.

A commenter argued that removing "willful violation" would "improperly merge" "willfully" and "willful violation," which are distinct terms that the Act uses in different contexts. According to the commenter, the "willful" in "willful violation" in section 510(c) of the Act, 30 U.S.C. 1260(c), means that a person "intends the result that actually occurs."

We agree that context establishes meaning. However, we disagree that either term is used in a unique manner under SMCRA. As we stated above in the discussion of *willful* or *willfully*, the "willful" standard is employed four times in SMCRA, including section 510(c), 30 U.S.C. 1260(c). The previous definition of "willful violation" is inconsistent with how "willful" is used in sections 518 and 521 of SMCRA, 30 U.S.C. 1268 and 1271. The phrase "willful violation" appears only in section 510(c), where it is one criterion for permanent permit ineligibility.

In section 510(c), "willful" modifies "violation" in the same manner that "demonstrated" modifies "pattern" and "irreparable" modifies "damage." The violations that would result in a finding of permanent permit ineligibility are not simply violations, they are willful violations. The type of pattern that must be determined is a demonstrated pattern. The damage that must result from the demonstrated pattern of willful violations must be irreparable damage.

We conclude that the previously defined term is now unnecessary. The new definition of "*willful* or *willfully*" includes an element of intent. There is no need to find that a person "intends the result that actually occurs." Therefore, we are removing *willful violation* from §§ 701.5 and 843.5.

B. Section 724.5—Definitions

In this final rule, § 724.5 is removed from our regulations.

We proposed to replace the definitions of *knowingly* and *willfully* in § 724.5 with the definitions of "*knowing* or *knowingly*" and "*willful* or *willfully*" in 30 CFR 701.5. A commenter asked if the change was proposed because of unresolved bond forfeitures under the initial regulatory program. Our proposal had nothing to do with unresolved bond forfeitures. (The initial regulatory program did not require any bonds.) Instead, it arose from a desire to consolidate our definitions in § 701.5 to the extent possible.

The final rule replaces *knowingly* with "*knowing* or *knowingly*" and *willfully* with "*willful* or *willfully*." As proposed, we are placing the final definitions in § 701.5 after them in § 724.5. In this final rule, we are also moving the definition of *violation, failure or refusal* previously in § 724.5 to § 701.5. The net result of these changes is that § 724.5 is removed from our regulations.

C. Section 773.5—Definitions

We proposed to either move or remove the definitions from previous § 773.5 and remove this section from our regulations. There were no comments on our proposal, which we adopted in revised form in this final rule.

We adopted certain definitions from previous § 773.5 in revised form at § 701.5 while removing the definitions of *ownership or control link, Federal violation notice*, and *State violation notice*. Section 773.5 remains a part of our regulations since we redesignated previous § 773.12 as § 773.5

D. Section 773.10—Information Collection

In this final rule, the provision we adopted from proposed § 773.10 is found at § 773.3.

We proposed to revise the information collection burden for part 773. We reorganized part 773. As a result, previous § 773.10 is redesignated new § 773.3. Final § 773.3 contains the information collection requirements for part 773 and the Office of Management and Budget (OMB) clearance number.

In this final rule, § 773.3(a) is revised to show that the new OMB clearance number for this part is 1029–0115. Section 773.3(b) is revised to adjust the estimated public reporting burden from 34 hours to 36 hours. The estimate represents the average response time. For unchanged provisions in the regulations, our revised estimates are based on updated estimates developed in May 2000 using more current information.

Summary of Comments and Adjustments to Burden Estimates

We considered information from the individuals who commented on information collection aspects of the proposed rule. In general, commenters stated that the estimated information collection burden related to the proposed rule was too low. Commenters generally did not mention any specific rule change which was underestimated or any specific number of hours that would alter the OSM estimate.

A commenter stated that the burden hours for part 773 should be 50, instead of 34 hours. To reduce information requirements, we are not adopting some of the proposed changes in this final. We also increased estimates of burden hours for the remaining requirements.

A commenter stated that the time burden in § 773.10 differed from what was proposed in parts 774 and 778 and requested information on how these numbers were derived and a clarification of average reporting burden.

We receive approval from the OMB to collect information based on each "part" in the Code of Federal Regulations (CFR). There is a different burden associated with responding to

each part in the CFR since each requires different types of information from respondents (citizens, coal companies, State and Indian regulatory authorities). We also request approval from OMB based on the *average* burden hours per respondent, not the total burden. The total hours divided by the number of potential respondents equals the average burden hour estimate per respondent. For further information regarding our compliance with the Paperwork Reduction Act and OSM's information collection calculations, please contact OSM's Information Collection Clearance Officer identified under §§ 773.3(b), 774.9(b), and 778.8(b).

A commenter suggested that OSM lacked authority under SMCRA to collect much of the information required in the proposed rule. Our response to this comment relies on the decision in *NMA* v. *DOI II*. The court spoke directly on this issue saying that the information requirements contained in SMCRA are not exhaustive. So as long as the information required under our regulations is necessary to implement the Act, we are justified in requiring it. As explained elsewhere in this preamble, all of the information we obtain under this final rule is indeed necessary to enforce the Act.

Lastly, some commenters continue to assume that because OSM continues to require certain information, it will necessarily use that information to make permit eligibility determinations on surface coal mining permit applications. The commenters said this would be inconsistent with the court decision.

While we cannot use all of the information we obtain under this rule to make permit eligibility determinations under section 510(c) of the Act, 30 U.S.C. 1260(c), we are expressly required to obtain some of the information under section 507 of the Act, 30 U.S.C. 1257. Other information we obtain is necessary to enforce other aspects of the Act. The information we require will allow us and regulatory authorities to implement the purposes of the Act, including permitting, compliance, and enforcement provisions. As we have said, this is consistent with the decision in *NMA* v. *DOI II*.

E. Section 773.15—Review of Permit Applications

In this final rule, the provisions proposed at § 773.15 are found at §§ 773.8 through 773.15 and 774.11(c) through (e).

We proposed to revise certain aspects of previous § 773.15. In the proposed rule, we, among other things: (1) Provided for separate review of the legal identity, permit, and compliance information provided in applications; (2) separated permit eligibility determinations under section 510(c) of the Act from the application review process; (3) proposed to distinguish among applicants based upon surface coal mining experience and successful environmental compliance criteria; and (4) proposed the use of investigations to ensure compliance with certain statutory and regulatory provisions. The preamble of the proposed rule also provided notice that we would cease providing AVS and OSM recommendations to State regulatory authorities to assist in permitting decisions. *See also* OSM System Advisory Memorandum #20 (discontinuance of AVS and OSM permitting recommendations), a copy of which is in the administrative record for this rulemaking and on our Applicant/Violator System Office Internet home page (Internet address: www.avs.osmre.gov).

In this final rule, we modified the proposed revisions and reorganized them into smaller sections. As a result, part 773 is entirely reorganized and re-numbered. As part of the reorganization of part 773, some of the previous sections we did not propose for revision are also re-numbered. The new designations for these sections are incorporated in the derivation tables in section IV.B. of this preamble. We also modified certain proposed provisions to comply with the effects of the ruling of the D.C. Circuit in *NMA* v. *DOI II*; this final rule also conforms to the D.C. Circuit's holding in *NMA* v. *DOI I*.

As explained previously, in *NMA* v. *DOI I*, the appeals court held that the clear language of section 510(c), 30 U.S.C. 1260(c), of SMCRA authorizes regulatory authorities to deny a permit only on the basis of violations of "any surface coal mining operation owned or controlled by the applicant." *NMA* v. *DOI I*, 105 F.3d at 693–94. In contrast, OSM's 1988 ownership and control rule also allowed regulatory authorities to deny a permit on the basis of violations of any person who owned or controlled the applicant. In the IFR, published in 1997, we cured the defect identified by the court of appeals by requiring regulatory authorities to deny permits based on section 510(c) of the Act only when the applicant owned or controlled an operation with a current violation, and not when a person with a current violation owned or controlled the applicant. In § 773.12(a) and (b) of this final rule, we retain the substance of this IFR provision.

In *NMA* v. *DOI II*, the court of appeals agreed with OSM that section 510(c) of SMCRA allows OSM to deny permits based on violations cited at operations that the applicant owns or controls, including "limitless downstream violations" at operations indirectly owned or controlled by an applicant through intermediary entities. *Id.* at 4–5. (A further discussion of "direct" versus "indirect" ownership or control appears below, in this section.) In final §§ 773.11, 773.12(a) and 773.12(b), we retain the substance of the existing provision (30 CFR 773.15(b)(1)), and proposed §§ 773.15(b)(3)(i)(A) & (B) and 773.16(a), which allow OSM to deny permits to applicants who are currently in violation and to applicants who—directly or indirectly—own or control operations that are currently in violation. OSM may consider violations at operations which are "limitless[ly] downstream," so long as ownership or control (as defined in final § 701.5) by the applicant is present.

The court agreed with NMA that "[f]or violations of an operation that the applicant "has controlled" but no longer does, * * * the Congress authorized permit-blocking only if there is "a demonstrated pattern of willful violations'" under section 510(c) of SMCRA. *Id.* at 5. As such, in order to deny a permit under section 510(c) of the Act, the violation must be outstanding (*i.e.*, unabated or uncorrected) *and* the applicant must own or control the operation with a violation at the time of application. If the ownership or control relationship has been terminated, OSM may not deny a permit (absent a pattern of willful violations), even if the violation remains current. *NMA* v. *DOI II*, 177 F.3d at 5. However, if a person is himself a violator, severing an ownership or control relationship will not make the person eligible for a permit. OSM may not base permit eligibility on past ownership or control except in instances of a "demonstrated pattern of willful violations of [the] Act of such nature and duration with resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of [the] Act." SMCRA section 510(c). As proposed, §§ 773.15(b)(3)(i)(A) and (B) and 773.16(a) would have allowed permit eligibility determinations to be based on past ownership or control. In final §§ 773.11, 773.12(a) and 773.12(b), we modified the proposed language to clarify that permit eligibility must be based on operations which the applicant or operator currently owns or controls. However, OSM may still consider past ownership or control of operations with violations in determining whether there

is a pattern of willful violations under section 510(c) of the Act and final § 774.11(c), except where constrained by the appeals court's retroactivity holding (discussed below).

On the applicability of the five-year statute of limitations at 28 U.S.C. 2462, the court agreed with OSM that the section 2462 limitations period does not apply to violations when determining permit eligibility under section 510(c) of SMCRA. *Id.* at 7–8. Thus, except where constrained by the appeals court's retroactivity holding (discussed below), OSM may deny permits to applicants who own or control an operation with a current violation, regardless of when the violation first occurred. On this point, since the court of appeals ratified the approach contained in the proposed rule, no modification was necessary in this final rule. Subject to the retroactivity holding, as reflected in final §§ 773.12(a) and (b), final §§ 773.12(a) and (b) allow OSM to deny permits based on violations at operations which the applicant currently owns or controls, regardless of when the violation was first cited.

With regard to retroactivity, the court found that the IFR, at 30 CFR 773.15(b)(1), is impermissibly retroactive to the extent it authorizes permit denials under section 510(c) of the Act based on indirect control in cases where *both* the assumption of indirect control and the violation occurred before November 2, 1988, the effective date of OSM's 1988 ownership and control rule. *NMA* v. *DOI I*, 177 F.3d at 8–9. The court explained that the 1988 ownership and control rule imposed a " 'new disability,' permit ineligibility, based on 'transactions or considerations already past. * * *' " *Id.* at 8.

Specifically, the court held that the IFR is retroactive "insofar as it block [*sic*] permits based on transactions (violations and control) antedating November 2, 1988, the [1988] ownership and control rule's effective date." *Id.* Thus, under the court's reasoning, the IFR is retroactive only when *both* "transactions"—the violation and the assumption of indirect ownership or control—occurred before November 2, 1988. Indeed, the court explained that the IFR is not retroactive to the extent it allows permit denials when an applicant acquires control of an ongoing (*i.e.*, unabated or uncorrected), pre-rule violation on or after the effective date of the 1988 ownership and control rule. *Id.* at n.12. This is so because one of the relevant transactions—assumption of control—will have occurred on or after November 2, 1988: thus, the applicant would be on notice of the requirements of the 1988 rule. By this same logic, the IFR also is not retroactive when the assumption of control occurred before November 2, 1988, but the relevant violation occurred or occurs on or after November 2, 1988. At bottom, if *either* of the relevant transactions occurred or occurs on or after November 2, 1988, OSM may continue to deny permits under section 510(c) without running afoul of the court's retroactivity holding.

The court's reasoning turns on the fact that permit denials based on *indirect control*, though reasonable, were first clearly provided for in the 1988 ownership and control rule. *Id.* In this regard, the court explains, the 1988 ownership and control rule imposed a "new disability" and "change[d] the legal landscape." *Id.* (quotation omitted). However, even under the most restrictive reading of section 510(c), after enactment of SMCRA in 1977, OSM could always deny permits based on violations by the applicant's "own, *directly* [owned or] controlled operations" (*id.*) (emphasis added); indeed, the statutory language of section 510(c) expressly mandates permit denials in these circumstances.

As such, under the court's ruling, OSM may continue to require permit denials based on an applicant's own violations or *direct* ownership or control of operations with pre-rule violations, even when the applicant acquired ownership or control before promulgation of the 1988 ownership and control rule. For purposes of the final rule we are adopting today, and consistent with the *NMA* v. *DOI II* decision, an entity directly owns or controls another entity if it owns greater than 50 percent of the entity or actually controls the entity, and there is not an intermediary entity between the two. For example, if company A owns greater than 50 percent of company B, and there is no intermediary entity between the two, company A directly owns company B. If company A owns 50 percent or less of company B, but actually controls company B, and there is no intermediary entity between the two, company A directly controls company B. However, even if there is an intermediary entity, ownership and control will also be deemed direct if there is 100 percent ownership at each level of the corporate chain between two entities. For example, if company A owns 100 percent of company B, and company B owns 100 percent of company C, company A will be deemed to directly own and control company C, its wholly owned subsidiary.

While, in general, it is the presence of an intermediary entity, and not the percentage of ownership, which makes ownership or control indirect, we are adopting the "greater than 50 percent" threshold because greater than 50 percent ownership will usually confer control. The 50 percent threshold is also consistent with the definition of *own, owner*, or *ownership* we are adopting today in final § 701.5 and the position we have taken since 1988 that greater than 50 percent ownership is deemed to constitute ownership or control. *See* previous § 773.5(a) (this category of deemed ownership or control was not challenged by the National Mining Association). As such, as of the enactment of SMCRA in 1977, an applicant would be on notice that, at a minimum, it could be denied a permit if it owned greater than 50 percent of an entity with a current violation. In the case of wholly owned subsidiaries, any intermediaries will be disregarded since they are subject to total control by the parent company; in this instance, it is clear that the parent company will directly own, and have the ability to directly control, the entity at the bottom of the corporate chain.

Under the court's notice-derived rationale, OSM may also continue to deny permits based on *indirect* ownership or control of an operation with a current violation—even if both of the relevant transactions occurred before November 2, 1988—so long as there was a basis to deny under established law at the time of the assumption of indirect ownership or control or at the time of the violation (whichever is earlier), independent of the provisions of the 1988 ownership or control rule. To the extent that such authority to deny permits based on *indirect* relationships existed before November 2, 1988, the 1988 ownership or control rule cannot be said to have "imposed a new disability" or "changed the legal landscape." Rather, the applicant would have been on notice that certain relationships to operations with current violations could result in a permit denial.

We modified proposed § 773.15(b)(3)(i)(B) to conform it to the court's retroactivity holding. Final § 773.12(a) and (b) incorporate the substance of the above discussion.

Other modifications to the proposed rule are discussed in connection with our responses to comments received with respect to the relevant proposed provisions.

General Comments on Proposed § 773.15

Several commenters, including those who commented on the effects of the *NMA* v. *DOI II* decision, expressed concern that OSM does not see that an

ineligibility determination based upon "upstream" violations is still possible. The commenters said: (1) The corporate form should not be used to perpetuate a fraud; (2) a corporate charter can be revoked; and (3) the decision in *NMA* v. *DOI I* specifically indicates how to determine the applicant. Other commenters raised similar concerns.

We agree that the corporate form should not be used to perpetrate a fraud. With respect to revocation of corporate charters, State regulatory authorities already have sufficient authority, under State laws, to seek revocation of corporate charters under appropriate circumstances.

We also agree that regulatory authorities have leeway to identify the true applicant, and to consider the violations of such person under the permit eligibility review of final § 773.12 and section 510(c) of the Act. We chose not to define the phrase "true applicant" at this time because regulatory authorities already have the authority and flexibility to determine the true applicant, based on the particular facts and circumstances of each case.

In *NMA* v. *DOI I*, the court of appeals explained that, as a general rule, OSM may not deny a permit based on violations of persons who own or control the applicant. However, the court explained: "OSM has leeway in determining who the 'applicant' is. As appellant concedes, OSM has the authority, in instances where there is subterfuge, to pierce the corporate veil in order to identify the real applicant." *NMA* v. *DOI I*, 105 F.3d at 695. Below, we briefly describe several tools, which exist independently of this rulemaking—State and Federal corporate veil piercing and case law interpreting section 521(c) of SMCRA, 30 U.S.C. 1260(c)—which may assist regulatory authorities in identifying the true applicant.

The court of appeals identified corporate veil piercing as a means of identifying the "true applicant." There are, generally speaking, two bodies of veil-piercing case law: State and Federal. However, the purpose of the State common law veil-piercing mechanism, which is typically employed as a method for imposing personal liability on shareholders of a corporation, does not precisely match the purpose and intent of this rulemaking. In promulgating the permit eligibility provisions of this final rule, we in no way intend to seek to impose personal liability on shareholders, or owners or controllers, for the wrongs or debts of a corporate permittee. Nor do we intend to alter the common law principles of corporate separateness and limited liability to a greater extent than SMCRA itself provides. Rather, the permit eligibility provisions we adopt today are designed to determine who is eligible to receive a permit under section 510(c) of SMCRA.

Despite the fact that the permit eligibility aspects of this rule do not impose personal liability on individuals for the debts or wrongs of a corporation, the body of State veil-piercing case law may, in certain instances, provide a useful analytical construct to assist regulatory authorities in identifying the true applicant. For example, in instances where State veil-piercing case law would allow the corporate form to be disregarded to impose personal liability on a person, it stands to reason that the person may be the true applicant, such that his violations become relevant to the permit eligibility determination under final § 773.12 and section 510(c) of the Act.

Federal veil-piercing, which serves a broader purpose than the imposition of personal liability for corporate debts or wrongs, is more closely aligned with the purpose of the permit eligibility provisions of this final rule; as such, it provides a better paradigm than State common law veil piercing for identifying the true applicant. Federal veil-piercing case law has developed to the extent that:

> The general rule adopted in the federal cases is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." In applying this rule, federal courts will look closely at the purpose of the federal statute [involved] to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine * * *.

Alman v. *Danin*, 801 F.2d 1, 3 (1st Cir. 1986) (quoting *Town of Brookline* v. *Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981); internal citations omitted). Under federal veil-piercing case law, if a person elects the corporate form to evade the requirements of SMCRA, it is in the interests of "public convenience, fairness and equity" to disregard the corporate form and consider the violations of the person, as the true applicant, in making a permit eligibility determination under final § 773.12 and section 510(c) of the Act.

Section 521(c) of SMCRA, 30 U.S.C. 1271(c), like veil piercing, allows for the imposition of personal liability in certain instances. The criteria for determining who is a section 521(c) "agent," as they have developed in the case law, may assist regulatory authorities in their efforts to identify the true applicant. For example, in the case of *United States v. Dix Fork Coal Co.*, 692 F.2d 436 (6th Cir. 1982), the U.S. Court of Appeals for the Sixth Circuit found an individual directly liable for the violations of a corporation under section 521(c) of SMCRA, 30 U.S.C. 1271(c), which, under specified circumstances, allows the United States to institute a civil action for relief against a permittee or his "agent." In that case, the individual—Wilford Niece—was neither an officer nor director of the corporation (Dix Fork), but was delegated "responsibility [for] ensuring compliance with the Act throughout the mining operation by Dix Fork." *Id.* at 439. Borrowing from the definition of "agent" in the Coal Mine Health and Safety Act, 30 U.S.C. 801 *et seq.*, the court explained:

> [A section 521] "agent" includes that person charged with the responsibility for protecting society and the environment from the adverse effects of the surface coal mining operation and particularly charged with effectuating compliance with environmental performance standards during the course of a permittee's mining operation.

Id. at 440. In finding Mr. Niece directly liable for Dix Fork's violations, the court explained that:

> The intervening corporate structure of Dix Fork is insufficient, given the aggravating circumstances of this case, to shield Wilford Niece from the affirmative obligations necessary to rectify the environmental hazard which would not have manifested but for the assets and decisions of Wilford Niece. * * *
>
> Refusal of the federal forum to implement affirmative obligations on Niece as an agent would permit circumvention of the Act through the establishment of a sham corporation.

Id. at 441. Since SMCRA itself disregards the corporate form to impose personal liability on section 521(c) agents for the wrongs of a corporation, it is reasonable to conclude that a section 521(c) agent may be the true applicant, such that his violations should be considered during the permit eligibility review under final § 773.12 and section 510(c) of the Act.

The tools identified above are not intended to be exhaustive. There may well be other mechanisms or procedures available to regulatory authorities to identify the true applicant. In most cases, the nominal applicant (the person whose name appears on the permit application) will also be the true applicant. Certainly, not all owners or controllers of an operation are susceptible to veil piercing or other corporate avoidance mechanisms; as such, not all owners or controllers are true applicants. However, if the regulatory authority has reason to

believe that the nominal applicant is not the true applicant, the regulatory should conduct an investigation to determine the identity of the true applicant. In short, each regulatory authority should consider the totality of circumstances in determining whether the nominal applicant is also the true applicant.

Proposed § 773.15(a)(3)

We proposed to add paragraph (a)(3) to the general requirements in previous § 773.15. That provision would have required the regulatory authority to evaluate whether the permit application contained accurate and complete information and allowed the regulatory authority to stop review until any issues as to the accuracy and completeness of information were resolved.

Based upon comments and our further deliberations, we are not adopting proposed § 773.15(a)(3) because it is duplicative. Commenters had varying opinions on the proposed revisions. Some said stopping the review would hasten correction of the information. One said the provision is unnecessary and redundant. This commenter said a regulatory authority already has the obligation to make a written finding for application approval "and is under no obligation to proceed with an incomplete application." Two commenters expressed their belief that more time and resources would be required to determine that an application is accurate and complete before the review actually begins. Another commenter said that the ownership and control information should be reviewed for administrative completeness then entered into AVS. One commenter said the practice of providing a checklist instead of written findings should be eliminated in the final rule.

We agree, in part, with most of these comments. By our longstanding practice, at least since 1983, a regulatory authority is under no obligation to continue to process an administratively incomplete application. *See, e.g.*, final § 773.6(a)(1) (redesignated from previous § 773.13(a)(1)) and existing § 701.5 (definition of *administratively complete application*). We also included an administrative completeness requirement in final § 773.8(a) of this rule. Further, final §§ 773.8(b) and (c) require the regulatory authority to enter into AVS, and update, the ownership and control and violation information an applicant submits under final §§ 778.11, 778.12(c), and 778.14. Final § 773.15(a), which continues a provision which has also been in place since at least 1983 (*see* previous § 773.15(c)(1)), requires the applicant to affirmatively demonstrate, and the regulatory authority to find, that the application is accurate and complete before a permit is issued. In this final rule, at § 773.15(a), we made a technical revision to previous § 773.15(c)(1), changing the phrase "complete and accurate" to "accurate and complete," to match the statutory phrase used in section 510(b)(1) of the Act. Finally, at final § 773.15(n), we added a requirement for the regulatory authority to make a written finding that the applicant is eligible to receive a permit based on the reviews under §§ 773.8 through 773.14 of this final rule. A checklist, without sufficient detail, will not satisfy the written finding requirement of final § 773.15(n).

Proposed § 773.15(b)

We proposed to revise certain provisions of previous § 773.15(b). In general, we proposed to:

- Reorganize the section to encompass, among other things, a three-part review of permit application information (*see* proposed §§ 773.15(b)(1) through (3))
- Revise our previous criteria for determining permit eligibility under section 510(c) of the Act (*see* proposed § 773.15(b)(3)(i); *see also* proposed § 773.16)
- Revise the circumstances under which an applicant with an outstanding violation could receive a permit (*see* proposed § 773.15(b)(3)(i)(B) and (C); *see also* proposed § 773.16(b))
- Revise our previous regulations pertaining to patterns of willful violations under section 510(c) of the Act (*see* proposed § 773.15(b)(3)(i)(D) through (F))
- Require regulatory authorities to investigate an applicant's owners or controllers to determine if they are responsible for outstanding violations and whether alternative enforcement actions are appropriate
- Impose special conditions on permits issued to applicants that did not have at least five years of mining experience or whose owners or controllers had not demonstrated successful environmental compliance (*see* proposed §§ 773.15(b)(2) and (b)(3)(ii)(C))

As explained in more detail below, we reorganized and modified the provisions proposed in § 773.15(b). In this final rule, we:

- Adopted the three-part review of permit application information (*see* final §§ 773.8 through 773.11)
- Consolidated and adopted provisions related to permit eligibility under section 510(c) of the Act (*see* final § 773.12)
- Adopted provisions whereby an applicant with an outstanding violation can receive a "provisionally issued" permit under certain circumstances (*see* final § 773.14, discussed in section VI.F. of this preamble)
- Adopted provisions relating to patterns of willful violations under section 510(c) of the Act (*see* final § 774.11(c) through (e), discussed in section VI.K. of this preamble)
- Did not adopt specific reference to investigations of an applicant's owners or controllers (though, under final § 774.11(b), if we discover that a person owns or controls an operation with an unabated or uncorrected violation, we will determine whether an enforcement action is appropriate)
- Did not adopt the five-year experience and successful environmental compliance criteria or additional permit conditions based on the applicant's mining experience and the compliance histories of the applicant's owners or controllers

General Comments on Proposed § 773.15(b)

A commenter said that OSM's rules should be altered only as necessary to fill the regulatory gap created by *NMA* v. *DOI I* and should recapture the linkages between permit applicants and their owners and controllers who are responsible for outstanding violations. The commenter said there is ample authority in SMCRA outside of section 510(c) to deny a permit to an applicant where an owner or controller of the applicant is responsible for an outstanding violation.

As mentioned above, this final rule fully complies with the D.C. Circuit's decision in *NMA* v. *DOI I*. In light of the fact that the *NMA* v. *DOI II* decision was issued after our proposed rule was published, modifications were required to conform this final rule to that decision as well. As previously noted, we reopened the comment period for this rulemaking in order to obtain public comments on the effects of the *NMA* v. *DOI II* decision. Further, rather than merely fill the "gaps" perceived by the commenter, we took the opportunity to improve upon other aspects of our previous regulations. This final rule is in full compliance with the court decisions, and also makes our previous procedures more efficient and effective.

We disagree that we should recapture linkages between applicants and their owners and controllers who are responsible for outstanding violations during the permit eligibility review required under section 510(c) of the Act. The *NMA* v. *DOI I* decision was clear on the point that we may no longer

routinely consider the violations of an applicant's owners or controllers during the section 510(c) compliance review. Nonetheless, as explained above, regulatory authorities have the authority, in appropriate circumstances, to identify the true applicant.

One commenter said the plain language of SMCRA does not limit permit ineligibility to current ownership or control of operations with violations. Other commenters, including those who commented on the effects of the *NMA* v. *DOI II* decision, said the final rule should only allow permit denials based on violations at operations which the applicant owns or controls at the time of application. One commenter said the court's ruling affects provisions in addition to the proposed permit eligibility provisions. Finally, a commenter expressed concern that, after the *NMA* v. *DOI II* decision, a permittee could fraudulently transfer a permit with a violation to a shell or dummy corporation and become permit eligible again.

Under *NMA* v. *DOI II*, as explained above, we may no longer routinely consider an applicant's past ownership or control of a violation during the permit eligibility review process. We may, however, consider such past ownership or control in determining whether there has been a pattern of willful violations under section 510(c) of the Act and § 774.11(c) of this final rule (which accommodates the appeals court's retroactivity holding). We modified the permit eligibility criteria of final § 773.12 accordingly, and have also modified all other proposed provisions affected by the court's ruling. As to fraudulent transfers to shell or dummy corporations, we are confident that regulatory authorities will not approve such transfers under existing 30 CFR 774.17 or the equivalent State counterparts. Also, as explained above, if a person is himself a violator, severing an ownership or control relationship will not make the person eligible.

A commenter said OSM should delete all "administrative procedures" imposed on itself and on State regulatory authorities—such as the proposed procedures for checking and recording data. The same commenter said OSM should also delete all references to investigations and referrals for prosecution, as well as any references to the review of outstanding violations of any person other than the applicant, persons the applicant owns or controls, or the alter ego of the applicant. The commenter said regulatory authorities do not need regulations for the procedures they will follow to check and record data; rather, these procedures should be left to policies and directives.

For the most part, we decline to adopt this commenter's suggestions. We do not believe the provisions of this section are so easily dismissed as "administrative procedures." Rather, the procedures we adopt today are integral parts of the regulatory program to implement the provisions of SMCRA. Further, the procedures we adopt today provide necessary guidelines to regulatory authorities as to how to properly meet their responsibilities under these regulations.

We note, as indicated above, that we are not adopting direct reference to investigations in these provisions. The three proposed provisions in part 773 which referenced investigations are discussed more fully below at proposed § 773.15(b)(1)(i)(B).

Finally, a review of other outstanding violations, for example those of the applicant's or permittee's owners and controllers, may have utility outside of the permit eligibility context. For example, a review of the outstanding violations of an applicant's owners and controllers may reveal that enforcement actions are appropriate to remedy the violations. Also, the review under final § 773.11 requires an examination of the operator's compliance history, since an operator's violations may bear on the section 510(c) permit eligibility review under final § 773.12.

A commenter said that the sanctions for failing to identify owners and controllers—potential permit denial and referral for prosecution—are too stringent, in light of the fact that the standards for identifying owners and controllers are, in the commenter's view, ambiguous and uncertain.

It is appropriate to require applicants to disclose their owners and controllers in the first instance, based on the definitions of *own*, *owner*, or *ownership* and *control* or *controller* we are adopting today in final § 701.5. These definitions are sufficiently clear to put applicants on notice of the information which is required in a permit application. We removed the reference to criminal prosecution in these provisions. In most instances, if an applicant fails to provide required permit application information, the applicant simply will not receive a permit. However, there may be instances where prosecution for knowingly withholding or providing false information is warranted under final § 847.11(a)(3).

Several commenters suggested that it would be in the public interest for regulatory authorities to issue press releases to local newspapers when investigating "AVS violations." They maintain that such press releases would heighten public awareness.

We do not believe that issuing press releases under such circumstances would be in the public interest. Announcing the pendency of an investigation before its conclusion could unfairly attach a stigma to a company or an individual who is ultimately vindicated. It could also compromise the integrity of the investigation. Balancing any advantage to be gained by such press releases against the potential to compromise the rights of the person being investigated or the integrity of the investigation, we conclude that the latter concerns substantially outweigh any perceived benefit. Nonetheless, the results of our investigations—*i.e.*, written findings on ownership and control under final § 774.11(f)(1)—will be entered into AVS. *See* final § 774.11(f)(2). Also, under final § 773.28(d), the result of any challenge to a finding on ownership or control will be posted on AVS and on OSM's Applicant/Violator System Office Internet home page (Internet address: www.avs.osmre.gov).

Several commenters asked if there is a penalty for States if they do not use AVS. AVS is a tool we developed specifically to assist States in implementing section 510(c) of the Act. After more than 13 years of successful operation, regulatory authorities now routinely use AVS to implement a variety of provisions under SMCRA. Given the efficiencies gained by using AVS, as opposed to independently and arduously compiling the information contained in AVS, it is highly unlikely that any State would choose to discontinue using AVS. Nonetheless, under our previous regulations, and the regulations we adopt today (*see* final §§ 773.9, 773.10 and 773.11), State regulatory authorities are required to use AVS during the section 510(c) permit eligibility review process. If they fail to do so, they are subject to OSM's general oversight authority.

One commenter said that AVS "is an essential part of OSM's regulatory program." Another expressed concern that the proposed rule would weaken the effectiveness of AVS. This commenter also said the computer system gives small communities a way to identify corporate officials and investors who fail to abate violations or forfeit performance bonds. We agree that AVS is an essential part of our regulatory program and that it is an equally powerful tool for the public at large and the regulated industry alike. We want to assure the commenter that this rulemaking will not compromise

the integrity of the information contained in AVS in any way.

Two commenters asked how the final rule will affect existing permits. One of the commenters also asked: (1) what will happen to the current data in AVS for controllers; and (2) how will previous ownership or control links or links to violations discovered during bond forfeiture investigations be affected.

The provisions adopted 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 not affect existing permits, but will apply to Federal permitting as applications are received for new permits, renewals, revisions, transfers, assignments or sales. 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. This final rule will not affect the existing information shown in AVS, though it will affect how that information is used by regulatory authorities.

Proposed § 773.15(b)(1)

We proposed to revise previous § 773.15(b)(1) to provide for a three-part review of the information which applicants must provide under part 778. We adopted a general section to precede the three specific reviews, final § 773.8, and adopted the three specific reviews at final §§ 773.9 through 773.11.

We proposed that the review of an applicant's legal identity information would require an initial determination of whether information disclosed under previous § 778.13 is accurate and complete (proposed (b)(1)). We further proposed that after the preliminary determination, we would update the relevant records in AVS (proposed (b)(1)(i)). If we found that an applicant, operator, owner, controller, principal, or agent had knowingly or willfully concealed information about an owner or controller, we would: inform the applicant of the finding and request full disclosure (proposed (b)(1)(i)(A)), investigate to determine if full disclosure was made (proposed (b)(1)(i)(B)), and, if appropriate, deny the permit (proposed (b)(1)(i)(B)(1)) and refer the finding for prosecution under section 518(g) of the Act, 30 U.S.C. 1268(g), (proposed (b)(1)(i)(B)(2)). We modified the proposed revisions in this final rule. The proposed revisions, as modified, are at §§ 773.8 and 773.9 of this final rule.

We adopted final § 773.8 to provide general requirements which precede the three-part review of permit application information. At final § 773.8, we changed the proposed phrase "accurate and complete" to "administratively complete," in response to comments, to highlight that the reviews of information are to commence after an application is found to be administratively complete. We recognized that a determination that an application is administratively complete occurs after an application is received but before we determine that the information is accurate and complete, based on a detailed examination of the information the applicant submits. A finding that the information is accurate and complete is part of the written findings required under final § 773.15(a). At final §§ 773.8(b) and (c), we adopted a provision requiring the regulatory authority to enter into AVS, and update, the ownership or control and violation information an applicant submits under final §§ 778.11, 778.12(c), and 778.14.

At final § 773.9, we adopted the proposed review of the applicant's "legal identity information." For clarity, and to match the heading at final § 778.11, we changed the section heading to "Review of applicant, operator, and ownership and control information." The final provision provides that the regulatory authority will rely upon the applicant, operator, and ownership and control information an applicant submits under final § 778.11, information from AVS, and any other available information, to review the applicant's and operator's business structure and ownership and control relationships. This review is required before making a permit eligibility determination under final § 773.12.

A commenter said that proposed § 773.15(b)(1) meant that all information must be found accurate and complete before an application is administratively complete. We modified the final rule language, as indicated, to require the reviews of information under final §§ 773.9 through 773.11 to proceed on the basis of an administratively complete application. *See* final § 773.8(a). The determination that an application is accurate and complete will come at a later stage of the permit application review process. *See* final § 773.15(a).

Several commenters asked OSM to clarify: (1) what is to be checked to determine accuracy and completeness; (2) how should States verify information provided in an application and to what depth and detail; and (3) how far above the applicant should ownership and control information be provided.

As indicated above, we changed "accurate and complete" to "administratively complete." The term "administratively complete application," and the requirement that an applicant must submit an administratively complete application before permit processing begins, have been in place since at least 1983. *See* previous § 773.13(a)(1) and existing § 701.5 (definition of *administratively complete application*). Under our longstanding practice, as well as under this final rule at § 773.8, an application is administratively complete when the regulatory authority determines that it contains information addressing each application requirement and all information necessary to initiate processing and public review. On the other hand, under final § 773.15(a), a determination of accuracy and completeness will occur before a permitting decision is made and will require written findings by the regulatory authority. This process, too, has been in place since at least 1983. *See* previous § 773.15(c)(1). When making a finding that an application is accurate and complete, rather than merely determining that information and responses have been provided, the regulatory authority must examine the veracity of submitted information. We leave it to the regulatory authorities to determine how this requirement is best implemented under their programs. However, in making a finding that an application is accurate and complete, a regulatory authority is expected to review all information supplied in the permit application, pertinent information in AVS, and all other reasonably available information. As for the extent of ownership and control information required to be provided for persons "above the applicant," we note that under final § 778.11(c)(5) and (d), an applicant is required to submit the information required by final § 778.11(e) for all persons who own or control the applicant and the operator, according to the definitions of *own, owner*, or *ownership* and *control* or *controller* which we adopt today in final § 701.5.

A commenter said review of an applicant's legal identity will lengthen the permit review process and could require additional staff and resources to accomplish the required reviews and investigations.

As indicated above, at final § 773.9, we changed that heading to "Review of applicant, operator, and ownership and control information," to more accurately reflect the nature of the review. Also, we removed direct references to investigations in this section, such that investigations will not be routinely required. Rather, while we fully expect investigations to be conducted when

warranted, investigations as proposed in part 773 are at the discretion of the regulatory authority. This should substantially alleviate the staff burden perceived by the commenter. As to the review of applicant, operator, and ownership and control information under final § 773.9, this final rule, in large part, continues requirements and practices which were previously in effect, and thus should not lengthen the review process or require additional staff and resources.

A commenter asked OSM to explain the term "other reasonably available information." The commenter said that an application probably contains information more up-to-date than State databases, which are updated only once a year.

In final §§ 773.9 through 773.11, we use the phrase "other available information" instead of the proposed phrase "other reasonably available information." However, the change was editorial in nature and does not change the scope of information the regulatory must consider. The phrase "other available information" is derived from section 510(c) of SMCRA, which requires regulatory authorities to consider the section 510(c) schedule of information submitted by the applicant, as well as "other information available." Under final §§ 773.9 through 773.11, we intend that the phrase means information that may be obtained from State and Federal sources—such as AVS—without extraordinary effort. The term also encompass information supplied to the regulatory authority by the public.

Numerous commenters all said "OSM should require States to validate their information before entry into AVS and should require the States to enter corrections in a timely manner." Final § 773.15(a) requires regulatory authorities to make a written finding that a permit application is accurate and complete. As explained above, when making a finding of accuracy and completeness, the regulatory authority must examine the veracity of information submitted by the applicant. In doing so, we expect regulatory authorities to consider all reasonably available information, including information already contained in AVS. We also note, however, that most of the information contained in AVS is supplied to regulatory authorities by applicants and permittees, who have the burden of providing accurate and complete information. We also agree that States should enter all data into AVS, including any corrections, in a timely manner.

Several other commenters said "information should be required and entered into AVS at the time of permit application with a notation indicating that it will be updated before permit issuance, and that the information should be updated by the applicant and input at the time of final permit review and issuance."

We modified several proposed provisions based on our modifications to proposed § 773.15(b)(1). Our modifications accomplish the intent of the commenters. Final § 773.8(b) requires the regulatory authority to enter into AVS permit application information relating to ownership and control and violations. Final § 773.8(c) requires the regulatory authority to update this information in AVS after it verifies any additional information submitted or discovered during a permit application review. Final § 778.9(d) requires an applicant, after permit approval but before permit issuance, to update, correct, or indicate that no change has occurred in the permit application information submitted under final §§ 778.11 through 778.14. Finally, § 773.12(d), which is modified and adopted from proposed § 773.15(e), provides that after a regulatory authority approves a permit, it will not issue the permit until the applicant complies with the information update and certification requirement of final § 778.9(d). After the applicant completes the update and certification, § 778.9(d) requires a regulatory authority, no more than five business days before permit issuance, to again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect the applicant's permit eligibility.

Proposed § 773.15(b)(1)(i)

We proposed to revise previous § 773.15(b) to provide for a finding whether any applicant or operator, or any owner, controller, principal, or agent of an applicant or operator, has knowingly or willfully concealed information about any owner or controller of the proposed operation. We did not adopt this provision in part 773 because it is duplicative of the provisions of final § 847.11(a)(3).

Several commenters asserted that denial of an incomplete application is mandatory when an applicant has not fully complied with, for example, sections 506, 507, 508, and 510 of SMCRA. 30 U.S.C. 1256, 10 U.S.C. 1257, 30 U.S.C. 1258 and 30 U.S.C. 1260. The commenters also said: "To the extent that OSM proposes to make elective the rejection of the application by the agency where it is demonstrated that the applicant has failed to disclose information, the proposal falls short of the mark." The commenter noted the applicant is obligated to file accurate and complete information and that "[n]on-disclosure which is intentional or which with reasonable diligence should have been avoided, should be the basis of . . . for referral by the agency for possible criminal prosecution for fraud or violation of the False Claims Act."

