

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 773, 778, and 843

RIN 1029-AB-91

Ownership and Control; Permit Application Process; Improvidently Issued Permits

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Interim final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is amending its regulations governing permit application information requirements; criteria for permit issuance; and criteria, procedures, and sanctions for improvidently issued permits. The affected provisions generally address ownership and control information and compliance review requirements. This action is being taken in response to a decision by the U.S. Court of Appeals for the District of Columbia Circuit invalidating the previous rules as inconsistent with the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The court held that SMCRA authorizes the regulatory authority to block issuance of a permit only for unabated violations incurred by the applicant or entities owned or controlled by the applicant, not, as provided in the previous rules, for violations incurred by any person who owns or controls the permittee. The rules being promulgated today cure this defect. Because of the urgent need to fill the void created by the court's decision, OSM is invoking the good cause exemptions of the Administrative Procedure Act and is adopting these rules on an interim final basis, effective April 3, 1997.

EFFECTIVE DATE: April 3, 1997.

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I. Background

Section 510(c) of SMCRA, 30 U.S.C. 1260(c), requires that each application for a permit to conduct surface coal mining operations include a schedule listing "any and all notices of violation of this 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 during the three-year period prior to the date of application." It further specifies that "[w]here the schedule or other information available to the regulatory authority indicates that 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 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." Finally, it provides that "no permit shall be issued to an applicant 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." *Id.*

To implement these provisions of the Act, OSM adopted three sets of

regulations known respectively as the ownership and control rule (53 FR 38868, October 3, 1998), the permit information rule (54 FR 8982, March 2, 1989), and the improvidently issued permits rule, also known as the permit rescission rule (54 FR 18438, April 28, 1989). The ownership and control rule revised 30 CFR 773.15(b) to prohibit permit issuance on the basis of unabated violations attributed to either the applicant or any person who owns or controls the applicant. It also defined the terms "owns or controls" and "owned or controlled" as used in that rule and as the latter term is used in section 510(c) of SMCRA. The permit information rule revised 30 CFR 778.13 and 778.14 to establish permit application information and compliance review and reporting requirements consistent with the new ownership and control definition and the revisions that the ownership and control rule made to 30 CFR 773.15(b). The improvidently issued permits rule established criteria and procedures for determining when an existing permit has been issued improvidently; i.e., in violation of 30 CFR 773.15(b) and section 510(c) of the Act. This rule also included remedial measures for improvidently issued permits.

The Applicant/Violator System procedures rule published on October 28, 1994 (59 FR 54306) modified several provisions of the ownership and control, permit information, and improvidently issued permits rules. In addition, the remining rule published on November 27, 1995 (60 FR 58480) added paragraph (b)(4) to 30 CFR 773.15. None of these revisions was at issue in the litigation discussed below.

The National Mining Association and the National Wildlife Federation filed suit challenging the validity of the ownership and control, permit information, and improvidently issued permits rules on a variety of grounds. On August 31, 1995, the U.S. District Court for the District of Columbia granted summary judgment in favor of OSM on all claims. See *National Wildlife Fed'n v. Babbitt*, Civ. Nos. 88-3117, 88-3464, 88-3470 (consolidated) (Aug. 31, 1995), slip op. at 25; *National Wildlife Fed'n v. Babbitt*, Civ. Nos. 89-1130, 89-1167 (consolidated) (Aug. 31, 1995), slip op. at 12; *National Wildlife Fed'n v. Babbitt*, Civ. Nos. 89-1751, 89-1811 (consolidated) (Aug. 31, 1995), slip op. at 19.

On appeal, however, in a decision that took effect April 4, 1997, the U.S. Court of Appeals for the District of Columbia Circuit found the ownership and control rule to be "unlawful" because 30 CFR 773.15(b)(1) blocks

permit issuance for violations at operations owned or controlled by any person who owns or controls the applicant, a provision that, according to the court, "conflicts with the plain meaning of section 510(c)." *National Mining Ass'n v. United States Dept. of the Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997) ("NMA—O&C"). The court ruled that section 510(c) is "unmistakably clear" in stating that a permit may not be issued "when 'any surface coal mining operation owned or controlled by the applicant' is currently in violation of SMCRA." In addition, the court held, with little elaboration, that because the permit information rule and the permit rescission (improvidently issued permits) rule "are centered on the ownership and control rule * * *, they too must fall." *Id.* at 696.

Nothing is the court's decision eliminates the responsibility of OSM and State regulatory authorities to implement the requirements of sections 507(b) and 510(c) of the Act. Nor does it terminate the Applicant/Violator System, the database that OSM and State regulatory authorities use to track violations and violators, although it will impact the use of that data. OSM has taken steps to modify system reports and recommendations to reflect the court's decision. Today's rulemaking action represents OSM's initial effort to conform its regulations to the court's decision. OSM intends to propose further regulatory revisions in the near future in accordance with standard notice and comment procedures.

II. Rationale for Invoking APA Good Cause Exemptions

The court's action in striking the ownership and control, permit information, and improvidently issued permits rules creates considerable uncertainty with respect to permit application information requirements and implementation of the statutory permit block sanction in section 510(c). This sanction has proven to be one of the most effective incentives for compliance with the requirements of the Act. It has prevented persons who are either unable or unwilling to adhere to the environmental protection standards of the Act from repeatedly causing environmental problems on additional sites.

Under sections 101(f) and 503 of SMCRA, States have the primary responsibility for regulating surface coal mining and reclamation operations. Once a State attains primacy (an approved regulatory program under section 503 of the Act), OSM's role is reduced to that of assistance and oversight. At present, 24 of the 27 coal-

producing States have achieved primacy.

At least 5 State programs include provisions that automatically repeal or require review of any State program counterpart to a Federal rule remanded or otherwise invalidated by the courts. In addition, another 7 States have laws or regulations that prohibit the promulgation of regulations that are more stringent than Federal requirements. If there are no Federal rules in place, OSM expects that most of these States will suspend or otherwise remove the corresponding State provisions. While removal of a State program rule, either automatically or by legislative or administrative action, is often rapid restoration through SMCRA's program amendment process is both lengthy and complex, often requiring a number of years to accomplish. Regardless of the mechanism by which the programmatic void comes into being, the result will be an absence of information that will translate into the issuance of permits to persons who are not entitled to receive them under section 510(c) of the Act.

