



# United States Department of the Interior

## OFFICE OF SURFACE MINING

Reclamation and Enforcement  
 Applicant/Violator System Office  
 2679 Regency Road  
 Lexington, Kentucky 40503

September 7, 2001

Greg A. Walker, Esq.  
 Senior Vice President  
 General Counsel and Secretary  
 RAG American Coal Holding, Inc.  
 999 Corporate Blvd.  
 Linthicum Heights, MD 21090-2227

RECEIVED  
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 OFFICE OF SURFACE MINING  
 JACOBSON  
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Dear Mr. Walker:

This is to acknowledge your August 7, 2001, letter regarding Joel Richards, III, and RAG American Coal Holding, Inc. and its subsidiaries (collectively, RACH). The purpose of this letter is to advise you that we, the Office of Surface Mining Reclamation and Enforcement (OSM), will be issuing a decision on Mr. Richards' ownership or control challenge. However, before we issue our decision, we require additional information in this matter.

The Federal rules regarding ownership or control challenges were revised on December 19, 2000 (65 FR 79582), and became effective in Federal programs on January 18, 2001. States administering their own mining regulatory programs have yet to adopt counterparts to the revised rules. We have determined that RACH subsidiary companies hold mining permits in eight permanent program States. Kentucky and West Virginia have accepted jurisdiction of the challenge. Colorado, Wyoming, Utah, Indiana and Pennsylvania have deferred jurisdiction to OSM. As a result, Mr. Richards will likely receive more than one decision on his challenge, including ours.

We would also like to clarify that the current definitions of *control or controller and own, owner, or ownership* do not rely on presumptions. We ceased using presumptions of ownership or control with the revised ownership and control rule. Since the information regarding Mr. Richards' membership on the board of directors was provided by RACH, we consider it official and reliable information. Nonetheless, Mr. Richards is entitled to challenge any ownership or control association within the RACH companies.

In your letter you referred us to our ownership or control decision concerning Dr. Thomas Falkie, a Director of Cyprus Amax Minerals Co. You indicated your belief that Mr. Richards' challenge is "effectively identical" to that of Dr. Falkie. We disagree. First, since issuing the decision on Dr. Falkie, we have revised our regulatory policies. Second, we believe we must review Mr. Richards' challenge on its own merits.

In your letter, you asserted that Mr. Richards' only authority, as a director of RACH, "is to vote and then abide by the majority vote of all nine directors." We cannot accept this rationale by itself. If all directors claim to possess only one vote among many, who then, among the directors, as "director" is defined in Black's Law Dictionary, is "authorized to manage and direct the affairs of a corporation or company"?

Based on the foregoing, we have determined that we require additional information with respect to Mr. Richards and his association to RACH before we can render an ownership or control decision in this matter. Examples of the materials you may submit to support his challenge are found in the Federal rules governing ownership or control challenges at 30 CFR 773.27. We have enclosed a copy of the regulation for your reference. In addition, we require the following specific information:

1. A list of all titles Joel Richards, III holds in RACH and the corresponding identity of each company in the corporate structure in which he holds the title.
2. A description of the duties assigned to each title he holds and the date Mr. Richards began serving in each position.
3. A list of every RACH board of directors' committee on which Mr. Richards serves, his position on each, and the date he began serving on each committee.
4. The composition and a description of the functions of each RACH committee on which Mr. Richards serves.
5. The identity of the RACH directors that have authority over the subsidiary coal companies.
6. The name of the committee on which these directors serve.
7. The official description of the functions of this committee.
8. A copy of the two most recent RACH annual reports.

Under our revised rules, OSM expects to issue a decision within 60 days of receiving an ownership or control challenge. However, we will "stop the clock" at this time in order for you to send the additional information we have requested and any other information or evidence you believe will support Mr. Richards challenge. If you wish, you may also telefax any documents to my attention at 859.260.8418. Please free to call me at 1.800.643.9748 if you have questions.

Sincerely,



Earl D. Bandy, Jr., Chief  
Applicant/Violator System Office

Mr. Greg A. Walker

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Enclosure

cc: Colorado Office of Mined Lands Reclamation  
Illinois Office of Mines and Minerals  
Indiana Division of Reclamation  
Kentucky Department for Surface Mining Reclamation and Enforcement  
Pennsylvania Department of Environmental Protection  
Utah Division of Oil, Gas and Mining  
West Virginia Division of Environmental Protection  
Wyoming Department of Environmental Quality

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: <http://www.avos.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.avos.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