We agree with the commenters' premise, but not with their conclusion. We agree that an applicant is initially obliged to file an administratively complete application and ultimately bears the burden of demonstrating that the application is accurate and complete. Absent a demonstration by the applicant that the application is accurate and complete, we agree that no permit may be issued by a regulatory authority. However, we disagree that a regulatory authority should immediately proceed to criminal prosecution in all instances of nondisclosure of required information. As mentioned above, the most common outcome for failing to provide accurate and complete information will be permit denial. However, if an applicant knowingly conceals or fails to provide material information, prosecution may be appropriate under final § 847.11(a)(3) and section 518(g), 30 U.S.C. 1268(g), of the Act. *See* section VI.AA. of this preamble.

A commenter said that making a finding that persons have knowingly and willfully concealed information from an application could be difficult without extensive administrative and legal research. The commenter also said that "[c]onducting such research within statutory and regulatory time-frames mandated for permit reviews could require staff to spend less time on reviewing the technical, scientific, and regulatory adequacy of proposed operations."

We expect the occurrence of knowing withholding of information to be relatively rare, and this rule does not require regulatory authorities to conduct an investigation of all applicants to determine whether information has been knowingly withheld. As such, the research to which the commenter refers should not substantially interfere with the regulatory authorities' other application review obligations. However, under final § 773.15(a), the regulatory authority must find that the information submitted by the applicant is accurate and complete. If a regulatory authority encounters evidence of wrongdoing or misconduct, the regulatory authority is obligated, under

SMCRA, to evaluate the circumstances and to take appropriate action under the Act.

A commenter objected to "the inclusion of operators" in proposed § 773.15(b)(1)(i). The commenter said including operators is both unnecessary and impermissible. The commenter said "[i]f the operator is an agent of a permittee or an applicant, the operator will fall within the SMCRA provisions concerning agents. If not, the operator is outside the scope of SMCRA in this context." In final §§ 773.9 through 773.11, we modified the proposal to clarify that the regulatory authority will review the information the applicant submits under part 778. However, the applicant must provide information about its operator. We expect that the applicant will exercise due diligence to verify the accuracy and completeness of any information it receives from its operator. Ultimately, all of the information an applicant provides, including information pertaining to its operator, must be accurate and complete.

Proposed § 773.15(b)(1)(i)(A)

We proposed that following a finding of concealed information, we would inform an applicant or operator in writing of the finding to provide an opportunity to supply the undisclosed information before a permitting decision was made. There were no comments on this provision. We did not adopt this proposed provision because it unnecessarily duplicates existing procedures.

Proposed § 773.15(b)(1)(i)(B)

We proposed to provide for investigations as to whether an applicant's or operator's response to a finding of nondisclosure was satisfactory. All comments on proposed § 773.15(b)(1)(i)(B) addressed the proposed use of investigations to determine if an applicant provided full disclosure in response to a regulatory authority's written notification of a finding of less than full disclosure of owners and controllers. All comments on investigations proposed in §§ 773.15(b)(1)(i)(B), (b)(2)(iii), and (b)(3)(ii)(B) will be discussed together here.

Investigations

All comments on investigation, except one, variously questioned the reason for including this mechanism in the proposed revisions of previous § 773.15. Some commenters expressed concern that during oversight, OSM and State regulatory authorities would disagree with the conduct and results of investigations. Several commenters were concerned that additional staff and funding would be required to conduct the investigations. One commenter said that a mandate to investigate the information in every application is burdensome and that a State regulatory authority would, in fact, investigate when there was reason to believe that an application did not contain full disclosure. Some commenters asked about the scope and level of detail necessary to perform an investigation. One commenter said the final rule should clarify that a regulatory authority will conduct an investigation related to these provisions at its discretion. Several commenters expressed support for including investigations in the provisions and suggested that OSM or the State regulatory authority publish notices in local newspapers when an investigation is being conducted in order to increase public participation.

In response to these comments, we did not adopt the three provisions that made direct reference to mandatory investigations during the permit review process. Regulatory authorities already have the authority and discretion to perform an investigation, comprehensive review, examination or evaluation when they have reason to believe information in an application is not accurate or complete, or has been intentionally concealed. However, a regulatory authority's permitting decisions and all actions attendant to such a decision are subject to OSM's general oversight authority. In addition, for reasons explained above, we reject the suggestion to publish notification of a regulatory authority's investigations. Any benefit to be gained by such publication is outweighed by the countervailing concerns relating to the rights of the person being investigated and the integrity of the investigation.

Proposed § 773.15(b)(1)(i)(B)(1)

We proposed that, depending upon an applicant's or operator's response under proposed § 773.15(b)(1)(i)(A) and the results of our investigation under proposed § 773.15(b)(1)(i)(B), we "may" deny an application. We did not adopt this proposed provision. We decided that the proposed provision is an unnecessary revision because sufficient provisions already exist supporting the proposition that a regulatory authority is under no affirmative obligation to issue a permit when the application is not accurate and complete.

Proposed § 773.15(b)(1)(i)(B)(2)

We proposed that if we found knowing or willful concealment of ownership or control information, we would refer the finding to the Attorney General or equivalent State office for prosecution under section 518(g) of the Act and proposed § 846.11. We did not adopt this provision because it is duplicative.

Four commenters supported including a regulatory provision for referral for prosecution under section 518(g) of the Act. Three of the commenters said that the threat of being convicted on criminal charges will motivate coal companies to tell the truth in their applications for permits. We agree that it is appropriate to incorporate a regulatory provision implementing section 518(g) in this rulemaking, and have done so at final § 847.11.

Proposed § 773.15(b)(2) and (b)(2)(i)

We proposed § 773.15(b)(2) to provide for the review of an applicant's permit history, which comprises the second part of the three-part review of the information required from applicants under part 778. At paragraph (b)(2)(i), we proposed to use AVS and any other available information to review the permit history of the applicant as well as the permit history of any persons with the ability to control the applicant. We intended that the review would determine the extent of mining experience of the applicant and persons who own or control the applicant and whether previous mining was conducted in compliance with applicable requirements. We modified the proposed provisions in this final rule. Within the reorganization of part 773, the section is adopted as final § 773.10. We received no comments specific to proposed § 773.15(b)(2)(i).

Final § 773.10 provides for a review of "permit history." Under final § 773.10(a), the regulatory authority will rely upon the permit history information the applicant submits, information in AVS, and any other available information to review the permit histories of the applicant and the operator. This review is required before a regulatory authority makes a section 510(c) permit eligibility determination under final § 773.12. Under final § 773.10(b) the regulatory authority will also determine whether the applicant, operator, and their owners and controllers have previous mining experience. If none of these persons has prior mining experience, the regulatory authority may conduct an additional review under final § 774.11(f) to determine if someone else controls the mining operation and was not disclosed under § 778.11(c)(5).

Proposed § 773.15(b)(2)(ii)

At paragraph (b)(2)(ii), we proposed that if an applicant had five or more years mining experience, the applicant would not be subject to additional permit conditions, as proposed at § 773.18, unless a controller of the applicant was linked to an outstanding violation. We specifically invited comments on the five-years experience and successful environmental compliance criteria.

Several commenters supported the five years experience and successful environmental compliance criteria to distinguish among applicants. Two of these commenters said the five-years criterion should be clarified to mean five consecutive years of surface coal mining experience. One commenter said that the experience criterion should be applied only to the applicant, not to the owners and controllers of the applicant. Another commenter said the five-year threshold should be applied only to the applicant, unless an investigation "should prove that someone else is the true applicant." A group of commenters said that past performance can be a predictor of future performance. However, these last commenters also said that the proposal fails to address the core problem, which is how to prevent new permit-related damage by entities who are owned or controlled by violators, given that section 510(c) can no longer be used. These commenters suggested that if the intent of the proposed criteria was to reduce the risk posed by applicants with no mining experience or a history of unsuccessful compliance, perhaps performance bonds could be adjusted to address the increased risk.

Many more commenters opposed the five-years experience criterion. Numerous commenters all said mergers and name changes could create a new entity that would be unfairly subject to the criterion. Two commenters said that applicants identified in proposed § 773.15(b)(2)(ii) as subject to additional permit conditions differ from the persons identified in proposed § 773.18. Another said that existing State laws and regulations are sufficient to effect environmental compliance without additional permit conditions or monitoring. Two commenters asked if OSM relied upon statistical data to develop the five-year criterion. Numerous commenters said the five-year experience criterion is not authorized under the Act. Several commenters asserted that the experience criterion is inconsistent with the ruling in *NMA* v. *DOI I*. Several commenters said that "all permittees should be subject to obligations to pay bills on time, to reclaim expeditiously, and to maintain proper compliance records. The agency cannot pick and choose who gets breaks from mandatory obligations."

Another commenter asserted that SMCRA establishes the only permissible criteria for issuing and conditioning a permit to an applicant. In the commenter's view, our proposed criteria are not authorized by the Act. This commenter also said that there are other factors more relevant to an operation's financial and compliance success but even those factors are "not part of the statutory calculus for a decision whether to issue or condition a permit. In any event, the statute directly addresses performance risk by requiring for every surface coal mining operation a reclamation bond payable to the regulatory authority and 'conditioned upon faithful performance of all requirements of the Act.'"

Based on the comments received on this provision and our further deliberations, we are not adopting the proposed five-years experience and successful environmental experience criteria. There are no references to either in the regulatory language of this final rule. However, in final § 773.10(c), if neither the applicant or operator, nor any of their owners or controllers identified under final § 778.11(c)(5), has any previous mining experience, we may conduct an additional review to determine if another person with mining experience owns or controls the operation but was not disclosed under final § 778.11(c)(5). We also note that amendments to the existing bonding regulations, as alluded to by several commenters, may provide an adequate means of reducing the risk posed by applicants or permittees with little or no mining experience. However, bonding is outside the scope of this rulemaking.

Proposed § 773.15(b)(2)(iii)

All comments received on proposed paragraph (b)(2)(ii) addressed the proposed use of investigations. All comments on the proposed use of investigations have been discussed above at proposed § 773.15(b)(1)(i)(B), the first instance in proposed § 773.15 where the use of investigations was proposed.

Proposed § 773.15(b)(3)

We proposed to revise § 773.15(b)(3) to provide for the review of an applicant's compliance history, the third part of the review of an application. We modified and adopted this provision at final § 773.11, "Review of permit history." Final § 773.11(a) requires a regulatory authority to rely upon the compliance, or violation, history information the applicant submits to review the compliance histories of the applicant, operator, and their owners and controllers. Under final § 773.11(b), this review must occur before a regulatory authority makes a section 510(c) permit eligibility determination under final § 773.11(b).

Proposed § 773.15(b)(3)(i)

We proposed paragraph (b)(3)(i) to provide that a regulatory authority must request a compliance history report from AVS for every application for a new permit, revision, renewal, transfer, assignment, or sale of permit rights. In this final rule, we modified the proposed provision to require regulatory authorities to obtain an AVS report before making a section 510(c) permit eligibility, whenever such a determination is required under our regulations, under final § 773.12.

General Comments on Proposed § 773.15(b)(3)(i)

Two commenters said the provisions proposed for the review of compliance history are not consistent with section 510(c) of SMCRA. First, they said permit revisions are exempt from a permit eligibility determination under section 510(c). One said that applications for permit renewals are also exempt. This commenter said proposed paragraph (b)(3) should be entirely deleted.

We disagree that permit revisions and renewals are exempt from the requirements of section 510(c). Section 510 refers generally to applications for permits and revisions. It is, therefore, reasonable to conclude that the term "applicant" in section 510(c) encompasses applicants for permits as well as revisions. Moreover, the term "permit" in section 510(c) does not exclude applications for permit revisions or renewals. It is reasonable to conclude that the requirements of section 510(c) apply with equal force not only to applications for new permits, but also to applications for permit revisions and renewals. In sum, while we did not include specific references to revisions, renewals, and transfers in the final rule language, we intend that a regulatory authority may evaluate all permitting actions for eligibility under section 510(c).

Permitting Recommendations

In the proposed rule, we provided notice that we would cease providing AVS and OSM recommendations to regulatory authorities on pending applications and other actions subject to permit eligibility determinations. We

provided official notice of the termination of permitting recommendations on October 29, 1999. *See* AVS System Advisory Memorandum #20. In the proposed rule, we explained that the AVS report which regulatory authorities are required to obtain under final § 773.11 (proposed § 773.15(b)(3)(i)) would replace OSM's current policy, which included providing permitting recommendations. After reviewing the comments received on the elimination of permitting recommendations, we will continue the practice of not providing recommendations, under the rationale we articulated in the proposed rule:

> In the future, instead of providing permit eligibility recommendations, we would use AVS to provide a variety of reports, including a report on applicants and violations on the operations they own or control, for use by the regulatory authority in reviewing applications and permits. Consistent with the principle of State primacy, regulatory authorities would then perform their own analyses of an applicant's legal identity information, permit history, and compliance history, and make permitting decisions based on their findings without receiving a recommendation from OSM. Our role would be to administer and operate the AVS and maintain the integrity of the system data. The State, subject to OSM oversight reviews, would have full authority in deciding whether to issue a permit.

63 FR 70580, 70593. We do note, however, that even when we were providing recommendations, the State regulatory authorities retained the ultimate authority to render a permitting decision.

Three commenters supported our decision to cease providing permitting recommendations. These commenters said the decision supported State primacy and that States should make their own permitting decisions. We supported the principle of State primacy in the past, and continue to do so, as evidenced by many provisions adopted in this final rule. For example, in addition to eliminating permitting recommendations, we provided that State regulatory authorities are to apply their own ownership and control rules to outstanding violations in other jurisdictions, including Federal violations, when deciding challenges to ownership or control listings and findings (*see* final §§ 773.25 through 773.28).

Our decision to cease providing permitting recommendations was also based upon the ever-increasing sophistication among State users of AVS. States have fully integrated the use of AVS into their programs. In addition, all information used in AVS data processing has been completely automated for several years. This has resulted in an exceptionally high degree of accuracy of the information contained in, and the reports generated by, AVS. The need for OSM to routinely check the quality of system outputs has continuously decreased, as has the need for OSM and State collaboration to resolve discrepancies.

Our role in maintaining and managing the computer system will continue. Nonetheless, the above-mentioned factors have brought us to the conclusion that it is appropriate to cease providing permitting recommendations. We remain committed to maintaining the integrity of AVS data and will continue to provide a variety of support services to State and Federal users, as well as to the industry and the general public.

Many commenters opposed or expressed concern regarding our decision to cease providing permitting recommendations. One commenter said that providing AVS and OSM recommendations is consistent with the Congress' view of OSM's role in primacy States. One commenter said: (1) AVS is an OSM system that can only be operated and maintained by OSM; (2) ceasing permitting recommendations will result in second-guessing State decisions during oversight; and (3) "OSM should continue to use the data in its AVS system to provide permit eligibility decisions." Another commenter said that if OSM provides only raw data, some States may ignore violations in other States. Another commenter expressed concern about resolving data discrepancies.

We appreciate these concerns, but decline to reinstate permitting recommendations. Our response to these commenters is largely the same as our previous responses regarding recommendations. We do note that under this final rule, as with the previous rules, States are required to consider all violations, both State and Federal, during the section 510(c) compliance review (unless the violations are subject to one of the exceptions for remining (final § 773.13) or provisionally issued permits (final § 773.14)). If a State fails to consider all violations, it is subject to our general oversight authority. We also note our strong intent not to routinely second guess State permitting decisions; we will use our oversight to respond to egregious situations. So long as State permitting decisions are reasonable under the approved State program, we will not disturb the State decision-making process.

In the area of data discrepancies, the agency with jurisdiction over a violation is the first place to attempt to resolve any discrepancy. We are always prepared to receive any requests regarding Federal violations and to assist any State should the need arise.

Proposed § 773.15(b)(3)(i)(A)

At paragraph (b)(3)(i)(A), we proposed that a permit eligibility determination under section 510(c) would be based upon the compliance history of the applicant and operations owned or controlled by the applicant, unless there was an indication that the history of persons other than the applicant should also be included. Proposed § 773.15(b)(3)(i)(A), as modified, along with proposed § 773.16(a), as modified, is adopted in final § 773.12.

In final § 773.12, we clarified that we will consider an operator's compliance history, when the operator is different than the applicant, during the section 510(c) compliance review. As explained in section VI.A. of this preamble, there is no time when an applicant/permittee does not control its entire surface coal mining operation. As such, the permittee will always control the operator, at least to the extent that the permittee selects, and can ultimately fire, the operator. Since the operator is effectively "downstream" from the applicant/permittee, it is consistent with section 510(c) to consider the operator's compliance history, *i.e.*, whether the operator has any outstanding violations, during the section 510(c) compliance review. While reviewing the operator's compliance history was subsumed in the proposed provision, which would have required regulatory authorities to consider violations at all operations owned or controlled by the applicant, we decided to add specific reference to the operator to avoid any confusion. If we could not consider an operator's violations during the compliance review, operators could create violations at multiple sites and remain in the business by associating with "clean" applicants. The Act cannot be read to support such a result. The provision will also encourage applicants to hire "clean" operators.

A commenter asked that we explain which "other persons" we are referring to in proposed § 773.15(b)(3)(i)(A). The commenter said that without explanation, "the regulations allow far too much leeway to the agency issuing the permit." By "persons other than [the applicant]," we intended to clarify that persons other than applicants for new permits may be subject to a section 510(c) permit eligibility determination. However, we decided that the reference to "other persons" is unnecessary in

final § 773.12 because other rule provisions already provide the circumstances under which a section 510(c) compliance review is required.

One commenter said that "State law governs the analysis for piercing the corporate veil" so that "a Federal rule that attempts to displace State corporate law would be particularly intrusive and unjustified." This rule does not displace State corporate law to a greater extent than provided for in SMCRA. Further, as explained above, State common law pertaining to piercing the corporate veil is not the exclusive tool to determine the true applicant. It is true that corporations are creatures of State law; however, the corporate form cannot be used to evade the requirements of a Federal statute, such as SMCRA. To the extent that SMCRA is inconsistent with State corporate law principles, federal law prevents the provisions of SMCRA from being subverted by State law.

A commenter asked if the rule would allow for permit denial based only on the applicant's violations, or would it also allow for denial based on violations indirectly owned or controlled by the applicant. This final rule, like the provisions in the IFR, allows for permit denials based on "limitless downstream violations" at operations which the applicant owns or controls through intermediary persons or entities. This provision was expressly upheld in *NMA* v. *DOI II*. 177 F.3d at 4–5. Thus, during a section 510(c) compliance review under final § 773.12, we may consider not only the applicant's own, directly owned or controlled violations, but also violations at operations which the applicant indirectly owns or controls through intermediary persons or entities. This provision is subject to the court's retroactivity holding, as embodied in final § 773.12(a) and (b).

Proposed § 773.15(b)(3)(i)(B)

In paragraph (b)(3)(i)(B), we proposed that if an applicant or any surface coal mining operation owned or controlled by the applicant has an outstanding violation, the application may not be approved unless: (1) the regulatory authority with jurisdiction over the violation approves a properly executed abatement plan or payment schedule; or (2) the violation is being abated or is the subject of a good faith administrative or judicial appeal, contesting the validity of the violation; or (3) the violation is subject to the presumption of NOV abatement under proposed § 773.16(b).

We modified and reorganized the proposed provision. We consolidated all proposed provisions describing permit eligibility into final § 773.12. We moved proposed provisions regarding appeals, abatement plans, and payment schedules to final § 773.14. Section 773.14 governs the circumstances under which a permit may be provisionally issued, when an applicant or operator has outstanding violations. The adopted provisions of final § 773.14 are described below in the discussion of proposed § 773.16 at section VI.F. of this preamble.

In final § 773.12, we also changed the proposal's use of the past tense "owned or controlled" to the present tense "own or control" in order to conform the proposed provision to the ruling in *NMA* v. *DOI II*. In other words, the adopted language clarifies that we may no longer consider unabated or uncorrected violations at operations formerly, but no longer, owned or controlled by the applicant during the section 510(c) compliance review. We may, however, consider past ownership or control in determining if there has been a pattern of willful violations under final § 774.11(c) and section 510(c) of the Act.

Finally, we modified the proposed language to conform to the *NMA* v. *DOI II* court's ruling on retroactivity. Under this final rule, we may no longer deny a permit when an applicant assumed indirect ownership or control of an operation before November 2, 1988, and that operation has an outstanding violation which was cited before November 2, 1988, unless there was an established basis, independent from our 1988 ownership or control rule, to deny the permit at the time of the assumption of indirect ownership or control or at the time of violation (whichever is earlier).

A commenter who provided comments on the effect of the *NMA* v. *DOI II* decision said that under the court's retroactivity holding, our pre-1988 regulations only pertained to the applicant's violations. Another commenter said that the court's ruling "did not prohibit imposition of permit blocks for direct ownership or control of violators whose violations occurred before [November 2, 1988]."

We agree with the latter comment. As explained above, the court found that the previous rule was impermissibly retroactive to the extent it required permit denials based on *indirect* control and transactions which occurred before November 2, 1988. Thus, the rule was not retroactive to the extent it required permit denials based on pre-rule transaction in instances involving *direct* control. Final § 773.12(a)(1) requires permit denial when the applicant directly owns or controls an operation with an unabated or uncorrected violation, regardless of when the ownership or control was established or when the violation occurred. The distinction between direct and indirect control is discussed more fully above.

A commenter said that proposed § 773.15(b)(3)(i)(B) appears to address an "outstanding violation," but subparagraphs (B)(2) and (B)(3) appear to address only notices of violation. The commenter is correct that the proposal treated "outstanding violations" and "notices of violation" differently. We proposed to define *outstanding violation* to mean a violation notice that remains unabated or uncorrected beyond the abatement or correction period. As such, a notice of violation for which the abatement period has not expired would not have been an outstanding violation under the proposal. As previously explained, we are not adopting the proposed definition of *outstanding violation*. As such, the phrase "outstanding violation" will continue to have its plain meaning—*i.e.*, a violation that is unabated or uncorrected. Thus, under the final rule, an NOV is an outstanding violation, even if the abatement period has not expired. We also clarify that, under section 510(c) of the Act and our longstanding policy, regulatory authorities must consider notices of violation—and any other outstanding violations—during the section 510(c) compliance review (though the applicant may be eligible for a permit under final §§ 773.13 or 773.14).

Two commenters asked if the phrase "may not approve" in proposed § 773.15(b)(3)(i)(B) means that the regulatory authority has the discretion not to approve an application. The commenters said that if OSM is granting discretion to regulatory authorities in this matter, then it should be made clear in the final rule. In this final rule, denying a permit under § 773.12 is *not* discretionary. If a person is ineligible for a permit under final § 773.12, and does not meet the criteria of §§ 773.13 and 773.14, the regulatory authority must deny the application.

Several commenters opposed the presumption in proposed § 773.15(b)(3)(i)(B) that a violation is being abated "merely because there is an abatement plan." They said the presumption should be that the violation exists until it is abated, "not merely promised to be abated." These commenters also opposed the use of appeals to defer a finding of a violation. The commenters asked, "when is a violation final enough to block issuance of a new permit?"

The proposed amendment provided for permit approval if an approved abatement plan or payment schedule is

in place to correct a violation which remains unabated beyond the abatement period, or the violation is subject to a good faith appeal, at the time a permitting decision is made. In our view, the presence of an abatement plan or payment schedule demonstrates a good faith effort to correct a violation. We conclude that this current practice should continue. We also conclude that it is appropriate to provisionally issue a permit when a violation is subject to a *good faith* appeal. However, under final § 773.14(c), if a permittee, operator, or other person fails to comply with an abatement plan or payment schedule, or if a court affirms the existence of a violation properly attributable to the applicant, then a regulatory authority should pursue other means to compel compliance, and must institute procedures to suspend or rescind the provisionally issued permit. *See* section VI.F. for a detailed discussion of provisionally issued permits.

Proposed § 773.15(b)(3)(i)(C)

At proposed paragraph (b)(3)(i)(C), we proposed that any application approved with outstanding violations must be conditioned under § 773.17(j). Because we are not adopting proposed § 773.17(j), we also are not adopting proposed (b)(3)(i)(C). There were no comments on this proposed provision. Permits which are issued when there are outstanding violations properly attributable to the applicant under section 510(c) must be provisionally issued in accordance with final § 773.14.

Proposed § 773.15(b)(3)(i)(D), (E), and (F)

We preserved the substance of these proposed provisions at final §§ 773.12(c) and 774.11(c) through (e). In proposed subparagraphs (b)(3)(i)(D), (E), and (F), we provided that OSM will serve a preliminary finding of permanent permit ineligibility under 43 CFR 4.1351 when we find that an applicant or operator owned or controlled mining operations with a demonstrated pattern of willful violations of the Act and its implementing regulations, and the violations are of such nature and duration that they result in irreparable damage to the environment so as to indicate an applicant or operator's intent not to comply with the Act or implementing regulations. We further proposed that a person would be able to request a hearing under 43 CFR 4.1350 through 4.1356 with the Office of Hearings and Appeals within 30 days of receiving a preliminary finding under paragraph (3)(i)(D) of this proposed section. If a request for a hearing is filed, the Office of Hearings and Appeals would give written notice of the hearing to an applicant or operator and issue a decision within 60 days of the filing of the request for a hearing. We further proposed that a person may appeal the decision of the administrative law judge to the Interior Board of Land Appeals under procedures in 43 CFR 4.1271 through 4.1276 within 20 days after receipt of a decision. The provisions were based upon previous § 773.15(b)(3) and were proposed with only minor, non-substantive changes from the previous provisions. As mentioned, we adopted the provisions, without substantive modification, in final §§ 773.12(c) and 774.11(c) through (e).

A commenter asserted that the finding would require an investigation and extensive staff resources. These are not new provisions. The proposed provision at § 773.15(b)(3)(i)(D) and the final provisions at § 774.11(c) through (e) are derived from previous § 773.15(b)(3), which implements the "pattern of willful violations" aspect of section 510(c) of SMCRA. There are no substantive changes from the previous provisions, except that we modified the provision to conform it to the appeals court's retroactivity holding. We note that compliance with the provisions is not discretionary, as they are necessary to implement section 510(c)'s mandate. As such, although an investigation requiring staff resources may be required in certain instances, this result is unavoidable under the Act.

A commenter who provided comments on the effect of the *NMA* v. *DOI II* decision suggested that the rule require regulatory authorities to evaluate past ownership or control of operations in violation and make a written finding if there is a pattern of willful violations. Consistent with *NMA* v. *DOI II*, final § 774.11(c) requires regulatory authorities to consider past ownership or control in determining whether there has been a pattern of willful violations under section 510(c). However, we adopted language in final § 774.11(c) to comply with the court of appeals' retroactivity holding. Thus, when determining whether there is a pattern of willful violations, we will only consider ownership and control relationships and violations which would make, or would have made, the applicant ineligible under final § 773.12, which incorporates the substance of the court's retroactivity holding. Final § 774.11(c) also requires regulatory authorities to serve a preliminary finding of permanent permit eligibility if such a pattern exists.

A commenter said the "use of the word 'irreparable' should be replaced with 'material damage.' Irreparable is not the only damage which should not be tolerated. Property owners have to put up with all kinds of illegal damages because they are not significant enough. Material damage may affect many more properties than irreparable damage." We note that section 510(c) of the Act uses the term "irreparable damage."

Proposed § 773.15(b)(3)(i)(G)

We proposed subparagraph (b)(3)(i)(G) to provide that a person is not eligible for a permit if the person or anyone proposing to engage in or carry out operations on the proposed permit has been barred, disqualified, restrained, enjoined, or otherwise prohibited from mining by a Federal or State or court.

We are not adopting the proposed provision. We decided that there are sufficient existing authorities to allow regulatory authorities to avoid violating court orders or injunctions or aiding and abetting enjoined individuals in violating injunctions. For example, if an owner or controller of an applicant is enjoined by a court from engaging in surface coal mining operations, granting a permit to the applicant may be viewed as violating the injunction. Even if the regulatory authority processing the permit application is not technically bound by the injunction, granting a permit may nonetheless be viewed as aiding and abetting an enjoined individual in violating an injunction. Because the specific terms of an injunction will be outlined in the court's order, the regulatory authority must decide, on a case by case basis, whether the order prevents it from issuing a permit.

Proposed § 773.15(b)(3)(ii)

We proposed subparagraph (b)(3)(ii) to provide for an examination of an applicant's controllers. We proposed to ask for an AVS report to show if an applicant's owners or controllers owned or controlled a surface coal mining operation when a violation notice was issued and if the violation is outstanding. We further proposed to investigate each person and violation to determine whether alternative enforcement action under proposed part 846 is appropriate and to enter into AVS the results of each determination or referral. We further proposed that if an applicant has less than five years experience, or has owners or controllers that are linked to outstanding violations, we would consider the applicant to have insufficient or unsuccessful environmental compliance and, if approved for a permit, subject such applicant to additional permit conditions under proposed § 773.18.

In this final rule, we are not adopting direct references to investigations, the five-years experience criterion, the successful environmental compliance criterion, or additional permit conditions. We adopted the remaining provisions, as modified, at final § 774.11(b). Under final § 774.11(b), if we discover that any person owns or controls an operation with an unabated or uncorrected violation, we will determine if an enforcement action is appropriate under parts 843, 846, or 847. We must enter the results of any enforcement action in AVS. *See also* the description of final § 774.11(b) in section VI.K. of this preamble.

A commenter said the proposed provision seems to be inconsistent with the ruling in *NMA* v. *DOI I*, "especially if the applicant is part of a large corporate family where the same individuals hold officer positions in several of the companies." The commenter suggested that outstanding violations should be considered only if they were issued to the applicant or any operation owned or controlled by the applicant. The commenter further said that "[v]iolations at other operations of an applicant's parent or sister companies must not be considered if their only connection to the applicant is a common individual officer or "controller." To do so would have the same result as the previous regulation which denied permits if anyone owning or controlling the applicant had outstanding violations. This concept was disallowed by the court decision in *NMA* v. *DOI [I]*."

The provisions adopted at final § 774.11(b) are unrelated to permit eligibility determinations. Rather, the final regulations at § 774.11 provide that regulatory authorities may determine whether enforcement actions are appropriate under 30 CFR 843.13 and parts 846 and 847, which implement sections 518 and 521 of the Act. The ruling in *NMA v. DOI I* does not alter our statutory authority to pursue enforcement actions under sections 518 and 521.

Proposed § 773.15(b)(4)

We proposed to revise previous § 773.15(b)(4) by correcting the date in previous subparagraph (b)(4)(i)(C)(1) to read "September 30, 2004." In the reorganization of part 773, we moved the provisions in previous paragraph (b)(4) to a separate section, final § 773.13. We adopted the date correction at final § 773.13(a)(2)(i) and also modified and reorganized the prior provisions for increased clarity. The substance of the final provision is unchanged.

Final §§ 773.15(a) and (n)

Under the reorganization of part 773 in this final rule, the provisions in previous § 773.15(c) are placed in a separate section. The section appears at final § 773.15. In this final rule, we also adopted two amendments at final § 773.15. In final § 773.15(a), we made a technical revision to previous § 773.15(c)(1), changing the phrase "complete and accurate" to "accurate and complete," to match the statutory phrase used in section 510(b)(1) of the Act. We added final § 773.15(n) to require a written finding based upon the results of the reviews under §§ 773.8 through 773.14.

Proposed § 773.15(e)

We proposed to revise paragraph (e) of previous § 773.15 to require regulatory authorities to obtain an AVS compliance report no more than three days before a permit is issued. Our intent was to ensure, immediately before permit issuance, that no new violations have been cited at operations which the applicant or operator owns or controls since the initial section 510(c) compliance review.

We modified the proposed provision in the final rule. The final provision, at § 773.12(d), provides that after a regulatory authority approves a permit, it will not issue the permit until the applicant complies with the information update and certification requirement of final § 778.9(d). After the applicant completes the update and certification, § 778.9(d) requires a regulatory authority, no more than five business days before permit issuance, to again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect the applicant's permit eligibility.

We increased the proposed three days to five days in response to comments on the proposed provision. The final compliance history report should be obtained close to the anticipated date of the permitting decision. Five days provides a better opportunity to review the compliance report and resolve any discrepancies that arise before a final permitting decision is made. The purpose of the second compliance history report is to make sure that the applicant and operator, and operations they own or control, continue to be in compliance. If there are compliance problems identified in the second report, or otherwise known, they must be resolved before a permit may be issued. We added the provision requiring the final compliance history report to be obtained after the applicant complies with the information update and certification requirement of final § 778.9(d) to ensure that the regulatory authority's permitting decision is based on the most current information.

F. Section 773.16—Permit Eligibility Determination

The provisions that we proposed at § 773.16 are found at §§ 773.12 and 773.14 of this final rule.

Under proposed § 773.16, permit eligibility determinations would be based upon the permit and compliance history of the applicant, operations which the applicant currently owns or controls, and operations the applicant owned or controlled in the past. If you were eligible for a permit, proposed § 773.16(a)(1) would have required us to determine whether additional permit conditions should be imposed under § 773.18. Proposed § 773.16(a)(2) required written notice of a finding of ineligibility. That notice also would have contained guidance as to how to challenge a finding on the ability to control the surface coal mining operation. Proposed § 773.16(b) provided for a "presumption of NOV abatement" and set forth criteria for the presumption.

In developing this final rule, we modified the proposed rule based upon the *NMA* v. *DOI II* decision concerning our previous rules and the comments we received on proposed §§ 773.15 and 773.16. (Section VI.E of this preamble contains a detailed discussion of the court decision.) We did not adopt the proposed provisions pertaining to additional permit conditions. We adopted proposed § 773.16(a) in modified form as final § 773.12. We also adopted proposed §§ 773.15(b)(3)(i)(B) and (C) and 773.16(b) in modified form as final § 773.14 (provisionally issued permits).

Final § 773.12—Permit Eligibility Determination

We added § 773.12 to this final rule as a part of the reorganization of part 773. Final § 773.12 contains a modified form of provisions proposed as §§ 773.15(b)(3) and 773.16(a).

Paragraphs (a) and (b). Paragraphs (a) and (b) of final § 773.12 require that the regulatory authority determine whether the applicant is eligible for a permit under section 510(c) of the Act, based upon a review of compliance, permit history, and ownership and control information under 30 CFR 773.9 through 773.11. Specifically, paragraph (a) states that—

Except as provided in §§ 773.13 and 773.14 of this part, you are not eligible for a permit

if we find that any surface coal mining operation that—

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

(2) You or your operator indirectly own or control, regardless of when the ownership or control began, has an unabated or uncorrected violation cited on or after November 2, 1988; or

(3) You or your operator indirectly own or control has an unabated or uncorrected violation, regardless of the date the violation was cited, and your ownership or control was established on or after November 2, 1988.

The November 2, 1988 cutoff date in paragraphs (a)(2) and (3) reflects the decision in *NMA* v. *DOI II*, which prohibited us from applying the permit block sanction for actions that occurred before the effective date of our first ownership and control rules. In final paragraph (b), we clarify that the ban on retroactive application does not apply to situations in which there was an established legal basis, independent of authority under section 510(c) of the Act, to deny the permit at the time that the applicant or operator assumed indirect ownership or control or at the time the violation was cited, whichever is earlier.

Except for the addition of paragraph (b) and the November 2, 1988 cutoff date, final § 773.12(a) and (b) do not differ significantly in substance from the corresponding provisions in § 773.15(b)(1) of our previous rule.

Paragraph (c). Paragraph (c) of final § 773.12 provides that the regulatory authority may not issue a permit to an applicant if the applicant or operator is permanently ineligible to receive a permit under § 774.11(c). This provision is discussed more fully in sections VI.E. and K. of this preamble.

Paragraph (d). Paragraph (d) of final § 773.12 requires that, after approving the application, the regulatory authority refrain from issuing the permit until the applicant complies with the information update and certification requirement of 30 CFR 778.9(d). Paragraph (d) also requires that, after that update, but no more than five business days before permit issuance, the regulatory authority again request a compliance history report from AVS to ensure that the applicant remains eligible for a permit. Except for the addition of the 5-day timeframe, this paragraph is substantively identical to previous § 773.15(e). We added the 5-day limitation to ensure that the final compliance review occurs reasonably close to the date of permit issuance.

Paragraph (e). Paragraph (e) of final § 773.12 requires that the regulatory authority send the applicant written notice of any decision finding the applicant ineligible for a permit. Paragraph (e) further provides that the notice must contain the reason for the ineligibility determination and apprise the applicant of his or her appeal rights under 30 CFR part 775 and 43 CFR 4.1360 through 4.1369. We are adding these provisions to ensure that any adversely affected applicant is aware of the decision, the reasons for the decision, and the steps that must be taken to procure administrative review of the decision.

Disposition of comments pertaining to the permit eligibility criteria of proposed § 773.16(a). A commenter said that reference to owners and controllers of the applicant in proposed § 773.16(a)(1) should be deleted. In the permit eligibility criteria at § 773.12 of this final rule, we are not adopting the proposed reference to "owners and controllers of the applicant." Likewise, we are not adopting the imposition of additional permit conditions based on the compliance history of an applicant's owners and controllers. As previously explained, at final § 773.12, we limit the permit eligibility review to an examination of whether the applicant and the operator have any outstanding violations or own or control any operations with outstanding violations.

A commenter said that proposed paragraph (a) fails to clearly provide that a permit block under section 510(c) can only occur on the basis of outstanding violations at operations the applicant presently owns or controls. As previously explained, we modified the proposal to conform it to the decision in *NMA* v. *DOI II*; in the process, we eliminated the commenter's concern. During the section 510(c) compliance review, we may only consider violations at operations which the applicant or operator presently owns or controls.

A commenter asserted that a parent company which owns or controls a subsidiary does not necessarily own or control the operations of the subsidiary. The commenter said that actual control of the operations is the only circumstance in a parent/subsidiary relationship that should lead to permit ineligibility for the parent company if the subsidiary has an outstanding violation.

We disagree. This argument was advanced and rejected in *NMA* v. *DOI II*. If the parent company owns or controls the subsidiary under the definitions we adopt today, the parent company, de facto, also owns or controls the subsidiary's operations. In upholding our previous construction of section 510(c), which, on this point, we import into this final rule, the D.C. Circuit explained that our view is "consistent with, if not mandated by, the statutory language which, as noted, applies to any violating operations 'controlled by the applicant,' not only those directly owned by him. Accordingly, the agency's construction must be upheld." *NMA* v. *DOI II*, 177 F.3d at 5. Thus, in § 773.12 of this final rule, we retained the ability to deny permits based on both direct and indirect ownership or control (including both the exercise of control and the ability to control) of operations with current violations, subject to the court's retroactivity holding. *See also* our response to similar comments in sections VI.A. and E. of this preamble.

A commenter said that we correctly state that the appeals court [in *NMA* v. *DOI I*] found only one aspect of our rules to be flawed. However, the commenter also said that we should not alter other aspects of "a permit block system which has been substantially successful in holding corporations accountable for the damage caused by their contract miners, but instead [should focus] on assuring that the full gamut of regulatory powers are employed to prevent those who have violated State or Federal environmental laws or this Act from obtaining new permits through indirect means."

As discussed throughout this preamble, we believe that there are sound reasons for the assorted modifications that we are making to the rules implementing the permit block sanction of section 510(c) of the Act. We targeted our outreach efforts to identifying how our rules could be improved in their entirety, not just how our rules should be revised as a result of *NMA* v. *DOI I*. One of the new rules that we are adopting (part 847) emphasizes use of the alternative enforcement mechanisms provided in sections 518(e), 518(g), and 521(c) of the Act. See section VI.AA. of this preamble.

Several commenters said that OSM apparently believes ownership is irrelevant to permit eligibility determinations, and that eligibility is based only on ownership to the extent it reflects the ability to control. One commenter further said that "[o]wnership itself should be a basis for [a permit eligibility determination], otherwise it insulates individuals that own but purposefully do not control."

We agree that ownership in and of itself can form the basis for denying a permit. However, we note that both the proposal (see, e.g., proposed §§ 773.15(b)(3) and 773.16(a)) and final § 773.12 properly identify ownership and control as independent bases for permit denials under section 510(c). Thus, under this final rule, if an

applicant owns an operation with a violation, under the definition of "*own, owner*, or *ownership*" in final § 701.5, he or she will not be eligible for a permit unless he or she qualifies for a provisionally issued permit under final § 773.14). Further, under the challenge procedures we adopt today at final §§ 773.25 through 773.27, an applicant may only successfully challenge a listing or finding that he owns an operation by proving by a preponderance of the evidence that he does not own, or did not own, the relevant operation; in this situation, a demonstration of the lack of control of an operation will be of no avail.

Several commenters said that "OSM should clarify the proper forum and procedures to challenge erroneous permit blocks. The permit applicant should not be punished for improper actions or inactions of regulatory bodies." We respond to this comment, and similar comments, in section VI.N., *infra*.

We invited comments on the criteria to identify which applicants should be subject to additional permit conditions and what types of conditions should be imposed. 63 FR 70580, 70595. Commenters did not provide comments in the context of proposed § 773.16. Commenters did, however, provide comments in response to this invitation with respect to proposed §§ 773.15 and 773.18. We address those comments in section VI.E. of this preamble.