Prior to establishment of the Applicant/Violator System, OSM and State regulatory authorities had few sources of information about industry practices and enterprises except for disclosures in permit applications. They also lacked a regulatory structure or centralized data processing system to track persons or entities which owned or controlled operations with unabated violations as they reincorporated or renamed themselves, used a series of contract miners, or moved from State to State. The lack of such a system is especially significant since, as noted at 53 FR 38886 (October 3, 1988), over half of all Federal permit applicants between March 1985 and April 1986 had unabated violations, unpaid abandoned mine land reclamation fees, or unpaid civil penalties, although some of these outstanding obligations were under appeal. The problem was particularly difficult to address when an applicant for a permit in one State owned or controlled an operation with an unabated violation in another State, since there were few mechanisms by which States exchanged information.

The effectiveness of the section 510(c) permit block sanction depends upon maintenance of a reliable nationwide database (currently, the Applicant/Violator System) on permit applicants, organizational relationships, and violations. Otherwise, violators can simply move from State to State and company to company to evade their reclamation obligations and other responsibilities under the Act. States are

primarily responsible for inputting data into this system. Therefore, it is imperative that the integrity of State programs, including permit application information requirements, be maintained. State program provisions are relatively easy to delete, but difficult and time-consuming to restore.

The court's decision creates a regulatory gap that would result in substantial uncertainty and confusion regarding permit application information requirements, use of the Applicant/Violator System, and the identification and handling of improvidently issued permits. Such regulatory confusion would be contrary to the public interest because issuance of permits to persons who are not entitled to receive them under the Act, as would likely occur in the absence of consistent permit application content, review, and reporting requirements, would prove injurious to the environment and public health and safety. The schedule for issuance of the court's mandate allows insufficient time for public notice and comment on replacement regulations before the regulatory gap occurs. Therefore, following normal notice and comment procedures under the Administrative Procedure Act (APA) would be impracticable and contrary to the public interest.

To avoid creation of a regulatory gap, OSM is now promulgating replacement regulations on an interim final basis, as authorized by the APA at 5 U.S.C. 553(b)(3)(B). This provision of the APA provides a "good cause" exemption that allows an agency to issue a rule without prior notice or opportunity for public comment "when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." As discussed above, promulgation of an interim final rule without prior notice or opportunity to comment is in the public interest because it avoids creation of a regulatory gap and the adverse impacts associated with such a gap. The requirements and procedures in the interim final rules have gained widespread acceptance among State regulatory authorities. Furthermore, most provisions of the rules being promulgated today are substantively identical to those previously promulgated in accordance with the standard notice and comment procedures of the APA. The only substantive changes are those that address the specific provisions that the court found to be in conflict with, or

potentially in conflict with, the "unmistakably clear" language of section 510(c) of SMCRA.

Using the same rationale, OSM also is availing itself of the good cause exemption at 5 U.S.C. 553(d)(3) to the APA requirement that rules be published at least 30 days prior to their effective date. To avoid any regulatory gap, the effective date of the rules being published today is April 3, 1997.

The interim final rules being published today are only interim measures intended to ensure that implementation of the court's decision does not result in a regulatory gap or substantial confusion in the regulatory community or the regulated industry. OSM is committed to exploring various methods of implementing the court's observation in *NMA—O&C* that "OSM has leeway in determining who the 'applicant' is." *Id.* at 695. The agency intends to seek public comment on any resulting proposed regulatory changes.

III. Discussion of Interim Final Rules

The rulemaking actions that OSM is taking today remedy the defects identified by the court in *NMA—O&C*. They also preserve those aspects of the previous rules to which the court expressed no specific objection. These measures are needed to fully and properly implement the permit block sanction of section 510(c) of SMCRA and to flesh out other statutory provisions, such as the permit application information requirements of paragraphs (b)(4) and (b)(5) of section 507 of the Act.

Nothing in the following findings or the rules to which they pertain affects the regulatory authority's power or responsibility to determine whether the nominal applicant is the true applicant to which the court refers. Nor do these findings or rules affect the regulatory authority's power to pierce the corporate veil or to withhold a permit, which, if issued, would violate a court order.

A. Section 773.5—Definitions

On October 3, 1988 (53 FR 38868), OSM amended its regulations at 30 CFR 773.5 by adding a definition of the terms "owned or controlled" and "owns or controls." This definition determines, in part, what type of information a permit applicant must submit under 30 CFR 778.13 and the circumstances under which the section 510(c) permit block sanction would apply under 30 CFR 773.15(b).

The reach of the definition depends on the context in which these terms are used in a specific regulation. For example, as revised and repromulgated

in this rulemaking in response to the court's decision, 30 CFR 773.15(b) refers only to persons owned or controlled by the applicant or operations that the applicant controls or has controlled. Therefore, in this context, the definition would be used only to determine which entities the applicant owns or controls, not which entities own or control the applicant. As another example, 30 CFR 778.13(c), as revised and repromulgated in this rulemaking, provides that a permit application must include identifying information about persons who own or control the applicant. In this context, the definition would be used to determine which individuals or entities own or control the applicant, not which entities are owned or controlled by the applicant. This information is needed to verify the applicant's statement under section 507(b)(5) of the Act concerning bond forfeitures and permit revocations for operations under common control with the applicant. It also incorporates the ownership and control information requirements of section 507(b)(4) of SMCRA, which, the court noted, requires information relevant to statutory provisions other than the section 510(c) permit block sanction, such as the individual civil penalty sanction of section 518(f) of the Act. This information would not, however, be used for purposes of blocking permit issuance under 30 CFR 773.15(b) in a manner inconsistent with the court's decision.

Hence, the definition itself presents no conflict with the court's interpretation of section 510(c) of the Act in *NMA—O&C*, and OSM is repromulgating the definition without substantive change as part of the rulemaking action being published today. The rationale for the text of the definition is set forth in detail in the preamble to the 1988 rulemaking at 53 FR 38868–80 (October 3, 1988).

B. Section 773.15(b)—Permit Block

On October 3, 1988, OSM revised 30 CFR 773.15(b) to expand the scope of the compliance review of permit applications and to expressly require the withholding of a permit when persons who own or control the applicant own or control operations with unabated violations. In *NMA—O&C*, the court held that this sanction applies only to violations incurred by the applicant or entities owned or controlled by the applicant, although the court left some room for the regulatory authority to determine the true applicant. *Id.* at 695. Therefore, the interim final rule being promulgated today does not include the language in

the version of 30 CFR 773.15(b)(1) and (b)(3) promulgated in 1988 that applied the permit block sanction to violations incurred by persons who own or control the applicant.