Final § 773.14—Provisionally Issued Permits

We added § 773.14 to this final rule as part of the reorganization of part 773. Final § 773.14 is a modification of provisions in previous § 773.15(b)(1) and (2), proposed §§ 773.15(b)(3)(i)(B) and (C), and proposed § 773.16(b). Instead of using the term "conditionally issued permits" as in the previous and proposed rules, the final rule substitutes the term "provisionally issued permits" to clarify that permits issued under final § 773.14 are not the same as permits issued with conditions under 30 CFR 773.17.

Paragraph (a). Paragraph (a) of final § 773.14 explains that this section applies to applicants who own or control a surface coal mining and reclamation operation with either—

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

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

Paragraph (b). Paragraph (b) of final § 773.14 identifies the circumstances under which a regulatory authority may find an applicant eligible for a permit even though an outstanding violation would otherwise make the applicant ineligible for a permit under 30 CFR 773.12 and section 510(c) of the Act. Specifically, final paragraph (b) states that—

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

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

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

(3) You are pursuing a good faith—

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

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

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

In general, final § 773.14(b) is substantively identical to the corresponding provisions in §§ 773.15(b)(1) and (2). However, there is one significant exception. We added paragraph (b)(3) to the final rule in response to comments that our challenge procedures for ownership and control listings or findings failed to provide due process by way of a pre-deprivation hearing. To address these concerns, and in the interest of equity, the final rule allows issuance of a provisional permit when a person is in the process of challenging an ownership or control listing or finding. Our rules have always included a similar provision for good faith administrative and judicial appeals of the validity of a violation. We see no reason not to extend this opportunity to persons who are pursuing good faith challenges to, or administrative or judicial review of, ownership or control listings or findings.

This paragraph of the final rule will afford additional due process protection to adversely affected applicants while presenting little risk of environmental harm. The applicant must meet all other permit application approval and issuance requirements before receiving a provisionally issued permit. In addition, the provisional permittee must comply with all performance standards. If he or she fails to do so while pursuing a challenge or appeal of all pertinent ownership or control listings and findings, the regulatory authority must take all appropriate enforcement measures, including issuance of an imminent harm cessation order when applicable.

Furthermore, addition of this provision does not abrogate the permit eligibility provisions of section 510(c) of the Act. It merely delays their implementation until a judicial decision affirms the validity of a violation or an ownership or control listing or finding. An applicant whose challenges and appeals are ultimately unsuccessful will be ineligible to receive a permit from that time forward until the violation causing the ineligibility is corrected or until the applicant ceases to be responsible for that violation.

Paragraph (c). Paragraph (c) of final § 773.14 provides that the regulatory authority must immediately initiate procedures under §§ 773.22 and 773.23 to suspend or rescind a provisionally issued permit if—

(1) Violations included in final § 773.14(b)(1) are not abated within the specified abatement period;

(2) The applicant, operator, or operations that the applicant or operator owns or controls do not comply with the terms of an abatement plan or payment schedule mentioned in final § 773.14(b)(2);

(3) In the absence of a request for judicial review, the disposition of a challenge and any subsequent administrative review referenced in final § 773.14(b)(3) or (4) affirms the validity of the violation or the ownership or control listing or finding; or

(4) The initial judicial review decision referenced in final § 773.14(b)(3)(ii) or (4) affirms the validity of the violation or the ownership or control listing or finding.

We added this new paragraph to ensure that regulatory authorities take action to suspend or rescind provisionally issued permits as improvidently issued when the conditions justifying provisional issuance cease to exist. As this rule makes clear, a provisional permittee is not entitled to, nor is there any need for, the initial review and finding requirements of § 773.21 normally applicable to improvidently issued permit proceedings. The initial permit

application review procedures leading to issuance of a provisional permit effectively replace the initial review and finding requirements of § 773.21. Therefore, the final rule requires that the regulatory authority proceed directly to § 773.22 and propose to suspend or revoke the permit.

Under the previous rule at § 773.15(b)(1)(ii), the permittee had 30 days from the date that the initial judicial review decision affirmed the validity of the violation to submit proof that the violation was being corrected to the satisfaction of the agency with jurisdiction over the violation. In contrast, final § 773.14(c) requires that the regulatory authority initiate action to suspend or revoke the permit as improvidently issued if the disposition of challenges or administrative or judicial appeals affirms the violation or ownership or control listing or finding. We made this change to ensure prompt implementation of the section 510(c) permit block sanction once the validity of a violation or ownership or control listing or finding is affirmed on appeal. (The previous rule did not specify what action the regulatory authority must take if the permittee did not submit the required proof within 30 days.) Under § 773.23 of the final rule, the permittee still has ample opportunity to submit proof of corrective action and thus avoid permit suspension or revocation. Final § 773.22(b) requires 60 days notice for a proposed suspension, while final § 773.22(c) requires 120 days notice for a proposed rescission.

Disposition of Comments on Presumption of NOV Abatement

In the proposed rule, we provided that the presumption that a notice of violation (NOV) is being corrected—the "presumption of NOV abatement"—was not available to applicants who were subject to additional permit conditions under proposed § 773.18 because their owners or controllers were linked to violations. We invited comments on withholding the presumption of NOV abatement based on this criterion, and also sought suggestions as to other criteria which could be used to withhold the benefit of the presumption. 63 FR 70580, 70593. In this final rule, we are not adopting the "additional permit conditions" of proposed § 773.18. We also decided not to distinguish between applicants who can and cannot obtain the benefit of the presumption of NOV abatement. Rather, all applicants may obtain the benefit of the presumption, provided that they meet the requirements of final § 773.14.

Several commenters argued that the presumption of NOV abatement is unlawful because it is inconsistent with section 510(c) of SMCRA. The commenters said the law requires submission of proof that an NOV is being corrected to the satisfaction of the regulatory authority or agency with jurisdiction over the violation and that there is no discretion on this point.

We disagree with these commenters. The provisionally issued permit provisions that we adopt at § 773.14 today continue, in substance, our previous use of the presumption and are a reasonable implementation of section 510(c). We extensively explained the basis for the presumption in the preamble to our 1994 AVS Procedures rule. 59 FR 54306, 54322–54324 (October 28, 1994). We continue to rely, in part, on the same rationale for purposes of this rulemaking. In short, based on our experience, we firmly believe that the efficiencies gained by use of the presumption far outweigh any perceived reduction in environmental harm that might result from its elimination.

Further, we note that the certification requirement in final § 773.14(b)(1) satisfies section 510(c)'s proof requirement that an applicant who owns or controls operations that are currently in violation submit "proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation * * *." An applicant's certification that the violation is in fact being abated, with attendant consequences for failure to comply with the certification, constitutes adequate proof under section 510(c). To that extent, the use of the term "presumption" in connection with this provision is a misnomer; under this final rule, regulatory authorities cannot simply "presume" that an NOV is being abated, but must require the requisite certification before a permit may be provisionally issued.

In NMA's challenge to the AVS Procedures rule, the U.S. District Court for the District of Columbia stated: "The Court finds the "certification of abatement" requirement consistent with SMCRA and a rational way to enforce the Act's requirements." *National Mining Assoc. v. Babbitt*, 43 Env't Rep. Cas. (BNA) 1097, 1109 (D.D.C. 1996), *appeal docketed*, No. 96–5274 (D.C. Cir). As the court explained, "certification provides state-of-mind insurance to the regulatory authority by giving it recourse against the applicant who does not correct a NOV." *Id.* at 1110. Similar recourse is available in final § 773.14(c).

When there is an unabated or uncorrected violation and the abatement or correction period has expired, final § 773.14(b)(2) establishes prerequisites for provisional permit issuance that similarly satisfy the proof requirement. The presence of an approved abatement plan or payment schedule, and confirmation of compliance with the plan or schedule, represents a good faith effort to correct the violation and constitutes more than adequate proof that the violation is being abated. Finally, the criteria §§ 773.14(b)(3) and (4), which allow issuance of a provisional permit when the violation or ownership or control listing or finding is the subject of a good faith challenge or administrative or judicial appeal, have adequate support in the legislative history of section 510(c), as discussed at 44 FR 15024–25 (March 13, 1979).

The National Wildlife Federation and Kentucky Resources Council, Inc. also filed a complaint challenging our 1994 AVS procedures rule. In that action, plaintiffs claimed, among other things, that the presumption of NOV abatement failed to satisfy section 510(c)'s proof requirement. Ultimately, the parties filed a joint motion for voluntary dismissal of the action, based on our agreement to "reopen the issues and regulatory language complained of in this lawsuit for public comment, and to reevaluate the position of the agency with respect to those matters complained of in this case," including the presumption of NOV abatement. By order of September 15, 1997, the court granted the joint motion. This rulemaking, in conjunction with our 1998 proposed rule, fulfils the commitment we made in the joint motion. We carefully considered all the comments received on our proposal to continue the use of the presumption of NOV abatement. As explained above, we decided to retain the presumption, confident that it is consistent with section 510(c) of the Act. However, we revised the previous rules by providing that we will immediately propose to suspend or revoke a provisionally issued permit under final §§ 773.22 and 773.23 if a person fails to comply with its terms. *See* final § 773.14(c). This change should increase the probability that a notice of violation will be abated.

Three commenters expressed concern over the resources required to monitor the notices of violation issued to permittees with less than five years experience in surface coal mining operations. As explained elsewhere in this preamble, we are not adopting the experience criterion. Therefore, no additional resources will be required to

monitor NOVs issued to permittees with less than five years of experience.

One commenter said that proposed § 773.16(b) would eliminate the presumption of NOV abatement. Final § 773.14 clearly provides that the presumption of NOV abatement is still available.

A commenter said:

> An outstanding violation is to be defined as one where the abatement period has expired without corrective action. A portion of the presumption [of NOV abatement] includes an abatement period which has not expired. It is unclear how a regulatory authority can presume the abatement period has not expired when the presumption process is triggered by a violation for which the abatement period has already expired.

The commenter is incorrect that the proposed presumption of NOV abatement is "triggered by a violation for which the abatement period has already expired." Proposed § 773.16(b)(1)(ii) clearly said, "we may presume an NOV is being corrected to the satisfaction of the agency with jurisdiction over the violation if the abatement period for the notice of violation has not yet expired." 63 FR 70580, 70619. Indeed, the primary basis for use of the provision is that the abatement period has *not* expired. *See* proposed § 773.16(b)(1)(ii) and final § 773.14(b)(1). However, we note that final § 773.14(b) also pertains to violations which remain unabated or uncorrected beyond the abatement or correction period. To receive a provisionally issued permit when there is such a violation, a person must be eligible under § 773.14(b)(2) through (4).

A commenter said that if there is no failure-to-abate cessation order, then the abatement period for an NOV has not expired. We disagree. The fact that a failure-to-abate cessation order has not been issued does *not* mean that the abatement period has not expired.

Three commenters expressed support for the presumption of NOV abatement. One said the presumption "is clearly supported by the Act. Section 521(a)(3) expressly sets forth that the NOV will provide 'a reasonable time' for the abatement of the violation." We agree that the presumption is supported by section 510(c) of the Act, but not by section 521(a)(3). Providing a reasonable time for abatement does not mean that the NOV is not a violation when written; nor is it the same thing as presuming a violation is being abated within the time period allotted for abatement. We retained the presumption because it is beneficial to State regulatory authorities and industry, will not likely result in harm to the environment, and because it is authorized by section 510(c) of the Act.

Two commenters said the presumption of NOV abatement "supports the concept of all violations being entered into AVS, then updated as to [whether they are] abated or not." The commenters questioned the need for the States to perform, as they see it, duplicate data entry. They said, "[we] really do not think our State is going to deny a permit because the applicant may owe a penalty in another State. This situation would be overridden under today's AVS recommendation."

These commenters are mistaken. First, they are incorrect as to the effect of the presumption on violation data in AVS. Use of the NOV presumption is continued from previous regulations. It has not meant, nor does it now mean, that all notices of violation must be entered into AVS. Rather, under final §§ 773.8(b)(2) , 773.8(c), and 774.11(a)(2), regulatory authorities must enter into AVS only those violations which are unabated or uncorrected after the abatement or correction period has expired. Second, the commenters are incorrect regarding the effect "a penalty in another State" has on permit eligibility. Unless a person is eligible under final §§ 773.13 or 773.14, final § 773.12 and section 510(c) do not allow issuance of a permit if the applicant owns or controls an operation with a current violation; that violation may be anywhere in the United States. AVS helps to implement this statutory requirement. The recommendation process we previously used would not result in the outcome alleged by these commenters.

Finally, a commenter said that proposed § 773.16(b)(2)(iv) must be deleted because we may not issue a notice of violation for non-payment of abandoned mine land fees or civil penalties. We are not adopting proposed § 773.16(b)(2)(iv). Under this final rule, the presumption of NOV abatement is available for all NOVs, including those written for non-payment of reclamation fees. Under 30 CFR 773.17(g), every permit must contain a condition requiring payment of reclamation fees. Failure to adhere to this permit condition is enforceable under 30 CFR 843.12, which authorizes issuance of an NOV for noncompliance with a permit condition.

G. Section 773.17—Permit Conditions

In this final rule, the provisions we adopt from proposed § 773.17 are found at §§ 774.11 and 774.12.

Proposed § 773.17(h)

We proposed to revise existing § 773.17(h), which requires permittees to provide or update ownership and control information, or indicate that there is no change in the information, within 30 days of receiving a cessation order issued under § 843.11. The proposed rule would have revised the cross-references in § 773.17(h) to be consistent with the proposed revisions to the application information requirements in proposed § 778.13 and to clarify that the updated application information should be based upon the information provided to the regulatory authority in a permit application. We received no comments on proposed § 773.17(h).

As part of our reorganization of part 773, we are recodifying the provisions in previous and proposed § 773.17(h) in revised form at final § 774.12(a). Section VI.P. of this preamble discusses final § 774.12(a) more fully in the context of proposed § 774.13(e).

Proposed § 773.17(i)

This new paragraph would have provided that the regulatory authority would assume that the permittee, the operator, and any other person named in the application as having the ability to determine the manner in which a surface coal mining operation is conducted is a controller. We are not adopting this provision because final § 778.11 already requires disclosure of applicant, operator, and ownership and control information. Therefore, proposed § 773.17(i) is unnecessary.

Proposed § 773.17(j)

We proposed to add paragraph (j) to § 773.17 to state that all controllers are jointly and severally responsible for compliance with the terms and conditions of the permit and are subject to the jurisdiction of the Secretary of the Interior. Several commenters opposed proposed § 773.17(j) as lacking sufficient basis in SMCRA. After further evaluation, we agree. Therefore, we are not adopting proposed § 773.17(j).

Proposed § 773.17(k)

We proposed to add paragraph (k) to § 773.17 to allow the regulatory authority to identify, at any time, any controller that the permittee did not previously identify to the regulatory authority. We are not adopting proposed § 773.17(k) as a permit condition, but we are adopting it in revised form as a stand-alone provision at final § 774.11(f). Under that final rule, the regulatory authority may identify any owner or controller of an applicant or operator not disclosed in a permit

application. Section VI.K. of this preamble more fully discusses final § 774.11(f) in the context of proposed § 773.22.

Some commenters opposed proposed § 773.17(k) as an unusual determination that sounded like a presumption, did not provide an opportunity to challenge a finding of control, and did not obligate the regulatory authority to provide any explanation of the basis for the determination.

The proposed rule did not involve a presumption. However, in response to the commenters' concerns, we added a requirement in final § 774.11(f) that the regulatory authority make a written finding explaining the basis for the determination. We also added language specifying that a person has the right to challenge the finding under final §§ 773.25 through 773.27. We discuss final § 774.11 more fully in section VI.K. of this preamble in the context of proposed § 773.22.

Proposed § 773.17(l)

We proposed to add paragraph (l) to § 773.17 to require permittees and operators to abate or correct any outstanding violation or payment, unless an administrative or judicial decision invalidates the violation. There were no comments on this proposal. However, we are not adopting the proposed rule because part 843 of our existing rules already requires abatement and correction of violations.

Proposed § 773.17(m)

We proposed to add paragraph (m) to § 773.17 to state that a permit is subject to any other special permit conditions that the regulatory authority determines to be necessary to ensure compliance with the performance standards and regulations. Commenters opposed this proposed rule as unnecessary. We agree that regulatory authorities already have the inherent authority to impose any necessary conditions when issuing a permit. Therefore, we are not adopting proposed § 773.17(m).

H. Section 773.18—Additional Permit Conditions

In this final rule, we are not adopting any of the provisions proposed at § 773.18.

We proposed to add § 773.18 to our regulations to provide for the imposition of additional permit conditions on new permits if the applicant has less than five years experience in surface coal mining operations or if the applicant's controllers have not demonstrated successful environmental compliance. We are not adopting proposed § 773.18 because we found insufficient basis under SMCRA for treating these applicants in a manner that differs from the treatment afforded to other applicants.

I. Section 773.20—Improvidently Issued Permits: General Procedures

In this final rule, the provisions proposed at §§ 773.20 and 773.21 are found at §§ 773.21 through 773.23. In this section of the preamble, we discuss the proposed and final provisions collectively, and do not repeat the discussion in section VI.J. of this preamble. In section VI.J., we will only discuss the comments received on proposed § 773.21.

In 1989, we promulgated regulations to establish procedures and criteria relating to improvidently issued permits. 54 FR 18438 (April 28, 1989). In *NMA* v. *DOI I*, which was decided in 1997, the D.C. Circuit invalidated the 1989 rule on the narrow grounds that it was centered on the invalidated 1988 ownership or control rule. 105 F.3d at 692, 696. Prior to that ruling, we revised the procedures in 1994. 59 FR 54325 (October 28, 1994). The 1994 rule provisions were upheld in their entirety, though the case is currently on appeal to the D.C. Circuit. *National Mining Assoc.* v. *Babbitt*, 43 Env't Rep. Cas. (BNA) 1097, 1111–17 (D.D.C. 1996), *appeal docketed*, No. 96–5274 (D.C. Cir). In our 1997 emergency interim final rule (IFR), which was issued after the *NMA* v. *DOI I* decision, we cured the defects noted by the court of appeals and repromulgated otherwise substantively identical improvidently issued permits provisions. 62 FR 19450, 19453 (April 21, 1997); previous 30 CFR 773.20 and 773.21.

In our December 21, 1998 proposal, we reproposed previous §§ 773.20 and 773.21 in their entirety, with only minor proposed revisions. 63 FR 70597–98; 70620. The proposed revisions included:

- Adding failure to provide information which would have made the applicant ineligible for a permit to the criteria we use to determine if a permit was improvidently issued (see proposed § 773.20(b)(1)(iii); *see also* related provisions at proposed §§ 773.20(c)(1)(i), 773.20(c)(1)(ii)(C), 773.21(a)(2), 773.21(a)(5)). As discussed below, we did not adopt these revisions.
- Removing previous § 773.20(c)(1)(ii), which included imposition of a permit condition requiring abatement or correction of a violation as one of the remedial measures a regulatory authority could take relative to an improvidently issued permit. As discussed below, we deleted this provision as proposed.
- Removing previous § 773.20(b)(2), which made the challenge standards at previous § 773.25 applicable to certain improvidently issued permit proceedings. As discussed below, we did not adopt this revision.

After the close of the comment period for the proposed rule, the D.C. Circuit issued its decision relating to the National Mining Associations's challenge to the IFR. *NMA* v. *DOI II*, 177 F.3d 1 (D.C. Cir. 1999). The court of appeals upheld the improvidently issued permits provisions contained in the IFR, stating as follows:

> [T]he IFR rescission and suspension provisions reflect a permissible exercise of OSM's statutory duty, pursuant to section 201(c)(1) of SMCRA, to "order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this chapter or any rules and regulations adopted pursuant thereto." 30 U.S.C. 1211(c). The IIP provisions simply implement the Congress's general directive to authorize suspension and rescission of a permit "for failure to comply with" a specific provision of SMCRA—namely, section 510(c)'s permit eligibility condition.

Id. at 9. The court also explained: "In addition, apart from the express authorization in section [201(c)(1)], OSM retains "implied" authority to suspend or rescind improvidently issued permits because of its express authority to deny permits in the first instance." *Id.* (citation omitted).

In this final rule, we adopt the basic approach and substance of the provisions upheld by the court. To the extent the provisions we adopt today correspond to our previous provisions, we continue to rely upon the rationales set forth in the preambles to the prior rulemakings. *See* 54 FR 18439–62; 59 FR 54325–29; 62 FR 19453. However, based on comments, the *NMA* v. *DOI II* decision, and further deliberation, we modified the proposal. The most significant modifications from our previous regulations and the proposed rule are enhanced due process and public notice provisions. We also applied plain language principles, reorganized proposed §§ 773.20 and 773.21 into three sections, and eliminated duplicate text. A discussion of the proposed and final provisions follows.

Discussion of Proposed Revisions to Previous §§ 773.20 and 773.21

Proposed §§ 773.20(b)(1)(iii), 773.20(c)(1)(i), 773.20(c)(1)(ii)(C), 773.21(a)(2), and 773.21(a)(5)

As mentioned above, we proposed adding failure to provide information which would have made the applicant ineligible for a permit to the criteria we

use to determine if a permit was improvidently issued. *See* proposed § 773.20(b)(1)(iii). If we found a permit improvidently issued on this basis, we could require the permittee to correct any inaccurate information or provide any incomplete information. *See* proposed § 773.20(c)(1)(i). Under proposed § 773.20(c)(1)(ii)(C), we could suspend the permit until the inaccurate or incomplete information was corrected or provided. Under proposed §§ 773.21(a)(2) and (a)(5), we would not suspend or rescind a permit if the inaccurate or incomplete information was provided or subject to a pending challenge.

We did not adopt these proposed revisions. Under the proposed rule, we intended to allow failure to submit accurate and complete information at the time of application for a permit to form the basis for a finding that a permit was improvidently issued, if disclosure of the information would have made the applicant ineligible to receive a permit.

However, upon further review, we determined that we did not have a sufficient basis to in effect treat failure to supply permit application information as a violation in the absence of any underlying outstanding enforcement action concerning the failure to submit that information. It is an underlying violation, and not a failure to disclose information, which is the ultimate basis for a finding that a permit was improvidently issued.

Proposed Withdrawal of Previous § 773.20(c)(1)(ii)

We proposed to remove previous § 773.20(c)(1)(ii), which included imposition of a permit condition requiring abatement or correction of a violation as one of the remedial measures a regulatory authority could take relative to an improvidently issued permit. We deleted this provision as proposed. We concluded it is unnecessary to impose a permit condition to achieve abatement or correction under these provisions. Because this final rule provides ample incentive and opportunity for abatement, coupled with appropriate sanctions if a violation is not abated, adding a permit condition is not necessary.

Proposed Withdrawal of Previous § 773.20(b)(2)

We proposed to withdraw previous § 773.20(b)(2), which made the challenge standards of previous § 773.25 applicable to certain improvidently issued permit proceedings. As discussed below, we did not fully adopt the proposed withdrawal. In final § 773.21(e), we provide that the ownership or control challenge procedures at final §§ 773.25 through 773.27 apply when a person is challenging an ownership or control finding which leads to a determination that a permit was improvidently issued.

Discussion of Final Rule Provisions

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

Under final § 773.21(a), if a regulatory authority has reason to believe a permit was improvidently issued, it must review the circumstances surrounding permit issuance. Assessing the criteria at final §§ 773.21(a) and (b), which are similar to the criteria at previous § 773.20(b), the regulatory authority will make a preliminary finding if it determines that the permit was improvidently issued. The "reason to believe standard" is carried forward from previous § 773.20(a). Under this standard, the regulatory authority is not required to review all of the permits in its jurisdiction on a regular basis for improvident issuance. Rather, § 773.21 will apply if the regulatory has some particular reason to believe a permit was improvidently issued. The "reason to believe" standard would encompass credible evidence submitted by citizens which may indicate improvident issuance of a permit.

Section 773.21(b) provides that a permit will only be considered improvidently issued if the circumstances in paragraphs (b)(1) through (3) exist. These provisions are substantively identical to previous §§ 773.20(b)(1)(ii) and (iii) in that a permit will not be considered improvidently issued if the permittee is no longer ineligible for a permit. When a permittee severs its ownership or control relationship, abates or corrects the violation, or otherwise becomes eligible to receive a new permit, it is incongruous to suspend or rescind an existing permit only to issue a new one to the same permittee upon reapplication.

The concept of a "preliminary finding," as provided for in final § 773.21(a), is new in this rulemaking. Under final § 773.21(c), if the regulatory authority makes a preliminary finding of improvident issuance, it will serve the permittee with written notice of the finding and provide public notice of the decision. Then, under final § 773.21(d), the permittee may challenge the preliminary finding by submitting evidence, within 30 days of receiving the notice, that the permit was not improvidently issued. Together, these provisions enhance due process and public notice.

Final § 773.21(e) provides that the ownership or control challenge procedures at final §§ 773.25 through 773.27 apply when a challenge to a preliminary finding of improvident issuance involves issues of ownership or control. This provision is modified from previous § 773.20(b)(2). While we proposed to withdraw previous § 773.20(b)(2), we decided that it is important to have uniform challenge procedures for issues of ownership or control. Thus, at final § 773.21(e), we retained the substance of previous § 773.20(b)(2)(ii), in modified form. However, as explained in detail in section VI.M. of this preamble, a person may not use the provisions at §§ 773.25 through 773.27 to challenge the initial existence or status of a violation. Only the regulatory authority, or other agency, with jurisdiction over a violation may resolve issues pertaining to the initial existence or status of a violation. However, under final § 773.21(d), a person may submit evidence that the violation has been abated, or is being abated, to the satisfaction of the regulatory authority, or other agency, with jurisdiction over the violation. Likewise, if the initial existence of a violation has been timely challenged, and the challenger prevailed, evidence of the outcome may be submitted under final § 773.21(d).

Final § 773.22—Notice Requirements for Improvidently Issued Permits.

Final § 773.22(a) provides that the regulatory authority will serve a written notice of proposed suspension or rescission on the permittee if: (1) the regulatory authority, after considering any evidence submitted under final § 773.21(d), finds that the permit was improvidently issued or (2) the permit was provisionally issued under final § 773.14(b) and one or more of the conditions in §§ 773.14(c)(1) through (4) exists. This finding differs from the preliminary finding under final § 773.21 in that the permittee will have been given a prior opportunity under final § 773.21(d) to submit evidence that the permit was not improvidently issued. This finding also triggers the notice requirements of final §§ 773.22(b) and (c) and requires the regulatory authority to take action under final § 773.23 (*see* final § 773.22(f)). If, after making a finding that the permit was improvidently issued, the regulatory authority decides to suspend the permit, it must provide the permittee with 60 days notice; if the regulatory authority decides to rescind the permit, it must provide the permittee with 120 days

notice. The provisions of final §§ 773.22(a) through (c) derive from previous § 773.20(c)(2) and the introductory language of previous § 773.21. In order to enhance public notice, we added final § 773.22(d), which requires public posting of the notice of proposed suspension or rescission.

Final § 773.22(e) is derived from previous § 773.20(c)(2). It allows the permittee to request administrative review of a notice of proposed suspension or rescission with the Department of the Interior's Office of Hearings and Appeals (OHA), or its State counterpart, before a permit is suspended or rescinded under final § 773.23. Final paragraph (e) also specifies that a permittee who wishes to appeal a notice must exhaust available administrative remedies. Final § 773.22(f) clarifies that after the permittee is served with a notice of proposed suspension or rescission, the regulatory authority must take action under final § 773.23. Final § 773.22(g) governs service of the notice, and final § 773.22(h) provides that the time periods specified in paragraphs (b) and (c) will remain in effect during the pendency of any appeal, unless the permittee obtains temporary relief under the procedures at 43 CFR 4.1376 or the State regulatory program equivalent. While the time periods are not tolled during the pendency of an appeal, under final § 773.23(b), we will not suspend or rescind a permit until there is a final disposition of any administrative appeals which affirms our finding that the permit was improvidently issued.

Final § 773.23—Suspension or Rescission Requirements for Improvidently Issued Permits.

Final § 773.23(a) largely corresponds to previous § 773.21(a). Under final § 773.23(a), subject to the exception in final § 773.23(b), the regulatory authority will suspend or rescind the permit upon expiration of the time specified in final § 773.22(b) or (c), unless the permittee submits evidence, and the regulatory authority finds, that suspension or rescission is no longer warranted under the circumstances enumerated in final §§ 773.23(a)(1) through (6). Paragraphs (a)(1) through (6) are substantively identical to previous §§ 773.21(a)(1) through (4), except that we have modified some of the language and terminology for consistency with plain language principles and other provisions of this final rule. We added paragraph (a)(6) and modified paragraph (a)(4) for consistency with the new eligibility standards for provisionally issued permits under final § 773.14(b). It is appropriate to forestall suspension or rescission under these circumstances because the permittee would no longer be ineligible to receive a permit under 30 CFR 773.12 or 773.14 and section 510(c) of the Act.

Under final § 773.23(b), if the permittee requests administrative review of a notice of proposed suspension or rescission under final § 773.22(e), we will not suspend or rescind the permit until there is a final administrative disposition which affirms our finding that the permit was improvidently issued. As discussed more fully below, we added this provision in response to comments raising due process concerns.

Final § 773.23(c)(1) is partially new, and partially derived from previous § 773.21(b). When a regulatory authority suspends or rescinds a permit, final § 773.23(c)(1) requires the regulatory authority to issue a written notice to the permittee, requiring the permittee to cease all surface coal mining operations under the permit. Final § 773.23(c)(2) requires the regulatory authority to publicly post the notice. Final § 773.23(d) allows the permittee to request, at its election, either administrative or judicial review of a permit suspension or rescission. The suspension or rescission will remain in effect during the pendency of any administrative or judicial appeals. We added final §§ 773.23(b) through (d) to enhance due process and public notice.

Responses to Comments on Proposed Section 773.20

A commenter said that once an abatement or payment plan is entered into, completion of the abatement or payment plan should become a permit condition. The commenter also said that the regulatory authority should stay the rescission of the permit only if an abatement plan is executed and the plan is imposed as a condition on the improvidently issued permit.

As mentioned above, the remedies for an improvidently issued permit will no longer include imposition of a permit condition requiring abatement of the violation. However, if we do not suspend or rescind an improvidently issued permit because the permittee enters into an abatement plan or payment schedule, we may suspend or rescind the permit under final § 773.23 if the abatement plan or payment schedule is not being met to the satisfaction of the agency with jurisdiction over the violation (unless one of the other criteria of § 773.23 precludes suspension or rescission). In the face of permit suspension or rescission, these final provisions provide ample incentive to permittees to cause violations to be abated or corrected. Permit conditions are unnecessary to achieve this result.

A commenter said that the public should be given explicit rights to request enforcement action against permits that have been improvidently issued and to appeal a decision by the regulatory authority not to take action.

As indicated above, these final provisions enhance the public's notice of decisions by the regulatory authority concerning improvidently issued permits. The final provisions require the regulatory authority to provide public notice at three specific decision points: (1) when the regulatory authority makes a preliminary finding that a permit was improvidently issued (*see* final § 773.21(c)(2)); (2) when the regulatory authority finds that a permit was improvidently issued and serves the permittee with a notice of proposed suspension or rescission (*see* final § 773.22(d)); and (3) when the regulatory authority suspends or rescinds a permit (*see* final § 773.23(c)(2)). Further, under the "reason to believe" standard under in final § 773.21(a), a regulatory authority will receive and consider information from concerned citizens pertaining to improvidently issued permits. Such information, if credible, may well inform a regulatory authority's decision as to whether a permit was improvidently issued. Finally, citizens can continue to assert their interests under the existing provisions at 30 CFR 842.11 and 842.12. The provisions we adopt today provide for ample public notice, and thereby expand the opportunity for public participation under our existing regulations.

The same commenter said that the proposed provisions create an essentially meaningless standard of review to determine if a permit was improvidently issued. According to the commenter, the scope of review to determine whether a permit was improvidently issued is limited to the "violations review criteria" of the regulatory program at the time of permit issuance. The commenter objected to "OSM's deferral" to State regulatory authorities to determine which types of violations would be "the subject of the permit block for improvidently issued permits." The commenter also said that any violation of the Act should be the basis for determining if a permit has been improvidently issued.

We disagree with this characterization of the proposal, but note that we modified the proposed provision to which the commenter objects. In final

§ 773.21(a), we replaced the phrase "violations review criteria" at previous § 773.20. Under final § 773.21(a), a permit will be considered improvidently issued, if, among other things, the permit should not have been issued under the "permit eligibility criteria of the applicable regulations implementing section 510(c) of the Act in effect at the time of permit issuance" because the permittee or operator owned or controlled a surface coal mining operation with an unabated or uncorrected violation. Under the final provision, the regulatory authority must consider all violations, as the term *violation* is defined in final § 701.5. Thus, regulatory authorities do not have discretion to determine which violations may be considered when making a determination whether a permit was improvidently issued.

A commenter expressed concern regarding proposed § 773.20(b)(1)(i). Under the proposed provision, a permit would be considered improvidently issued if there was an outstanding violation under the violations review criteria at the time the permit was issued. The commenter said the proposed provision seemed to conflict with proposed §§ 773.15(b)(3)(i)(B) and (C), which proposed to allow conditional approval of permits when applicants are linked to outstanding violations.

Under this final rule, a permit will only be found to be improvidently issued if, among other things, the permit should not have been issued under the permit eligibility criteria of the regulations implementing section 510(c) of the Act at the time of permit issuance. *See* final § 773.21(a). Under § 773.12(a) of this final rule, a person who owns or controls an operation with an outstanding violation may nonetheless be eligible for a permit under final § 773.13 or a provisionally issued permit under final § 773.14. Thus, if a person with outstanding violations was eligible for a permit under final §§ 773.13 or 773.14 at the time of permit issuance, a permit will not be considered to be improvidently issued at the time of issuance. However, under final §§ 773.14(c) and 773.22(a)(2), a provisionally issued permit will be considered improvidently issued, and we will initiate suspension or rescission procedures, if one or more of the circumstances in §§ 773.14(c)(1) through (4) exists.

Several commenters expressed concern about OSM oversight of State permitting decisions in the context of improvidently issued permits. Our oversight relative to improvidently issued State permits is governed, in part, by final § 843.21. Final § 843.21 is fully discussed in section VI.Y. of this preamble. In *NMA* v. *DOI II*, the court of appeals upheld our ability to suspend or revoke State-issued permits, but found that our previous regulations did not comply with the procedures established under section 521(a)(3) of SMCRA. *NMA* v. *DOI II*, 177 F.3d at 9. Final § 843.21 is fully consistent with the *NMA* v. *DOI II* decision.

A commenter said that the provisions should be revised so that the regulatory authority does not suspend or revoke a permit "unless and until a plan for correcting the problem has been attempted but failed." Other commenters said that a permittee or operator should not be allowed to enter into an abatement plan to forestall a finding of improvident issuance or suspension or rescission of a permit. These commenters said allowing a permittee to forestall suspension or rescission by entering into an abatement plan encourages fraud at the permit application stage because the operator knows if he gets caught, he can later negotiate an abatement plan and mining can continue, without penalty.

Under final § 773.21, if the violation is the subject of an abatement plan or payment schedule that is being met to the satisfaction of the agency with jurisdiction over the violation, the permit will not be considered improvidently issued because the permittee would no longer be ineligible to receive a permit. *See* final § 773.21(b)(3). Further, under final § 773.23(a)(5), we will not suspend or rescind an improvidently issued permit if, after a finding of improvident issuance under final § 773.22(a), the violation becomes subject to an abatement plan or payment schedule. However, we may proceed to suspension or rescission if the abatement plan or payment schedule fails. The ultimate intent of these provisions is not to suspend or rescind permits, but to accomplish abatement of violations. However, a regulatory authority has no obligation to enter into an abatement plan or payment schedule, especially if it has reason to believe that a person will not comply with the plan or schedule. The discretion lies with the regulatory authority to determine whether the person is acting in good faith. We are confident that regulatory authorities will not encourage or reward fraudulent activity by entering into abatement plans with bad actors, but will instead proceed with suspension or rescission, and use any other enforcement tools available to compel compliance.

A commenter said our proposed improvidently issued permits provisions are "not only unauthorized but are grossly inconsistent with the [Act]." We received this comment before the decision in *NMA* v. *DOI II*. As explained above, the D.C. Circuit upheld our substantively similar previous rules, holding that they were expressly authorized by section 201(c)(1) of the Act. 177 F.3d at 9. "Apart from the express authorization in section [201(c)(1)]," the court explained, "OSM retains 'implied' authority to suspend or rescind improvidently issued permits because of its express authority to deny permits in the first instance." *Id.* (citation omitted).

Finally, a commenter objected to our reference in proposed § 773.20(b)(3) to "operations" being responsible for violations. The commenter stated that an operation is not a legal entity and therefore cannot be responsible for violations. We have recast the final provisions from responsibility for violations to ownership or control of operations to eliminate confusion. Thus, under this final rule, a permit will only be considered improvidently issued if, among other things, the permittee or the operator continues to own or control the operation with an unabated or uncorrected violation and the violation would cause the permittee to be ineligible under the permit eligibility criteria in our current regulations. *See* final §§ 773.21(b)(1) and (b)(3). These provisions do not impose personal liability on owners or controllers of permittees or operators.

J. Section 773.21—Improvidently Issued Permits: Rescission Procedures

In this final rule, the provisions proposed at §§ 773.20 and 773.21 are found at §§ 773.21 through 773.23. In this section of the preamble, we discuss the comments received on proposed § 773.21. We discuss the proposed and final improvidently issued permits provisions, collectively, in section VI.I. of this preamble.

Several commenters asked for an explanation of proposed § 773.21(a)(4), which would provide that a permit would not be suspended or rescinded if the permittee and operations owned or controlled by the permittee are no longer responsible for the violation, penalty, or fee, or the obligation to provide required information. Three commenters asked how the permittee can be responsible for a violation at one point in time and later relieved of that responsibility. One commenter stated:

This implies that if an applicant has successfully transferred, assigned or sold a previously held permit, he/she will no longer

be liable for any violations associated with that former permit. Although we understand that the new permittee to whom the former permit was transferred, assigned or sold is now responsible for any outstanding violations, penalties or fees and for appropriate corrective action, some states prefer to hold the original permittee/violator responsible for those violations, regardless of the new permittee's responsibilities until the matter is adequately resolved.

Another of these commenters stated that the proposed provision seemed to allow for a "liability dump."

We agree with the substance of these comments. If a person severs an ownership or control relationship to an operation with an outstanding violation, but remains directly responsible for the violation, the person is not eligible to receive a new permit. Likewise, if a person is directly responsible for a violation, he or she cannot avoid a finding that a permit was improvidently issued under the criteria of final § 773.21, or forestall suspension or rescission of a permit under final § 773.23, by severing an ownership or control relationship to the operation with the violation. Further, a regulatory authority may take appropriate enforcement action against a person who continues to be directly responsible for a violation under applicable law.

A commenter supported our proposal to remove the words "and reclamation" from previous 30 CFR 773.21(b). In proposed § 773.21(b), we removed this phrase to clarify that after permit suspension or rescission, required reclamation activities must continue. The substance of proposed § 773.21(b) is adopted at final § 773.23(b)(1). Under that section, upon suspension or recission of a permit, all surface coal mining operations must cease; required reclamation must continue.

A commenter objected to the proposed provisions for permit suspension or rescission. In substance, the commenter stated that the proposal denied due process because it improperly allowed permit suspension or rescission without a prior hearing. The commenter also claimed that the opportunity to request a hearing, as proposed, did not provide due process because the effect of the suspension notice would not be automatically stayed pending appeal and the permit would be automatically suspended after a specified period of time, regardless of whether an appeal was filed. The commenter expressed the view that under *Darby* v. *Cisneros*, 509 U.S. 137 (1993), exhaustion of administrative remedies is not required under the Administrative Procedure Act if the effect of the suspension or rescission notice is not stayed pending appeal. The commenter also stated that the temporary relief which may be granted under existing 43 CFR 4.1376 is not an adequate substitute for a pre-deprivation hearing.

The final improvidently issued permits provisions at §§ 773.21 through 773.23 fully comport with due process. As explained above, in section VI.I. of this preamble, the key modifications from the proposed provisions are enhanced due process and public notice. Under final § 773.21, if a permit meets the criteria of paragraphs (a) and (b), the regulatory authority will make a *preliminary finding* that a permit was improvidently issued. The permittee will then have an opportunity to challenge the preliminary finding under final § 773.21(d).

If, after considering any evidence submitted by the permittee, the regulatory authority finds that the permit was in fact improvidently issued, the regulatory authority will issue a written notice of proposed suspension or rescission. *See* final § 773.22(a). The notice will provide 60 days notice if the regulatory authority decides to suspend the permit, and 120 days notice if the regulatory authority decides to rescind the permit. *See* final §§ 773.22(b) and (c).

If the permittee wishes to appeal a notice of proposed suspension or rescission, it must first exhaust administrative remedies. *See* final § 773.22(e). However, in response to the comment pertaining to *Darby*, the decision will not remain in effect while the permittee exhausts administrative remedies. Under final § 773.23(b), if the permittee requests administrative review, we will not suspend or rescind a permit until *after* a permittee exhausts administrative remedies and the administrative body affirms that the permit was improvidently issued. Section 773.23(b) also ensures that the permittee will have a meaningful opportunity for a hearing *before* a permit suspension or rescission.

Finally, if a permit is ultimately suspended or rescinded under final § 773.23, the permittee may seek administrative or judicial review. *See* final § 773.23(d). In response to the comment pertaining to *Darby*, we decided not to require permittees to exhaust administrative remedies before seeking judicial review of a permit suspension or rescission. Thus, the permit suspension or rescission will remain in effect during the pendency of any appeals. Together, the foregoing provisions provide ample due process to permittees by way of meaningful opportunities for pre- and post-suspension or rescission hearings.

K. Section 773.22—Identifying Entities Responsible for Violations

In this final rule, the provisions we adopt from proposed § 773.22 are found at §§ 774.11 and 847.2.

We proposed to revise and redesignate previous § 773.22 and add a new § 773.22, which would have required regulatory authorities to identify entities responsible for violations, enter and maintain that information in AVS, and consider taking alternative enforcement action when appropriate.

We are not adopting § 773.22 as it was proposed. Instead, we have incorporated a revised version of proposed § 773.22(b), (c), and (d) into new § 774.11. Final § 774.11 has its origins in provisions that we proposed at §§ 773.15(b)(3)(i)(D), (E) and (F), (b)(3)(ii); 773.17(k); 773.22(b), (c), and (d); and 774.13(e). From proposed § 773.22, it incorporates the timely entry and update of violation information in AVS (proposed §§ 773.22(b) and (c)) and the use of alternative enforcement actions to compel the abatement or correction of violations (proposed § 773.22(d)).

Proposed § 773.22(d) would have also provided that the existence of a performance bond cannot be used as the sole basis for a determination that alternative enforcement action is not warranted. We are adopting this provision as final § 847.2(b). We received one comment on proposed § 773.22(d), which we discuss in Part VI.AA. of this preamble in connection with final § 847.2(b).

We are not adopting the introductory statement in proposed § 773.22, which provided that a person who owns or controls a surface coal mining operation has an affirmative duty to comply with the Act, the regulatory program, and any approved permit, because it does not add any meaningful value to our existing regulations. We are also not adopting proposed §§ 773.22(a) and (b) insofar as we proposed to determine the identity of persons responsible for outstanding violations and to designate in AVS owners, controllers, principals, and agents as persons we could compel to abate or correct a violation. We determined that we have insufficient basis under SMCRA to automatically ascribe personal liability or responsibility to persons listed in an application for a permit, including owners and controllers.

Final § 774.11—Post-Permit Issuance Information Requirements for Regulatory Authorities and Other Actions Based on Ownership, Control, and Violation Information

Final § 774.11(a) provides that, for purposes of future permit eligibility determinations and enforcement actions, the regulatory authority must enter into AVS: (1) Permit records within 30 days after a permit is issued or a subsequent change to a permit is made; (2) unabated or uncorrected violations within 30 days after the abatement or correction period for the violation expires; (3) changes of ownership and control within 30 days after a regulatory authority receives notice of a change; and (4) changes in violation status within 30 days after abatement, correction, or termination of a violation, or a decision from an administrative or judicial tribunal. Under final § 774.11(a), regulatory authorities must update and maintain these records in AVS. Final § 774.11(a), which codifies the use and maintenance of AVS, is based upon provisions proposed at §§ 773.22(b), (c), 774.13(e), and 774.14(e). An accurate and complete nationwide database such as AVS is critical to effective and efficient implementation of the permit block sanction of section 510(c) of the Act.

Final § 774.11(b) provides that if, at any time, the regulatory authority discovers a person who owns or controls a surface coal mining operation for which there is an unabated or uncorrected violation, the regulatory authority will determine whether alternative enforcement action is appropriate under part 843, 846 or 847. Final § 774.11(b) further requires that a regulatory authority must enter the results of each enforcement action, including administrative and judicial review decisions, into AVS. Final § 774.11(b) is derived from proposed §§ 773.15(b)(3)(ii) and 773.22(d). This provision emphasizes a regulatory authority's continued obligation to use all available enforcement mechanisms to compel the abatement or correction of unabated and uncorrected violations.

Final § 774.11(c) requires that a regulatory authority serve a preliminary finding of permanent permit ineligibility under section 510(c) of the Act, 30 U.S.C. 1260(c), on an applicant or operator if the applicant or operator: (1) controls or has controlled mining operations with a demonstrated pattern of willful violations under section 510(c) of the Act and (2) the violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate the applicant's or operator's intent not to comply with the Act, its implementing regulations, the regulatory program, or permit. Final § 774.11(c) further requires that, in making a finding of permanent permit ineligibility, the regulatory authority will only consider control relationships and violations which would make, or would have made, an applicant or operator ineligible for a permit under final §§ 773.12(a) and (b). This provision is consistent with *NMA* v. *DOI II*.

Consistent with section 510(c) of the Act, final § 774.11(d) provides for a hearing under 43 CFR 4.1350 through 4.1356 on a preliminary finding of permanent permit ineligibility. Final § 774.11(d) is based upon proposed § 773.15(b)(3)(i)(E) and (F) and previous § 773.15(b)(3). Final § 774.11(d) is modified from the proposed rule in that we decided not to unnecessarily reiterate the OHA appeals procedures.

Final § 774.11(e) requires that the regulatory authority enter the results of a finding of permanent permit ineligibility and any hearing on such a finding into AVS.

Final § 774.11(f) provides that the regulatory authority may identify a person who owns or controls an entire surface coal mining operation or any relevant portion or aspect of such operation at any time. Final § 774.11(f) enables regulatory authorities to discover owners or controllers of an operation that the applicant has failed to list in an application as required under final §§ 778.11(c)(5) and (d). As explained elsewhere in this preamble, ownership or control of an applicant, permittee, or operator is tantamount to owning or controlling the operation, or relevant portion or aspect of the operation.

In addition, final § 774.11(f) provides that when a regulatory authority identifies such a person, the regulatory authority will: (1) issue a written finding describing the nature and extent of ownership or control; (2) enter the results of the finding into AVS; and (3) require the person to disclose his or her identity under § 778.11(c)(5) and certify as a controller under § 778.11(d), if appropriate. Final § 774.11(f) is based upon proposed § 773.17(k). We are adopting final § 774.11(f) to enable a regulatory authority to identify any owner or controller of an applicant, permittee, or operator that has not been disclosed under the requirements under final § 778.11(c)(5) and (d) to disclose owners and controllers in a permit application.

Final § 774.11(f) is modified from proposed § 773.17(k) to be consistent with the application information requirements at final § 778.11(c)(5) where an owner or controller may be listed in an application as owning or controlling a portion or aspect of a proposed surface coal mining operation. As we indicate below in this preamble in the discussion of final § 778.11(c)(5), it is important that an applicant have the ability to disclose in an application those owners and controllers that own or control only a portion or aspect of a proposed surface coal mining operation as well as the entire proposed operation. In implementing final § 774.11(f), this means a regulatory authority may identify a previously undisclosed owner or controller that owns or controls only a portion or aspect of a surface coal mining operation.

Final § 774.11(f) is also modified from proposed § 773.17(k) to require that the results of any finding made under the provision be entered into AVS.

Paragraph (g) provides that any person whom a regulatory authority finds to be an owner or controller under final § 774.11(f) may challenge the finding using the provisions of final §§ 773.25, 773.26 and 773.27, which provide the procedures for challenging an ownership or control listing or finding.

Comments on Proposed § 773.22

Commenters on proposed § 773.22 opposed mandatory investigations, holding individuals responsible for the violations of corporate permittee, the elimination of permitting recommendations, designating specific persons as those responsible for correcting violations, and use of the term "agent." Commenters opposing proposed § 773.22 expressed the same concerns regarding proposed §§ 773.15, 773.17, 773.24, 773.25, and 778.5. These comments are addressed in sections VI.A., VI.E., VI.G., VI.M., and VI.N. of this preamble.

L. Section 773.23—Review of Ownership or Control and Violation Information

We proposed to remove previous § 773.23 from our regulations, based on our conclusion that it was centered on ownership or control links and based on presumptions of control between applicants and operations with violations. We received no comments on our proposal to remove these provisions. Since our final rule does not incorporate either presumptions of ownership or control or links to violations based upon presumptions of ownership or control, we are removing previous § 773.23 as proposed. However, under final §§ 773.8 through 773.11, a regulatory authority must review all applicant, operator, and

ownership and control information; permit history information; and compliance history (violation) information before making a permit eligibility determination under final § 773.12.

In reorganizing part 773 in this final rule, we have used the section number "773.23" for other purposes.

M. Section 773.24—Procedures for Challenging a Finding on the Ability To Control a Surface Coal Mining Operation

In this final rule, the provisions we adopt from proposed §§ 773.24 and 773.25 are found at §§ 773.25 through 773.28.

We proposed to revise previous § 773.24 to provide for challenges to a finding on the ability to control a surface coal mining operation. We modified this section from the proposed rule. We reorganized two sections, proposed as §§ 773.24 and 773.25, into four sections in this final rule and modified the provisions based on comments. The provisions are adopted at final §§ 773.25 through 773.28. A description of these final provisions follows, including discussion of the modifications from the proposed rule. Discussion of these final provisions will not be repeated in the discussion of comments received on proposed § 773.25 in section VI.N. of this preamble.

§ 773.25 Who may challenge ownership or control listings and findings

Section 773.25 provides that any person listed in a permit application or in the Applicant/Violator System (AVS) as an owner or controller, or found to be an owner or controller under §§ 773.21 or 774.11(f), of an entire surface coal mining operation, or any portion or aspect thereof, may challenge the listing or finding under §§ 773.26 and 773.27. Any applicant or permittee affected by an ownership or control listing also may initiate such a challenge. This section is modified from proposed § 773.24(a). We modified the proposed provision in this final rule by adding that any person listed in AVS may challenge such listing, regardless of whether there is a pending permit application. This modification is consistent with § 773.24(a) of our previous regulations. We also clarified that permit applicants and permittees affected by ownership or control decisions also may initiate ownership or control challenges. We decided that a person listed as or found to be an owner or controller may use these procedures at any time. This modification will enhance due process by allowing additional opportunities for challenges. Consistent with the modification to § 778.11(c)(5), which allows for identification of controllers of specific portions or aspects of an operation, and in response to comments, we decided to allow persons to challenge their ownership or control of portions or aspects of an entire surface coal mining operation. Finally, in order to enhance due process, we are not adopting the requirement that a challenge must occur before certification under § 778.11(d). This will allow persons who certify as to their ownership or control of an operation to in effect "de-certify" if they can demonstrate that circumstances have changed so that they no longer own or control the operation.

Final § 773.26 How To Challenge an Ownership or Control Listing or Finding

Final § 773.26(a) is modified from proposed § 773.24(b). Proposed § 773.24(b) provided that ownership or control challenges were to be made to the agency with jurisdiction over existing violations. This meant that if there were multiple existing violations in different jurisdictions (State or Federal), the challenger had to initiate separate challenges in each jurisdiction. In response to comments, we modified final § 773.26(a) to provide that in order to challenge an ownership or control listing or finding, a challenger must submit a written explanation of the basis for the challenge, along with any evidence or explanatory materials, to the regulatory authority with jurisdiction over a pending permit application or permit, rather than to the agency with jurisdiction over an existing violation. This modification will greatly simplify the provisions by allowing ownership and control challenges to proceed in one forum.

Final § 773.26(b) is modified from proposed § 773.24(d) and provides that the provisions of final §§ 773.27 and 773.28 apply only to challenges to ownership or control listings or findings. We simplified the provision by clarifying that the procedures are limited to challenges to ownership or control listings or findings; no person may use these provisions to challenge any other liability or responsibility under any other provision of the Act or its implementing regulations.

Final § 773.26(c) provides that when the challenge concerns a violation under the jurisdiction of a different regulatory authority, the regulatory authority with jurisdiction over the permit application or permit must consult the regulatory authority with jurisdiction over the violation and the AVS Office to obtain additional information. We added paragraph (c) to complement final § 773.26(a). Since the regulatory authority with jurisdiction over a pending permit application or an issued permit will be deciding ownership or control challenges, it is likely that the regulatory authority will not have access to all information regarding violations in other jurisdictions. As such, it is important for the regulatory authority deciding the challenge to consult with these other jurisdictions to obtain necessary background information on violations in order to make an informed decision on a challenge.

Final § 773.26(d) provides that a State regulatory authority with responsibility for deciding an ownership or control challenge may request an investigation by OSM's AVS Office. Like final § 773.26(c), we added this provision to assist State regulatory authorities in deciding challenges. This provision is especially relevant when a State regulatory authority does not have adequate access to the pertinent information. Under this provision, a State regulatory authority may ask us for assistance, by way of investigation, whenever it believes that it does not have adequate information to render an informed decision on a challenge. However, the ultimate responsibility to decide the challenge and issue a written decision rests with the State regulatory authority.

Final § 773.27 Burden of Proof for Ownership or Control Challenges

Final § 773.27(a) provides that when a listing or finding of ownership or control of a surface coal mining operation is challenged, the challenger must prove, by a preponderance of the evidence, that the challenger does not, or did not, own or control that operation. Paragraph (a) is modified from proposed § 773.25(c)(2). At paragraphs (a)(1) and (a)(2) of final § 773.27, we provide that a person may challenge current or past ownership or control. Challenging past ownership or control may be relevant when a challenger is contesting a finding that a permit was improvidently issued under final § 773.21(b). For clarity, in this final rule, we organized the provisions for burden of proof, called evidentiary standards in the proposed rule, into a separate section. We retained the "preponderance of the evidence" standard in this final rule.

Final § 773.27(b) provides that a challenger must meet its burden of proof by presenting reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority deciding the challenge.

Paragraph (b) is modified from proposed § 773.25(c)(3). We added to the provision that any evidence or supporting materials presented in connection with the challenge will become part of the permit file, an investigation file, or another public file. This addition is in response to comments that we should expand the public's access to decisions made under these provisions. The addition is also consistent with existing regulations regarding the availability of records. If the challenger requests, we will hold as confidential any information which is not required to be made available to the public under §§ 840.14 or 842.16, as applicable.

Final § 773.27(c) provides some examples of materials a challenger may submit in an effort to satisfy the requirements of paragraph (b). Paragraph (c) is adopted from proposed § 773.25(c)(3)(i). Subparagraph (c)(1) is slightly modified from proposed § 773.25(c)(3)(i)(A). Subparagraph (c)(2) is adopted as proposed in § 773.25(c)(3)(i)(B). Subparagraph (c)(3) is adopted as proposed in § 773.25(c)(3)(i)(C). Subparagraph (c)(4) is adopted from proposed § 773.25(c)(3)(i)(D). There are no substantive changes between final paragraph (c) and the proposed provision.

We did not adopt proposed § 773.25(c)(3)(ii) because it is unnecessary. This proposed provision stated that evidence and supporting material presented before any administrative or judicial tribunal reviewing a decision by a regulatory authority may include any evidence admissible under the rules of such tribunal. We removed this provision because the rules of the tribunal will set forth the evidence that the tribunal may receive; as such, the proposed provision was superfluous.

Final § 773.28 Written Agency Decision on Challenges to Ownership or Control Listings or Findings

Final § 773.28(a) provides that the regulatory authority deciding the challenge will review and investigate any evidence or information a challenger submits under § 773.27 and issue a written decision within 60 days of receipt of the challenge. Paragraph (a) also requires the written decision to state whether the challenger owns or controls the relevant surface coal mining operation, or owned or controlled that operation, during the relevant time period. For clarification and simplification, and to avoid redundancy, we merged proposed §§ 773.25(a), 773.25(b)(1) through (3) and 773.25(c)(1), as well as the first sentence of proposed § 773.24(c)(1), and incorporated them into final § 773.28(a). The regulatory authority referenced in final § 773.28(a) is the agency which will decide the challenge in accordance with final § 773.26(a).

Paragraph (b) of final § 773.28 provides that the regulatory authority will promptly provide the challenger with a copy of the decision by either certified mail or any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure, or the equivalent State regulatory program counterparts. Paragraph (b) is adopted from the notification procedures in the second sentence of proposed § 773.24(c)(1) and the first sentence of proposed § 773.24(c)(2). In response to comments, we removed the requirement that the regulatory authority directly notify regulatory authorities with an interest in the challenge; the proposed requirement was too subjective, and regulatory authorities will receive ample notice through AVS and our AVS Office's Internet home page (Internet address: www.avs.osmre.gov).

Paragraph (c) of final § 773.28 provides that service of the decision on a challenger is complete upon delivery and is not incomplete if delivery is refused. Paragraph (c) is adopted from the second sentence in proposed § 773.24(c)(2).

Paragraph (d) of final § 773.28 provides that the regulatory authority will post all decisions made under this section on AVS and on the AVS Office Internet home page (Internet address: www.avs.osmre.gov). This provision is added to the final rule in response to comments that we should expand the public's access to decisions made under these provisions. Public notice of a decision, and the availability of the records supporting the decision, adopted in final § 773.27(b), are the appropriate places to expand such accessibility. Public posting of the decisions will also accomplish notice to regulatory authorities.

Paragraph (e) of final § 773.28 provides that any person who receives a written decision—i.e., the challenger—and who wishes to appeal that decision, must exhaust administrative remedies under the procedures at 43 CFR 4.1380 through 4.1387, or the equivalent State regulatory program counterparts, before seeking judicial review. For clarity and simplification, we modified paragraph (e) from proposed § 773.24(c)(3), and added specific mention of the requirement to exhaust administrative remedies. Also, we are not adopting the proposed provision which would allow "any person who is or may be adversely affected" by a decision to appeal the decision. As explained below, there are ample public participation provisions in our other regulations.

Finally, paragraph (f) of final § 773.28 provides that, following a written decision by the regulatory authority responsible for deciding the challenge, or any decision by a reviewing administrative or judicial tribunal, the regulatory authority will review the information in AVS to determine if it is consistent with the decision. Paragraph (f) further provides that if the information in AVS is not consistent with the decision, the regulatory authority will promptly revise the information in AVS to reflect the decision. Paragraph (f) is adopted from proposed § 773.25(d) and the second sentence of proposed § 773.24(c)(1).

We are not adopting proposed § 773.25(b)(4) because it is unnecessary. Proposed § 773.25(b)(4) provided that the agency with jurisdiction over a violation will determine whether the violation has been abated or corrected. While this statement is correct, it is not necessary to include it in the regulatory language pertaining to ownership or control challenges. While this final rule makes clear that the regulatory authority responsible for deciding an ownership or control challenge will apply its ownership or control rules to violations both inside and outside its jurisdiction, only the agency with jurisdiction over a violation can properly make decisions regarding the initial existence or current status of the violation.

In response to comments, we are also not adopting the last sentence of proposed § 773.24(c)(3), which would have provided that our written decision would remain in effect during the pendency of an appeal, unless the challenger obtained temporary relief. Instead, as explained in greater detail in section VI.F. of this preamble, we are allowing applicants to obtain provisional permits during the pendency of ownership or control challenges and appeals. *See* final § 773.14. Thus, our ownership or control findings are in effect stayed or inoperative while a challenger exhausts administrative remedies and during the pendency of any subsequent judicial review. Allowing provisional permits under these circumstances enhances due process.

General Comments on Proposed § 773.24

One commenter said the procedures for challenging an ownership or control

listing or finding, or alternately our proposed revisions to the existing challenge procedures, are not needed. This commenter did not offer a reason for the objection. The challenge procedures, in general, are definitely needed for several reasons, but most importantly to afford due process to the regulated industry. Furthermore, the specific revisions we adopted in this final rule are necessary in light of the fact that the nature of the challenges has changed from rebuttals of presumptions of ownership or control to challenges to listings and agency findings of actual, rather than presumed, ownership or control.

In contrast, another commenter expressed support for the intent of due process behind the proposed challenge provisions. We agree with the comment and underscore that it is critically important that persons either disclosed as an owner or controller, or later found by a regulatory authority to be an owner or controller, have the opportunity to challenge such a listing or finding.

A commenter said the provisions proposed in § 773.24 unlawfully preclude persons from challenging the underlying violation to which they are linked and for which they will be held responsible. Expressing a contrary view, another commenter stated that a challenge to an ownership or control link should not include a challenge to the underlying fact of the violation.

In this final rule, we removed the ability to challenge directly both the current status of a violation (i.e., whether the violation has been abated, is in the process of being abated, etc.) and the initial existence or validity of a violation (i.e., whether a violation existed at the time it was cited) in the context of ownership or control challenges. Only the regulatory authority, or other agency, with jurisdiction over a violation can make determinations regarding the initial existence or current status of a violation. Of course, if a person is challenging an ownership or control listing or finding because he or she is ineligible for a permit under section 510(c) of the Act, 30 U.S.C. 1260(c), and final § 773.12—*i.e.*, he or she owns or controls an operation with a current violation—the person may submit evidence *from the regulatory authority, or other agency, with jurisdiction over the violation* that the violation never existed in the first instance or has been abated or corrected. If a person can demonstrate, in this manner, that he or she does not own or control an operation with a current violation, he or she would become eligible for a permit under section 510(c) and final § 773.12.

We removed the ability to challenge the existence of a violation at the time it was cited because there is a prime regulatory interest in finality of agency actions. Allowing the initial existence of a violation to be challenged at any time, in an open-ended process, is neither required by law nor desirable. For example, if a challenge to the existence of a violation is raised years after the fact, it might be difficult, if not impossible, for an agency to obtain all pertinent evidence relating to the violation at the time it was cited. Witnesses might be unlocatable, or even deceased, or their memories may have understandably faded; documentary evidence might be lost or destroyed; and evidence of "on the ground" violations might be lost due to the passage of time and changes in physical conditions.

Furthermore, if the existence of a violation has been litigated to conclusion by an affected party, or the right to challenge the existence of a violation has been waived, we see no reason to provide for additional challenges covering the same subject matter. It is not necessary to allow persons who failed to exercise a prior opportunity to challenge the existence of the violation to initiate such a challenge in the context of an ownership or control challenge. Our existing regulations provide that a person issued a Federal notice of violation or cessation order, "*or a person having an interest which is or may be adversely affected by the issuance, modification, vacation or termination of a notice or order,* may request review of that action * * * within 30 days after receiving notice of the action." 30 CFR 843.16 (emphasis added). If ownership or control consequences attach or may attach to a person as a result of the issuance of a notice of violation or cessation order, that person "is or may be adversely affected by the issuance," such that they would have the right, and it would be incumbent on them, to challenge the issuance under the available procedures. If the persons affected by the issuance of a notice of violation do not initiate a challenge, or fail to obtain a favorable decision on such a challenge, then it is fair to assume that the violation did in fact exist when cited.

Likewise, in the event that someone initiating an ownership or control challenge did not have the opportunity to challenge the underlying existence of the violation, the persons legally responsible for the violation will have had ample opportunity and sufficient motivation to challenge the violation if they believe it was improperly cited. If the persons who are legally responsible for the violation do not initiate a challenge, or fail to obtain a favorable decision on such a challenge, then it is fair to state that the violation did in fact exist when cited.

In sum, we emphasize that the ownership or control challenges provided for in this final rule do not exist so that a person may challenge anew the initial existence of a violation. At the same time, the rights of owners and controllers are well protected by the ability to challenge an ownership or control listing or finding under the procedures we adopt today.

A commenter said the final rule should make clear that the documents submitted by a person initiating a challenge and relied upon by regulatory authorities for their decisions are public records and should be made a part of the permit file. We agree with the commenter that documents submitted to challenge an ownership or control listing or finding should normally be considered public records and, as such, should be readily available for public review. Based on this comment, we added the requirement in final § 773.27(b) that any materials presented in connection with a challenge will become part of the permit file, an investigation file, or another public file. However, the location and manner in which the records are retained is at the discretion of the regulatory authority, as identified in final § 773.26(a). We also added a provision allowing a challenger to request that any confidential information not be placed in a public file. We will hold as confidential any information which is not required to be made available to the public under §§ 840.14 or 842.16, as applicable.

A commenter said proposed § 773.24 confuses responsibility for liability and for permit blocking. To paraphrase, the commenter states that the proposed rule assumes that any owner or controller is the alter ego of the applicant and therefore liable for the applicant's violations. In the commenter's view, holding owners or controllers liable for a violation negates the need for "an elaborate scheme of permit blocking." We disagree with the commenter for at least two reasons. First, neither the proposed rule nor the rule adopted today presumes that an owner or controller is the alter ego of the applicant or a permittee, though an owner or controller may in fact, in the circumstances of a given case, be an alter ego. And, while an owner or controller may, in certain circumstances, be personally liable for the violations of an operation under sections 518 and 521 of the Act, 30

U.S.C. 1268 and 30 U.S.C. 1271, neither the challenge procedures, nor any other provision of the final rule adopted today, gives rise to such an assumption. If a person is found to be personally liable for a violation under the Act, that person has ample opportunity to challenge that finding outside of the ownership or control challenge procedures. The pertinent parts of this final rule establish when a person owns or controls the relevant surface coal mining operation, as contemplated by section 510(c) of the Act; the challenge procedures afford due process by allowing a person to challenge an ownership or control listing or finding. Second, this final rule does not create an "elaborate permit-blocking scheme." Rather, this rule implements section 510(c) of the Act in a manner fully consistent with the *NMA* v. *DOI I* and *NMA* v. *DOI II* decisions.

Two commenters asked how a person is notified of a regulatory authority's initial determination that they have the ability to control. A person found to be an owner or controller will be notified by the regulatory authority making the finding. In this final rule, we modified the proposed provision to clarify that the regulatory authority must make a written finding of ownership or control. *See* final § 774.11(f); *see also* final § 773.22(a). The regulatory authority will then notify the person subject to the finding of the determination.

A commenter said the challenge provisions are unlawful because they fail to provide due process, by way of an opportunity for hearing or appeal, "prior to the imposition of sanctions including permit blocks and conditions based on the [ownership or control] finding, or before the inclusion of the finding or determination in the AVS."

We disagree that the proposed ownership or control challenge procedures would deny due process, for largely the same reasons explained in the preamble to OSM's Applicant/Violator System Procedures rule (AVS Procedures rule). 59 FR 54306, 54312–16 (1994). The AVS Procedures rule, which contained predecessor ownership or control challenge procedures, was upheld in court against all due process challenges, including an argument similar to the one advanced by the commenter. *National Mining Assoc.* v. *Babbitt*, 43 Env't Rep. Cas. (BNA) 1097, 1111–17 (D.D.C. 1996), *appeal docketed*, No. 96–5274 (D.C. Cir). To the extent relevant, we continue to rely on the due process discussion set forth in the preamble to the AVS Procedures rule in support of this rulemaking.

Nonetheless, we modified the final rule to address the commenter's concerns. Most significantly, as explained in greater detail in section VI.F. of this preamble, we decided to allow issuance of a provisional permit when a person is challenging or appealing an ownership or control listing or finding. Under final § 773.14, an applicant who owns or controls an operation with a violation may be eligible for a provisional permit if it is challenging or appealing all pertinent ownership or control listings or findings. However, if an ownership or control listing or finding is ultimately upheld in favor of the regulatory authority, the provisionally issued permit will be considered improvidently issued, and the regulatory authority must initiate suspension or rescission procedures under final §§ 773.22 and 773.23. *See* final § 773.14(c). Thus, under the procedures we adopt today, any negative consequence, or "sanction," flowing from an ownership or control listing or finding—*i.e.*, a permit block or permit suspension or rescission—will only arise *after* an applicant has had a full and meaningful opportunity to challenge the listing or finding both administratively and judicially. It is also important to emphasize that a person may initiate an ownership or control challenge *at any time*. *See* final § 773.25.

While our modification allowing for provisional permits is alone sufficient to address the due process concerns expressed by the commenter, we note that there are numerous other provisions in this final rule and our existing rules, including provisions which are available before a permit denial, which safeguard the interests of applicants. First, section 513(b) of the Act, 30 U.S.C. 1263(b), allows any person having an interest which is or may be adversely affected by a proposed application to file written objections and seek an informal conference before a permitting decision. Second, under final § 773.25, any person listed or found as an owner or controller, or any applicant affected by such listing or finding, may challenge an ownership or control listing or finding at any time, including before a permitting decision (if the listing or finding occurs before a permitting decision). Third, existing 43 CFR 4.1380 provides for review of OSM's written ownership and control decisions by OHA. Under the OHA procedures at 43 CFR 4.1386, a party may seek temporary relief from OSM's decision upon a showing that, among other things, the petitioner is likely to prevail on the merits of the claim. Finally, if the ownership or control finding results in a permit denial, existing 30 CFR part 775 allows the "the applicant, permittee, or any person with an interest which is or may be adversely affected" to seek administrative, and ultimately judicial, review of the permitting decision. Given that applicants may now receive provisional permits while they are appealing ownership or control listings or findings, coupled with the ample recourse an applicant has, both before and after a permitting decision, the risk of an erroneous permit denial is virtually nonexistent.

We do note that under this final rule, we will continue to enter ownership or control findings promptly into AVS. *See* final § 774.11(f)(2). When OSM makes a finding that someone who is not listed in the permit application, or subsequently identified by the permittee, is an owner or controller of the operation, there is a strong governmental and public interest in listing that information in AVS as soon as possible so it may be of use to the various regulatory authorities in carrying out their permitting responsibilities under section 510(c) of the Act. Section 510(c), among other things, prevents violators from receiving new permits so that they will not be able to cause environmental harm at new sites. If OSM or a State regulatory authority had to wait until after a challenge or hearing, and a potentially lengthy appeal to the court of last resort, to list the information in AVS, another regulatory authority may issue a permit to a person who is not entitled to receive one under section 510(c). At a minimum, the permitting authority must have access to the most current and complete information when it makes its permitting decision. The most efficient way to achieve that result is to enter ownership or control findings promptly into AVS.

However, since an applicant may now receive a provisional permit during the pendency of a merits challenge or appeal, there will not be any "sanction" or negative consequence flowing from the entry of the finding into AVS unless and until the finding is ultimately upheld. If a finding entered into AVS is ultimately upheld, then any negative consequences will be due to the conduct of the person found to be an owner or controller, or the conduct of operations the person owns or controls. On the other hand, allowance of a provisional permit ensures that there will not be a "sanction" to a person subject to an erroneous finding of ownership or control.

We also take this opportunity to emphasize that AVS is an informational

database, which contains, among other things, information pertaining to *all* owners and controllers of all applicants and all permittees, regardless of whether there are outstanding violations. Thus, the mere entry of an ownership or control relationship into AVS is not punitive and may not have any adverse consequences. For example, if a person is identified in AVS as an owner or controller of an operation, there is no adverse permitting consequence unless that operation has a current violation. Even then, under this rule, an applicant will be eligible for a provisional permit if it challenges, in good faith, its ownership or control of the operation.

Each regulatory authority uses the information in AVS, along with other reasonably available information, to determine permit eligibility under its own ownership and control rules. OSM's interest is in maintaining the integrity of the information in the system—both in terms of accuracy and completeness—so that OSM and the States may make informed and appropriate permitting decisions, consistent with final § 773.12 and section 510(c) of the Act. So long as the information is accurate and complete, any negative consequences flowing from being listed in AVS will not be created by OSM, but by the person owning or controlling an operation with an outstanding violation and/or the person who created the violation. In short, it is a person's conduct, and not identification in AVS, which creates any adverse consequences.

In sum, the procedures we adopt today, in conjunction with existing procedures, strike the appropriate balance between due process and OSM's and the public's interest in prompt entry of ownership and control information into AVS.

Several commenters expressed their concerns regarding citizens' participation under these provisions. One commenter said the public should be afforded the same rights of review regarding OSM's ownership and control decisions as exist generally for permit decisions. Another commenter said that we should not weaken citizens' participation in AVS matters. Another said there is a lack of public notice concerning any challenge to a finding of the ability to control and a lack of ability to participate, by comment or intervention, in such proceedings. According to the commenter, this lack of notice and public involvement is inconsistent with the Act.

The rule we adopt today increases the opportunity for public participation in ownership or control challenges, particularly through enhanced notice of ownership or control decisions. We expressly adopted additional notice procedures so that the public will be informed of all written decisions concerning ownership or control challenges. *See* final § 773.28(d). Further, all records supporting an ownership or control decision, excluding any confidential information, will be made available to the public under final § 773.27(b).

Of course, citizens can pursue other avenues of redress if they believe the ownership or control challenge procedures are insufficient to protect their interests. Indeed, the rule we adopt today does nothing to disturb the public's role in the permitting process under 30 CFR 773.13 and 30 CFR part 775, including the ability of persons who have an interest which is or may be adversely affected to raise ownership or control issues during the permitting process and to request a hearing on the reasons for a permitting decision. Additional provisions pertaining to public participation and access to records are found at existing 30 CFR 842.11, 842.12, and 842.16 and final § 843.21. For example, if a person disagrees with an ownership or control finding, he can request a Federal inspection of any relevant permit under 30 CFR 842.12. If OSM denies an inspection request, the person may seek review under 30 CFR 842.15, and may ultimately appeal to OHA under 43 CFR part 4.

Also, as mentioned previously, AVS is available to the public to increase public access to ownership or control information in the system. AVS software is provided free of charge and can be ordered from the AVS Office in Lexington, Kentucky, by calling, toll-free, 1–800–643–9748. The software can also be downloaded from the AVS Office's Internet home page on the Internet (Internet address: *http://www.avs.osmre.gov*).

It should also be noted that section 510(c) of the Act, 30 U.S.C. 1260(c), itself requires regulatory authorities to consider "other information available" when determining whether a permit may be granted based on ownership or control considerations. If the public supplies information to the regulatory authority with jurisdiction over an application, the regulatory authority must consider it as "available information" in making a permitting decision.

In short, OSM recognizes the Act's requirements for public participation in the permitting process, including ownership or control matters. The rule we adopt today, in conjunction with existing procedures, will provide more immediate, wider, and economical access to persons with an interest in ownership or control challenges. Together, notice of a decision, access to the records underlying that decision, and our existing public participation procedures provide an appropriate measure of public participation in ownership or control challenges.

We also note that the National Wildlife Federation and Kentucky Resources Council, Inc., filed a complaint challenging our 1994 AVS Procedures rule. In that action, plaintiffs claimed, among other things, that the 1994 provisions did not provide for adequate public participation and notice relative to ownership or control determinations. Ultimately, the parties filed a joint motion for voluntary dismissal of the action, based on our agreement to "reopen the issues and regulatory language complained of in this lawsuit for public comment, and to reevaluate the position of the agency with respect to those matters complained of in this case," including the role of the public in ownership and control determinations. By order of September 15, 1997, the court granted the joint motion. In this rulemaking, we fulfilled the commitment we made in the joint motion by reopening the issues complained of in the lawsuit, and reevaluating our position relative to those issues. We carefully considered all the comments received on our proposed ownership or control challenge procedures. As explained above, in this final rule, we expand public access to written decisions concerning ownership or control challenges, and provide for public access to the records underlying such decisions. In terms of our ownership or control challenge procedures, these provisions represent an appropriate level of public participation and notice, given the ample public participation provisions which exist in our other regulations.

One commenter said that there is a lack of clarity regarding the right to challenge ownership or control when a regulatory authority's finding of control is necessitated by the applicant's nondisclosure of required permit application information. Any challenge, this commenter explained, should occur in the context of a civil or criminal prosecution for fraud under section 518 of the Act. We disagree that a regulatory authority should immediately initiate civil proceedings or proceed to criminal prosecution in all instances of nondisclosure of required information, from the most benign to the most egregious. However, we fully intend to pursue these actions when they are warranted.

Another commenter said that the refocusing of the challenge to whether the person has the current ability to control is inappropriate. The question, according to the commenter, is whether the applicant owned or controlled other operations which have current violations, not whether the current ability to control continues. After the *NMA* v. *DOI II* decision, we may no longer deny a permit to an applicant who has relinquished its ownership or control of an operation with a still-existing violation. *NMA* v. *DOI II*, 177 F.3d at 5. The court did hold, however, that OSM may continue to deny permits based on an applicant's past ownership or control of an operation with a violation (whether or not abated) when determining whether there is "a demonstrated pattern of willful violations" under section 510(c) of the Act. *Id.* Absent the requisite "pattern of willful violations," the court held that a permit denial based on past ownership or control "contravenes the statute and cannot be upheld." *Id.*

Proposed § 773.24(a)

Proposed § 773.24(a) addressed who may challenge a finding on the ability to control a surface coal mining operation. 63 FR 70580, 70621.

A commenter said that it is not clear that a permit applicant can challenge a listing under the proposed provisions. We did not intend to exclude applicants or permittees from being able to challenge an ownership or control listing or finding. *See* 63 FR 70599. We modified the language in this final rule to clarify that an applicant or permittee who is affected by an ownership or control listing or finding may indeed challenge the listing or finding in accordance with these final challenge procedures. *See* final § 773.25(c). However, if an applicant or permittee is initiating a challenge with regard to an ownership or control relationship initially disclosed by the applicant or permittee, we do not expect the challenge to be premised on the argument that the person listed by the applicant or permittee was not an owner or controller in the first instance. An applicant or permittee, having identified a person as an owner or controller, should not prevail in a challenge by claiming the person was not an owner or controller at the time the information was submitted to the regulatory authority. Rather, a challenge initiated by an applicant or permittee, concerning a listing made by the applicant or permittee, should be limited to changed circumstances, like the fact that the person listed by the applicant or permittee as an owner or controller has relinquished ownership or control of the operation.

Several commenters submitted comments pertaining to the timing of ownership or control challenges and the consequences of certifying under proposed § 778.13(m) or being found to be an owner or controller after permit issuance. Under proposed § 773.24(a), an ownership or control challenge had to be initiated "before certification under [proposed] § 778.13(m)." Proposed § 778.13(m) would have required all owners or controllers to certify as to their ability to control the operation.

Another commenter, without explanation, suggested that we remove the "before certification" requirement. One commenter pointed out that if a regulatory authority made a finding of ownership or control after certification, the person subject to the finding could not challenge the finding since it would have occurred after certification. Another commenter opined that if a person "fails to challenge the listing [by an applicant or regulatory authority] * * * prior to issuance of the permit, the person is forever deemed to be [an] owner/controller." This same commenter noted that if a person was listed or found to be an owner or controller after permit issuance, the person would "be placed in jeopardy through no action of his own, but merely by the action of others (applicant or [regulatory authority]) without there ever being any burden of proof [borne] by the applicant or [regulatory authority]."

Another commenter said that there could be lengthy delays in permit issuance if a person chose to challenge a listing or finding before permit issuance; on the other hand, if the person did not challenge before permit issuance, they would waive their right to do so at a later time. Finally, a commenter stated that the proposed rule required all listed owners or controllers to challenge their ownership or control before permit issuance or else they would all have to certify. The commenter also stated that requiring successful challenges and/or certification by all owners or controllers before permit issuance would be particularly burdensome to large corporations with many owners or controllers. As such, the commenter suggested we delete the provision in its entirety.

These comments were all well-taken. In this final rule, we are not adopting the "before certification" language in final § 773.25. As such, any person either listed as or found to be an owner or controller may challenge such listing or finding at any time, either before, or after, permit issuance. The adopted provision will reduce perceived delays in permit issuance, since a challenge can be initiated after permit issuance.

Removal of the "before certification" requirement also alleviates the concern that a person may "be placed in jeopardy through no action of his own * * * without there ever being any burden of proof [borne] by the applicant or [regulatory authority]." We note that both regulatory authorities and applicants do bear a burden of proof. If a regulatory authority makes a finding of ownership or control, it bears the initial burden of demonstrating ownership or control; only then does the burden shift to the challenger to prove by a preponderance of the evidence that he or she does not or did not own or control the operation. (The burden of proof is discussed in more detail in section VI.N. of this preamble.) As to being listed as an owner or controller, we note that the applicant has the burden to provide accurate and complete information in a permit application. Despite these burdens of proof, there is obviously a possibility that a person will be erroneously listed or found as an owner or controller. However, any perceived jeopardy can be eliminated by a successful challenge; in fact, these challenge procedures were developed largely for this reason.

Finally, since we modified the certification requirement at final § 778.11(d) to require certification by only one individual, and have modified the challenge procedures to allow for challenges at any time, including after permit issuance, we removed the perceived burden for large corporations. While corporations must still list all of their owners or controllers under final § 778.11(c)(5), only one controller must certify under final § 778.11(d), and any listed owner or controller may initiate a challenge after permit issuance.

Another commenter alluded to the timing issue, but in a slightly different context. This commenter raised the concern that after permit issuance, a person who controls a small portion of an operation (and is therefore listed as a controller), but has no control over areas where a violation occurs, would not be able to use the challenge procedures. The commenter said "the only avenue of appeal would be the administrative court system."

As stated above, we addressed the commenter's concern about being able to challenge after permit issuance by removing the "before certification" language. In response to this comment, we also modified final § 773.25(a) to allow a person to challenge their ability

to control a specific portion or aspect of an operation. For example, under the commenter's hypothetical, the controller of a small portion of an operation could initiate a challenge and attempt to prove that he does not or did not control another aspect of the operation. We also modified final § 778.11(c)(5) to allow applicants to identify the particular portion or aspect of the operation owned or controlled by each owner or controller.

Proposed § 773.24(b)

Proposed § 773.24(b) addressed how to challenge a finding on the ability to control a surface coal mining operation. 63 FR 70621.

A commenter said the proposal conflicts with the allocation of authority under SMCRA by balkanizing the process whereby a person will have to seek determinations in different State and Federal forums for the same questions related to a finding or decision on control.