Since there is nothing in the remainder of the 1988 changes to 30 CFR 773.15(b) (or the subsequent revisions in 1994 and 1995) that presents a conflict with the court's interpretation of section 510(c) of the Act in *NMA—O&C*, OSM is repromulgating the remainder of this paragraph without substantive change as part of the interim final rule being published today. The rationale for the other 1988, 1994, and 1995 changes, which include criteria for conditional issuance of a permit, provisions concerning the presumption that a notice of violation is in the process of abatement, and a special exception for remaining operations, is set forth in detail in the preambles to the 1988 rulemaking at 53 FR 38880–89 (October 3, 1988), the 1994 rulemaking at 59 FR 4322–24 (October 28, 1994), and the 1995 rulemaking at 60 FR 58482–86 (November 27, 1995).

C. Section 773.15(e)—Final Compliance Review

On March 2, 1989 (54 FR 8982), OSM adopted 30 CFR 773.15(e), which required that before issuing a permit, the regulatory authority reconsider its initial compliance review in light of any new information submitted pursuant to 30 CFR 778.13(i) and 778.14(d). In *NMA—O&C*, the court was silent on this aspect of the permit information rule. Since its contents do not present a conflict with the court's findings concerning the scope of the section 510(c) permit block, OSM is repromulgating it in substantively identical form as part of this interim final rule. In keeping with the changes to 30 CFR 778.13, the new rule replaces the reference to 30 CFR 778.13(i) with a reference to its new designation, 30 CFR 778.13(k).

D. Section 773.17(i)—Permit Condition

On March 2, 1989 (54 FR 8982), OSM adopted 30 CFR 773.17(i), which required that each permit include a condition obligating the permittee to update the information required by 30 CFR 778.13(c), which pertains to the identity and organizational position and relationship of persons who own or control the applicant, whenever the permittee receives a cessation order. The preamble to the 1989 rulemaking at 54 FR 8982–83 explains that the purpose of this condition was to reveal the identity of persons who own or control the permittee, and then use the

information collected to block issuance of permits to these persons pursuant to 30 CFR 773.15(b). However, in *NMA—O&C*, the court held that section 510(c) of the Act does not allow the blocking of permit issuance on the basis of violations incurred by persons who own or control the applicant. Therefore, the information can no longer be used for its original purpose. However, as noted at 54 FR 8986 (March 2, 1989) in the preamble to a related provision in 30 CFR 843.11(g), the information collected through this condition has other uses, such as the identification of persons against whom individual civil penalties may be assessed under 30 CFR Part 846 and section 518(f) of the Act. Therefore, OSM is repromulgating this permit condition in substantively identical form as part of the interim final rule being promulgated today, although its designation is now paragraph (h), which was previously reserved, instead of paragraph (i).

E. Section 773.20 and 773.21—Improvvidently Issued Permits

On April 28, 1989 (54 FR 18438), OSM promulgated 30 CFR 773.20 and 773.21 to establish procedures and criteria for (1) determining when a permit had been improvvidently issued, and (2) applying appropriate remedial measures. In *NMA—O&C*, the court struck down these rules based on a finding that they “are centered on the ownership and control rule,” which the court found to exceed the mandate of SMCRA. *Id.* at 696. In support of its decision, the court pointed to the reference to ownership or control links in 30 CFR 773.20(b)(1)(iii).

Accordingly, the interim final rule being published today replaces the term “ownership or control link” (and related language concerning ownership and control links and responsibility for violations, penalties, or fees) in 30 CFR 773.20(b)(1)(iii), 773.20(b)(2)(ii), and 773.21(a)(4) with more specific language that applies the provisions of these rules only to situations in which the permittee or any person owned or controlled by the permittee is responsible for the violation, penalty, or fee.

OSM also is revising 30 CFR 773.20(b)(1)(ii)(B), 773.20(c)(1) (i) and (ii), and 30 CFR 773.21(a) (2) and (3) to either eliminate the phrase “the permittee or other person responsible” or replace it with language that clarifies that the rule applies only to violations, penalties, and fees for which the permittee or persons owned or controlled by the permittee are responsible. OSM is making these changes to ensure that 30 CFR 773.20

and 773.21 are applied in a manner consistent with the revisions to 30 CFR 773.15(b) and the court’s decision on the scope of section 510(c) of the Act.

Since there is nothing in the remainder of the 1989 version of 30 CFR 773.20 and 773.21 (or the subsequent revisions in 1994) that presents a conflict with the court’s interpretation of section 510(c) of the Act in *NMA—O&C*, OSM is repromulgating the remainder of these sections without substantive change as part of the interim final rule being published today. The rationale for these procedural requirements and criteria for improvvidently issued permit is set forth in detail in the preambles to the 1989 rulemaking at 54 FR 18439–62 (April 28, 1989) and the 1994 rulemaking at 59 FR 54325–29 (October 28, 1994). However, in view of the court decision and the changes in wording of these rules and 30 CFR 773.15(b), the discussions of ownership or control links in the preambles to previous versions of these rules no longer apply in full, especially Part II of the violations review criteria set forth in the April 28, 1989 preamble at 54 FR 18440–41. Similarly, the explanation of the meaning of “other person responsible” at 54 FR 18447 under the heading “Inconsistent Terminology” and at 54 FR 18455 under the heading “Ownership and Control Relationships Covered” is no longer fully applicable, especially since the revised versions of the rules no longer include this term.

F. Section 778.10—Information Collection

In *NMA—O&C* at 696, the court struck down the permit information rule, of which this section was a part. Since the contents of this section do not present a conflict with the court’s holding on the scope of the section 510(c) permit block sanction, OSM is repromulgating it in revised form as part of the interim final rule being published today. The revisions reflect current Departmental guidance concerning format and content.

G. Section 778.13—Organizational and Ownership Information Requirements for Permit Applications

On March 2, 1989 (54 FR 8982), OSM promulgated revised permit application information requirements at 30 CFR 778.13 to conform these requirements to the definition of “owned or controlled or” owns or controls” at 30 CFR 773.5. In *NMA—O&C*, the court struck down the revised rules based on a finding that they “are centered on the ownership and control rule,” which the court found to exceed the mandate of SMCRA.