We agree that the proposal dispersed the challenge procedures. For example, under the proposal, if an applicant was applying for a permit in State X, but was not eligible for a permit based on ownership or control of operations with violations in States Y and Z, he would have to initiate challenges in States Y and Z (to the agencies with jurisdiction over the violations). We modified the procedures in final § 773.26(a) to provide that in order to challenge an ownership or control listing or finding, a challenger must submit a written explanation of the basis for the challenge to the regulatory authority with jurisdiction over a pending permit application or permit, rather than to the agency with jurisdiction over an existing violation. As explained above, this modification will greatly simplify the provisions by allowing ownership and control procedures to proceed in one forum. The regulatory authority hearing the challenge will apply its own ownership and control rules in deciding the challenge, subject only to OSM's general oversight authority. Consistent with the concept of State primacy, it is appropriate for the regulatory authority with jurisdiction over an application or permit to decide ownership or control challenges, 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 deciding a challenge which involves questions pertaining to violations in other jurisdictions, it is important for that regulatory authority to consult and coordinate with the regulatory authority with jurisdiction over the violation and our AVS Office; we require such consultation in final § 773.26(c).

At the same time, we must stress that a regulatory authority deciding an ownership or control challenge 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. Rather, all questions as to the existence or status of the violation must be addressed to the regulatory authority, or other agency, with jurisdiction over the violation, providing the challenger is not foreclosed from initiating such a challenge under the applicable regulations. As such, if a challenger has violations in different jurisdictions which are affecting his permit eligibility, and wishes to contest the initial existence or status of those violations, and is not foreclosed from doing so, he must do so with the regulatory authorities, or other agencies, with jurisdiction over the violations; this is consistent with the concept of State primacy embodied in the Act. It is also consistent with section 510(c) of the Act, which requires a permit applicant to prove that any violation it owns or controls has "been corrected * * * to the satisfaction of the regulatory authority * * * which has jurisdiction over such violation."

In sum, the procedure we are adopting today enhances State primacy by allowing each regulatory authority to apply its own ownership or control rules when deciding ownership or control challenges pertaining to applications and permits within its jurisdiction. The rule also underscores that each regulatory authority is properly responsible for deciding issues pertaining to the existence or status of a violation within its jurisdiction and ultimately permit eligibility.

Proposed § 773.24(c)

Proposed § 773.24(c) addressed the written decision, service, and appeals procedures under the provisions for challenge a listing or finding of ownership or control. 63 FR 70580, 70621.

Proposed § 773.24(c)(1) would have required the regulatory authority issuing a written decision on an ownership or control challenge to notify the challenger and "any regulatory authorities" with an interest in the challenge. A commenter said OSM should clarify the term "regulatory authorities," as used in proposed § 773.24(c)(1), to mean only "SMCRA regulatory authorities." Four commenters asked OSM to clarify how a regulatory authority discovers and notifies all regulatory authorities with an interest in the challenge. One asked if "regulatory authorities with an interest in the challenge" includes "air and water authorities" and at what point in the permitting process must the decision and notification occur.

At the outset, we note that the term "regulatory authority" is defined in the Act, at section 701(22), to include only regulatory authorities administering SMCRA. As such, the term regulatory authorities in § 773.24(c)(1) encompassed only SMCRA regulatory authorities, and not "air and water authorities." However, these comments are largely moot because, as explained above, we modified the notification requirements such that the regulatory authority does not have to directly notify regulatory authorities with an interest in an ownership or control challenge. The proposed requirement was too subjective. Both SMCRA and non-SMCRA regulatory authorities, as well as the general public, will receive ample notice of ownership or control decisions through the posting of those decisions on AVS and our AVS Office's Internet home page under final § 773.28(d). This modification will eliminate any concerns about identifying and notifying interested regulatory authorities.

Finally, we note that a decision does not necessarily occur during the permitting process, though a regulatory authority may receive an ownership or control challenge during the permitting process. The written decision requirement for ownership or control challenges is not triggered by the permitting process, but by receipt of a challenge under these provisions. Notification to the challenger, and posting of the decision on AVS and the Internet, must occur after the written decision, in accordance with the provisions we adopt today.

Two commenters, concerned about potential delays in the permitting process, said there should be a time limit for issuing a written decision under the ownership or control challenge provisions. One of the commenters suggested 30 days, while the other said 15 days is adequate to make a decision.

While in the past we elected not to set a time limit for regulatory authorities to decide ownership or control challenges (*see* 59 FR 54306, 54332–33), we modified the proposal to require regulatory authorities to decide ownership or control challenges within 60 days of receipt of a challenge and any evidence submitted by the challenger. *See* final § 773.28(a). Our experience

since the promulgation of similar ownership or control challenge procedures in 1994, and the fact that OSM and State regulatory authorities have become increasingly sophisticated in processing these challenges, leads us to conclude that the imposition of a 60 day time limit is practical.

Another commenter objected to there being no time limits for the agency to reach a decision at the "ALJ or IBLA levels." To the extent the commenter meant to refer to the lack of a time limit for a written decision in the proposed ownership or control challenge procedures, our response is as above. If the commenter truly meant to refer to OHA's regulations, no response is necessary, as those provisions are not at issue in this rulemaking. We note, however, that OHA's provisions for review of written ownership or control decisions do in fact contain specific time limits for filing of requests for review, answers or responsive motions, hearings, and decisions. 43 CFR 4.1380 through 4.1387.

A commenter said that the OHA appeal procedures referenced in proposed paragraph (c)(3)—43 CFR 4.1380 through 4.1387—were not designed to address what the commenter calls "expanded control findings" and thus, do not apply. The commenter also said that the OHA procedures are woefully inadequate to provide due process.

We disagree. The referenced OHA procedures, captioned "Review of Office of Surface Mining Written Decisions Concerning Ownership and Control," are broad enough to encompass appeals of written ownership or control decisions under this final rule. While some of the terminology in the OHA provisions does not precisely match the terminology in this final rule, the substance of the OHA appeals procedures readily accommodates the review of ownership or control decisions contemplated by these final challenge procedures. Nonetheless, in light of this rulemaking, OHA is currently determining whether or not it will be necessary to modify its procedural rules. The existing OHA procedures are more than adequate in the interim, and will in fact apply until such time as they are revised or replaced.

As to the commenter's other concern about the OHA provisions—that they do not provide due process—no response is necessary, as those provisions are not at issue in this rulemaking. We note, however, that the OHA provisions, coupled with the provisions of this final rule, afford ample due process to the regulated industry.

The same commenter, citing *Darby* v. *Cisneros*, 509 U.S. 137 (1993) and *Coteau Properties Co.* v. *Babbitt*, 53 F.3d 1466 (8th Cir. 1995), said that we cannot "require exhaustion of administrative remedies unless the effect of the [ownership or control] finding or decision is automatically stayed pending appeal."

Under this final rule, ownership or control findings are in effect stayed while a challenger exhausts administrative, as well as judicial, remedies. This is so because an applicant may receive a provisional permit under final § 773.14 during the pendency of an ownership or control challenge under final §§ 773.25 through 773.27, or any subsequent administrative or judicial appeal. *See* final § 773.14(b)(3). Thus, the potential effect of an ownership or control finding—*i.e.*, permit blocking under section 510(c)—is stayed while a challenger pursues both administrative and judicial remedies. As such, we can properly require exhaustion of administrative remedies before a challenger seeks judicial review. We have added a mandatory exhaustion requirement to final § 773.28(e).

Proposed § 773.24(d)

Proposed § 773.24(d) addressed the limitations under these provisions. 63 FR 70580, 70621. We did not receive any comments on this proposed provision. We slightly modified the proposed provision, in final § 773.26(b), to provide that no person may use these provisions to challenge their liability or responsibility under any other provision of the Act or its implementing regulations; in the proposal, we only referenced liability for reclamation fees assessed under Title IV of SMCRA. This modification is appropriate in order to emphasize that these procedures apply only to ownership or control challenges, and may not be used as a secondary source to challenge liability or responsibility under the other provisions of SMCRA or its implementing regulations.

N. Section 773.25—Standards for Challenging a Finding or Decision on the Ability To Control a Surface Coal Mining Operation

In this final rule, the provisions proposed at §§ 773.24 and 773.25 are found at §§ 773.25 through 773.28.

We proposed to revise previous § 773.25 to provide standards for challenging a finding or decision on ownership of or the ability to control a surface coal mining operation. 63 FR 70580, 70600. We modified proposed § 773.25 in this final rule. The details of the modifications are set forth in the discussion of proposed § 773.24, in preceding section VI.M. of this preamble. Section VI.M. includes a discussion of the final ownership or control challenge provisions at §§ 773.25 through 773.28.

General Comments on Proposed § 773.25

A commenter found the provisions "puzzling." The commenter questioned why we need a rebuttal mechanism if regulatory authorities are no longer allowed to make presumptions of control. The commenter asked, if all controllers certify as to their ability to control, then "how can they back-pedal and decide later that they don't?"

First, the challenge procedures we adopt today are not, strictly speaking, a rebuttal mechanism. Despite the fact that OSM can no longer rely on presumptions to make a *prima facie* case of ownership or control, we may still, at any time, make findings of ownership or control under §§ 774.11(f) and 773.21. Thus, while the challenge provisions are no longer centered on presumptions of ownership or control, it remains important for any owner or controller to be able to challenge an ownership or control listing or finding. Should a person disagree with a regulatory authority finding that the person owns or controls a surface coal mining operation, then the person should have the right to challenge that finding.

Further, as stated in section VI.M., above, we modified the certification requirement at final § 778.11(d) to require certification by only one individual; thus, not all owners or controllers will have knowingly certified to their status. Still, applicants must list all of their owners or controllers under § 778.11(c). Thus, persons will be listed as an owners or controllers in a permit application, even though they are not required to certify. Under these circumstances, it is important to allow these persons to initiate challenges. On the other hand, if a person has certified as to control of an operation, or the applicant is initiating a challenge with regard to a listing made by the applicant in a permit application, we expect that any challenge will involve changed circumstances, and will not contest the validity of the certification or listing in the first instance. In other words, a person or applicant, having knowingly certified or made a listing, should not be able to "back-pedal," as the commenter put it, and claim that the certification or listing was incorrect in the first instance. At the same time, it is

desirable to create a mechanism whereby a person or applicant can attempt to demonstrate that circumstances have changed since the certification or listing, such that a person is no longer an owner or controller of the operation.

Another commenter said the proposed regulation fails to provide meaningful standards for contesting an ownership or control finding, and that the proposed evidentiary standards are not substitutes for concrete standards for how one can successfully prove an error in a regulatory authority's finding.

We disagree. When OSM makes a finding on ownership or control, the written decision will contain an explanation of the basis for the finding. In bringing a challenge, there is really only one meaningful standard: A person bears the burden of proving by a preponderance of evidence, that he does not, or did not, own or control the relevant surface coal mining operation, under the ownership or control definitions we adopt today at final § 701.5. These definitions are sufficiently clear to allow for a meaningful challenge. The proof provided by the challenger should address the specific items in the finding with which the person takes issue. By not limiting the challenge to "concrete" criteria, the challenger is given substantial leeway to present any and all evidence which may be germane to the challenge. At the same time, regulatory authorities are not faced with having to reverse a listing or finding when a challenger meets a technical standard, but there are nonetheless indicia of ownership or control. This approach allows challengers to present, and regulatory authorities to consider, all the pertinent facts of each case, including the peculiar operating structure of a given entity. Further, providing "concrete" standards would mean attempting to anticipate every circumstance that would precipitate a challenge; this is not feasible. Finally, we also note that our 1994 AVS Procedures rule, which did not contain detailed standards for rebutting presumptions of ownership or control, was upheld in court against a challenge which was similar to this comment. *National Mining Assoc.* v. *Babbitt*, 43 Env't Rep. Cas. (BNA) 1097, 1115–16 (D.D.C. 1996), *appeal docketed*, No. 96–5274 (D.C. Cir).

Proposed § 773.25(a)

We proposed paragraph (a) to state when the challenge standards apply. 63 FR 70580, 70621. We did not receive comments on this proposed provision. However, we are not adopting proposed § 773.25(a) because it would be a duplicate regulatory provision. Applicability is addressed at final § 773.25.

Proposed § 773.25(b)

As proposed, paragraph (b) described which regulatory authorities are responsible for deciding ownership or control challenges. 63 FR 70580, 70621. As explained above, in section VI.M. of this preamble, we modified this provision in this final rule by incorporating it into final § 773.26, which, in conjunction with final § 773.28, identifies the regulatory authorities responsible for deciding ownership or control challenges.

A commenter said that it is conceivable that there will be inconsistent determinations made regarding ownership or control if there are both Federal and State violations. The commenter asserted that ownership or control decisions can only be made by the agency with the application before it and that the decision on abatement of a violation is the only appropriate decision for another agency (when another agency issued the violation).

We agree. As we explained in detail in the discussion of proposed § 773.24(b) in section VI.M., above, under this final rule, the regulatory authority with jurisdiction over a pending permit application or permit will apply its ownership and control rules to all outstanding violations, if any. Only a regulatory authority, or other agency, with jurisdiction over a violation will decide issues pertaining to the initial existence or status of the violation. Nonetheless, there is still potential for inconsistent decisions among different regulatory authorities, since regulatory authorities likely will not have identical ownership and control regulations. To the extent there are inconsistent ownership or control decisions based on the same violations, such a result is consistent with the primacy scheme established by SMCRA itself.

Three commenters questioned proposed § 773.25(b)(3), which provided that the regulatory authority which processed the permit application or which issued the permit will decide challenges not associated with violations. The commenters asked what administrative or judicial venues are available to an applicant to resolve disagreements if the information supplied by one regulatory authority to another is wrong and the incorrect information results in a permit denial. The commenters also stated that OSM should require regulatory authorities to validate their information before entry into AVS, specify the administrative and judicial venues in which erroneous permit blocks can be challenged, and specify that application review can continue during the pendency of ownership or control appeals.

We note that we incorporated proposed § 773.25(b)(3) into final § 773.26(a), such that the regulatory authority with jurisdiction over an application or permit will now decide all ownership and control challenges, regardless of the existence or non-existence of a violation. The challenge procedures we adopt today are designed to resolve questions of ownership or control. Questions as to the correctness of any other information contained in AVS, such as information required to be submitted in permit applications or information pertaining to the existence or status of violations, should be addressed to the regulatory authority which was responsible for entering that information into AVS. An applicant may or may not have recourse depending on whether the time to challenge such information has lapsed under the applicable regulations. However, we are confident, and our experience bears out, that in the case of truly incorrect information, such as information inaccurately loaded into AVS, regulatory authorities which loaded the information will work with the applicant and other persons to see that the information is corrected. Regulatory provisions are not necessary to accomplish this goal.

Likewise, additional regulatory language is not needed to require regulatory authorities to validate information before loading it into AVS. First, much of the information in AVS originates with applicants themselves, under our permit application information requirements; applicants are required to provide accurate and complete information. Further, under final § 773.15(a), regulatory authorities are required to find that an application is accurate and complete. Finally, there is ample opportunity to challenge other data in AVS, such as ownership or control findings, under existing rules and the rules we adopt today.

As to the appropriate administrative or judicial venues in which to challenge "erroneous permit blocks," the rule we adopt today, at final § 773.26(a), clearly identifies how and to whom to submit challenges regarding ownership or control listings and findings. Further, if an ownership or control finding results in a permit denial, existing 30 CFR part 775 provides for administrative and judicial review of the permitting decision. The appropriate forums in

which to initiate such challenges are identified in the regulations.

Finally, it is not necessary to provide rule language specifying that application review can continue during the pendency of ownership or control appeals. There is nothing in our regulations which suggests that application review must be suspended during the pendency of ownership or control appeals. As such, we expect that regulatory authorities will continue to process applications while appeals are pending, unless there is an independent provision of law which requires application review to be put on hold.

Proposed § 773.25(c)

We proposed paragraph (c) to provide for the evidentiary standards in the challenge procedures. 63 FR 70580, 70621. In this final rule, parts of proposed § 773.25(c) have been adopted in final § 773.27. Proposed § 773.25(c)(1) has been modified and incorporated into final § 773.28. Proposed § 773.25(c)(2) is modified and adopted at final § 773.27(a). Proposed § 773.25(c)(3) is modified and adopted at final § 773.27(b). Proposed § 773.25(c)(3)(i) is modified and adopted at final § 773.27(c). As explained in the discussion of final § 773.27(c), in section VI.M. of this preamble, we are not adopting proposed § 773.25(c)(3)(ii) because it is unnecessary.

We received numerous comments on the proposed rule's burden of proof allocation for ownership or control challenges. In this final rule, as in the proposal, the ultimate burden of proof in ownership or control challenges is on the challenger, rather than the regulatory authority.

Two commenters approved of the proposed burden of proof allocation. In substance, the commenters said it was appropriate that the burden of proof is on the person challenging a regulatory finding and the preponderance of the evidence standard is appropriate.

One commenter said the regulatory authority, not the challenger, should bear the ultimate burden of proof. Another said that the burden of proof in ownership or control challenges should always lie with the regulatory authority, especially since under the proposed rule, in the commenter's view, "to find that an individual is a controller is to also find that he is responsible for misdeeds committed by the mining company."

Two commenters said it was inappropriate to place a preponderance of the evidence standard on the challenger, while the agency does not have to make a *prima facie* showing of ownership or control. Similarly, another commenter stated that there is never any burden of proof borne by the regulatory authority.

Two commenters, citing *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267, 278–281 (1994), said the Administrative Procedure Act (APA) governs the burden of proof for these procedures, and places the ultimate burden of persuasion on the regulatory authority. One said the proposal,

> violates the APA's allocation of the burden of proof. The APA places the burden of proof (both the burden of going forward with proof and the ultimate burden of persuasion) on the proponent of the rule, i.e., the finding, made by the regulatory authority.

Since the above-identified comments all pertain to the challenger's burden of proof, as well as the regulatory authority's burden of proof, we will address all burden of proof comments together.

First, we want to remove any confusion about the determination which is required by a regulatory authority when it makes an ownership or control finding. Under final § 774.11(f), the regulatory authority must make a written finding of ownership or control. Although the preamble to the proposed rule indicated that the regulatory authority does not have to make a *prima facie* determination, we meant the regulatory authority no longer has to make a *prima facie* determination with regard to rebuttable presumptions, since the proposed rule did not employ the rebuttable presumption mechanism. However, we want to make clear that in making a finding under final § 774.11(f), the regulatory authority must indeed make a *prima facie* determination of ownership and control, based on the evidence available to the regulatory authority. In making a *prima facie* determination, the finding should include evidence of facts which demonstrate that the person subject to the finding meets the definition of *own, owner,* or *ownership* or *control* or *controller* in § 701.5 of this final rule.

As to the applicability of the APA, and the import of the Supreme Court's decision in *Greenwich Collieries,* we begin with the threshold observation that the burden of proof in formal adjudications under the APA does not constrain OSM's informal adjudications, such as the challenges provided for in this final rule. Secondly, even if the APA applies to informal adjudications, SMCRA itself expressly excepts ownership or control challenges from the APA's burden of proof provisions. Finally, even if the APA's burden of proof provisions are applicable to these final challenge procedures, the burden shifting mechanism we adopt today is consistent with the APA and *Greenwich Collieries.*

Section 556(d) of the APA provides, in pertinent part: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d) (emphasis added). SMCRA provides otherwise, and thus exempts ownership or control challenges from the APA's burden of proof requirements. Section 510(a) of SMCRA, 30 U.S.C. 1260(a), provides that "[t]he applicant for a permit, or revision of a permit, shall have the burden of establishing that his application is in compliance with all the requirements of the applicable State or Federal program," including section 510(c) of SMCRA. Similarly, under section 510(b), the applicant bears the ultimate burden of proving compliance with all requirements of SMCRA, including section 510(c), and of State and Federal programs. *See also National Mining Assoc.* v. *Babbitt,* 43 Env't Rep. Cas. at 1108. Finally, section 510(c) prohibits permit issuance until the applicant proves that there are no outstanding violations at operations owned or controlled by the applicant, or that any violations are in the process of being corrected. *See also id.* (We also note that section 510(c) is silent as to how an applicant may prove that he does not own or control a surface coal mining operation; the burden of proof allocation in this final rule is a reasonable construction of the statute, and appropriately implements section 510(c).) These sections clearly establish that the ultimate burden of proof in ownership or control challenges is properly borne by a permit applicant. Also, the burden of proof we adopt today appropriately applies to both applicant and non-applicant challengers, since the primary purpose of ownership or control findings, and therefore challenges, is to evaluate both present and future eligibility for permits. *See,* e.g., *National Mining Assoc.* v. *Babbitt,* 43 Env't Rep. Cas. at 1108.

Greenwich Collieries clarified that "burden of proof" means the ultimate "burden of persuasion." 512 U.S. at 276. Under the procedures we adopt today, OSM bears the burden of going forward with evidence to establish ownership or control (i.e., OSM must make a *prima facie* determination). The burden then shifts to the challenger to prove, by a preponderance of the evidence, that he does not, or did not, own or control the relevant surface coal mining operation. If OSM does not match that evidence, the challenger will prevail. The ultimate

burden of persuasion is properly borne by the applicant because SMCRA requires as much, but also because the challenger is most likely to be in possession of evidence to counter the regulatory authority's *prima facie* case. Under these circumstances, it is appropriate to require the challenger to produce the evidence which it has access to in attempting to rebut OSM's *prima facie* finding. This burden shifting mechanism is fully consistent with both the APA and *Greenwich Collieries*. We also note that a similar burden of proof allocation, contained in our 1994 AVS Procedures rule, was upheld against industry challenge after the decision in *Greenwich Collieries*. *See National Mining Assoc.* v. *Babbitt*, 43 Env't Rep. Cas. at 1108–09.

A commenter said that the lack of a reference in the challenge procedures to the "standards" for determining who is an owner or controller suggests that the "standards" elsewhere in the proposed rule are rebuttable presumptions which may be challenged. We disagree. The only issue in an ownership or control challenge is whether or not the challenger owns or controls, or owned or controlled, the relevant surface coal mining operation under the definitions of *own, owner,* or *ownership* or *control* or controller contained in § 701.5 of this final rule.

A commenter said the provision regarding submission of opinions of counsel as evidence in ownership or control challenges should be stricken. The commenter said that it is obvious that an attorney would be willing to sign statements supporting the cause of his client and that a statement "simply saying that this person is or is not a controller is not worthy evidence." We retained this provision, first adopted in the 1994 AVS Procedures rule, because it has continued efficacy. In this final rule, we rely upon the rationale for the opinion of counsel provision as stated in the 1994 rule. *See* 59 FR 54306, 54342–43.

Proposed § 773.25(d)

We proposed § 773.25(d) to require regulatory authorities to update AVS, as necessary, upon an agency determination pertaining to ownership or control or the issuance of a decision by a reviewing tribunal. 63 FR 70580, 70621. We did not receive comments on this proposed provision. We slightly modified the proposed provision and adopted it at final § 773.28(f).

O. Section 774.10—Information Collection

In this final rule, the provision proposed as § 774.10 is found at § 774.9.

We proposed to revise the information collection burden for part 774. We are redesignating § 774.10 as new § 774.9 which contains the information collection requirements for part 774 and the Office of Management and Budget (OMB) clearance number. For our response to comments on general information collection, see the discussion under proposed § 773.10 which appears in section VI.D. of this preamble.

In this final rule, § 774.9(a) is revised to show the new OMB clearance number for this part is 1029–0116. The provision under § 774.9(b) is revised to adjust the estimated public reporting burden from 32 hours to 8 hours. The estimate represents the average response time. The reduction in burden is predominantly due to a calculation error on the provisions in the proposed rule. The proposed rule inadvertently provided the total burden hours for each response, as if respondents were always to prepare a permit revision, permit renewal, a transfer, assignment or sale of permit rights all at the same time, not the average burden per respondent to complete the requirements of part 774. In addition, new §§ 774.11 and 774.12 are added in this final rule. Section 774.11 requires regulatory authorities to identify entities responsible for violations, maintain information in AVS, and take enforcement actions based upon ownership, control, and violation information. Section 774.11 is based on provisions proposed in §§ 773.15, 773.22, and 774.13. Section 774.12 requires permittees to provide new or updated information to regulatory authorities. Section 774.12 is based on provisions proposed in §§ 773.17 and 774.13. The estimate represents the average response time.

Summary of Comments and Adjustments to Burden Estimates

We considered information from the individuals who commented on information collection aspects of the proposed rule. In general, commenters stated that the estimated information collection burden related to the proposed rule was too low. Commenters generally did not mention any specific rule change which was underestimated or any specific number of hours that would alter the OSM estimate.

A commenter stated that the burden hours for part 774 should be 50, instead of 32 hours. We compared the commenter's estimate with other data collected from industry sources and found them inconsistent. In performing the comparison, we took into account the addition of new §§ 774.11 and 774.12. As such, we did not accept the comment.

P. Section 774.13—Permit Revisions

In this final rule, the provision we adopt from proposed § 774.13(e) is found at § 774.12(c).

We proposed to add paragraph (e) to existing 30 CFR 774.13 to require a permittee to report to the regulatory authority any change of an owner or controller where the officer, owner, or other controller is not identified in the current permit and is not subject to the certification requirements for owners and controllers under proposed § 778.13(m). A change of an officer, owner, or other controller meeting these criteria would have to be reported within 60 days of the change and approved as a permit revision.

We are not adopting the proposal to add paragraph (e) to § 774.13. Instead, we added new § 774.12, which is also based upon the ownership and control information update requirements of proposed § 773.17(h).

Final § 774.12—Post-permit Issuance Information Requirements for Permittees

Final § 774.12(a) provides that, within 30 days after the issuance of a cessation order under § 843.11, or its State regulatory program equivalent, a permittee must provide or update all the information required under § 778.11. Final § 774.12(b) provides that a permittee does not have to submit this information if a court of competent jurisdiction grants a stay of the cessation order and the stay remains in effect. These provisions of the final rule are substantively identical to previous § 773.17(h).

Final § 774.12(c) provides that, within 60 days of any addition, departure, or change in position of any person identified in the permit application as an owner or controller of the applicant or operator under final §§ 778.11(c) or (d), the permittee must provide the information required under final § 778.11(e). That information includes, for each owner or controller, the person's name, address, and telephone number; the person's position title, relationship to the applicant, percentage of ownership, and location in the organizational structure; and the date the person began functioning in the relevant position. Final § 774.12(c) is based upon proposed § 774.13(e). Requiring timely updates of this information will enable the regulatory authority to make more accurate and timely permit eligibility determinations under section 510(c) of the Act.

Disposition of Comments on Proposed § 774.13(e)

A commenter said proposed § 774.13(e) is unnecessary because there is no reason to report changes of individuals unless they are the alter ego of the applicant. We disagree. Maintaining the accuracy and completeness of ownership and control information for existing permits is critical to making accurate permit eligibility decisions under section 510(c) of the Act.

Several commenters said that the proposed rule would impose a tremendous burden because it would require reporting of changes in surface and mineral owners for the permit and adjacent areas. The commenters asserted that it is unnecessary to notify a regulatory authority of those changes if the persons involved do not control the manner in which mining and reclamation operations are conducted. As noted above, we are not adopting the rule as proposed. Final § 774.12 does not require any reporting of changes in surface or mineral ownership unless that change alters the ownership or control status of the persons involved.

Commenters suggested that we should only require updates of ownership and control information either annually or at the time of mid-term permit review (every two and a half years). We decline to adopt the commenters' suggestions because the recommended update intervals are too infrequent for maintenance of the reasonably accurate and complete database needed to ensure accurate section 510(c) permit eligibility determinations.

One commenter claimed that a permittee may not learn of an ownership change until a long time after it occurs. We believe that permittees will always either be aware of, or be in a position to be aware of, changes in ownership or control at the time that the change occurs.

One commenter opposed categorizing these information updates as permit revisions. The final rule does not classify these updates as permit revisions.

Commenters asked if a permittee's failure to comply with the 60-day reporting requirement would require a notice of violation. Since this rule applies only to permits that have already been issued, failure to comply would subject to the permittee to enforcement action under part 843 of our rules. We have no basis for distinguishing between a failure to comply with this reporting requirement and a failure to comply with any other reporting requirement applicable to permittees, such as water monitoring.

Several commenters requested clarification as to who would be subject to proposed § 774.13(e) and whether proposed § 774.17 would include changes in certified officers and directors. Both the proposed and final rules clearly place the responsibility for submitting the information updates on the permittee. Final § 774.12 requires reporting of all changes in owners and controllers.

A commenter asked under what circumstances and authority regulatory authorities could investigate reported and unreported changes. The commenter said the ability of States to thoroughly investigate multi-State entities is limited and that States would likely have to rely on assistance from the AVS Office.

A regulatory authority may investigate any circumstance, including changes of ownership or control information, at any time the regulatory authority believes the circumstances warrant. The AVS Office has assisted, and will continue to assist, State regulatory authorities with investigations at a variety of levels.

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

We proposed to revise the provisions for the transfer, assignment, or sale of permit rights in § 774.17 to distinguish between those instances when a new permit would be required and those instances requiring only approval of a change to existing permit information. We also proposed to revise the definition of *successor in interest.*

We are not adopting the proposed revisions to § 774.17. Because of the numerous comments we received on the proposed revisions, we decided to further study issues and considerations regarding the transfer, assignment, or sale of permit rights.

R. Section 778.5—Definitions

As proposed, § 778.5 would have included definitions and examples of ownership and control. Instead of creating this new section, we are adopting revised versions of the proposed definitions in final § 701.5. The definitions in the final rule also incorporate revised versions of the proposed examples. See the discussion of "*own, owner,* or *ownership*" and "*control* or *controller*" in section VI.A. of this preamble.

S. Section 778.10—Information Collection

In this final rule, the section we adopt from proposed § 778.10 is found at § 778.8.

We proposed to revise the information collection burden for part 778. We are redesignating previous § 778.10 as new § 778.8 which contains the information collection requirements for part 778 and the Office of Management and Budget (OMB) clearance number.

In this final rule, § 778.8(a) is revised to show the new OMB clearance number for this part is 1029–0117. The provision under § 778.8(b) is revised to adjust the estimated public reporting burden from 48 hours to 27 hours. The revision is the result of reductions in use and in programmatic changes. The estimate represents the average response time.

Summary of Comments and Adjustments to Burden Estimates

We considered information from the individuals who commented on information collection aspects of the proposed rule. In general, commenters stated that the estimated information collection burden related to the proposed rule was too low. Commenters generally did not mention any specific rule change which was underestimated or any specific number of hours that would alter the OSM estimate.

A commenter stated that the burden hours should be 600 hours, instead of 25 hours, for part 778. We compared the commenter's estimate with other data collected from industry sources and found them too inconsistent to use in the estimate. While we might otherwise be inclined to incorporate an estimate larger than the one published in the proposed rule, we have not in this instance because the discrepancy is so large. As such, the comment was not accepted. Instead, the estimated burden hours in this final rule remain approximately the same as proposed.

T. Section 778.13—Legal Identity and Identification of Interests

The regulations we adopt from proposed § 778.13 are found at §§ 778.9, 778.11, 778.12, and 778.13. We proposed to revise previous § 778.13 to emphasize the importance of full disclosure of ownership and control information.

We originally adopted regulations on this subject in §§ 778.13 and 778.14 of our 1979 rules, which we substantially revised in 1989. See 44 FR 15021 (March 13, 1979) and 54 FR 8982 (March 2, 1989). In *NMA* v. *DOI I*, the U.S. Court of Appeals for the D.C.

Circuit invalidated the 1989 permit information rule, including §§ 778.13 and 778.14, on the narrow grounds that it was centered on the invalidated 1988 ownership or control rule. 105 F.3d at 692, 696. In our 1997 IFR, which we adopted in response to the *NMA* v. *DOI I* decision, we cured the defects noted by the Court and repromulgated §§ 778.13 and 778.14 in a form that contained few other substantive changes from the 1989 rule. See 62 FR 19450, 19453–54 (April 21, 1997).

The National Mining Association challenged the IFR, arguing it was *ultra vires* because it required submission of permit application information not expressly required under sections 507(b) and 510(c) of the Act. The U.S. Court of Appeals upheld the permit information requirements in the IFR, stating:

> This court has already held, however, 'that the Act's explicit listings of information required of permit applicants [in sections 507 and 508] are not exhaustive, and do not preclude the Secretary from requiring the states to secure additional information needed to ensure compliance with the Act.' *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514 (D.C. Cir.) (en banc), *cert. denied*, 454 U.S. 822, 102 S.Ct. 106, 70 L.Ed.2d 93 (1981). Because section 510 is by its terms no more exhaustive than sections 507 and 508, we conclude the Secretary may require schedule information not specifically listed in any of the cited provisions of the Act.

NMA v. *DOI II*, 177 F.3d 1, 9 (D.C. Cir. 1999).

The information submission requirements in this final rule are similar to the requirements previously upheld by the Court of Appeals. To the extent that the provisions we adopt today correspond to provisions in our previous rules, we continue to rely upon the rationales set forth in the preambles to the prior rulemakings. *See* 44 FR 15021–25 (March 13, 1979); 54 FR 8982–90 (March 2, 1989); 59 FR 54347–49 (October 28, 1994); 62 FR 19452–54 (April 21, 1997).

Summary of Rule Changes

The regulations we are adopting today differ from both the previous and proposed regulations in that the final regulations reflect greater use of plain language principles and clarify that the identity, ownership and control, and permit history information requirements pertinent to a permit applicant or permittee also apply to an operator.

The most significant new provisions of this final rule: (1) Require that the natural person who will have the greatest level of effective control over the entire proposed surface coal mining operation certify as to his or her ability to control the proposed operation; (2) allow applicants to identify the specific portion(s) or aspect(s) of an operation that their owners and controllers own or control; (3) allow an applicant having other active permits to use AVS to provide required permit application information if the applicant certifies that all of the relevant part of the information already in AVS is accurate, complete, and up-to-date; and (4) allow a regulatory authority to establish a central file for permittees with multiple permits to eliminate duplicate information in permit files.

Final § 778.9 Certifying and Updating Existing Permit Application Information

This new section includes two provisions intended to reduce the paperwork and information collection burden on applicants and regulatory authorities. Originally proposed as § 778.13(o), final § 778.9(a) allows permit applicants to (1) certify that existing information in AVS is accurate and complete and (2) include the certification in an application instead of submitting duplicate information separately for each new application. Final § 778.9(c), which we proposed as § 778.13(p), allows regulatory authorities to establish a central file for an applicant instead of keeping duplicate information for each application and permit.

Final § 778.9(b) requires permit applicants to swear or affirm that the information provided in an application is accurate and complete. We are adding this provision in response to comments to emphasize the importance of disclosure of accurate and complete application information.

Final § 778.9(d) consolidates the requirements of previous §§ 778.13(k) and 778.14(d) without making any substantive changes to the previous rules. Section 778.9(d) specifies that, after an application is approved but before a permit is issued, an applicant must update, correct, or indicate that no change has occurred in the information provided under final §§ 778.9 and 778.11 through 778.14. Final §§ 778.11 through 778.14 contain applicant identity, operator identity, ownership and control, permit history, property interest, and violation information requirements.

Final § 778.11 Providing Applicant, Operator, and Ownership and Control Information

We moved those portions of previous and proposed § 778.13 that pertain to the identity of the applicant, operator, owners, controllers, and other persons with a role in the proposed surface coal mining operation to new § 778.11. Except for the changes noted above under the heading "Summary of Rules Changes" and the modifications discussed below, final § 778.11 is substantively identical to previous §§ 778.13(a), (b), and (c).

The proposed rule would have replaced the provisions in previous § 778.13 for voluntary submission of social security numbers and mandatory submission of employer identification numbers with a requirement for submission of taxpayer identification numbers. Commenters objected to the proposed requirement as burdensome and challenged its legality. In response, §§ 778.11 and 778.12 of this final rule require taxpayer identification numbers only for permit applicants, permittees, and operators. Thus, this final rule is consistent with 31 U.S.C. 7701(c), which requires that applicants for a Federal permit, recipients of a Federal permit, and persons who owe fees to a Federal agency furnish their taxpayer identification numbers.

Final § 778.11(c)(5) is a new provision that allows an applicant to identify which of its owners or controllers own or control only a portion or aspect of the proposed surface coal mining operation. We made this change because some of an applicant's owners and controllers may have responsibilities only for distinct portions or aspects of an operation. However, if an applicant elects to identify owners and controllers that only own or control a portion or aspect of a proposed operation, the applicant must account for ownership and control of all portions or aspects of the proposed operation in the application. In addition, when an owner or controller ceases to own or control a portion or aspect of an operation, the permittee must update the permit within 60 days of the change to identify the replacement owner or controller. See final § 774.12(c).

Final § 778.11(d) is a new provision. It requires that the natural person with the greatest level of effective control over the entire proposed surface coal mining operation certify, under oath, that he or she controls the proposed operation. Proposed as § 778.13(m), the certification requirement would have extended to all of an applicant's owners and controllers. However, in response to comments and upon further deliberation, the final rule applies the certification requirement only to the natural person with the greatest level of effective control over the entire proposed surface coal mining operation.

We are not adopting the portion of proposed § 778.13(m) that would require owners and controllers to certify that they would be under the

jurisdiction of the Secretary for compliance purposes. A certification of this nature cannot and would not expand jurisdiction beyond the limits already established by the Act and regulatory program. Therefore, it is unnecessary.

We also are not adopting the portion of proposed § 778.13(m) that would have extended the information disclosure requirements of final § 778.11 to "all other persons who will engage in or carry out surface coal mining operations as an owner or controller on the permit." Since final § 778.11(c)(5) already requires disclosure of information concerning persons who own or control either an applicant or an operator, the proposed rule is unnecessary. The definitions of "*own, owner,* and *ownership*" and "*control* or *controller*" in final § 701.5 will suffice to identify those persons subject to the application information disclosure requirements of § 778.11.

We are also not adopting in part 778 the portion of proposed § 778.13(c)(1)(iii) that would have required, in part, that a permittee submit the date of departure of an owner or controller whenever a cessation order was issued. Proposed § 778.13(c)(1)(iii) was substantively identical to previous § 778.13(c)(3). Instead, the final rule incorporates the requirement for a permittee to provide the date of departure for an owner or controller into new § 774.12(a), which contains information update requirements for permittees.

Final § 778.12 Providing Permit History Information

We are adding new § 778.12 to require the disclosure of the mining and permit history of an applicant, operator, and certain other persons with a role in the proposed surface coal mining operation. Final § 778.12 is substantively identical to previous §§ 778.13(d) through (f), with the exception of the changes previously noted above under the heading "Summary of Rule Changes" and the modifications discussed below.

Proposed § 778.13(e) would have required that an applicant provide all names under which the partners or principal shareholders of the applicant and operator operate or previously operated a surface coal mining and reclamation operation in the United States within the five years preceding the date of application. We are adopting a revised version of this proposed rule as final § 778.12(a). To increase consistency with section 507(b)(4) of the Act, 30 U.S.C. 1257(b), we are extending this requirement to the applicant and replacing the term "surface coal mining and reclamation operation" with "surface coal mining operation." Like the final rule, the Act applies this requirement to the applicant, and it does not require information concerning reclamation operations. We are extending this requirement to the operator and the operator's partners or principal shareholders for internal consistency with other regulations. Hence, this final rule requires that an applicant must provide all names under which the applicant, the operator, the applicant's partners or principal shareholders, and the operator's partners or principal shareholders operate or previously operated a surface coal mining operation in the United States within the five-year period preceding the date of the application.

Final § 778.12(a) also differs from previous § 778.13(d) in that, like section 507(b)(4) of the Act, it requires only a list of names under which these persons operate or previously operated a surface coal mining operation. The final rule does not include the permit identification information that the previous rule required. As discussed below, we will require permit identification information only for those surface coal mining operations specified in final § 778.12(c).

Proposed § 778.13(g) would have required detailed permit history information about permits for surface coal mining operations held by the applicant or the operator during the five years preceding the date of the application. The corresponding provisions of previous § 778.13(d) and (f) required detailed permit history information for all surface coal mining operations either: (1) currently owned or controlled by the applicant (previous § 778.13(f)), or (2) currently or previously owned or controlled by the applicant or the applicant's partners or principal shareholders within the five years preceding the date of the application (previous § 778.13(d)). After evaluating the comments received, we are adopting a middle course to ensure that we receive sufficient information to make an informed permit eligibility decision under section 510(c) of the Act while otherwise minimizing information collection burdens on permit applicants. Accordingly, § 778.12(c) of the final rule requires detailed permit history information for all surface coal mining operations that the applicant or operator: (1) currently owns or controls, or (2) owned or controlled during the five-year period preceding the date of application. For the same reason, we also decided to retain the substance of previous § 778.13(f)(2), which the proposed rule would have eliminated. We are codifying this provision as final § 778.12(c)(5). Like previous § 778.13(f)(2), final § 778.12(c)(5) requires that the permit history of each operation include the permittee's and operator's relationship to the operation, including the percentage of ownership and location in the organizational structure.

As we proposed, we are eliminating the requirement in previous § 778.13(f)(1) for submission of the date each MSHA identification number was issued. In our experience, this information has no practical value in implementing SMCRA.