Id. at 696. In support of its decision, the court pointed to 30 CFR 778.13(d), which requires information pertaining to any surface coal mining operation owned or controlled by either the applicant or by any person who owns or controls the applicant under the definition of owned or controlled and owns or controls in 30 CFR 773.5.

Accordingly, the interim final rule being published today modifies the language of former 30 CFR 778.13(d) [now 30 CFR 778.13(f)] to restrict its scope to operations owned or controlled by the applicant. OSM also is:

- Recodifying former 30 CFR 778.13(c)(4) as paragraph (d) and revising it to apply only to the applicant and each partner or principal shareholder of the applicant in accordance with the language of section 507(b)(4) of the Act;
- Recodifying former 30 CFR 778.13(c)(5) as paragraph (e) and revising it to apply only to the applicant in accordance with the language of section 507(b)(3) of the Act; and
- Redesignating former 30 CFR 778.13 (d) through (j) as paragraphs (f) through (l), respectively.

Under revised 30 CFR 778.13(c), the application must continue to include identifying information about persons who own or control the applicant. This information is needed 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. Revised 30 CFR 778.13(c) also is based upon and generally analogous to the ownership and control information requirements of section 507(b)(4) of SMCRA. The court noted that this section of the Act requires information relevant to statutory provisions other than the section 510(c) permit block sanction, such as the individual civil penalty sanction of section 518(f) of the Act. The court also observed that “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.” *Id.* at 695. The information required under revised 30 CFR 778.13(c) will improve the ability of OSM and state regulatory authorities to initiate these types of enforcement and compliance measures.

Since there is nothing in the remainder of the 1989 version of 30 CFR

778.13 that presents a conflict with the court's interpretation of section 510(c) of the Act in *NMA—O&C*, OSM is repromulgating the remainder of this section without substantive change (apart from redesignation of paragraphs) as part of the interim final rule being published today. The rationale for these permit application information requirements is set forth in the preamble to the 1989 rulemaking at 54 FR 8983–90 (March 2, 1989).

H. Section 778.14—Compliance Information Requirements for Permit Applications

On March 2, 1989 (54 FR 8982), OSM promulgated revised permit application information requirements at 30 CFR 778.14. Among other things, these regulations required information about unabated violations and other compliance data concerning persons who own or control the applicant. In *NMA—O&C*, the court struck down the revised rules based on a finding that they “are centered on the ownership and control rule,” which the court found to exceed the mandate of SMCRA by applying the permit block sanction of section 510(c) of the Act to violations incurred by persons who own or control the applicant. *Id.* at 696.

Accordingly, the interim final rule being published today modifies the language of former 30 CFR 778.14(c) to restrict its scope to the applicant and operations owned or controlled by the applicant. Since there is nothing in the remainder of the 1989 version of 30 CFR 778.14 (or the subsequent 1994 revisions to that section) that presents a conflict with the court's interpretation of section 510(c) of the Act in *NMA—O&C*, OSM is repromulgating the remainder of this section without substantive change as part of the interim final rule being published today. The rationale for these permit application information requirements is set forth in the preambles to the 1989 rulemaking at 54 FR 8985–90 (March 2, 1989) and the 1994 rulemaking at 59 FR 54347–49 (October 28, 1994).

I. Section 843.11(g)—Notification Following Issuance of Cessation Order

On March 2, 1989 (54 FR 8982), OSM amended its regulations by adding 30 CFR 843.11(g), which provides that, within 60 days of issuance of a cessation order in situations in which OSM is the regulatory authority, OSM must notify all owners and controllers identified under 30 CFR 778.13(c) that a cessation order has been issued and that they have been identified as owners or controllers of the violator. As explained in the preamble at 54 FR 8986, one of

the purposes of this requirement is to provide notification to individual owners and controllers of a nature sufficient to establish a basis for the assessment of an individual civil penalty under section 518(f) of the Act and 30 CFR part 846 or its State program equivalent.

Since this purpose and the language of the regulation itself do not present a conflict with the court's interpretation of section 510(c) of the Act in *NMA—O&C*, OSM is repromulgating 30 CFR 843.11(g) in substantively identical form as part of the interim final rule being published today. Unlike the previous rule, the new rule does not contain a reference to 30 CFR 778.13(d). While the latter rule is being repromulgated in revised form as 30 CFR 778.13(f) as part of this rulemaking, the revised version no longer includes information requirements pertinent to owners or controllers of the applicant. Therefore, it is no longer relevant to the requirements of 30 CFR 843.11(g). OSM also is replacing the reference to 30 CFR 773.17(i) with a reference to 30 CFR 773.17(h) to reflect the new designation of the paragraph in question.

J. Section 843.21—Federal Procedures for Improvidently Issued State Permits

On April 28, 1989 (54 FR 18438), OSM amended its regulations by adding 30 CFR 843.21 to provide a mechanism for Federal enforcement in those situations where the regulatory authority has failed to take appropriate actions under 30 CFR 773.20 with respect to an improvidently issued permit. In *NMA—O&C*, the court struck down this rule and related regulations based on a finding that they “are centered on the ownership and control rule,” which the court found to exceed the mandate of SMCRA. *Id.* at 696. In support of its decision, the court pointed to the reference to ownership or control links in 30 CFR 773.20(b)(1)(iii).

Accordingly, the interim final rule being published today replaces the term “ownership or control link” (and related language concerning ownership and control links and responsibility for violations, penalties, or fees) in 30 CFR 843.21(d) and (e)(2)(iii) with more specific language that applies the provisions of these rules only to situations in which the permittee or any person owned or controlled by the permittee is responsible for the violation, penalty, or fee.

OSM also is revising 30 CFR 843.21(e)(2) (i) and (ii) to either eliminate the phrase “the permittee or other person responsible” or replace it with language that clarifies that the rule applies only to violations, penalties, and

fees for which the permittee or persons owned or controlled by the permittee are responsible. OSM is making these changes to ensure that 30 CFR 843.21 is applied in a manner consistent with the revisions to 30 CFR 773.15(b) and the court's decision on the scope of section 510(c) of the Act.

Since there is nothing in the remainder of the 1989 version of 30 CFR 843.21 that presents a conflict with the court's interpretation of section 510(c) of the Act in *NMA—O&C*, OSM is repromulgating the remainder of this section without substantive change as part of the interim final rule being published today. The rationale for the procedural requirements and enforcement provisions of 30 CFR 843.21 is set forth in detail in the preamble to the 1989 version of this rule at 54 FR 18454–62 (April 28, 1989). However, the discussions of ownership or control links in that preamble no longer apply in full in view of the court decision and the wording changes in 30 CFR 843.21 (d) and (e). Similarly, the explanation of the meaning of “other person responsible” at 54 FR 18447 under the heading “Inconsistent Terminology” and at 54 FR 18455 under the heading “Ownership and Control Relationships Covered” is no longer fully applicable, especially since the revised version of 30 CFR 843.21 no longer includes this term.

K. Effect in Federal Program States and on Indian Lands

Through cross-referencing in the respective regulatory programs, this rule will apply in the following Federal program States: Arizona, California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal Programs for these States are codified at 30 CFR parts 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively. The rule also applies to Indian lands through cross-referencing in 30 CFR part 750.

L. Effect on State Programs

None of the rules being promulgated today will require changes in State regulatory programs under the standards set forth in section 503 of SMCRA and 30 CFR part 732, provided States have fully amended their programs to be consistent with the previous versions of these Federal rules. If the Director determines that there are special circumstances in a particular State that result in a need for a State program amendment as a result of this rulemaking, she or he will notify the State in accordance with 30 CFR 732.17.

M. Comparison of Interim Final Rule Language with Prior Rule Language

Set forth below is the text of the interim final rule showing all changes in paragraph designation and substantive changes in language from the version of the rules that currently appears in the Code of Federal Regulations. Deleted text is enclosed in brackets ([]). Added text appears in italics. Asterisks indicate no change in the existing text.

This comparison is provided solely as a user aid in locating significant changes. It does not identify every minor editorial revision, and it does not include 30 CFR 778.10, the information collection section. It is not a substitute for the actual rule text that follows the preamble.

§ 773.5 Definitions.

No substantive change.

§ 773.15 Review of permit applications.

(a) * * *

(b) *Review of violations.* (1) Based on a review of all reasonably available information concerning violation notices [and ownership or control links] involving *either the applicant or any person owned or controlled by the applicant*, including information obtained pursuant to §§ 773.22, 773.23, 778.13, and 778.14 of this chapter, the regulatory authority may 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 § 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 *the* [such] notice of violation has not yet expired and where, as part of the violation information provided pursuant to § 778.14 of this chapter, the applicant has provided certification that *the* [such] violation is in the process of being so corrected. *This* [such] presumption does 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 must require the applicant or *any person* [who owns or controls] *owned or controlled by the applicant*, before the issuance of the permit, to either:

(i) Submit to the regulatory authority proof that the current violation has been or is in the process of being corrected to the satisfaction of the agency that has jurisdiction over the violation; or

(ii) Establish for the regulatory authority that the applicant, or any person owned or

controlled by [either] the applicant [or any person who owns or controls the applicant], has filed and is presently pursuing, in good faith, a direct administrative or judicial appeal to contest the validity of the current violation. If the initial judicial review authority under § 775.13 of this chapter affirms the violation, then the applicant must, within 30 days of the judicial action, submit the proof required under paragraph (b)(1)(i) of this section.

(2) Any permit that is issued on the basis of a presumption supported by certification under § 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, must be issued conditionally.

(3) If the regulatory authority makes a finding that the applicant, [anyone who owns or controls the applicant,] or the operator specified in the application, controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations of the Act of such nature and duration, and with resulting irreparable damage to the environment as to indicate an intent not to comply with the Act, no permit may be issued. Before such a finding becomes final, the applicant or operator must be afforded an opportunity for an adjudicatory hearing on the determination as provided for in § 775.11 of this chapter.

(4) No substantive change.

(c) * * *

(d) * * *

(e) *Final compliance review.* After an application is approved, but before the permit is issued, the regulatory authority must reconsider its decision to approve the application, based on the compliance review required by paragraph (b)(1) of this section in light of any new information submitted under sections [778.13(i)] 778.13(k) and 778.14(d) of this chapter.

§ 773.17 Permit conditions.

* * * * *

(h)[(i)] Within 30 days after a cessation order is issued under § 843.11 of this chapter, or the State program equivalent, for operations conducted under the permit, except where a stay of the cessation order is granted and remains in effect, the permittee must either submit to the regulatory the following information, current to the date the cessation order was issued, or notify the regulatory authority in writing that there has been no charge since the immediately preceding submittal of such information:

(1) Any new information needed to correct or update the information previously submitted to the regulatory authority by the permittee under § 778.13(c) of this chapter; or

(2) If not previously submitted, the information required from a permit applicant by § 778.13(c) of this chapter.

§ 773.20 Improvidently issued permits: General procedures.

(a) *Permit review.* A regulatory authority which has reason to believe that it improvidently issued a surface coal mining and reclamation permit must review the

circumstances under which the permit was issued, using the criteria in paragraph (b) of this section. When the regulatory authority finds that the permit was improvidently issued, it must comply with paragraph (c) of this section.

(b) *Review criteria.* (1) A regulatory authority must 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 *that is being met* [with which the permittee or other person responsible is complying] to the satisfaction of the responsible agency; and

(iii) [Where the] *The permittee or any person owned or controlled by 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 § 773.25 of this part *apply whenever* [shall be applicable when] a regulatory authority [determines] *makes one of the following determinations:*

(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

(iii) Whether [any ownership or control link between] the permittee or *any person owned or controlled by the permittee continues to be* [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 must use one or more of the following remedial measures:

(i) Implement, with the cooperation of the *responsible agency, the permittee, and persons owned or controlled by 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 *abatement of the violation or payment of the penalty or fee within* [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 must afford at least 30 days written notice to the permittee. If the regulatory authority decides to rescind the permit, it must issue a notice in accordance with § 773.21 of this part. In either case, the permittee must 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 will 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.

§ 773.21 Improvidently issued permits: Rescission procedures.