Final § 778.13 Providing Property Interest Information

This section of the final rule requires the disclosure of mineral and surface ownership information for the proposed permit and adjacent areas. Final § 778.13 is derived from proposed §§ 778.13(h) through (k) and is substantively identical to the property interest information requirements in previous §§ 778.13(g) through (j).

Proposed § 778.13(n) Is Not Adopted

Proposed § 778.13(n) would have required that an applicant submit the information required under proposed §§ 778.13 and 778.14 in any format we prescribe. We are not adopting this provision because existing § 777.11(a)(3) already requires an applicant to submit all permit application information in any format that the regulatory authority prescribes. We see no purpose in duplicating this requirement in part 778. We also see no need for a counterpart to previous § 778.13(l), which, to facilitate data entry into AVS, required that an applicant submit the information required under proposed §§ 778.13 and 778.14 in any format that OSM prescribed. Section 773.8 of this final rule adds a new requirement that the regulatory authority enter all application data into AVS. Hence, there is no longer a need for a rule specifying that application information be submitted in an OSM-prescribed format. As the agency responsible for data entry, the regulatory authority should have the flexibility to prescribe whatever format it deems appropriate.

General Comments on Proposed § 778.13

One commenter expressed support for continuing to require disclosure of the persons who own or control an applicant and other information in the permit application process. However, the commenter also expressed concern that the proposed rule weakens

responsibility for providing accurate and complete information. We disagree. Nothing in the proposed rule altered the requirement of previous § 773.15(c)(1), now final § 773.15(a), that an application be complete and accurate. However, to provide additional assurance, we have added § 778.9(b), which requires that applicants swear or affirm that the information in a permit application is accurate and complete. In addition, under part 847 of this final rule, if a regulatory authority determines that an applicant has intentionally omitted information from an application, that person may be prosecuted under section 518(g) of the Act, 30 U.S.C. 1268(g), for knowingly making a false statement or a knowing failure to provide required information. See final § 847.11(a)(3).

A commenter asked whether a contract operator who is also the applicant is subject to information disclosure requirements. All applicants are subject to the same information disclosure requirements under part 778.

One commenter encouraged us to continue to require "upstream" information. The final rule does so, partly because section 507(b) of the Act mandates collection of most of this information, and partly because regulatory authorities use this information for other purposes under the Act, including alternative enforcement and future permit eligibility determinations should an owner or controller of a permittee later become an applicant.

Another commenter argued that the information requirements of proposed §§ 778.13 and 778.14 vastly exceed the information Congress authorized the agency to collect in sections 507 and 510(c) of the Act. We acknowledge that our rules require more information than is expressly required under the statutory provisions cited by the commenter. However, under section 201(c)(2) of the Act, we have the authority to adopt "such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." We are not limited to the specific permit application requirements of section 507 and 510(c) of the Act. See *NMA* v. *DOI II*, 177 F.3d at 9. The information required by our final rule will assist us in determining permit eligibility under section 510(c) of the Act, which prohibits issuance of a permit to any person who owns or controls an operation with an outstanding violation. There is no limitation on the scope of that prohibition, even though section 510(c) only requires a schedule of violation notices received during the previous 3 years. We also need the information in our final rule to assist us in evaluating the accuracy and completeness of other permit applications, and, when appropriate, identifying the persons that may be subject to alternative enforcement actions. For example, we need identifying information about persons who own or control the applicant or operator to 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.

One commenter asserted that the proposed rule disregarded the purposes of the Act's permit application information requirements. We disagree. Section 102(d) of SMCRA states that the purposes of the Act is to "establish a nationwide program to protect society and the environment from adverse effects of surface coal mining operations." Collecting the information needed to implement the permit block sanction of section 510(c) and pursue alternative enforcement is fully consistent with this purpose.

A commenter expressed concern about the liability of a person who prepares or signs an application. Except as specifically provided in § 847.11(a)(3) of this rule or another provision of our existing regulations or the Act, we are not ascribing any form of liability to anyone who prepares or signs an application.

The commenter also expressed concern about the liability of persons erroneously listed in an application as owners or controllers. Any person listed as an owner or controller in an application may challenge that listing under final §§ 773.25, 773.26, and 773.27.

One commenter noted that *NMA* v. *DOI II* (177 F.3d at 5) allows us to consider past ownership and control of operations with violations when determining a pattern of willful violations under section 510(c) of the Act, 30 U.S.C. 1260(c). To facilitate this determination, the commenter suggested that the final rule require submission of information on past ownership or control relationships.

We are not adopting the commenter's suggestion. Under final § 773.8(b) and (c), a regulatory authority must enter and update ownership and control information and violation information provided in permit applications into AVS. We retain this information in AVS as application history and, once a permit is issued, as permit history. Because regulatory authorities have been entering this information for over a decade, the AVS data base, combined with new information submitted in a permit application, should enable a regulatory authority to determine past ownership or control relationships when necessary.

Another commenter suggested that, based on the retroactivity holding in *NMA* v. *DOI II*, we should revise our information disclosure regulations to require applicants to report ownership or control relationships and violations with reference to whether the relationships and violations occurred before or after November 2, 1988, the effective date of the October 3, 1988, "ownership and control" rule. We see no need to make the suggested change. Final §§ 778.11(e) and 778.14(c) require that an applicant provide dates associated with ownership or control relationships and violations. AVS contains an historical record of these dates. Hence, regulatory authorities will have the information needed to make permit eligibility determinations using whatever cutoff date applies.

A commenter stated that because *NMA* v. *DOI II* invalidated our previous rule's presumption of ownership or control for officers and directors, we should only require information for presidents, not for other officers and directors. We disagree. Under section 507(b)(1) and (4) of the Act, 30 U.S.C. 1257(b)(1) and (4), each permit application must include information about officers, directors and principal shareholders. In addition, the court's invalidation of the previous presumption does not mean that officers and directors are never owners or controllers. Furthermore, a regulatory authority may need this information to determine ownership or control relationships and eligibility for alternative enforcement actions under parts 843, 846, and 847 of our rules or the State program equivalents.

One commenter stated that the proposed rules improperly confused the terms "owner" and "controller" with the person carrying out the mining operation. According to the commenter, under the *NMA* v. *DOI* decision, the obligations of these two entities should be kept separate. We disagree. The court did not address this issue. However, as discussed elsewhere in this preamble, we are not adopting proposed § 778.13(b)(5), which would have specifically required information about any person "who will engage in or carry out surface coal mining operations as an owner or controller on the permit." We have also eliminated the "engage in or

carry out" terminology from the certification requirements of final § 778.11(d), which we proposed as § 778.13(m). These modifications should eliminate any confusion. The operative principle is whether a person meets the criteria in the ownership and control definitions in § 701.5 of this rule.

Comments on Proposed § 778.13(b)

Numerous commenters objected to the requirement in proposed § 778.13(b) for disclosure of taxpayer identification numbers, especially when that number is a social security number. One commenter stated that the preamble to the proposed rule incorrectly characterized 31 U.S.C. 7701 as providing a basis for this requirement. Several commenters urged us to require that social security numbers be kept confidential, both for privacy reasons and because State regulatory authorities would have a difficult time convincing people to divulge their social security numbers on an application that is open to public inspection and review. Another commenter said the Social Security Administration does not allow social security numbers to be used for this purpose.

We disagree with the commenters' assertions that we lack the authority to require submission of taxpayer identification or social security numbers. The Debt Collection Improvement Act of 1996 revised 31 U.S.C. 7701 to read—

Sec. 7701. Taxpayer Identifying Number

(a) In this section—

* * * * *

(2) "taxpayer identifying number" means the identifying number required under section 6109 of the Internal Revenue Code of 1986 (26 U.S.C. 6109).

* * * * *

(c)(1) The head of each Federal agency shall require each person doing business with that agency to furnish to that agency such person's taxpayer identifying number.

(2) For purposes of this subsection, a person shall be considered to be doing business with a Federal agency if the person is—

* * * * *

(B) an applicant for, or recipient of, a Federal license, permit, right-of-way, grant, or benefit payment administered by the agency or insurance administered by the agency;

* * * * *

(D) assessed a fine, fee, royalty or penalty by the agency; * * *

Persons who apply for or receive permits for which we are the regulatory authority lie within the scope of 31 U.S.C. 7701(c)(2)(B) because those permits are Federal permits. Furthermore, under 30 CFR 773.17(g), all SMCRA permittees have an obligation to ensure payment of the Federal reclamation fees required under 30 CFR part 870. Therefore, all permit applicants and permittees under both State and Federal regulatory programs approved under SMCRA lie within the scope of 31 U.S.C. 7701(c)(2)(D). Operators of coal mining operations lie within the scope of 31 U.S.C. 7701(c)(2)(D) because section 402 of SMCRA and 30 CFR part 870 provide that those operators have an obligation to pay Federal reclamation fees. Hence, operators, permit applicants, and permittees for surface coal mining operations under both State and Federal regulatory programs under SMCRA are subject to 31 U.S.C. 7701(c)(1), which requires submission of a taxpayer identifying number. To ensure consistency with 31 U.S.C. 7701(c), we have modified final §§ 778.11 and 778.12 to provide that the application need only include taxpayer identification numbers for permit applicants, permittees, and operators.

The Internal Revenue Code specifies that "the identifying number of an individual (or his estate) shall be such individual's social security account number." 26 U.S.C. 6109(a). See also 26 U.S.C. 6109(d), which restates this requirement. As noted in the preamble of the proposed rule, a taxpayer identification number means an employer identification number for businesses and a social security number for individuals. 63 FR 70605–06, December 21, 1998.

With respect to privacy concerns, we note that, under the previous rules, many individuals voluntarily supplied their social security numbers to regulatory authorities to ensure that they would not be confused with other individuals who have the same name. In addition, when we made on-line access to AVS available to the general public, we modified the system to ensure that only regulatory authorities are able to view social security numbers when accessing AVS via the Internet.

Several commenters requested clarification on how to address "foreigners who serve as directors of U.S. companies who may not have social security numbers." One commenter asked if social security numbers for individual owners or controllers are required if the application includes an employer identification number for the company. As discussed above, the final rule requires taxpayer identification numbers only for the applicant or permittee and the operator, not individual directors, owners, or controllers.

Another commenter stated that the proposed rule confuses operations, which are not legal entities, with the legal entities which conduct them. Specifically, the commenter noted that the entity conducting a mining operation would have a taxpayer identification number, but the operation itself would not. We acknowledge that the wording of both the previous and proposed provisions was ambiguous. The final rule at § 778.12(c)(2) eliminates this ambiguity by clearly specifying that the application must include the taxpayer identification numbers for the permittee and operator.

Comments on Proposed § 778.13(c)

One commenter opposed requiring the same information from both applicants and their owners and controllers. The commenter asserted that identification of the owners and controllers of an applicant is sufficient to determine permit eligibility should the current applicant have an unabated violation. As previously discussed, we use the application information concerning owners and controllers for purposes other than determining permit eligibility under §§ 773.12 through 773.14 of this rule and section 510(c) of the Act.

One commenter suggested that proposed § 778.13(c)(1)(iii) be revised to require that a person's date of departure be included at the time the application is submitted, instead of only when a cessation order is issued. We are not adopting this suggestion because the departure would not have occurred at the time of permit application. However, we are adopting a new provision at § 774.12(c) to require that additions, departures, or changes in the position of any person identified in § 778.11(c) be reported to the appropriate regulatory authority within 60 days of the change. Routine updates, including departure dates, may be reported as soon as a change occurs.

Proposed § 778.13(c)(2) would have limited the information required from publicly traded corporations. One commenter supported the proposed provision. Other commenters opposed any reduction in the information required from publicly held corporations because this information would allow for a more thorough review. After further analysis, we are not adopting the proposed rule because we could not find sufficient support in the Act for differential treatment of publicly traded corporations. Under the final rule, corporate applicants are subject to the same information disclosure requirements regardless of

whether the corporation is privately held or publicly traded.

One commenter noted that the list of persons for whom information must be submitted in a permit application differs from the list of persons in the proposed ownership and control definitions. We did not intend these lists to be identical. Section 507(b)(4) of the Act, 30 U.S.C. 1257(b)(4), requires permit application information concerning certain persons even if they are not owners or controllers under our final definitions of "*own, owner*, or *ownership*" and "*control* or *controller*."

Another commenter asked why proposed § 778.13(c)(3)(v) required identification of entities that own between 10 and 50 percent of the stock of a corporation since these stockholders are not necessarily owners or controllers. Like the previous and proposed rules, final § 778.11(c)(4) includes this requirement because section 507(b)(4) of SMCRA, 30 U.S.C. 1257(b)(4), mandates the collection of this information.

Numerous commenters said that we should revise proposed § 778.13(c)(3)(v) to limit its scope to persons who directly own the applicant itself, rather than including persons farther upstream, such as a person who owns the owner of the applicant. We are not adopting this suggestion. The ownership information we require under § 778.11(c)(4), the final rule's counterpart to the proposed provision, may be useful, for example, in assessing permit application accuracy and completeness, in identifying persons subject to the permanent permit block sanction under section 510(c) of the Act, or other enforcement actions, and future permit eligibility determinations.

Several commenters suggested that the final rule should include a dilution formula to determine the percentage of ownership for "upstream" owners and minimize the information collection burden by restricting reporting requirements to persons who actually own 10 percent or more of the applicant after application of the formula. We asked for input on the dilution formula concept during the public outreach preceding the development of our proposed rule. Since we received little support for this concept, we did not propose a formula. The commenters presented no new arguments in favor of this concept. Therefore, we are not adopting their suggestion. Final § 778.11(c)(4) requires information concerning all persons who own 10 to 50 percent of an applicant. If a person owns an entity, that person also owns all entities owned by the first entity.

One commenter opposed "any effort to restrict responsibility for owners of operations to [those who have] more than 10 percent ownership." Ten percent ownership is the information reporting threshold established by section 507(b)(4) of the Act. However, if a person owning less than 10 percent of an entity is nonetheless a controller of that entity under the definition of "*control* or *controller*" in final § 701.5, final § 778.11 requires that an applicant report information pertaining to that person as well.

Comments on Proposed § 778.13(d)

Proposed § 778.13(d) would have provided that an applicant need not report the identity of any corporate owner not licensed to do business in any State or territory of the United States. One commenter expressed support for the proposed provision on the basis that it would eliminate unnecessary information in AVS. The commenter also asked if these entities would be removed from AVS once a final rule is adopted, and if not, would they be considered in permit eligibility determinations. After further analysis, we are not adopting the proposed rule because the Act provides little if any support for excluding this information. In addition, adopting the proposed exclusion would compromise the accuracy and completeness of information in AVS.

Comments on Proposed § 778.13(g)

One commenter expressed support for eliminating the requirement to provide the date of issuance for the MSHA identification number. We are eliminating this requirement as proposed.

Comments on Proposed § 778.13(h) and (i)

Two commenters requested that the timeframes in proposed § 778.13(h) and (i) be extended from 30 to 90 days because of the extensive research needed to document the name and address of each legal or equitable owner of record within and adjacent to the proposed permit area. Since neither the previous regulations nor the proposed rules contained any timeframes for preparation of a permit application, we are not adopting this suggestion.

Comments on Proposed § 778.13(m)

Proposed § 778.13(m) would have required that, before permit approval, the persons who will engage in or carry out surface coal mining operations as owners or controllers of the proposed operation must certify that they have the ability to control the operation and that they are under the jurisdiction of the Secretary for the purposes of compliance with the terms and conditions of the permit and the requirements of the regulatory program.

Numerous commenters opposed this proposal, especially its application to all owners and controllers. In response to these comments, § 778.11(d) of this final rule requires only that the natural person with the greatest level of effective control over the entire proposed surface coal mining operation submit a certification in the application, under oath, that he or she controls the proposed operation. Identifying this person is of greater value than requiring that all owners and controllers certify as to their ability to control the proposed surface coal mining operation. Every surface coal mining operation should have one individual who is responsible for everything that occurs with respect to that operation. We anticipate that this individual normally will be the president of the applicant or a person who holds an equivalent office. However, depending on the circumstances, the individual may be someone else.

Many commenters also opposed proposed § 778.13(m) because it appeared to ascribe personal liability for compliance to the person providing the certification. One commenter expressed concern that the certification would serve as a personal guarantee of the permittee's obligations. The commenter questioned the legal basis for demanding such a guarantee as a prerequisite for permit issuance. Another commenter argued that the certification provision improperly assigned the responsibilities of the applicant or permittee to the owner or controller.

We are not adopting that part of proposed § 778.13(m) that would have required owners and controllers to certify that they were subject to the jurisdiction of the Secretary of the Interior. This portion of the proposed rule was related to proposed § 773.17(j), which would have assigned joint and several liability for compliance to all owners and controllers and made them subject to the Secretary's jurisdiction. However, as discussed elsewhere in this preamble, we decided not to adopt that provision. Therefore, the final rule does not ascribe any personal liability to the person who provides the certification. That person's liability is limited to whatever liability the person already has under other provisions of law or regulation, such as the individual civil penalty provisions of 30 CFR part 846 and corporate and common law governing personal liability for the

applicant's actions or inaction. We acknowledge that certification cannot expand the Secretary's jurisdiction beyond the limits established by the Act.

Several commenters argued that the certification should be required at the time that a violation occurs, rather than at the time of application for a permit. We disagree. A regulatory authority needs this information at the time of application so that it is readily available when a violation occurs. Applicants are generally more willing to identify owners and controllers than are permittees in violation.

One commenter found the certification provision confusing because, according to the commenter, proposed §§ 773.17(i), 773.22, and 773.25 use the terms "owner" and "controller" in an inconsistent manner and establish three different standards of ownership and control, in addition to the definitions of those terms proposed at § 778.5. We disagree with the commenter's characterization of the proposed rule (and, by extension, this final rule). In § 701.5 of this final rule, we define "*own, owner,* or *ownership*" and "*control* or *controller.*" These definitions establish the standards for ownership and control that apply throughout relevant portions of the final rule, even as similar definitions of similar terms applied throughout relevant portions of the proposed rule. We find no inconsistencies in the use of these terms in our rules nor do our rules differ in terms of the standards for ownership and control.

Commenters asserted that the final rule must include a provision for decertification to ensure that a certified controller who leaves an operation would not remain subject to the permit block sanction for violations associated with an operation over which he or she no longer has control. We see no need to add the requested provision. Under final § 774.12(c), a permittee must update the permit within 60 days of the date that the person certified under final § 778.11(d) leaves or changes positions. And under final § 774.11(a), the regulatory authority must enter the updated information into AVS within 30 days of the date that the permittee submits it. These provisions should adequately address the situation about which the commenter expressed concern. Further, any owner or controller, including a certifying controller, may use the challenge procedures at final §§ 773.25 through 773.27 to challenge any ownership or control listing or finding which they believe to be in error.

Several commenters expressed concern that certification would lead to penalties for "honest mistakes, innocent omissions, and possibly even deliberate actions that have absolutely no impact on the environment." This comment overlooks the fact that, under the permit eligibility provisions of section 510(c) of the Act, the operative question is whether those mistakes, omissions, or deliberate actions resulted in a violation that has not been abated or corrected or is not in the process of being abated or corrected. The reasons for those violations do not matter in this context.

One commenter stated that there is no need for certification if all officers are deemed controllers. Neither the proposed nor the final rules classify all officers as deemed controllers. Instead, they list officers as an example of persons who may be controllers depending upon the extent to which they direct or influence the operation. See the definition of "*control* or *controller*" in § 701.5 of this final rule.

A commenter stated that the certification requirement causes uncertainty "when linking the applicant to the outstanding violations of its controllers." We disagree. This rulemaking is consistent with the *NMA* v. *DOI I* decision in that the unabated or uncorrected violations of the owners and controllers of an applicant in no way obstruct the applicant's ability to obtain a permit. The certification requirement for the natural person with the greatest level of effective control over the entire proposed surface coal mining operation is an application information requirement. It is independent of the determination of permit eligibility for an applicant.

Comments on Proposed § 778.13(o)

Several commenters supported adoption of proposed § 778.13(o), which provided that a permit applicant may certify that information already in AVS is accurate and complete, either in whole or in part, instead of resubmitting the information for each new application. The commenters said the provision would reduce the burden on both the applicant and the regulatory authority. For this reason, we are adopting the proposed provision as final § 778.9(a) in this rule.

One commenter objected to proposed § 778.13(o) on the basis that it shifted the responsibility for submitting accurate and complete information from the applicant to the regulatory authority. We disagree. Both the proposed and final rules clearly provide that the applicant must certify that the information in AVS is accurate and complete.

The same commenter also argued that paper records are needed to facilitate public review. Again, we disagree. The public has access to AVS, so the lack of paper records should not foreclose the opportunity for the public to review electronic records or to obtain printouts of those records.

Another commenter suggested that, in the case of a corporate applicant, one official should be able to certify that AVS information is accurate and complete. The proposed and final rules do not differentiate between corporate and other applicants. In both cases, the rules require that an applicant certify that the information in AVS is accurate and complete. If corporate bylaws allow one official to provide this certification for the corporation, then only that official's certification is required with respect to AVS information.

Comments on Proposed § 778.13(p)

Numerous commenters supported adoption of proposed § 778.13(p), which provided that regulatory authorities may establish a central file to house identity information instead of keeping duplicate information in each application or permit file. We are adopting the proposed provision as final § 778.9 in this rule.

One commenter suggested that the applicant should be responsible for creating a central file and submitting it to the regulatory authority for review and approval. The commenter said that after this approval an applicant would no longer be required to submit the same information with each application. In keeping with the principles of State primacy, both the proposed and final rules allow the regulatory authority to decide whether and how to establish a central file. We do not see any merit in restricting regulatory authority flexibility by mandating a particular method in this final rule. However, creation of a central file does not relieve an applicant of the responsibility, as a part of each application, to either certify that the information in AVS is accurate and complete or update that information as needed, as required by § 778.9(a) of this final rule.

Another commenter expressed concern that State regulatory authorities are not as diligent as the AVS Office when it comes to maintaining the accuracy of the records in their systems. The commenter stated that industry must not be held responsible for information in State files that is not as current as the information in AVS. This comment lies beyond the scope of this rulemaking. In taking actions under this final rule, we will rely upon the most

current and accurate information available.

U. Section 778.14—Violation Information

The regulations we adopt from proposed § 778.14 are found at final § 778.14.

At the beginning of section VI.T. of this preamble, we provide a summary of the history of—and, in part, the rationale for—the provisions described in §§ 778.9, 778.11, 778.12, and 778.13 of this final rule. That discussion also applies to the provisions we are adopting in final § 778.14.

The permit application information requirements at proposed § 778.14 appear in modified form in final § 778.14, with the exception of proposed § 778.14(d), which we are adopting as final § 778.9(d). In general, the final rule differs from both the previous and proposed rules in that this final rule reflects greater use of plain language principles and clarifies that the violation and other information requirements of § 778.14 pertinent to a permit applicant also apply to the operator of a proposed surface coal mining operation.

Changes From Previous § 778.14

In addition to the general changes described above, final § 778.14 differs substantively from previous § 778.14 in the following respects.

- In final § 778.14(a)(2), we are limiting the reporting of past bond forfeitures to those that occurred in the five-year period preceding the date of submission of the application. Section 507(b)(5) of the Act, 30 U.S.C. 1257(b)(5), requires this information only for that period and we see no compelling reason to require data from prior years as part of this rule.
- In final § 778.14(b)(1), we are eliminating the requirement at previous § 778.14(b)(1) to submit dates of permit issuance. Providing the permit number and the name of the regulatory authority that issued the permit is sufficient to identify permits that have been suspended or revoked or for which a bond has been forfeited.
- In final § 778.14(c)(1), as proposed, we are eliminating the requirement for submission of the date an MSHA identification number was issued. We find this information to be of no practical value for SMCRA implementation purposes.
- In final § 778.14(c)(2), we are adding a requirement for submission of the identification number for each violation notice. The previous rule implied this requirement, but, because of the importance of the violation notice identification number for tracking purposes, we decided to include an express requirement in the final rule.
- In final § 778.14(c)(8), we are no longer requiring that applicants submit information about the actions being taken to abate all violations listed under paragraph (c). Instead, we are limiting this requirement to violations not covered by the certification provision of paragraph (c)(7). That paragraph, like previous paragraph (c), allows an applicant to certify that, for violations included in notices of violation issued under § 843.12 or a State program equivalent, the violation is being abated to the satisfaction of the agency with jurisdiction over the violation, provided that the abatement period has not expired. There is no reason to require a description of corrective actions for violations covered by the certification since, in the absence of information to the contrary, the certification alone satisfies the eligibility requirements for a provisionally issued permit, as specified in § 773.14(b) of this final rule.

These changes are necessary or appropriate to improve consistency with the Act or other regulations or to respond to commenters' concerns about both the adequacy and extent of the information required under this section.

With the exception of the items discussed above and in this paragraph, final § 778.14 is identical, in substance, to previous § 778.14. New § 778.9(d) consolidates the procedurally identical requirements of previous § 778.13(k) and § 778.14(d) (proposed as §§ 778.13(l) and 778.14(d), respectively) without making any substantive changes to those provisions. As we also indicate above in section VI.T. of this preamble, final § 778.9(d) specifies that, after an application is approved but before a permit is issued, an applicant must update, correct, or certify that no change has occurred in the information previously submitted under §§ 778.9 and 778.11 through 778.14.

The proposed rule would have eliminated the requirement that an applicant certify that violations are in the process of being abated. We are not adopting the proposed change. Final § 778.14(c)(8) retains the certification requirement because of its utility in determining whether an applicant, may be eligible for a provisionally issued permit under final § 773.14(b).

Comments on Proposed § 778.14

Commenters asserted that we have authority to collect only the information specified in sections 507(b)(5) and 510(c) of the Act, 30 U.S.C. 1257(b)(5) and 30 U.S.C. 1260(c). Specifically, commenters stated that we must limit the scope of § 778.14(c) to include only violations at operations owned or controlled by the permit applicant and then only if the violation notices were received during the three-year period preceding the date of application, since that is the only information that section 510(c) requires. We disagree. As discussed at length in the preamble to the 1989 version of the rule, we have ample authority under other provisions of the Act to adopt these regulations. See 54 FR 8986–87, March 2, 1989. Section 201(c)(2) authorizes the Secretary to "promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." Section 517(b)(1)(E) requires that a permittee "provide such other information relative to surface coal mining and reclamation operations as the regulatory authority deems reasonable and necessary." In *In re: Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 527 (D.C. Cir. 1981), the U.S. Court of Appeals held that the Act's explicit listings of permit information were not exhaustive and did not preclude the Secretary from requiring additional information needed to ensure compliance with the Act. The court held that both sections 201(c)(2) and 501(b) of the Act provide adequate authority for the Secretary to require submission of additional information. The court referenced and reaffirmed that holding in *NMA* v. *DOI II*, 177 F.3d at 9. Because the section 510(c) permit block sanction applies on the basis of all outstanding violations, not just violations incurred during the 3-year period preceding the date of application, we need the additional information we require in § 778.14 to assist in making permit eligibility determinations. We also need this information to evaluate application accuracy and completeness.

A commenter said that proposed § 778.14(c) violates the holding in *NMA* v. *DOI II* by requiring submission of violation information for operations the applicant no longer owns or controls. In this final rule, we are not adopting that part of proposed § 778.14(c) that would have required information concerning outstanding violation notices received for any surface coal mining operation that the applicant owned or controlled. In this final rule, the requirement applies only to unabated or uncorrected violation notices received in connection with surface coal mining and reclamation operations that the applicant or operator owns or controls at the time an application is submitted. However, section 510(c) of SMCRA expressly requires applicants to list all

violation notices received during the three-year period preceding the date of an application. This requirement, which we are adopting as part of final § 778.14(c), must be met regardless of whether the applicant still owns or controls the operations that incurred those violations.

Several commenters argued that the information requirements in §§ 778.14(a) and (b) concerning permit suspensions and revocations and bond forfeitures from persons under common control with the applicant are inconsistent with *NMA* v. *DOI I*. The commenters are mistaken. Nothing in the cited court decision prohibits collection of this information. Section 507(b)(5) of SMCRA, 30 U.S.C. 1257(b)(5), expressly requires submission of "a brief explanation of the facts involved" for permit suspensions and revocations and bond forfeitures experienced by "the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant." Our regulations appropriately flesh out this statutory requirement by requiring only the information relevant to identifying the circumstances of a permit suspension, revocation, or bond forfeiture and their bearing on permit eligibility.

Several commenters claimed that the proposed rule was flawed because it failed to address the requirement in section 510(c) of SMCRA to disclose violations of other environmental protection laws relating to air or water quality. Commenters also stated that noncompliance with this requirement is widespread, that inaccurate and incomplete disclosure of this information by applicants is the rule rather than the exception, that we have failed to enforce this provision for the past 22 years, and that we have failed to execute interagency agreements concerning the loading, listing, and cross-referencing of violations of State and Federal air and water laws by surface coal mining operations. The commenters said disclosure of air and water quality violations should be a part of "other information available to the regulatory authority" and that OSM and States should investigate the disclosure of this information by permit applicants.

We disagree that the proposed rule did not address these types of violations. Both proposed and final § 778.14(c) require a list of all violation notices received by an applicant during the three-year period preceding submission of an application as well as a list of all unabated or uncorrected violation notices incurred by operations the applicant or its operator own or control as of the date of application. Both our previous regulation (§ 773.5) and this final rule (§ 701.5) define "violation notice" as including these types of violations. With respect to enforcement, we acknowledge that we have not been successful in negotiating a formal agreement on a national basis with other agencies such as the Environmental Protection Agency (EPA). However, we do enter air and water quality violations into AVS when we receive this information from appropriate agencies. For example, EPA's Region III, which has responsibility for compliance with the Clean Water Act in the major coal mining States of northern Appalachia, has provided selected violation information to us for the past three years.

The same commenters suggested that we define the phrase "other information available" as used in section 510(c) of the Act to include any violations of air or water quality laws related to mining operations owned or controlled by the applicant. The commenters also stated that regulatory authorities should contact Federal and State agencies in other States to determine compliance with air and water quality laws; that we should require State regulatory authorities to maintain data in AVS of all violations of air or water quality laws related to mining operations; that we should maintain a current database in AVS for violations incurred under Federally approved State air and water quality programs; and that each permitting agency should be required to withhold permit issuance pending a demonstration of compliance with air and water quality protection requirements, as required under section 510(c) of the Act.

To the extent that reliable information readily available to the regulatory authority indicates that the applicant is in violation of air or water quality requirements, we agree that section 510(c) of the Act requires that the permit be withheld. However, this obligation is limited to violations meeting our definition of violation in § 701.5 of this rule; i.e., the agency with jurisdiction over air or water quality must have provided the offending party with written notification of the failure to comply. This limitation is consistent with the reference in section 510(c) to "notices of violation * * * incurred by the applicant." Section 510(c) requires use of both the violation schedule submitted with the application and "other information available to the regulatory authority" to determine permit eligibility. We decline to adopt the commenters' suggestions regarding application of the "other information available" phrase because we do interpret that phrase as requiring only that regulatory authorities use all reliable information readily available to them in a useable form. It does not mean that they must actively seek out all potential sources of information concerning air and water quality violations. Furthermore, we have no control over the availability of air and water quality violation information, which, in our experience, other agencies may be reluctant to provide, either at all or in the form and detail needed for accurate permit eligibility determinations under section 510(c). As discussed above, although we have not been successful in negotiating national agreements for AVS data entry, we do have an arrangement with EPA Region III whereby we enter air and water quality violation information into AVS when EPA determines that it is appropriate to do so. States are free to negotiate separate information exchange agreements with other agencies, and we encourage them to do so.

In any case, under section 510(c) of the Act and this final rule, the applicant has the responsibility to include all violations of air or water quality laws and regulations in the violation schedule submitted with the application. The regulatory authority must consider the information in the schedule when making permit eligibility determinations.

Several commenters expressed support for the proposed elimination of the provision in § 778.14(c) that requires the applicant to certify that any violation in a notice of violation for which the abatement period has not expired is being corrected to the satisfaction of the agency with jurisdiction over the violation. Upon further analysis, we decided to retain the certification requirement, which appears in § 778.14(c)(8) of this final rule. In the absence of evidence to the contrary, an applicant's certification that a violation is being abated satisfies the requirement of section 510(c) that an applicant submit proof that a violation "has been or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation." Hence, certification is a useful tool in determining whether an applicant may be eligible for a provisionally issued permit under final § 773.14(b).

A commenter suggested that violation information required from applicants should also include all outstanding violation notices for any entity who owns or controls the applicant and who

is owned or controlled by the applicant or its owners and controllers. The commenter stated that, while some of this information cannot be used to determine permit eligibility, it could be used for other enforcement purposes. We decline to adopt the commenter's suggestion. Our final rule closely resembles the information requirements of sections 507(b)(5) and 510(c) of the Act, 30 U.S.C. 1257(b)(5) and 1260(c), respectively, with the addition of a requirement to provide information concerning all unabated or uncorrected violation notices received in connection with any operation that the applicant or its operator owns or controls. The latter information is the most relevant for determining permit eligibility under section 510(c) of the Act. We do not believe that there is sufficient justification for requiring the additional information sought by the commenter simply because it might be useful for unspecified "other enforcement purposes."

Several commenters said that the controller of a violation should mean the person who did not abate the violation, not the person who created it. We disagree. The person who caused, or was initially cited for, the violation and any persons who subsequently had the authority to correct the violation are collectively responsible for abating or correcting the violation, unless otherwise provided for by the Act, its implementing regulations, or established principles of business law.

Several commenters asserted that the language in proposed § 778.14(c) is not consistent with section 507(b)(5) of SMCRA. The primary statutory authority for the previous, proposed and final versions of § 778.14(c) is a combination of sections 201(c)(2) and 510(c) of the Act. Section 507(b)(5) of the Act is the primary statutory basis only for paragraphs (a) and (b) of § 778.14.

A few commenters suggested that listing cessation orders should be required, since a cessation order suspends all or part of the operation of the permit. Both proposed and final § 778.14(c) require the reporting of all violation notices, which we define in § 701.5 as including cessation orders.

Some commenters asserted that the rule should require reporting of violation notices received by entities in common control with the applicant. We disagree. The "under common control" provision applies only to information requirements under section 507(b)(5) of the Act, 30 U.S.C. 1257(b)(5). Since section 507(b)(5) does not require reporting of violation notices received by the persons to whom it applies, the corresponding regulations in final §§ 778.14(a) and (b) also do not include this requirement.

The same commenters asserted that the information required in § 778.14 should include both abated and unabated violations. Final § 778.14(c) requires a list of all violation notices, both abated and unabated, that an applicant or operator received within the three-year period preceding the date of application. We based this requirement on section 510(c) of the Act, which includes a similar provision regarding the applicant. To meet this requirement, an applicant must disclose the abated and unabated violations which it and its operator received in the three-year period preceding the date of an application.

V. Section 842.11—Federal Inspections and Monitoring

We are not adopting proposed § 842.11.

We originally proposed to revise 30 CFR 842.11(e)(3)(i) because we believed the provision was inconsistent with the D.C. Circuit's decision in *NMA* v. *DOI I*. However, a closer examination found no inconsistency. The existing rule does not preclude applicants from receiving permits based on the violations of their owners or controllers. Rather, it precludes owners and controllers, when they apply for a permit of their own, from receiving that permit if there are unabated or uncorrected violations at operations they own or control.

A commenter suggested that we should make a corresponding change to a similar provision in 30 CFR 840.11(g)(3)(i), which applies to States. (Part 842 governs only Federal inspections and monitoring.) This suggestion is now moot since we are not adopting the proposed rule.

W. Section 843.5—Definitions

We proposed to remove § 843.5 from our regulations. Section 843.5 contained two definitions, *unwarranted failure to comply* and *willful violation*. We proposed to move the definition of *unwarranted failure to comply* from § 843.5 to § 846.5. In addition, we proposed to remove the definition of *willful violation* from §§ 843.5 and 701.5 because we found the definition of *willful violation* to be unnecessary in light of our proposed definition of "*willful* or *willfully*."

We received no comments on the proposed removal of § 843.5. However, since the final rule uses the term *unwarranted failure to comply* only in § 843.13, there is no longer any need to move the definition of *unwarranted failure to comply* from § 843.5. As a result, the final rule retains both § 843.5 and the existing definition of *unwarranted failure to comply*.

As proposed, we are removing the definition of *willful violation* from §§ 843.5 and 701.5 because it is no longer necessary in light of our newly adopted definition of "*willful* or *willfully*" in § 701.5. Under the final rule, a "willful violation" will be an act or omission that meets the definitions of "willful or willfully" and *violation* in § 701.5. Section VI.A. of this preamble discusses the comments that we received on the removal of *willful violation*.

X. Section 843.11—Cessation Orders

Previous 30 CFR 843.11(g) required that, within 60 days of issuance of a cessation order, we notify all persons identified as owners or controllers under other specified provisions of our rules. We proposed to revise that rule to make the cross-references consistent with proposed §§ 773.17 and 778.13 and to remove the requirement to notify the persons involved that they had been identified as an owner or controller. Under the proposed rule, we would be required only to notify them that a cessation order had been issued. We received no comments on this proposed rule.

We are adopting the proposed rule in revised form. Final § 843.11(g) provides that, within 60 days after issuing a cessation order, we will notify the permittee, the operator, and any person who has been listed or identified by the applicant, permittee, or OSM as an owner or controller of the operation. The final rule replaces the previous and proposed cross-references concerning identification of owners or controllers with a cross-reference to the ownership and control definitions in final § 701.5. We are making this change because the cross-references in the previous and proposed rules included only persons identified as owners or controllers by the permittee. However, the rules that we are adopting today establish procedures by which the regulatory authority also may identify and list persons as owners or controllers. See final § 774.11(f). Therefore, for consistency with that rule, we are replacing the previous and proposed cross-references with a requirement to notify all persons who are identified as owners or controllers, regardless of whether they were listed by an applicant in an application, subsequently disclosed by the permittee, or identified by the regulatory authority as an owner or controller of the applicant or permittee.

Y. Section 843.21—Procedures for Improvidently Issued State Permits

Background

We proposed minor amendments to paragraphs (d) and (e) of 30 CFR 843.21, which sets forth our procedures for taking Federal enforcement action concerning improvidently issued State permits. Although we did not propose any substantive changes to paragraphs (a), (b), (c), and (f) of the previous rule, we included them in the proposed rule to provide opportunity for public comment on the complete process. *See* 63 FR 70580, 70608.

After the proposal was published, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *NMA* v. *DOI II*. In that decision, the court upheld our ability to take remedial action relative to improvidently issued State permits, but found that our previous regulations "impinge on the "primacy" afforded states under SMCRA insofar as they authorize OSM to take remedial action against operators holding valid state mining permits without complying with the procedural requirements set out in section 521(a) of SMCRA, 30 U.S.C. § 1271(a)." *NMA* v. *DOI II*, 177 F.3d at 9. Specifically, the court ruled that, absent imminent danger or harm under section 521(a)(2) of SMCRA, we must use the "specific procedures in section 521(a)(3) of SMCRA" when we seek "to revoke a permit issued by the state under its state plan." *Id.* at 9–10. We modified the proposed rule to conform to the court's decision.

Section 521(a)(3) of the Act requires the Secretary to take enforcement action if, on the basis of a Federal inspection, "the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act." When taking enforcement action under this section, the Secretary must issue a notice of violation to the permittee or the permittee's agent fixing a reasonable time for abatement of the violation and provide opportunity for a public hearing. Section 521(a)(3) further provides for issuance of a cessation order if the permittee fails to abate the violation within the time originally fixed or subsequently extended.

Because section 521(a)(3) specifies that we may only take enforcement action on the basis of a Federal inspection, one commenter argued that the final rule also must be consistent with section 521(a)(1) of the Act, which establishes the conditions under which we may conduct a Federal inspection in a State with primacy. We agree. Therefore, we have revised the rule to adopt the commenter's recommendation, with the modifications needed to adapt those requirements and procedures to situations that involve improvidently issued permits.

Section 521(a)(1) of SMCRA provides that when the Secretary, on the basis of any information available to him, including receipt of information from any person, has reason to believe that any person is in violation of any requirement of the Act or any permit condition required by the Act, the Secretary must notify the State regulatory authority in the State in which the violation exists and provide the State ten days to take appropriate action to cause the violation to be corrected or to show good cause for not taking appropriate action. If the State fails to take appropriate action or show good cause within ten days, the Secretary must immediately order a Federal inspection unless the information available to the Secretary is a result of a previous Federal inspection. When a Federal inspection under section 521(a)(1) results from information provided to the Secretary by any person, the Secretary must notify the person when the inspection will take place and allow the person to accompany the inspector during the inspection.

Our final rule includes inspection provisions and procedures analogous to those in section 521(a)(1) of the Act and enforcement provisions and procedures analogous to those in section 521(a)(3) of the Act. Final § 843.21(a) requires that we provide the State regulatory authority with a ten-day notice when we have reason to believe that a State permit has been improvidently issued. Final § 843.21(b) clarifies the conditions under which we will consider a State response to a ten-day notice appropriate. Final § 843.21(c) requires that we notify the State and the permittee if we determine that a State response is not appropriate and that a Federal inspection is thus necessary. Final § 843.21(d) requires that we conduct a Federal inspection when a State response is not appropriate. It also requires that, on the basis of that inspection and other available information, we make a written finding as to whether the permit was improvidently issued. Final § 843.21(e)(1) requires that we issue a notice of violation if we find that the permit has been improvidently issued. Final § 843.21(e)(2) requires that we issue a cessation order if the notice of violation is not abated in a timely fashion. In both cases we must provide opportunity for a public hearing on the notice or order. Final § 843.21(f) sets forth the circumstances under which we may terminate or vacate a notice of violation or cessation order.

Final Paragraph (a): Initial Notice

Under final § 843.21(a)(1), we will issue an initial notice to the State regulatory authority, if, on the basis of any information available to us, including information submitted by any person, we have reason to believe a State-issued permit was improvidently issued, and the State has failed to take appropriate action. The initial notice will state in writing the reasons for our belief that the permit was improvidently issued and will request the State to take appropriate action under paragraph (b) of the final rule within 10 days. We will serve the notice on the State regulatory authority, the permittee, and any person providing information under paragraph (a). In response to comments advocating greater public notice and participation, we added paragraph (a)(2) to the final rule. Under that paragraph, we will also provide notice to the public by posting the initial notice at our office closest to the permit area and on the AVS Office Internet home page.

Final Paragraph (b): State Response

Final § 843.21(b) requires a State to respond to an initial notice under paragraph (a) within 10 days and to demonstrate in writing that: (1) the permit was not improvidently issued under § 773.21 or the State regulatory program equivalent; (2) the State is in compliance with the State regulatory program equivalents of final §§ 773.21 through 773.23; or (3) the State has good cause for not complying with the State regulatory program equivalents of §§ 773.21 through 773.23. Under final paragraph (b)(2), the State need not have completed action to suspend or rescind an improvidently issued permit as long as the State has initiated and is pursuing proceedings consistent with §§ 773.21 through 773.23.

"Good cause" under final paragraph (b)(3) does not include the lack of State program equivalents of §§ 773.21 through 773.23. A State without counterpart regulations retains implied authority to take remedial action on an improvidently issued State permit because of its express authority to deny permits in the first instance. See, *e.g.*, *NMA* v. *DOI II*, 177 F.3d at 9. Hence, this rule properly allows OSM to take remedial action when a State regulatory authority does not take action with respect to an improvidently issued State permit.

Paragraph (c): Notice of Federal Inspection

Under final § 843.21(c), if we find that the State has failed to make the demonstration required under paragraph (b), we must initiate a Federal inspection under paragraph (d) to determine if the permit was improvidently issued under the criteria of § 773.21 or the State regulatory program equivalent. We also must: (1) Issue a notice to the State regulatory authority and the permittee stating in writing the reasons for our finding and stating our intention to initiate a Federal inspection; (2) notify any person who provided information under paragraph (a) that leads to a Federal inspection that he or she may accompany the inspector on any inspection of the minesite; and (3) post the notice at our office closest to the permit area and on the AVS Office Internet home page.

Paragraph (d): Federal Inspection and Written Finding

Under final § 843.21(d), no less than 10 days and no more than 30 days after providing notice under paragraph (c), we will conduct an inspection and make a written finding as to whether the State permit was improvidently issued. In making that finding, we will evaluate all available information, including information submitted by the State, the permittee, or any other person. The timeframes in this paragraph are intended to allow for submission and receipt of information in response to the notice provided under paragraph (c) and investigation of complex ownership and control relationships while still ensuring that inspections and findings are made in a reasonably prompt fashion. The Federal inspection required under this paragraph will not always involve an on-the-ground inspection of either the permit at issue or the minesite with which the violation is associated because some violations, such as unpaid reclamation fees or civil penalties, do not constitute on-the-ground violations. Thus, in many instances, the inspection will consist of an examination of ownership or control relationships and review of relevant records, files, papers and the like.

To ensure that the public has the opportunity to review the finding, paragraph (d) of the final rule requires that we post the finding at our office closest to the permit area and on the AVS Office Internet home page. In addition, if we find that the permit was improvidently issued, the rule requires that we issue a notice to the State and the permittee stating in writing the reasons for our finding.

Final Paragraph (e): Federal Enforcement

If we find that a State permit was improvidently issued under paragraph (d), we must initiate Federal enforcement under paragraph (e). Under final § 843.21(e)(1), we must issue a notice of violation (NOV) to the permittee or the permittee's agent consistent with § 843.12(b), which contains format and content requirements for Federal notices of violation. Among other things, the notice must be in writing and must specify a reasonable time for abatement. Final § 843.21(e)(1) also provides opportunity for a public hearing under existing §§ 843.15 and 843.16 upon issuance of an NOV.

If an NOV is not remedied within the abatement period, final § 843.21(e)(2) requires us to issue a cessation order (CO) consistent with § 843.11(c), which contains format and content requirements for cessation orders. Among other things, under that rule, the order must be in writing and must specify the nature of the condition, practice or violation that resulted in issuance of the order. Final § 843.21(e)(2) also provides opportunity for a public hearing under §§ 843.15 and 843.16 upon issuance of a CO. In addition, 43 CFR 4.1160, *et seq.*, allows a permittee or any person having an interest which is or may be adversely affected by a notice of violation or cessation order issued under authority of section 521(a)(3) to seek review of the notice and order, including a public hearing.

The previous rule required only that we take unspecified "appropriate remedial action," which, the rule stated, could include issuance of an NOV ceasing mining by a specified date. However, in *NMA* v. *DOI II*, the court held that our remedial action must be consistent with section 521(a)(3) of the Act. Therefore, like that section of the Act, the final rule requires issuance of an NOV, followed by issuance of a failure-to-abate CO if the NOV is not abated in a timely fashion.

Final Paragraph (f): Remedies to Notice of Violation or Cessation Order

Final paragraph (f) establishes conditions under which we may vacate or terminate an NOV or CO issued under paragraph (e). Except as discussed below, it is substantively identical to previous 30 CFR 843.21(e), although we have modified some of the language and terminology for consistency with plain language principles and other provisions of this final rule. There are two significant changes from the previous rule. First, since final § 843.21(e) now provides for the issuance of failure-to-abate cessation orders as well as notices of violation, final § 843.21(f) applies to those orders, not just to NOVs as in the previous rule. Second, we have added paragraph (f)(2)(v) and modified paragraph (f)(2)(iii) for consistency with the new eligibility standards for provisionally issued permits under final § 773.14(b).

Final Paragraph (g): No Civil Penalty

Final paragraph (g) is substantively identical to previous 30 CFR 843.21(f).

Provisions of Proposed Rule That We Did Not Adopt

We did not adopt the provisions of proposed §§ 843.21(d)(3) and (e)(2) pertaining to the submission of accurate and complete information. Under the proposed rule, we intended to allow failure to submit accurate and complete information at the time of application for a permit to form the basis for a finding that a permit was improvidently issued (and the subsequent issuance of an NOV), if disclosure of the information would have made the applicant ineligible to receive a permit.

However, upon further review, we determined that we have insufficient basis to classify the failure to supply permit application information as a violation in the absence of any underlying outstanding enforcement action concerning the failure to submit that information. Therefore, we are not adopting the proposed revisions.

Disposition of Comments

Several commenters said that proposed § 843.21(d)(3) was unnecessary. That provision described instances when we would not take remedial action relative to an improvidently issued State permit. Under the proposal, we would not take remedial action if: (1) Any violation, penalty, or fee was abated or paid; (2) an abatement plan or payment schedule was entered into; (3) all inaccurate or incomplete information questions were resolved; or (4) the permittee and the operator, and all operations owned or controlled by the permittee and the operator, were no longer responsible for the violation, penalty, fee, or information. See proposed §§ 843.21(d)(3)(i) through (iv). The commenters objected to our failure to state in the preamble why remedial action would not be taken under the four conditions specified in proposed § 843.21(d)(3)(i) through (iv). They also stated that the conditions "open the door for delaying and negotiating compliance" and appear to violate "the

Act's requirement that enforcement action be taken immediately on all violations, regardless of whether the operator violated the rules on environmental standards, ownership or control information, or bonding."

After considering these comments, we are not adopting the proposed rules to which the commenters object. Under the final rule, if a State fails to adequately respond to our initial notice within ten days, we must initiate a Federal inspection. If we ultimately find that the permit was improvidently issued, we must undertake Federal enforcement under final § 843.21(e), including the issuance of an NOV and, when appropriate, a failure-to-abate CO. However, under final § 843.21(f)(2), we will terminate an NOV or CO if: (1) The violation has been abated or corrected; (2) the permittee or the operator no longer owns or controls the relevant operation; (3) the violation is the subject of a good faith administrative or judicial appeal; (4) the violation is the subject of an abatement plan or payment schedule; or (5) the permittee is pursuing a good faith challenge or appeal of relevant ownership or control listings or findings. Also, under final § 843.21(f)(1), we will vacate an NOV or CO if it resulted from an erroneous conclusion under § 843.21. Termination or vacation of an NOV or CO under these circumstances is appropriate because, even if the underlying violation remains uncorrected, the permittee would no longer be ineligible to receive a permit under section 510(c) of the Act.

A commenter noted that proposed §§ 843.21(d)(3)(iv) and (e)(2)(iii) both contain the phrase "no longer responsible for the violation." The commenter asked how an entity can be responsible for a violation at a particular point in time and later be relieved of responsibility. The commenter suggested that an entity, and its owners and controllers at the time the violation occurred, continue to be held responsible until the violation is abated without regard to who may later own or control the entity.

As explained above, we did not adopt the provision proposed at § 843.21(d)(3)(iv). However, we adopted a similar provision at final paragraph (f)(2)(ii), which is substantively identical to the corresponding provision in previous § 843.21(d). Final § 843.21(f)(2)(ii) is consistent with both *NMA* v. *DOI II* and our longstanding practice. See, *e.g.*, 54 FR 18438, 18456–57 (April 28, 1989). Under *NMA* v. *DOI II*, we may no longer deny a permit based on past ownership or control of an operation with an unabated violation. Therefore, when a permittee severs an ownership or control relationship and thus becomes eligible to receive a new permit, it would be incongruous to cease operations on an existing permit only to issue a new one to the same permittee for the same operation upon reapplication. Therefore, under final § 843.21(f)(2)(ii), if a person no longer owns or controls the relevant operation with a violation and is not directly responsible for the violation, we will terminate an NOV or CO issued under final § 843.21(e).

With reference to proposed § 843.21(e), the same commenter asked if a violation should be vacated rather than terminated if an operator can demonstrate a lack of current responsibility for a violation, penalty, or fee. In this final rule, as in the proposal, we continue our long-held distinction between vacation and termination. Under final § 843.21(f)(1), we will vacate an NOV or CO if we cited the violation in error. Technically, a vacated violation never existed. Under final § 843.21(f)(2), we will terminate an NOV or CO whenever one of the circumstances in (f)(2)(i) through (v) exists. In other words, we will terminate an NOV or CO issued under § 843.21(e) when the permittee is once again eligible to receive a permit under 30 CFR 773.12 or 773.14 and section 510(c) of the Act.

Two commenters said the word "may" in proposed § 843.21(d)(2) should be changed to "shall" to clarify that enforcement action is mandatory. Final § 843.21(e) provides that we must take enforcement action if we find that a permit was improvidently issued under final paragraph (d).

A commenter said that our remedial actions should not be limited to issuance of an NOV that ceases mining. Proposed § 843.21(d)(2) would not have done so. However, final § 843.21(e) clarifies that our remedial actions under this section are indeed limited to the issuance of an NOV and, as appropriate, a failure-to-abate CO. In *NMA* v. *DOI II*, the court held that our authority to take remedial action on improvidently issued State permits derives from section 521(a)(3) of SMCRA. That paragraph of the Act authorizes only the two types of enforcement actions identified in our final rule.

A commenter said that the proposed amendments to § 843.21 violate section 521 of SMCRA because operating under an improvidently issued permit is a violation of the Act. The commenter asserted that SMCRA "allows but one response by a State to a finding that a permit was unlawfully issued—the commencement of an enforcement action under section 521 of [SMCRA]."

SMCRA does not mention improvidently issued permits. However, in *NMA* v. *DOI II*, the court upheld our authority to take enforcement action on improvidently issued State permits provided we adhere to the requirements of section 521(a)(3) of the Act. The final rule is fully consistent with that section of the Act. If a State fails to adequately respond to a ten-day notice issued under final § 843.21(a), and if we subsequently find under final § 843.21(d) that a State permit was improvidently issued, we will take the appropriate enforcement actions under final § 843.21(e).

A commenter expressed disappointment that the proposed regulations would allow us to issue notices of violation whenever we disagree with a State's response to a ten-day notice. The commenter said the provision was unnecessary because the States have demonstrated an ability to properly administer their programs and determine what permittees need to do to achieve compliance. We concur that, in general, States have administered their programs in a responsible manner. However, that fact does not mean that we should not have a remedy for the occasional aberration or a future lapse in State performance.

The commenter also said that § 843.21, along with §§ 773.20 and 773.21, "conflict with specific terms of the Act's carefully defined enforcement structure, with fundamental notions of due process and finality, with Congress' provision for State primacy in the regulation of surface coal mining and reclamation, and with the law disfavoring retroactive regulations." In substance, this commenter questioned our authority to take enforcement actions concerning improvidently issued State permits.

In *NMA* v. *DOI II*, the U.S. Court of Appeals expressly upheld our authority to take remedial action for improvidently issued State permits under the express authority of section 201 of the Act, as long as we do so in accordance with the specific procedures of section 521. *Id.* at 9–10. This final rule fully complies with that decision.

Z. Section 843.24—Oversight of State Permitting Decisions With Respect to Ownership or Control or the Status of Violations

We proposed to remove previous § 843.24 from our regulations. Previous § 843.24 provided for the oversight of State permitting decisions with respect to ownership or control or the status of violations. In this final rule, we are removing previous § 843.24.

A commenter said the absence of previous § 843.24 would result in oversight teams needing more guidance on ownership and control issues. Another commenter said that OSM cannot rely upon § 843.21 to satisfy the oversight obligations under previous § 843.24(b).

We determined that final § 843.21, coupled with general oversight procedures, are sufficient to allow us to satisfy our oversight obligations with regard to improvidently issued State permits. Performance agreements between OSM and State regulatory authorities will address any concerns in the actual oversight procedures. The comments on this section did not persuade us to change our proposal to remove § 843.24 from our regulations.

AA. Part 846—Alternative Enforcement

The provisions we adopt from proposed part 846 are found in final part 847.

We proposed to revise part 846 by adding provisions to provide regulatory codification of certain statutory enforcement provisions that we refer to as alternative enforcement actions.

In this final rule, we are not adopting part 846 as it was proposed. Instead, we will retain the existing provisions in 30 CFR 843.13 for the suspension or revocation of permits for a pattern of violations and the existing provisions in part 846 for individual civil penalties. In addition, we are adopting part 847 to provide for criminal penalties and civil actions for relief under the authority of sections 518(e), 518(f), and 521(c) of Act, 30 U.S.C. 1268(e) and (f) and 1271(c). The final provisions largely track the statutory provisions they implement. We will take these actions when primary enforcement mechanisms do not result in the abatement of a violation.

Final § 847.1 states that part 847 governs the use of measures provided in sections 518(e), 518(g), and 521(c) of the Act for criminal penalties and civil actions to compel compliance with provisions of the Act.

Final § 847.2 provides that: (1) Whenever a court of competent jurisdiction enters a judgment against or convicts a person under these provisions, we will update AVS to reflect the judgment or conviction; (2) the existence of a performance bond or bond forfeiture cannot be used as the sole basis for determining that an alternative enforcement action is unwarranted; (3) each State regulatory program must contain provisions for civil actions and criminal penalties that are no less stringent than those in part 847 and include the same or similar procedural requirements; and (4) nothing in this part eliminates or limits any additional enforcement rights or procedures available under Federal or State law.

The provision concerning performance bonds and bond forfeitures is derived from proposed § 773.22(d). A commenter objected to that proposed rule, which would have provided, in part, that the existence of a performance bond cannot be used as the sole basis for a regulatory authority's determination that alternative enforcement action is not warranted. The commenter asserted that in some situations, the existence of the bond is, in fact, the sole basis for determining that alternative enforcement action is not warranted and that OSM should be sensitive to actual practice and procedure at the State level. We disagree. Bond forfeiture is not an enforcement action. In addition, bond forfeiture proceeds may be insufficient to reclaim the site or correct all violations. In these situations, the alternative enforcement actions described in part 847 may assist in achieving complete reclamation and full compliance.

Final § 847.11 implements the criminal penalty provisions of sections 518(e) and 518(g) of the Act. It provides that a regulatory authority will request pursuit of criminal penalties under sections 518(e) and 518(g) of the Act against any person who: (1) Willfully and knowingly violates a permit condition; (2) willfully and knowingly fails or refuses to comply with any order issued under section 521 or 526 of the Act, or any order incorporated into a final decision issued by the Secretary, except for those specifically excluded under section 518(e) of the Act; or (3) knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the regulatory program or any order or decision issued by the Secretary under the Act. In final § 847.11(a), we modified proposed § 846.11(a) to more closely track sections 518(e) and 518(g) of the Act. We are not adopting proposed § 846.11(c), which merely reiterated the penalties specified in sections 518(e) and (g) of the Act, 30 U.S.C. 1268(e) and (g), and is thus unnecessary since final § 847.11 already contains a reference to those provisions of the Act.

Final § 847.16 implements the civil action provisions at section 521(c) of the Act. Final § 847.16(a) requires that, under section 521(c) of the Act, 30 U.S.C. 1271(c), the regulatory authority request the Attorney General to institute a civil action for relief whenever a permittee or an agent of the permittee meets the criteria specified in final §§ 847.16(a)(1) through (a)(6). Final § 847.16(a) is derived from proposed § 846.16(a).

Final § 847.16(a)(1) requires that a regulatory authority request the Attorney General to institute a civil action for relief whenever a permittee or an agent of the permittee violates or fails or refuses to comply with any order or decision issued by the regulatory authority. Final § 847.11(a)(1) is derived from proposed § 846.16(a)(1)(i).

Final § 847.16(a)(2) requires that a regulatory authority request the Attorney General to institute a civil action for relief whenever a permittee or an agent of the permittee interferes with, hinders, or delays the regulatory authority in carrying out the provisions of the Act or its implementing regulations. Final § 847.16(a)(2) is derived from proposed § 846.16(a)(1)(ii).

Final § 847.16(a)(3) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to admit the regulatory authority's authorized representative onto the site of a surface coal mining and reclamation operation. Final § 847.16(a)(3) is derived from proposed § 846.16(a)(1)(iii).

Final § 847.16(a)(4) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to allow authorized representatives to inspect a surface coal mining and reclamation operation. Final § 847.16(a)(4) is derived from proposed § 846.16(a)(1)(iv).

Final § 847.16(a)(5) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to furnish any information or report that the regulatory authority requests under the Act or regulatory program. Final § 847.16(a)(5) is derived from proposed § 846.16(a)(1)(v).

Final § 847.16(a)(6) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to allow access to, or copying of, those records that the regulatory authority determine necessary to carry out the provisions of the Act and its implementing regulations. Final § 847.16(a)(6) is derived from proposed § 846.16(a)(1)(vi).

Final § 847.16(b) provides that a civil action for relief includes a permanent or

temporary injunction, restraining order, or any other appropriate order by a district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which a permittee has its principal office. Final § 847.16(b) is derived from proposed § 846.16(a)(2).

Final § 847.16(c) provides that temporary restraining orders will be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended. Final § 847.16(c) is derived from proposed § 846.16(b).

Final § 847.16(d) provides that any relief the court grants to enforce an order under final § 847.16(b) will continue in effect until completion or final termination of all proceedings for review of that order under the Act or its implementing regulations unless, beforehand, the district court granting such relief sets aside or modifies the order. Final § 847.16(d) is derived from proposed § 846.16(c).

General Comments on Proposed Part 846

A commenter said that, as recently as 1988, OSM expressly disavowed any connection between the ownership and control provisions in section 510(c) of the Act and the Act's enforcement provisions. The commenter said that in the 1988 individual civil penalty rule, the agency stated that the ownership or control rule does not inform the scope or circumstances of liability for a corporate officer, director, or agent under SMCRA. The commenter further claimed that the proposed rule imposes a responsibility on officers, directors, or agents to know all the facts arising in day-to-day operations.

This final rule does not purport any connection between the permit eligibility provision in section 510(c) of SMCRA and any enforcement provision, including those we call alternative enforcement. While an individual may incur a personal liability or sanction under the enforcement provisions in sections 518 and 521 of the Act, the permit eligibility requirement under section 510(c), and our definitions of ownership and control, do not impose any such personal liability. Further, this final rule does not impose any responsibility on any individual to know all of the facts arising from day-to-day operations. However, as we said in the 1988 individual civil penalty rule, any individual should exercise reasonable care in his or her position to acquire knowledge of the functions attendant to his or her position. 53 FR 3666 (February 8, 1988).

Several commenters asked us to clarify when alternative enforcement action is not warranted. Sections 847.11 and 847.16 of the final rule identify those circumstances under which the regulatory authority must seek criminal penalties or civil actions for relief. Otherwise, the regulatory authority must make a determination on a case-specific basis.

A commenter asserted that the language in the Act for criminal sanctions and civil actions for relief is sufficient without repeating the provisions in the regulations. We do not agree. Final §§ 847.11 and 847.16 flesh out the statutory requirements. Incorporation of the statutory sanctions into our regulations also emphasizes their availability.

A commenter said that section 518 of SMCRA expressly limits enforcement to permittees and that the proposed rule improperly attempts to punish operators, who are not permittees. The commenter is mistaken. Section 518(e) applies to "any person," while section 518(g) applies to "whoever" knowingly takes or fails to take certain actions.

A commenter said that the proposed rule ignores the existing mandate to employ alternative enforcement actions. There is no such mandate, except in the context of 30 CFR 845.15(b)(2), which applies only to certain cessation orders and is not germane to this rulemaking. Furthermore, the final rule does require the use of certain alternative enforcement actions in specified circumstances.

A commenter suggested the term "alternative enforcement" should be changed to "additional enforcement" to clarify that the provisions involve additional steps a regulatory authority may take to make a violator comply with the Act.

We do not believe adopting the commenter's suggestion is necessary. Alternative enforcement actions are, in fact, additional enforcement mechanisms authorized under the Act to compel compliance with the Act when primary enforcement mechanisms do not result in the abatement or correction of a violation. We have used the term "alternative enforcement" in this manner since the early days of the regulatory program without creating confusion. The same commenter expressed concern that States sometimes use alternative enforcement instead of "regular enforcement." We stress that the provisions for alternative enforcement are to be used, as appropriate, in conjunction with what the commenter calls "regular enforcement."

Specific Comments on Proposed Part 846

Following are descriptions of the proposed provisions, how the proposed provisions are disposed of in this final rule, and how we addressed the comments we received on them.

§ 846.1—Scope

We proposed to revise the scope of part 846 to conform to the proposed provisions for alternative enforcement. Since we did not adopt the revisions proposed in part 846, we also did not adopt the proposal to revise the scope at § 846.1. We received no comments on the proposed revision.

§ 846.5—Definitions

Unwarranted failure to comply. We proposed to revise the definition of *unwarranted failure to comply* and move the definition from § 843.5 to § 846.5. Since we are not revising existing § 843.13, the existing definition for *unwarranted failure to comply* remains unchanged at 30 CFR 843.5.

Violation, failure, or refusal. We proposed to retain the existing definition of *violation, failure, or refusal* in part 846. As part of our effort to consolidate definitions, we are instead moving the definition of *violation, failure, or refusal* in modified form to § 701.5.

Proposed § 846.11—Criminal Penalties

We proposed to add new regulations to provide for criminal penalties under the authority of sections 518(e) and 518(g) of the Act. We proposed to incorporate these provisions in part 846. In this final rule, we are adopting provisions for criminal penalties at § 847.11.

A commenter asserted that the proposed rule would give both OSM and primacy States the option of not pursuing criminal conviction for false statements, including those in permit applications, and the option of not penalizing mine operators who do not abate violations.

The final rule does not provide the regulatory authority with the option not to pursue abatement or correction of a violation. Furthermore, under final § 847.11(c), a regulatory authority must request that the Attorney General pursue criminal penalties against any person who knowingly makes a false statement, representation, or certification, or who knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the regulatory program or any order or decision issued by the Secretary under

the Act. However, the Attorney General has prosecutorial discretion in deciding whether to act on those requests. We have no authority under SMCRA to limit that discretion.

A commenter claimed the proposed provisions for criminal penalties improperly merged paragraphs (e), (f), and (g) of section 518 into one regulatory provision. Final § 847.11 implements only sections 518(e) and (g) of SMCRA. Neither SMCRA nor any other law prohibits us from addressing these sections of the Act in the same section of our regulations. The regulations implementing section 518(f) of SMCRA, 30 U.S.C. 1268(f), appear in 30 CFR part 846.

Commenters said the proposed § 846.11 included persons not mentioned in the statute. Section 518(e) of the Act applies to "any person" without limitation. Nonetheless, because of our desire to more closely conform to the language of the Act, we are not adopting proposed § 846.11(b), which would have more specifically identified the persons subject to criminal penalties.

Several commenters cited proposed § 846.11 as proof that "verbs other than 'shall' " negate the mandatory enforcement provisions of SMCRA. Another commenter said that section 518(g) of the Act requires us to pursue criminal conviction of persons making false statements and that the word "may" makes this enforcement requirement optional. The commenters have misinterpreted the meaning of "shall" in section 518(e) and (g) of SMCRA. As used in those sections, "shall" does not require enforcement, it only specifies the punishment that applies upon conviction.

Final § 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.

Several commenters said we should not use the proposed criminal sanctions to "go after" certified controllers under proposed § 778.13(m). In substance, these commenters suggest that persons certified as controllers under proposed § 778.13(m), which appears in revised form in § 778.11(d) of the final rule, should not be targeted for pursuit of criminal penalties. We do not anticipate that certified controllers will be singled out for criminal prosecution. Each case will be decided on its own merits.

Proposed § 846.12—Individual Civil Penalties

We proposed to revise the existing provisions for individual civil penalties and incorporate them into a section of alternative enforcement provisions within part 846. We are not adopting the proposed revisions to part 846 in this final rule. Therefore, the existing provisions for individual civil penalties in part 846 remain unchanged.

Proposed § 846.14—Suspension or Revocation of Permits: Pattern of Violations

We proposed to revise § 843.13, which implements section 521(a)(4) of the Act by providing for the suspension or revocation of permits for a pattern of violations, and move it to § 846.14. The proposed rule would have eliminated the restrictions on how a pattern of violations is determined.

Commenters opposed the proposed revisions to existing § 843.13 because the revisions would have expanded the circumstances under which the regulatory authority could issue a show cause order. The commenters also said that violations counted for pattern purposes should be limited to violations that occurred at individual mining operations; that is, they should be permit-specific as in the existing regulations. The commenters also opposed allowing consideration of a controller's compliance history at prior operations to establish a pattern of violations.

We have concluded that revision of the rules governing suspension or revocation of permits for a pattern of violations requires further study. Therefore, we are not adopting proposed § 846.14. Existing § 843.13 remains unchanged.

Proposed § 846.15—Suspension or Revocation of Permits: Failure To Comply With a Permit Condition

This proposed rule would have authorized suspension or revocation of permits for failure to comply with a permit condition imposed under proposed § 773.18.

Some commenters supported proposed § 846.15, asserting that suspension or revocation of permits is a powerful but seldom used enforcement tool. They also claimed that the proposed rule would clarify that suspension or revocation of a permit may be used for failure to comply with any permit condition, not just those that are related to ownership and control. Other commenters opposed proposed § 846.15, especially the circumstances that would prompt a regulatory authority to issue a show cause order for failure to comply with a permit condition.

As discussed in sections VI.E. and VI.H. of this preamble, we are not adopting the permit conditions in proposed § 773.18. Furthermore, we see no need to initiate permit suspension or revocation proceedings for an isolated failure to comply with a permit condition. Therefore, we are not adopting proposed § 846.15.

Proposed § 846.16—Civil Actions for Relief

We proposed to add a new § 846.16 to allow regulatory authorities to pursue civil actions for relief under the authority of section 521(c) of the Act. We are adopting the proposed rule in modified form at final § 847.16. We are not adopting the provision that would have specified the scope of persons subject to civil actions. Instead, final § 847.16(a) limits the scope of this rule to the permittee or the permittee's agent. We made this change so that the final rule conforms to the scope of section 521(c) of the Act.

Several commenters said they supported the use of section 521(c) of SMCRA to pursue injunctions against persons acting in concert with entities linked to outstanding violations. Other commenters argued that the proposed rule improperly applied to persons not mentioned in the statute. Since section 521(c) applies only to the "permittee or his agent," final § 847.16(a) applies only to these persons. We are not adopting the more expansive provisions in proposed § 846.16.

A commenter asserted that proposed § 846.16(a)(1)(v) did not match its preamble description. The commenter said the authority under which the information would be requested is more limited in the preamble discussion. Proposed § 846.16(a)(1)(v) stated that refusal to furnish any information or report requested by a regulatory authority is cause to pursue a civil action for relief. 63 FR 70627. The preamble discussion of proposed § 846.16(a)(1)(v) indicated that refusal to furnish any information or report requested by a regulatory authority under the provisions of the Act or its implementing regulations is cause to pursue a civil action for relief. 64 FR 70614. The difference to which the commenter refers appears to be that information requested under the Act and its implementing regulations is more limiting than any information requested by a regulatory authority. Since section 521(c)(E) applies to a permittee or agent who "refuses to furnish any information or report requested by the Secretary in furtherance of this Act," we have revised final § 847.16(a)(5) to apply only to refusals to furnish any information or report that the regulatory authority

requests "under the Act or regulatory program."

A commenter said proposed § 846.16(a)(1)(vi) is inconsistent with the existing regulations at 30 CFR 840.12(b) and 842.13(a)(2), which, the commenter claimed, authorize right of access by State and Federal regulatory authorities. We find no inconsistency among these rules. Final § 847.16(a)(6) provides a means of enforcing the record access requirement of §§ 840.12(b) and 842.13(a)(2) when the permittee refuses to grant access otherwise, *i.e.*, when standard enforcement mechanisms fail.

A commenter claimed that section 521(c)(F) of the Act applies only to those records required to be maintained under SMCRA. Section 521(c)(F) applies to "such records as the Secretary determines necessary in carrying out the provisions of this Act." Because the Act authorizes the adoption of State and Federal regulatory programs, the phrase "the provisions of this Act" necessarily includes regulations adopted pursuant to the Act. Therefore, final § 847.16(a)(6) applies to all records that the regulatory authority determines to be "necessary to carry out the provisions of the Act and its implementing regulations."

Several commenters asked who the "we" is in proposed § 846.16. Final § 847.16(a) clarifies that "we" means the regulatory authority.

A commenter suggested that "will" should be changed to "may" in proposed § 846.16(a). The commenter said "will" makes the provision a mandatory action, while "may" is more permissive. We are not adopting the recommended change. The 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.

BB. Miscellaneous Cross-References

As a result of certain revisions and redesignations in this final rule, it was necessary to change cross-references appearing in a number of sections which we did not otherwise change in substantive fashion. For example, we changed the cross-reference in 30 CFR 874.16 from "§ 773.15(b)(1)" to "§§ 773.12, 773.13, and 773.14" to reflect the fact that this rule revises previous § 773.15(b)(1). The amendatory language in this final rule identifies these cross-reference changes.

VII. What Effect Will This Rule Have in Federal Program States and on Indian Lands?

Through cross-referencing in the respective regulatory programs, this final rule applies to all lands in States with Federal regulatory programs. States with Federal regulatory programs include Arizona, California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. These programs are codified at 30 CFR parts 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively.

VIII. How Will This Rule Affect State Programs?

We will evaluate State regulatory programs approved under 30 CFR part 732 and section 503 of the Act to determine whether any changes in these programs are necessary to maintain consistency with Federal requirements. If we determine that a State program provision needs to be amended as a result of these revisions to the Federal rules, we will notify the State in accordance with 30 CFR 732.17(d).

Section 505(a) of the Act, 30 U.S.C. 1255(a), and 30 CFR 730.11(a) provide that SMCRA and Federal regulations adopted under SMCRA do not supersede any State law or regulation unless that law or regulation is inconsistent with the Act or the Federal regulations adopted under the Act. Section 505(b) of the Act and 30 CFR 730.11(b) provide that we may not construe existing State laws and regulations, or State laws and regulations adopted in the future, as inconsistent with SMCRA or the Federal regulations if these State laws and regulations either provide for more stringent land use and environmental controls and regulations or have no counterpart in the Act or the Federal regulations.

Under 30 CFR 732.15(a), State programs must provide for the State to carry out the provisions of, and meet the purposes of, the Act and its implementing regulations. In addition, that rule requires that State laws and regulations be in accordance with the provisions of the Act and consistent with the Federal regulations. As defined in 30 CFR 730.5, "consistent with" and "in accordance with" mean that the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act. The definition also provides that these terms mean that the State laws and regulations are no less effective than the Federal regulations in meeting the requirements of the Act. Under 30 CFR 732.17(e)(1), we may require a State program amendment if, as a result of changes in SMCRA or the Federal regulations, the approved State program no longer meets the requirements of SMCRA or the Federal regulations.

Among other things, this rule provides that State regulatory authorities must: (1) use the AVS in determining permit eligibility; (2) enter application, permit, and State violation information into AVS; (3) update and maintain permit and violation information in AVS; and (4) evaluate unabated and uncorrected violations to determine if alternative enforcement actions should be taken to compel the abatement or correction of such violations.

Several commenters said that the proposed rule would enhance and expand State roles. They thanked us for our confidence in the States' decision-making ability. Other commenters said that the rule would tax State resources and that our oversight of permitting decisions and State administrative procedures will likely increase. These commenters said that the rule would require additional personnel, computer hardware, and legal resources to support information collection, tracking and analysis, investigation, alternative enforcement, and permit eligibility determinations. Several commenters said that OSM should be ready to supplement State funding and/or provide technical assistance.

We recognize that these regulations will result in some changes in how we and the States operate. We agree there could be additional demands on Federal and State resources. As States adopt counterparts to our regulatory changes, we will provide them with technical assistance in implementing these changes, if requested. In the interim, we plan to hold various events to discuss the effects of this rulemaking. We also plan to update the various directives, policy statements, manuals, and other guidance documents, as necessary, and make them available to State regulators.

A commenter said that environmental groups could sue States like they sued OSM in the 1970s and '80s and that States want to avoid that possibility. The commenter expressed concern that the requirements that apply to regulatory authorities under the final rule might prompt allegations of a failure to comply with mandated duties. We have no reason to anticipate that these rules will generate citizen suits against the States. While these rules place some new requirements on regulatory authorities, they largely

codify long-standing practices in most States. However, section 520 of the Act does authorize such suits if the State regulatory authority fails to perform any nondiscretionary duty under the Act.

Commenters asked what will become of the AVS Users Guide and the System Advisory Memoranda. We will continue to rely upon and maintain the AVS Users Guide, System Advisory Memoranda, and other similar documents.

IX. Procedural Determinations

A. Executive Order 12866: Regulatory Planning and Review

This document is a significant rule and has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

a. This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

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

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

d. This rule does raise legal or policy issues that have been the subject of extensive litigation.

A cost benefit analysis prepared by OSM indicates that overall the final rule will decrease the administrative cost burden to the coal industry to comply with the new regulations because the majority of applicants will be able to certify that the information currently in AVS is accurate. The final rule will change requirements to allow applicants to reduce certain reporting burdens by making use of OSM's automated AVS to provide ownership, control, and other information that is common to all permit applications submitted by a company. OSM estimates that 75 percent of new permit applicants will be able to take advantage of this change in procedures. The estimated cost savings to the coal industry is approximately $397,000 per year. Estimates also indicated that administrative costs to the Federal government will increase by approximately $10,000 per year and to the State governments by a total of $434,000 per year. The analysis is on file in the OSM administrative record for this rulemaking.

Two commenters claimed that the proposed rule qualifies as a significant rule under Executive Order 12866 because it raises novel legal and policy issues and, therefore, should be reviewed by OMB. As stated above, the final rule is considered significant and has been reviewed by OMB under Executive Order 12866.

B. 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.*). This determination is based on the findings that the regulatory additions in the rule will not significantly change costs to industry or to Federal, State, or local governments. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

Under the regulations of the Small Business Administration (SBA) at 13 CFR 121.201, the size standard for a small business in coal mining is 500 or fewer employees. OSM neither collects nor maintains data on the number of employees a coal operator and its affiliates may have. Data available to OSM from another Federal agency indicated that out of approximately 4,000 coal mining operations, all but 11 may qualify as a small business under the SBA regulations. Since nearly all would qualify as a small business, the analysis of the impacts of the rule on the entire coal mining industry is in effect a determination of the impacts the rule would have on small entities.

OSM determined the impact of the final rule based on the estimated administrative costs potentially incurred by the coal industry in association with fulfilling the requirement to gather, organize, report and review the information required at the time of a permit application according to 30 CFR Parts 773, 774 and 778. The cost estimates are derived from the information collection clearance package submitted by OSM to OMB for the final regulation. While other costs may be incurred by the industry, OSM believes that these labor costs are the primary source of the costs of compliance with the final rule. For analytical purposes, OSM estimates of the number of applicants/respondents are based on data collected by OSM for the 1999 evaluation year.

OSM estimates that overall the final rule will decrease the administrative cost burden to the industry to comply with the new regulations because a majority of applicants per year will be allowed to certify that the information currently in AVS is accurate. The number of applicants subject to the new regulations range in number from 310 per year for new permits to approximately 4000 per year for all permits, permit revisions, permit renewals, and transfers, assignments and sales of permit rights. The final rule will change requirements to allow applicants to reduce certain reporting burdens by making use of OSM's automated AVS to provide ownership, control, and other information that is common to all permit applications submitted by a company. OSM estimates that 75 percent of permit applicants will be able to take advantage of this change in procedures.

ESTIMATED CHANGE TO INDUSTRY COSTS UNDER FINAL RULE

	Status quo prior to final regulation		Final regulation	
30 CFR part	Cost per applicant	Cost to industry	Cost per applicant	Cost to industry
773	$280	$36,250	$280	$36,250
774	1,020	1,693,200	960	1,462,800
778	1,460	394,640	1,290	227,760
Total	2,760	2,124,090	2,530	1,726,810
Net change	final rule compared to status quo ($397,280)			

One commenter stated that the proposed rule did not fully comply with the Regulatory Flexibility Act. The commenter said that OSM provided no facts to substantiate its statement that the rule will not have a significant economic impact on a substantial number of small entities or significantly change costs to the industry, Federal, State, or local governments as required by section 605(b) of the Regulatory Flexibility Act. The commenter also said that the rule would subject small entities to unlawful permit conditions and the threat of losing their permits and that OSM should solicit comments from small entities on how the proposal will affect them, as required by section 609 of the Regulatory Flexibility Act.

OSM disagrees. The proposed rule was issued in compliance with the requirements of section 605(b) of the Regulatory Flexibility Act. The proposed rule contained the certification required by section 605(b) and a statement providing the basis for the certification. A more detailed statement is included above and a cost benefit analysis is on file in the OSM administrative record for this rulemaking. With regard to the requirements of section 609 of the Regulatory Flexibility Act that small entities have an opportunity to participate in the rulemaking, section 609 applies only to rules that will have a significant economic impact on a substantial number of small entities. This rule does not have such an effect. Nevertheless, OSM took several steps to insure public participation by all that might be affected by the rule, both directly and indirectly through their national trade association. OSM held outreach meetings with industry prior to publishing the proposed rule in the **Federal Register**, published a proposed rule in the **Federal Register** with a public comment period that with extensions lasted over four months, issued a press release, made the proposed rule available on the Internet, and met with representatives from the coal industry during the public comment period.

C. Small Business Regulatory Enforcement Fairness Act

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

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

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because the rule does not impose major new requirements on the coal mining industry or consumers.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises for the reasons stated above.

D. Unfunded Mandates Reform Act of 1995

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 containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531, *et seq.*) is not required.

E. Executive Order 12630: Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. This determination is based on the fact that the rule will not have an impact on the use or value of private property and so, does not result in significant costs to the government.

F. Executive Order 13132: Federalism

This rule does not have Federalism implications. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

One commenter objected to OSM's statement that the rule did not have Federalism implications within the meaning of Executive Order 13132. OSM has again reviewed Executive Order 13132 and the provisions of SMCRA and concluded that the rule does not have Federalism implications within the meaning of Executive Order 13132. The provisions of SMCRA delineate the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." States are not required to regulate surface coal mining and reclamation operations under SMCRA, but they may do so if they wish and if they meet certain requirements. SMCRA also provides for Federal funding of 50 percent of the cost of administering State regulatory programs approved under SMCRA. Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA. Further, section 505 of SMCRA specifically provides for the preemption of State laws and regulations that are inconsistent with the provisions of SMCRA.