A regulatory authority which, under § 773.20(c)(1)(iv) of this part, elects to rescind an improvidently issued permit must serve on the permittee a notice of proposed suspension and rescission which includes the reasons for the finding of the regulatory authority under § 773.20(b) of this part and states that:

(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 § 773.25 of this part, that:

(1) The finding of the regulatory authority under § 773.20(b) of this part was erroneous;

(2) The [permittee or other person responsible has abated the] violation *has been abated*, [on which the finding was based,] or [paid] the penalty or fee *paid*, to the satisfaction of the responsible agency;

(3) The violation, penalty, or fee is the subject of a good faith appeal, or of an abatement plan or payment schedule *that is being met* [with which the permittee or other person responsible is complying] to the satisfaction of the responsible agency; or

(4) [Since the finding was made, the] *The permittee and all persons owned or controlled by the permittee* [has severed any ownership or control link with the person responsible for, and does not continue to be] *are no longer* responsible for the violation, penalty, or fee.

(b) *Cessation of operations.* After permit suspension or rescission, the permittee must cease all surface coal mining and reclamation operations under the permit, except for violation abatement and for reclamation and other environmental protection measures as required by the regulatory authority.

§ 778.13 Identification of interests.

An application must contain the following information, except that the submission of a social security number is voluntary;

(a) A statement as to whether the applicant is a corporation, partnership, single proprietorship, association, or other business entity.

(b) The name, address, telephone number, and, as applicable, social security number and employer identification number of the:

(1) Applicant;

(2) Applicant's resident agent; and

(3) Person who will pay the abandoned mine land reclamation fee.

(c) For each person who owns or controls the applicant under the definition of "owned or controlled" and "owns or controls" in § 773.5 of this chapter, as applicable:

(1) The person's name, address, social security number, and employer identification number;

(2) The person's ownership or control relationship to the applicant, including percentage of ownership and location in the organizational structure; and

(3) The title of the person's position, [and] *the date that the person assumed the position, [was assumed,] and, when submitted under section [773.17(i)] 773.17(h) of this chapter, the date of departure from the position.*

[(4)] *(d) For the applicant and each partner or principal shareholder of the applicant, each [additional] name and identifying number, including employer identification number, Federal or State permit number, and MSHA number with date of issuance, under which the person owns or controls, or previously owned or controlled, a surface coal mining and reclamation operation in the United States within the 5 years preceding the date of the application.;* and]

[(5)] *(e) The application number or other identifier of, and the regulatory authority for, any other pending surface coal mining operation permit application filed by the [person] applicant in any State in the United States.*

[(d)] *(f) For any surface coal mining operation owned or controlled by [either] the applicant [or by any person who owns or controls the applicant] under the definition of "owned or controlled" and "owns or controls" in § 773.5 of this chapter, the operation's:*

(1) Name, address, identifying numbers, including employer identification number, Federal or State permit number and MSHA number, the date of issuance of the MSHA number, and the regulatory authority; and

(2) Ownership or control relationship to the applicant, including percentage of ownership and location in organizational structure.

[(e)] *(g) The name and address of each legal or equitable owner of record of the surface and mineral property to be mined, each holder of record of any leasehold interest in the property to be mined, and any purchaser of record under a real estate contract for the property to be mined.*

[(f)] *(h) The name and address of each owner of record of all property (surface and subsurface) contiguous to any part of the proposed permit area.*

[(g)] *(i) The Mine Safety and Health Administration (MSHA) numbers for all mine-associated structures that require MSHA approval.*

[(h)] *(j) A statement of all lands, interest in lands, options, or pending bids on interests held or made by the applicant for lands*

contiguous to the area described in the permit application. If requested by the applicant, any information required by this paragraph which is not on public file pursuant to State law must be held in confidence by the regulatory authority, as provided under § 773.13(d)(3)(ii) of this chapter.

[(i)] *(k) After an applicant is notified that his or her application is approved, but before the permit is issued, the applicant must, as applicable, update, correct or indicate that no change has occurred in the information previously submitted under paragraphs (a) through [(d)] (f) of this section.*

[(j)] *(l) The applicant must submit the information required by this section and by § 778.14 of this part in any format that OSM prescribes.*

§ 778.14 Violation information.

Each application must contain the following information:

(a) A statement of whether the applicant or any subsidiary, affiliate, or persons controlled by or under common control with the applicant has:

(1) Had a Federal or State coal mining permit suspended or revoked in the 5 years preceding the date of submission of the application; or

(2) Forfeited a performance bond or similar security deposited in lieu of bond.

(b) A brief explanation of the facts involved if any such suspension, revocation, or forfeiture referred to in paragraphs (a)(1) and (a)(2) of this section has occurred, including:

(1) Identification number and date of issuance of the permit, and the date and amount of bond or similar security;

(2) Identification of the authority that suspended or revoked the permit or forfeited the bond and the stated reasons for the action;

(3) The current status of the permit, bond, or similar security involved;

(4) The date, location, and type of any administrative or judicial proceedings initiated concerning the suspension, revocation, or forfeiture; and

(5) The current status of the proceedings.

(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 § 773.5 of this chapter. For each notice of violation issued pursuant to § 843.12 of this chapter 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 corrected to the satisfaction of the agency with jurisdiction over the violation. For each violation notice reported, the list must include the following information, as applicable:

(1) Any identifying numbers for the operation, including the Federal or State permit number and MSHA number, the dates of issuance of the violation notice and MSHA

number, the name of the person to whom the violation notice was issued, and the name of the issuing regulatory authority, department or agency;

(2) A brief description of the violation alleged in the notice;

(3) The date, location, and type of any administrative or judicial proceedings initiated concerning the violation, including, but not limited to, proceedings initiated by any person identified in paragraph (c) of this section to obtain administrative or judicial review of the violation;

(4) The current status of the proceedings and of the violation notice; and

(5) The actions, if any, taken by any person identified in paragraph (c) of this section to abate the violation.

(d) After an applicant is notified that his or her application is approved, but before the permit is issued, the applicant must, as applicable, update, correct or indicate that no change has occurred in the information previously submitted under this section.

§ 843.11 Cessation orders.

* * * * *

(g) Where OSM is the regulatory authority, within 60 days after issuing a cessation order, OSM will notify in writing any person who has been identified under sections [773.17(i)] 773.17(h) and 778.13(c) (d)] of this chapter as owning or controlling the permittee, that the cessation order was issued and that the person has been identified as an owner or controller.

§ 843.21 Procedures for improvidently issued State permits.

(a) *Initial notice.* If OSM has reason to believe that a State surface coal mining and reclamation permit meets the criteria for an improvidently issued permit in § 773.20(b) of this chapter, or the State program equivalent, and the State has failed to take appropriate action on the permit under State program equivalents of §§ 773.20 and 773.21 of this chapter, OSM will issue to the State, and should provide to the permittee, an initial notice stating in writing the reasons for that belief.

(b) *State response.* Within 30 days of the date on which an initial notice is issued under paragraph (a) of this section, the State must demonstrate to OSM in writing either that:

(1) The permit does not meet the criteria of § 773.20(b) of this chapter, or the State program equivalent; or

(2) The State is in compliance with the State program equivalents of §§ 773.20 and 773.21 of this chapter.

(c) *Ten-day notice.* If OSM finds that the State has failed to make the demonstration required by paragraph (b) of this section, OSM will issue to the State a ten-day notice stating in writing the reasons for that finding and requesting that within 10 days the State take appropriate action under the State program equivalents of §§ 773.20 and 773.21 of this chapter;

(d) *Federal enforcement.* After 10 days from the date on which a ten-day notice is issued under paragraph (c) of this section, if OSM finds that the State has failed to take appropriate action under the State program equivalents of §§ 773.20 and 773.21 of this

chapter, or to show good cause for such failure, OSM will take appropriate remedial action. Such remedial action may include the issuance to the permittee of a notice of violation requiring that by a specified date all mining operations must cease and reclamation of all areas for which a reclamation obligation exists must commence or continue unless, to the satisfaction of the responsible agency, any violation, penalty, or fee on which the notice of violation was based is abated or paid, an abatement plan or payment schedule is entered into, or [any ownership or control link with the person responsible for the violation, penalty or fee is severed and] the permittee *and all persons owned or controlled by the permittee are no longer* [does not continue to be] responsible for the violation, penalty, or fee. Under this paragraph, good cause does not include the lack of State program equivalents of §§ 773.20 and 773.21 of this chapter.

(e) *Remedies to notice of violation.* Upon receipt from any person of information concerning the issuance of a notice of violation under paragraph (d) of this section, OSM will review the information and:

(1) Vacate the notice of violation if it resulted from an erroneous conclusion under this section; or

(2) Terminate the notice of violation if:

(i) [The permittee or other person responsible has, to the satisfaction of the responsible agency, abated any violation or paid any penalty or fee on which the notice of violation was based] *All violations have been abated and all penalties or fees have been paid;*

(ii) The permittee or any [other] person [responsible] *owned or controlled by the permittee* has filed and is pursuing a good faith appeal of the violation, penalty, or fee, or has entered into and is complying with an abatement plan or payment schedule to the satisfaction of the responsible agency; or

(iii) [Since the notice of violation was issued, the] *The permittee* [has severed any ownership or control link with the person responsible for, and does not continue to be] *and all persons owned or controlled by the permittee are no longer* responsible for the violation, penalty, or fee.

(f) *No civil penalty.* OSM will not assess a civil penalty for a notice of violation issued under this section.

IV. Procedural Matters

A. Executive Order 12866

This rule has been reviewed under the criteria of 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.*). The rule will not add to the cost of operating a mine under an approved regulatory program. Its provisions apply mainly to operators who previously operated mines in violation of the provisions of SMCRA and then failed to abate the violation or

pay monetary civil penalties that were assessed. Further, most coal mining operations subject to these regulations do not engage in prohibited activities and practices, and, as a result, the aggregate economic impact of these revised regulations will be minimal, affecting only those who engage in prohibited behavior in violation of SMCRA.

C. Executive Order 12988 on Civil Justice Reform

The Department of the Interior has determined that this rule meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988, "Civil Justice Reform" (56 FR 55195).

D. Unfunded Mandates Reform Act

This rule will not impose a cost of \$100 million or more in any given year on any governmental entity or the private sector.

E. Federal Paperwork Reduction Act

The Department of the Interior has determined that this rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* OMB has previously approved the collection activities and assigned clearance numbers 1029-0034-1029-0041 to 30 CFR parts 778 and 773, respectively.

F. National Environmental Policy Act

OSM has determined that this rulemaking action is categorically excluded from the requirement to prepare an environmental document under the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4332 *et seq.* This determination was made in accordance with the Departmental Manual (516 DM 2, Appendix 1.10).

Authors: The principal authors of this rule are Nancy Broderick and Dennis Rice, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Ave., NW., Washington, DC 20240. Telephone: (202) 2028-2700 and 2829. E-mail address: nbroderi@osmre.gov and drice@osmre.gov.

List of Subjects

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 843

Federal enforcement.

Dated: April 11, 1997.

Bob Armstrong,

Assistant Secretary, Land and Minerals Management.

For the reasons set forth in the preamble, the Department is amending 30 CFR parts 773, 778, and 843 as set forth below:

PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

1. The authority citation for part 773 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; 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; 16 U.S.C. 469 *et seq.*; 16 U.S.C. 470aa *et seq.*; and Pub. L. 100-34.

2. In § 773.5, the definition of “‘Owned or controlled’ and ‘owns or controls’” is revised to read as follows:

§ 773.5 Definitions.

* * * * *

Owned or controlled and owns or controls mean any one or a combination of the relationships specified in paragraphs (a) and (b) of this definition:

- (a)(1) Being a permittee of a surface coal mining operation;
- (2) Based on instrument of ownership or voting securities, owning of record in excess of 50 percent of an entity; or
- (3) Having 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.

(b) The following relationships are presumed to constitute ownership or control unless a person can demonstrate 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:

- (1) Being an officer or director of an entity;
- (2) Being the operator of a surface coal mining operation;
- (3) Having the ability to commit the financial or real property assets or working resources of an entity;
- (4) Being a general partner in a partnership;
- (5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity; or

(6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract 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.

* * * * *

3. In § 773.15, paragraphs (b) and (c) are revised to read as follows:

§ 773.15 Review of permit applications.