G. Executive Order 12988: Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule (1) does not unduly burden the judicial system and (2) meets the requirements of sections 3(a) and 3(b)(2) of the order. Additional remarks follow concerning individual elements of the Executive Order:

1. What is the preemptive effect, if any, to be given to the regulation?

This regulation will have the same preemptive effect as other standards adopted pursuant to SMCRA. To retain primacy, States have to adopt and apply standards for their regulatory programs that are no less effective than those set forth in OSM's regulations. Any State law that is inconsistent with or that would preclude implementation of the proposed regulation would be subject to preemption under SMCRA section 505 and implementing regulations at 30 CFR 730.11. To the extent that the proposed regulation would result in preemption of State law, the provisions of SMCRA are intended to preclude inconsistent State laws and regulations. This approach is established in SMCRA, and has been judicially affirmed. See *Hodel* versus *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).

2. What is the effect on existing Federal law or regulation, if any, including all provisions repealed or modified?

This rule modifies the implementation of SMCRA as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the Federal regulatory provisions that are affected by this rule.

3. Does the rule provide a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction?

The standards established by this rule are as clear and certain as practicable,

given the complexity of topics covered and the mandates of SMCRA.

4. What is the retroactive effect, if any, to be given to the regulation?

This rule is not intended to have retroactive effect.

5. Are administrative proceedings required before parties may file suit in court? Which proceedings apply? Is the exhaustion of administrative remedies required?

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, 30 U.S.C. 1276(a). Prior to any judicial challenges to the application of the rule, however, administrative proceedings must be exhausted, unless specified otherwise. See final 30 CFR 773.23(d). In situations involving OSM application of the rule, applicable administrative proceedings may be found in 43 CFR part 4. In situations involving state regulatory authority application of the provisions equivalent to those contained in this rule, applicable administrative procedures are set forth in the particular state program.

6. Does the rule define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items?

Terms which are important to the understanding of this rule are defined in the rule or set forth in 30 CFR 700.5 and 701.5.

7. Does the rule address other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget, that are determined to be in accordance with the purposes of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act, agencies may not conduct or sponsor a collection of information unless the collection displays a currently valid OMB control number. Also, no person must respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control number. Therefore, in accordance with 44 U.S.C. 3501 *et seq*, we submitted the information collection and recordkeeping requirements of 30 CFR Parts 773, 774, and 778 to OMB for review and approval. OMB subsequently approved the collection activities and assigned them OMB control numbers 1029–0115, 1029–0116, and 1029–0117, which appear in §§ 773.3, 774.9, and 778.8, respectively.

To obtain a copy of our information collection clearance authority, explanatory information and related forms, contact John A. Trelease, OSM's Information Collection Clearance Officer, at (202) 208–2783 or by e-mail at jtreleas@osmre.gov.

One commenter stated that the proposed rule violated the Paperwork Reduction Act by requiring the collection of information not specifically required by SMCRA. OSM disagrees. Section 507(b) lists some of the information required in a permit application and states that the application shall include, "among other things," 17 enumerated items. The use of the phrase "among other things" clearly indicates that the list in section 507(b) was not intended to be all inclusive. Further, many of the information collection requirements contained in the rule have been previously litigated and the courts have held that the listing of information required of permit applicants in the Act is not exhaustive and does not preclude the Secretary from requiring the States to secure additional information needed to insure compliance with the Act.

I. National Environmental Policy Act of 1969 and Record of Decision

OSM has prepared an environmental assessment (EA) for this rule and has made a finding that it would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. section 4332(2)(C). The EA and finding of no significant impact are on file in the OSM Administrative Record for this rule.

List of Subjects

30 CFR Part 701

Law enforcement, Surface mining, Underground mining.

30 CFR Part 724

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

30 CFR Part 750

Indian-lands, Reporting and recordkeeping requirements, Surface 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 775

Administrative practice and procedure, Surface mining, Underground mining.

30 CFR Part 778

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

30 CFR Part 785

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

30 CFR Part 795

Grant programs-natural resources, Reporting and record keeping requirements, Small business, Surface mining, Technical assistance, Underground mining.

30 CFR Part 817

Environmental protection, Reporting and record keeping requirements, Surface mining.

30 CFR Part 840

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

30 CFR Part 842

Law enforcement, 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 846

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

30 CFR Part 847

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

30 CFR Part 874

Indian-lands, Surface mining, Underground mining.

30 CFR Part 875

Indian-lands, Surface mining, Underground mining.

30 CFR Part 903

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 905

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 910

Environmental protection, Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 912

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 921

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 922

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 933

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 937

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 939

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 941

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 942

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR part 947

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 25, 2000.

Sylvia V. Baca,

Assistant Secretary, Land and Minerals Management.

For the reasons discussed in the preamble, the Office of Surface Mining amends 30 CFR chapter VII as follows.

PART 701—PERMANENT REGULATORY PROGRAM

1. Revise the authority citation for part 701 to read as follows:

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

2. Amend § 701.5 as follows:

a. Remove the definition of *Willful violation.*

b. In the definition of *Unanticipated event or condition* revise the reference from "§ 773.15" to read "§ 773.13."

c. Add the following definitions in alphabetical order to read as set forth below:

§ 701.5 Definitions.

* * * * *

Applicant/Violator System or *AVS* means an automated information system of applicant, permittee, operator, violation and related data OSM maintains to assist in implementing the Act.

* * * * *

Control or *controller,* when used in parts 773, 774, and 778 and § 843.21 of this chapter, refers to or means—

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

(2) An operator of a surface coal mining operation;

(3) A general partner in a partnership;

(4) A person who has the ability to, directly or indirectly, commit the financial or real property assets or working resources of an applicant, a permittee, or an operator; or

(5) Any other person who has the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted. Examples of persons who may, but do not necessarily, meet this criterion include—

(i) The president, an officer, a director (or a person performing functions similar to a director), or an agent of an entity;

(ii) A partner in a partnership, or a participant, member, or manager of a limited liability company;

(iii) 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;

(iv) An entity with officers or directors in common with another entity, depending upon the extent of overlap;

(v) 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

(vi) 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.

* * * * *

Knowing or *knowingly* means that a person who authorized, ordered, or carried out an act or omission knew or had reason to know that the act or omission would result in either a violation or a failure to abate or correct a violation.

* * * * *

Own, owner, or *ownership,* as used in parts 773, 774, and 778 and § 843.21 of this chapter (except when used in the context of ownership of real property), means being a sole proprietor or possessing or controlling in excess of 50 percent of the voting securities or other instruments of ownership of an entity.

* * * * *

Violation, when used in the context of the permit application information or permit eligibility requirements of sections 507 and 510(c) of the Act and related regulations, means—

(1) A failure to comply with an applicable provision of a Federal or State law or regulation pertaining to air or water environmental protection, as evidenced by a written notification from a governmental entity to the responsible person; or

(2) A noncompliance for which OSM has provided one or more of the following types of notice or a State regulatory authority has provided equivalent notice under corresponding provisions of a State regulatory program—

(i) A notice of violation under § 843.12 of this chapter.

(ii) A cessation order under § 843.11 of this chapter.

(iii) A final order, bill, or demand letter pertaining to a delinquent civil penalty assessed under part 845 or 846 of this chapter.

(iv) A bill or demand letter pertaining to delinquent reclamation fees owed under part 870 of this chapter.

(v) A notice of bond forfeiture under § 800.50 of this chapter when—

(A) One or more violations upon which the forfeiture was based have not been abated or corrected;

(B) The amount forfeited and collected is insufficient for full

reclamation under § 800.50(d)(1) of this chapter, the regulatory authority orders reimbursement for additional reclamation costs, and the person has not complied with the reimbursement order; or

(C) The site is covered by an alternative bonding system approved under § 800.11(e) of this chapter, that system requires reimbursement of any reclamation costs incurred by the system above those covered by any site-specific bond, and the person has not complied with the reimbursement requirement and paid any associated penalties.

Violation, failure or refusal, for purposes of parts 724 and 846 of this chapter, means—

(1) A failure to comply with a condition of a Federally-issued permit or of any other permit that OSM is directly enforcing under section 502 or 521 of the Act or the regulations implementing those sections; or

(2) A failure or refusal to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under section 518(b) or section 703 of the Act.

Violation notice means any written notification from a regulatory authority or other governmental entity, as specified in the definition of *violation* in this section.

* * * * *

Willful or *willfully* means that a person who authorized, ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation acted—

(1) Intentionally, voluntarily, or consciously; and

(2) With intentional disregard or plain indifference to legal requirements.

§ 701.11 [Amended]

3. Revise the reference in the second sentence of § 701.11(a) from "30 CFR 773.11(b)" to read "§ 773.4(b) of this chapter."

PART 724—INDIVIDUAL CIVIL PENALTIES

4. Revise the authority citation for part 724 to read as follows:

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

§ 724.5 [Removed]

5. Remove § 724.5.

PART 750—REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON INDIAN LANDS

6. Revise the authority citation for part 750 to read as follows:

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

7. Revise § 750.12(c)(2)(ii) to read as follows:

§ 750.12 Permit applications.

* * * * *

(c) * * *

(2) * * *

(ii) Sections 773.4, 773.15(c), 777.17;

* * * * *

PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

8. Revise the authority citation for part 773 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.*

9. Remove the following sections and paragraphs:

a. § 773.5
b. § 773.15(a) introductory heading
c. § 773.15(b)
d. § 773.15(c)(1)
e. § 773.15(e)
f. § 773.17(h)
g. § 773.20
h. § 773.24

10. Redesignate sections and paragraphs as indicated in the following table:

Section	is redesignated as...
773.10	773.3
773.11	773.4
773.12	773.5
773.13	773.6
773.15, section heading.	773.7
773.15(a)(1)	773.7(a)
773.15(a)(2)	773.7(b)
773.15(c)	773.15
773.15(c)(2)	773.15(b)
773.15(c)(3)	773.15(c)
773.15(c)(3)(i)	773.15(c)(1)
773.15(c)(3)(ii)	773.15(c)(2)
773.15(c)(4)	773.15(d)
773.15(c)(5)	773.15(e)
773.15(c)(6)	773.15(f)
773.15(c)(7)	773.15(g)
773.15(c)(8)	773.15(h)
773.15(c)(9)	773.15(i)
773.15(c)(10)	773.15(j)
773.15(c)(11)	773.15(k)
773.15(c)(12)	773.15(l)
773.15(c)(13)	773.15(m)
773.15(d)	773.16

11. Revise § 773.3 to reads as follows:

§ 773.3 Information collection.

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Regulatory authorities will use this information in processing surface coal mining permit applications. Persons intending to conduct such 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. The OMB clearance number for this part is 1029–0115.

(b) We estimate that the public reporting burden for this part will average 36 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 210, 1951 Constitution Avenue, NW, Washington, DC 20240. Please refer to OMB Control Number 1029–0115 in any correspondence.

§ 773.6 [Amended]

12. Revise the reference in newly designated § 773.5(a)(3)(ii) from "§ 773.12" to read "§ 773.5."

13. Add new §§ 773.8, 773.9, 773.10, 773.11, 773.12, 773.13, 773.14, and paragraphs 773.15(a) and 773.15(n) to read as follows:

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

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

(b) We will enter into AVS—

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

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

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

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

(a) We, the regulatory authority, will rely upon the applicant, operator, and ownership and control information that you, the applicant, submit under § 778.11 of this subchapter, information from AVS, and any other available information, to review your and your operator's business structure and ownership or control relationships.

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

§ 773.10 Review of permit history.

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

(b) We will also determine if you, your operator, or any of your controllers disclosed under §§ 778.11(c)(5) and 778.11(d) of this subchapter have previous mining experience.

(c) If you, your operator, your controllers, or your operator's controllers do not have any previous mining experience, we may conduct additional reviews under § 774.11(f) of this subchapter. The purpose of this review will be to determine if someone else with mining experience controls the mining operation and was not disclosed under § 778.11(c)(5) of this subchapter.

§ 773.11 Review of compliance history.

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

(1) You;

(2) Your operator;

(3) Operations you own or control; and

(4) Operations your operator owns or controls.

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

§ 773.12 Permit eligibility determination.

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

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

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

(2) You or your operator indirectly own or control, regardless of when the ownership or control began, has an unabated or uncorrected violation cited on or after November 2, 1988; or

(3) You or your operator indirectly own or control has an unabated or uncorrected violation, regardless of the date the violation was cited, and your ownership or control was established on or after November 2, 1988.

(b) You are eligible to receive a permit under section 510(c) of the Act if any surface coal mining operation you or your operator indirectly own or control has an unabated or uncorrected violation and both the violation and your assumption of ownership or control occurred before November 2, 1988. However, you are not eligible to receive a permit if there was an established legal basis, independent of authority under section 510(c) of the Act, to deny the permit at the time you or your operator assumed indirect ownership or control or at the time the violation was cited, whichever is earlier.

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

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

(e) If you are ineligible for a permit under this section, we will send you written notification of our decision. The notice will tell you why you are ineligible and include notice of your appeal rights under part 775 of this subchapter and 43 CFR 4.1360 through 4.1369.

§ 773.13 Unanticipated events or conditions at remining sites.

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

(1) Occurred after October 24, 1992; and

(2) Resulted from an unanticipated event or condition at a surface coal mining and reclamation operation on lands that are eligible for remining under a permit that was—

(i) Issued before September 30, 2004, including subsequent renewals; and

(ii) Held by the person applying for the new permit.

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

(1) Arose after permit issuance;

(2) Was related to prior mining; and

(3) Was not identified in the permit application.

§ 773.14 Eligibility for provisionally issued permits.

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

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

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

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

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

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

(3) You are pursuing a good faith—

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

(ii) Administrative or judicial appeal of all pertinent ownership or control listings or findings, unless there is an initial judicial decision affirming the

listing or finding and that decision remains in force.

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

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

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

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

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

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

§ 773.15 Written findings for permit application approval.

* * * * *

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

* * * * *

(n) The applicant is eligible to receive a permit, based on the reviews under §§ 773.7 through 773.14 of this part.

14. Revise §§ 773.21 through 773.23 to read as follows:

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

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

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

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

(2) The violation remains unabated or uncorrected; and

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

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

(1) Serve you with a written notice of the preliminary finding; and

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

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

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

§ 773.22 Notice requirements for improvidently issued permits.

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

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

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

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

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

(d) We will also post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

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

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

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

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

§ 773.23 Suspension or rescission requirements for improvidently issued permits.

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

(1) The violation has been abated or corrected to the satisfaction of the agency with jurisdiction over the violation;

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

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

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

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

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

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

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

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

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

(d) If we suspend or rescind your permit under this section, you may request administrative review of the notice under the procedures at 43 CFR 4.1370 through 4.1377 (when OSM is the regulatory authority) or under the State regulatory program equivalent (when a State is the regulatory authority). Alternatively, you may seek judicial review of the notice.

15. Revise § 773.25 and add §§ 773.26 through 773.28 to read as follows:

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

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

(a) Listed in a permit application or in 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(f) of this subchapter; or

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

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

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

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

If the challenge concerns a . . .	Then you must submit a written explanation to . . .
(1) Pending Federal permit application or Federally issued permit	OSM.
(2) Pending State permit application or State-issued permit	the State regulatory authority with jurisdiction over the application or permit.

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

(c) When the challenge concerns a violation under the jurisdiction of a different regulatory authority, the regulatory authority with jurisdiction over the permit application or permit must consult the regulatory authority with jurisdiction over the violation and the AVS Office to obtain additional information.

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

§ 773.27 Burden of proof for ownership or control challenges.

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

(a) When you challenge a listing or finding of ownership or control of a surface coal mining operation, you must prove by a preponderance of the evidence that you either—

(1) Do not own or control the entire operation or relevant portion or aspect thereof; or

(2) Did not own or control the entire operation or relevant portion or aspect thereof during the relevant time period.

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

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

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

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

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

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

(i) Evidentiary materials;

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

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

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

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

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

(1) Certified mail, return receipt requested; or

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

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

(d) We will post all decisions made under this section on AVS and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

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

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

revise the information in AVS to reflect the decision.

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

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

17. Revise the authority citation for part 774 to read as follows:

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

18. Redesignate sections as indicated in the following table:

Section	is redesignated as . . .
774.10	774.9
774.11	774.10

19. Revise § 774.1 to read as follows:

§ 774.1 Scope and purpose.

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

20. Revise newly redesignated § 774.9 to read as follows:

§ 774.9 Information collection.

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. 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. Persons 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. The OMB clearance number for this part is 1029–0116.

(b) We estimate that the public reporting burden for this part will average 8 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 210, 1951 Constitution Avenue, NW, Washington, DC 20240. Please refer to OMB Control Number 1029–0116 in any correspondence.

21. Add new § 774.11 to read as follows:

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

(a) For the purposes of future permit eligibility determinations and enforcement actions, we, the regulatory authority, must enter into AVS the data shown in the following table—

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 of ownership or control	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.

(b) If, at any time, we discover that any person owns or controls an operation with an unabated or uncorrected violation, we will determine whether enforcement action is appropriate under part 843, 846 or 847 of this chapter. We must enter the results of each enforcement action, including administrative and judicial decisions, into AVS.

(c) We must serve a preliminary finding of permanent permit ineligibility under section 510(c) of the Act on you, an applicant or operator, if the criteria in paragraphs (c)(1) and (c)(2) are met. In making a finding under this paragraph, we will only consider control relationships and violations which would make, or would have made, you ineligible for a permit under §§ 773.12(a) and (b) of this subchapter. We must make a preliminary finding of permanent permit ineligibility if we find that—

(1) You control or have controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations under section 510(c) of the Act; and

(2) The violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate your intent not to comply with the Act, its implementing regulations, the regulatory program, or your permit.

(d) You may request a hearing on a preliminary finding of permanent permit ineligibility under 43 CFR 4.1350 through 4.1356.

(e) We must enter the results of the finding and any hearing into AVS.

(f) At any time, we may identify any other person who owns or controls an entire operation or any relevant portion or aspect thereof. If we identify such a person, we must—

(1) Issue a written finding to the person and the applicant or permittee describing the nature and extent of ownership or control; and

(2) Enter our finding under paragraph (f)(1) of this section into AVS; and

(3) Require the person to—

(i) Disclose their identity under § 778.11(c)(5) of this subchapter; and

(ii) Certify they are a controller under § 778.11(d) of this subchapter, if appropriate.

(g) A person we identify under paragraph (f)(1) of this section may challenge the finding using the provisions of §§ 773.25, 773.26 and 773.27 of this subchapter.

22. Add § 774.12 to read as follows:

§ 774.12 Post-permit issuance information requirements for permittees.

(a) Within 30 days after the issuance of a cessation order under § 843.11 of this chapter, or its State regulatory program equivalent, you, the permittee, must provide or update all the information required under § 778.11 of this subchapter.

(b) You do not have to submit information under paragraph (a) of this section if a court of competent jurisdiction grants a stay of the cessation order and the stay remains in effect.

(c) Within 60 days of any addition, departure, or change in position of any

person identified in § 778.11(c) or (d) of this subchapter, you must provide—

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

(2) The date of any departure.

§ 774.13 [Amended]

23. Amend § 774.13 as follows:

a. Revise the reference in the first sentence § 774.13(b)(2) from "§§ 773.13" to read "§§ 773.6."

b. Revise the reference in § 774.13(c) from "§ 773.15(c)" to read "§ 773.15."

§ 774.15 [Amended]

24. Revise the reference in § 774.15(b)(3) from "§§ 773.13" to read "§§ 773.6."

§ 774.17 [Amended]

25. Revise the reference in § 774.17(d)(1) from "§ 773.15(b) and (c)" to read "§§ 773.12 and 773.15."

PART 775—ADMINISTRATIVE AND JUDICIAL REVIEW OF DECISIONS

26. The authority citation for part 775 continues to read as follows:

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

§ 775.11 [Amended]

27. Revise the reference in the third sentence of § 775.11(b)(1) from "§ 773.13(c)" to read "§ 773.6(c)."

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

28. Revise the authority citation for part 778 to read as follows:

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

29. Redesignate § 778.10 as § 778.8 and revise it to read as follows:

§ 778.8 Information collection.

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Section 507(b) of the Act provides that persons applying for a permit to conduct surface coal mining operations must submit to the regulatory authority certain information regarding the applicant and affiliated entities, their compliance status and history, property ownership and other property rights, violation information, right of entry, liability insurance, the status of unsuitability claims, and proof of publication of a newspaper notice. The regulatory authority uses this information to ensure that all legal, financial and compliance requirements are satisfied before issuance of a permit. Persons seeking 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. The OMB clearance number for this part is 1029–0117.

(b) We estimate that the public reporting and record keeping burden for this part averages 27 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection and record keeping requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, NW, Washington, DC 20240. Please refer to OMB Control Number 1029–0117 in any correspondence.

30. Add § 778.9 to read as follows:

§ 778.9 Certifying and updating existing permit application information.

In this section, "you" means the applicant and "we" or "us" means the regulatory authority.

(a) If you have previously applied for a permit and the required information is already in AVS, then you may update the information as shown in the following table.

If . . .	then you . . .
(1) All or part of the information already in AVS is accurate and complete.	may certify to us by swearing or affirming, under oath and in writing, that the relevant information in AVS is accurate, complete, and up to date.
(2) Part of the information in AVS is missing or incorrect	must submit to us the necessary information or corrections and swear or affirm, under oath and in writing, that the information you submit is accurate and complete.
(3) You can neither certify that the data in AVS is accurate and complete nor make needed corrections.	must include in your permit application the information required under this part.

(b) You must swear or affirm, under oath and in writing, that all information you provide in an application is accurate and complete.

(c) We may establish a central file to house your identity information, rather than place duplicate information in each of your permit application files. We will make the information available to the public upon request.

(d) After we approve an application, but before we issue a permit, you must update, correct, or indicate that no change has occurred in the information previously submitted under this section and §§ 778.11 through 778.14 of this part.

31. Add § 778.11 to read as follows:

§ 778.11 Providing applicant, operator, and ownership and control information.

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

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

(2) Taxpayer identification numbers for you and your operator.

(b) You must provide the name, address, and telephone number for—

(1) The applicant.

(2) Your resident agent who will accept service of process.

(3) Any operator, if different from the applicant.

(4) Person(s) responsible for submitting the Coal Reclamation Fee Report (Form OSM–1) and for remitting the reclamation fee payment to OSM.

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

(1) Officer.

(2) Director.

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

(4) Person who owns 10 to 50 percent of the applicant or the operator.

(5) Person who owns or controls the applicant and person who owns or controls the operator. For each owner or controller who does not own or control an entire surface coal mining operation, you may list the portion or aspect of the

operation which that person owns or controls.

(d) The 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.

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

(1) The person's name, address, and telephone number.

(2) The person's position title and relationship to you, including percentage of ownership and location in the organizational structure.

(3) The date the person began functioning in that position.

32. Add § 778.12 to read as follows:

§ 778.12 Providing permit history information.

(a) You, the applicant, must provide a list of all names under which you, your operator, your partners or principal shareholders, and your operator's partners or principal shareholders operate or previously operated a surface coal mining operation in the United States within the five-year period preceding the date of submission of the application.

(b) For you and your operator, you must provide a list of any pending permit applications for surface coal mining operations filed in the United States. The list must identify each application by its application number and jurisdiction, or by other identifying information when necessary.

(c) For any surface coal mining operations that you or your operator owned or controlled within the five-year period preceding the date of submission of the application, and for any surface coal mining operation you or your operator own or control on that date, you must provide the—

(1) Permittee's and operator's name and address;

(2) Permittee's and operator's taxpayer identification numbers;

(3) Federal or State permit number and corresponding MSHA number;

(4) Regulatory authority with jurisdiction over the permit; and

(5) Permittee's and operator's relationship to the operation, including percentage of ownership and location in the organizational structure.

33. Revise § 778.13 to read as follows:

§ 778.13 Providing property interest information.

You, the applicant, must provide in the permit application all of the following information for the property to be mined—

(a) The name and address of—

(1) Each legal or equitable owner(s) of record of the surface and mineral.

(2) The holder(s) of record of any leasehold interest.

(3) Any purchaser(s) of record under a real estate contract.

(b) The name and address of each owner of record of all property (surface and subsurface) contiguous to any part of the proposed permit area.

(c) A statement of all interests, options, or pending bids you hold or have made for lands contiguous to the proposed permit area. If you request in writing, we will hold as confidential, under § 773.6(d)(3)(ii) of this chapter, any information you are required to submit under this paragraph which is not on public file under State law.

(d) The Mine Safety and Health Administration (MSHA) numbers for all structures that require MSHA approval.

34. Revise § 778.14 to read as follows:

§ 778.14 Providing violation information.

(a) You, the applicant, must state, in your permit application, whether you, your operator, or any subsidiary, affiliate, or entity which you or your operator own or control or which is under common control with you or your operator, has—

(1) Had a Federal or State permit for surface coal mining operations suspended or revoked during the five-year period preceding the date of submission of the application; or

(2) Forfeited a performance bond or similar security deposited in lieu of bond in connection with surface coal mining and reclamation operations during the five-year period preceding the date of submission of the application.

(b) For each suspension, revocation, or forfeiture identified under paragraph (a), you must provide a brief explanation of the facts involved, including the—

(1) Permit number.

(2) Date of suspension, revocation, or forfeiture, and, when applicable, the amount of bond or similar security forfeited.

(3) Regulatory authority that suspended or revoked the permit or forfeited the bond and the stated reasons for the action.

(4) Current status of the permit, bond, or similar security involved.

(5) Date, location, type, and current status of any administrative or judicial proceedings concerning the suspension, revocation, or forfeiture.

(c) A list of all violation notices you or your operator received for any surface coal mining and reclamation operation during the three-year period preceding the date of submission of the application. In addition you must submit a list of all unabated or uncorrected violation notices incurred in connection with any surface coal mining and reclamation operation that you or your operator own or control on that date. For each violation notice reported, you must include the following information, when applicable—

(1) The permit number and associated MSHA number.

(2) The issue date, identification number, and current status of the violation notice.

(3) The name of the person to whom the violation notice was issued,

(4) The name of the regulatory authority or agency that issued the violation notice.

(5) A brief description of the violation alleged in the notice.

(6) The date, location, type, and current status of any administrative or judicial proceedings concerning the violation notice.

(7) If the abatement period for a violation in a notice of violation issued under § 843.12 of this chapter, or its State regulatory program equivalent, has not expired, certification that the violation is being abated or corrected to the satisfaction of the agency with jurisdiction over the violation.

(8) For all violations not covered by paragraph (c)(7) of this section, the actions taken to abate or correct the violation.

§ 778.21 [Amended]

35. Revise the reference in § 778.21 from "§ 773.13(a)(1)" to read "§ 773.6(a)(1)."

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

36. Revise the authority citation for part 785 to read as follows:

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

§ 785.13 [Amended]

37. Revise the reference in § 785.13(c) from "§ 773.13" to read "773.6" and the reference in the second sentence of § 785.13(h) from "§ 773.13" to read "§ 773.6."

§ 785.21 [Amended]

38. Revise the reference in the introductory text of § 785.21(e) from "773.11" to read "773.4."

§ 785.25 [Amended]

39. Revise the reference in the first sentence of § 785.25(a) from "§ 773.15(b)(4)" to read "§ 773.13."

PART 795—PERMANENT REGULATORY PROGRAM—SMALL OPERATOR ASSISTANCE PROGRAM

40. Revise the authority citation for part 795 to read as follows:

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

§ 795.9 [Amended]

41. Revise the reference in the first sentence of § 795.9(d) from "§ 773.13(d)" to read "§ 773.6(d)."

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

42. Revise the authority citation for part 817 to read as follows:

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

§ 817.121 [Amended]

43. Revise the reference in the last sentence of § 817.121(g) from "§ 773.13(d)" to read "§ 773.6(d)."

PART 840—STATE REGULATORY AUTHORITY: INSPECTION AND ENFORCEMENT

44. Revise the authority citation for part 840 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, unless otherwise noted.

§ 840.14 [Amended]

45. Revise the reference in § 840.14(b)(2) from "773.13(d)" to read "773.6(d)."

PART 842—FEDERAL INSPECTIONS AND MONITORING

46. Revise the authority citation for part 842 to read as follows:

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

§ 842.16 [Amended]

47. Revise the reference in § 842.16(a)(2) from "§ 773.13(d)" to read "§ 773.6(d)."

PART 843—FEDERAL ENFORCEMENT

48. Revise the authority citation for part 843 to read as follows:

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

§ 843.5 [Amended]

49. In § 843.5, remove the definition of *Willful violation.*

50. Revise § 843.11(g) to read as follows:

§ 843.11 Cessation orders.

* * * * *

(g) Within 60 days after issuing a cessation order, OSM will notify in writing the permittee, the operator, and any person who has been listed or identified by the applicant, permittee, or OSM as an owner or controller of the operation, as defined in § 701.5 of this chapter.

* * * * *

51. Revise § 843.21 to read as follows:

§ 843.21 Procedures for improvidently issued State permits.

(a) *Initial notice.* If we, OSM, on the basis of any information available to us, including information submitted by any person, have reason to believe that a State-issued permit meets the criteria for an improvidently issued permit under § 773.21 of this chapter, or the State regulatory program equivalent, and the State has failed to take appropriate action on the permit under the State regulatory program equivalents of §§ 773.21 through 773.23 of this chapter, we must—

(1) Issue a notice, by certified mail, to the State, to you, the permittee, and to any person providing information under paragraph (a) of this section. The notice will state in writing the reasons for our belief that your permit was improvidently issued. The notice also will request the State to take appropriate action, as specified in paragraph (b) of this section, within 10 days.

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

(b) *State response.* Within 10 days after receiving notice under paragraph (a) of this section, the State must demonstrate to us in writing that either—

(1) The permit does not meet the criteria of § 773.21 of this chapter or the State regulatory program equivalent;

(2) The State is in compliance with the State regulatory program equivalents of §§ 773.21 through 773.23 of this chapter; or

(3) The State has good cause for not complying with the State regulatory program equivalents of §§ 773.21 through 773.23 of this chapter. For purposes of this section, good cause has the same meaning as in § 842.11(b)(1)(ii)(B)(*4*) of this chapter, except that good cause does not include the lack of State program equivalents of §§ 773.21 through 773.23 of this chapter.

(c) *Notice of Federal inspection.* If we find that the State has failed to make the demonstration required by paragraph (b) of this section, we must initiate a Federal inspection under paragraph (d) of this section to determine if your permit was improvidently issued under the criteria in § 773.21 of this chapter or the State regulatory program equivalent. We must also—

(1) Issue a notice to you and the State by certified mail. The notice will state in writing the reasons for our finding under this section and our intention to initiate a Federal inspection.

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

(3) Notify any person who provides information under paragraph (a) of this section that leads to a Federal inspection that he or she may accompany the inspector on any inspection of the minesite.

(d) *Federal inspection and written finding.* No less than 10 days but no more than 30 days after providing notice under paragraph (c) of this section, we will conduct an inspection and make a written finding as to whether your permit was improvidently issued under the criteria in § 773.21 of this chapter. In making that finding, we will consider all available information, including information submitted by you, the State, or any other person. We will post that finding at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov). If we find that your permit was improvidently issued, we must issue a notice to you and the State by certified mail. The notice will state in writing the reasons for our finding under this section.

(e) *Federal enforcement.* If we find that your permit was improvidently issued under paragraph (d) of this section, we must—

(1) Issue a notice of violation to you or your agent consistent with § 843.12(b) of this part and provide opportunity for a public hearing under §§ 843.15 and 843.16.

(2) Issue a cessation order to you or your agent consistent with § 843.11(c), if a notice of violation issued under paragraph (e)(1) is not remedied under paragraph (f) of this section within the abatement period, and provide opportunity for a public hearing under §§ 843.15 and 843.16.

(f) *Remedies to notice of violation or cessation order.* Upon receipt of information from any person concerning a notice of violation or cessation order issued under paragraph (e) of this section, we will review the information and—

(1) Vacate the notice or order if it resulted from an erroneous conclusion under this section; or

(2) Terminate the notice or order if—

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

agency with jurisdiction over the violation;

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

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

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

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

(g) *No civil penalty.* We will not assess a civil penalty for a notice of violation issued under this section.

§ 843.24 [Removed]

52. Remove § 843.24.

PART 846–INDIVIDUAL CIVIL PENALTIES

53. Revise the authority citation to read as follows:

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

§ 846.5 [Removed]

54. Remove § 846.5.

55. Add part 847 to read as follows:

PART 847—ALTERNATIVE ENFORCEMENT

Sec.
847.1 Scope.
847.2 General provisions.
847.11 Criminal penalties.
847.16 Civil actions for relief.

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

§ 847.1 Scope.

This part governs the use of measures provided in sections 518(e), 518(g) and 521(c) of the Act for criminal penalties and civil actions to compel compliance with provisions of the Act.

§ 847.2 General provisions.

(a) Whenever a court of competent jurisdiction enters a judgment against or convicts a person under these provisions, we must update AVS to reflect the judgment or conviction.

(b) The existence of a performance bond or bond forfeiture cannot be used as the sole basis for determining that an alternative enforcement action is unwarranted.

(c) Each State regulatory program must include provisions for civil actions and criminal penalties that are no less stringent than those in this part and include the same or similar procedural requirements.

(d) Nothing in this part eliminates or limits any additional enforcement rights or procedures available under Federal or State law.

§ 847.11 Criminal penalties.

Under sections 518(e) and (g) of the Act, we, the regulatory authority, will request the Attorney General to pursue criminal penalties against any person who—

(a) Willfully and knowingly violates a condition of the permit;

(b) Willfully and knowingly fails or refuses to comply with—

(1) Any order issued under section 521 or 526 of the Act; or

(2) Any order incorporated into a final decision issued by the Secretary under the Act (except for those orders specifically excluded under section 518(e) of the Act); or

(c) Knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the regulatory program or any order or decision issued by the Secretary under the Act.

§ 847.16 Civil actions for relief.

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

(1) Violate or fail or refuse to comply with any order or decision that we issue under the Act or regulatory program;

(2) Interfere with, hinder, or delay us in carrying out the provisions of the Act or its implementing regulations;

(3) Refuse to admit our authorized representatives onto the site of a surface coal mining and reclamation operation;

(4) Refuse to allow our authorized representatives to inspect a surface coal mining and reclamation operation;

(5) Refuse to furnish any information or report that we request under the Act or regulatory program; or

(6) Refuse to allow access to, or copying of, those records that we determine necessary to carry out the provisions of the Act and its implementing regulations.

(b) A civil action for relief includes a permanent or temporary injunction, restraining order, or any other appropriate order by a district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which you have your principal office.

(c) Temporary restraining orders will be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended.

(d) Any relief the court grants to enforce an order under paragraph (b) of this section will continue in effect until completion or final termination of all proceedings for review of that order under the Act or its implementing regulations unless, beforehand, the district court granting the relief sets aside or modifies the order.

PART 874—GENERAL RECLAMATION REQUIREMENTS

56. Revise the authority citation for part 874 to read as follows:

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

57. Revise § 874.16 to read as follows:

§ 874.16 Contractor eligibility.

To receive AML funds, every successful bidder for an AML contract must be eligible under §§ 773.12, 773.13, and 773.14 of this chapter at the time of contract award to receive a permit or provisionally issued permit to conduct surface coal mining operations.

PART 875—NONCOAL RECLAMATION

58. Revise the authority citation for part 875 to read as follows:

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

59. Revise § 875.20 to read as follows:

§ 875.20 Contractor eligibility.

To receive AML funds for noncoal reclamation, every successful bidder for an AML contract must be eligible under §§ 773.12, 773.13, and 773.14 of this chapter at the time of contract award to receive a permit or provisionally issued permit to conduct surface coal mining operations.

PART 903—ARIZONA

60. The authority citation for part 903 continues to read as follows:

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

§ 903.773 [Amended]

61. Revise the reference in the second sentence of § 903.773(d)(3) from "§ 773.13(a)(1)" to read "§ 773.6(a)(1)."

62. Revise the reference in § 903.773(g) introductory text from "§ 773.13(d)" to read "§ 773.6(d)."

63. Revise the reference in § 903.773(g)(1) from "§ 773.13(a)(1)" to read "§ 773.6(a)(1)."

64. Revise the reference in § 903.773(g)(2) from "§ 773.13(a)(1)" to read "§ 773.6(a)(1)."

§ 903.774 [Amended]

65. Revise the reference in the first sentence of § 903.774(c) from "§ 773.13(b) and (c)" to read "§ 773.6(b) and (c)."

66. Revise the reference in § 903.774(f)(2) from "§ 773.13(a)(3)" to read "§ 773.6(a)(3)."

PART 905—CALIFORNIA

67. Revise the authority citation for part 905 to read as follows:

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

§ 905.773 [Amended]

68. Revise the reference in § 905.773(d)(3) from "§ 773.13" to read "§ 773.6."

69. Revise the reference in the first sentence of § 905.773(f) from "§ 773.13(c)" to read "§ 773.6(c)."

70. Revise the reference in § 905.773(g) from "§ 773.13(d)" to read "§ 773.6(d)."

§ 905.774 [Amended]

71. Revise the reference in the second sentence of § 905.774(b) from "773.13(b) and (c)" to read "773.6(b) and (c)."

72. Revise the reference in § 905.774(e) from "§ 773.13(a)(3)" to read "§ 773.6(a)(3)."

PART 910—GEORGIA

73. Revise the authority citation for part 910 to read as follows:

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

§ 910.773 [Amended]

74. Revise the reference in § 910.773(b)(4) from "§ 773.13" to read "§ 773.6."

§ 910.774 [Amended]

75. Revise the reference in § 910.774(b)(1) from "§§ 773.13" to read "§§ 773.6."

PART 912—IDAHO

76. Revise the authority citation for part 912 to read as follows:

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

§ 912.773 [Amended]

77. Revise the reference in § 912.773(b)(4) from "§ 773.13" to read "§ 773.6."

§ 912.774 [Amended]

78. Revise the reference in § 912.774(b)(1) from "§§ 773.13" to read "§§ 773.6."

PART 921—MASSACHUSETTS

79. Revise the authority citation for part 921 to read as follows:

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

§ 921.773 [Amended]

80. Revise the reference in § 921.773(b)(4) from "§ 773.13" to read "§ 773.6."

§ 921.774 [Amended]

81. Revise the reference in § 921.774(b)(1) from "§§ 773.13" to read "§§ 773.6."

PART 922—MICHIGAN

82. Revise the authority citation for part 922 to read as follows:

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

§ 922.773 [Amended]

83. Revise the reference in § 922.773(b)(4) from "§ 773.13" to read "§ 773.6."

§ 922.774 [Amended]

84. Revise the reference in § 922.774(b)(1) from "§§ 773.13" to read "§§ 773.6."

PART 933—NORTH CAROLINA

85. Revise the authority citation for part 933 to read as follows:

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

§ 933.773 [Amended]

86. Revise the reference in § 933.773(b)(4) from "§ 773.13" to read "§ 773.6."

§ 933.774 [Amended]

87. Revise the reference in § 933.774(b)(1) from "§§ 773.13" to read "§§ 773.6."

PART 937—OREGON

88. Revise the authority citation for part 937 to read as follows:

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

§ 937.773 [Amended]

89. Revise the reference in § 937.773(b)(4) from "§ 773.13" to read "§ 773.6."

§ 937.774 [Amended]

90. Revise the reference in § 937.774(b)(1) from "§§ 773.13" to read "§§ 773.6."

PART 939—RHODE ISLAND

91. Revise the authority citation for part 939 to read as follows:

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

§ 939.773 [Amended]

92. Revise the reference in § 939.773(b)(4) from "§ 773.13" to read "§ 773.6."

§ 939.774 [Amended]

93. Revise the reference in § 939.774(b)(1) from "§§ 773.13" to read "§§ 773.6."

PART 941—SOUTH DAKOTA

94. Revise the authority citation for part 941 to read as follows:

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

§ 941.773 [Amended]

95. Revise the reference in § 941.773(b)(4) from "§ 773.13" to read "§ 773.6."

§ 941.774 [Amended]

96. Revise the reference in § 941.774(b)(1) from "§§ 773.13" to read "§§ 773.6."

PART 942—TENNESSEE

97. Revise the authority citation for part 942 to read as follows:

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

§ 942.773 [Amended]

98. Revise the reference in § 942.773(b)(4) from "§ 773.13" to read "§ 773.6."

99. Revise the reference in the introductory paragraph of § 942.733(d) from "§ 773.11(d)(2)" to read "§ 773.5(d)(2)."

§ 942.774 [Amended]

100. Revise the reference in the first sentence of § 942.774(c) from "§ 773.13" to read "§§ 773.6."

PART 947—WASHINGTON

101. Revise the authority citation for part 947 to read as follows:

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

§ 947.773 [Amended]

102. Revise the reference in § 947.773(b)(4) from "§ 773.13" to read "§ 773.6."

§ 947.774 [Amended]

103. Revise the reference in the first sentence of § 947.774(b)(1) from "§§ 773.13" to read "§§ 773.6."

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Part II

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 773, 774 et al.
Ownership and Control; Permit and Application Information; Transfer, Assignment, or Sale of Permit Rights; Final Rule

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: Debbie J. Feheley, Chief, Applicant/Violator System Office, Office of Surface Mining Reclamation and Enforcement, Appalachian Region, 2679 Regency Road, Lexington, Kentucky 40503. Telephone: (859) 260–8424 or (800) 643–9748; electronic mail: *dfeheley@osmre.gov.*

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, reproposed 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 reproposed 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 "astonishing 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, assignments 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 bases 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 per centum 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.

IMMC 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 I* 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 primacy 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 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 identity 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—

* * * * *

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