* * * * *

(b) *Review of violations.* (1) Based on a review of all reasonably available information concerning violation notices involving either the applicant or any person owned or controlled by the applicant, including information obtained pursuant to §§ 773.22, 773.23, 778.13, and 778.14 of this chapter, the regulatory authority may not issue the permit if any surface coal mining and reclamation operation owned or controlled by 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 § 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 the notice of violation has not yet expired and where, as part of the violation information provided pursuant to § 778.14 of this chapter, the applicant has provided certification that the violation is in the process of being so corrected. This presumption does 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 must require the applicant or any person owned or controlled by the applicant, before the issuance of the permit, to either:

- (i) Submit to the regulatory proof that the current violation has been or is in the process of being corrected to the satisfaction of the agency that has jurisdiction over the violation; or
- (ii) Establish for the regulatory authority that the applicant, or any person owned or controlled by the applicant, has filed and is presently pursuing, in good faith, a direct administrative or judicial appeal to contest the validity of the current

violation. If the initial judicial review authority under § 775.13 of this chapter affirms the violation, then the applicant must, within 30 days of the judicial action, submit the proof required under paragraph (b)(1)(i) of this section.

(2) Any permit that is issued on the basis of a presumption supported by certification under § 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, must be issued conditionally.

(3) If the regulatory authority makes a finding that the applicant, or the operator specified in the application, controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations of the Act of such nature and duration, and with resulting irreparable damage to the environment as to indicate an intent not to comply with the Act, no permit may be issued. Before such a finding becomes final, the applicant or operator must be afforded an opportunity for an adjudicatory hearing on the determination as provided for in § 775.11 of this chapter.

(4)(i) Subsequent to October 24, 1992, the prohibitions of paragraph (b) of this section regarding the issuance of a new permit do not apply to any violation that:

- (A) Occurs after that date;
 - (B) Is unabated; and
 - (C) Results from an unanticipated event or condition that arises from a surface coal mining and reclamation operation on lands that are eligible for remaining under a permit:
- (1) Issued before September 30, 1994, or any renewals thereof; and
 - (2) Held by the person making application for the new permit.
- (ii) For permits issued under § 785.25 of this chapter, an event or condition will be presumed to be unanticipated for the purposes of this paragraph if it:
- (A) Arose after permit issuance;
 - (B) Was related to prior mining; and
 - (C) Was not identified in the permit.

* * * * *

(e) *Final compliance review.* After an application is approved, but before the permit is issued, the regulatory authority must reconsider its decision to approve the application, based on the compliance review required by paragraph (b)(1) of this section in light of any new information submitted under §§ 778.13(k) and 778.14(d) of this chapter.

4. In § 773.17, paragraph (i) is redesignated as paragraph (h), which is revised to read as follows:

§ 773.17 Permit conditions.

* * * * *

(h) Within 30 days after a cessation order is issued under § 843.11 of this chapter, or the State program equivalent, for operations conducted under the permit, except where a stay of the cessation order is granted and remains in effect, the permittee must either submit to the regulatory authority the following information, current to the date the cessation order was issued, or notify the regulatory authority in writing that there has been no change since the immediately preceding submittal of such information:

(1) Any new information needed to correct or update the information previously submitted to the regulatory authority by the permittee under § 778.13(c) of this chapter; or

(2) If not previously submitted, the information required from a permit application by § 778.13(c) of this chapter.

5. § 773.20 is revised to read as follows:

§ 773.20 Improvidently issued permits: General procedures.

(a) *Permit review.* A regulatory authority which has reason to believe that it improvidently issued a surface coal mining and reclamation permit must review the circumstances under which the permit was issued, using the criteria in paragraph (b) of this section. When the regulatory authority finds that the permit was improvidently issued, it must comply with paragraph (c) of this section.

(b) *Review criteria.* (1) A regulatory authority must 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 that is being met to

the satisfaction of the responsible agency; and

(iii) The permittee or any person owned or controlled by the permittee continues to be responsible for the violation, penalty, or fee.

(2) The provisions § 773.25 of this part apply whenever a regulatory authority makes one of the following determinations:

(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 the permittee or any person owned or controlled by the permittee continues to be responsible for the violation, penalty, or fee.

(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 must use one or more of the following remedial measures:

(i) Implement, with the cooperation of the responsible agency, the permittee, and persons owned or controlled by the permittee, 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 abatement of the violation or payment of the penalty or fee within a reasonable time;

(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 must afford at least 30 days written notice to the permittee. If the regulatory authority decides to rescind the permit, it must issued a notice in accordance with § 773.21 of this part. In either case, the permittee must be given the opportunity to request administrative review of the notice under 43 CFR 4.1370 through 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 will 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.

6. § 773.21 is revised to read as follows:

§ 773.21 Improvidently issued permits: Rescission procedures.

A regulatory authority which, under § 773.20(c)(1)(iv) of this part, elects to rescind an improvidently issued permit

must serve on the permittee a notice of proposed suspension and rescission which includes the reasons for the finding of the regulatory authority under § 773.20(b) of this part and states that:

(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 § 773.25 of this part, that:

(1) The finding of the regulatory authority under § 773.20(b) of this part was erroneous;

(2) The violation has been abated, or the penalty or fee paid, to the satisfaction of the responsible agency;

(3) The violation, penalty, or fee is the subject of a good faith appeal, or of an abatement plan or payment schedule that is being met to the satisfaction of the responsible agency; or

(4) The permittee and all persons owned or controlled by the permittee are no longer responsible for the violation, penalty, or fee.

(b) *Cessation of operations.* After permit suspension or rescission, the permittee must cease all surface coal mining and reclamation operations under the permit, except for violation abatement and for reclamation and other environmental protection measures as required by the regulatory authority.

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

7. The authority citation for Part 778 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended and Pub. L. 100-34.

8. § 778.10 is revised to read as follows:

§ 778.10 Information collection.

(a) In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Section 507(b) of SMCRA 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, 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 insure that all legal,

financial and compliance requirements are satisfied prior to 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 1029-0034.

(b) OSM estimates that the public reporting and recordkeeping burden for this part averages 48 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 recordkeeping 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; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, NW, Washington, DC 20503. Please refer to OMB Control Number 1029-0034 in any correspondence.

9. § 778.13 is revised to read as follows:

§ 778.13 Identification of interests.

An application must contain the following information, except that the submission of a social security number is voluntary:

(a) A statement as to whether the applicant is a corporation, partnership, single proprietorship, association, or other business entity.

(b) The name, address, telephone number, and, as applicable, social security number and employer identification number of the:

- (1) Applicant;
- (2) Applicant's resident agent; and
- (3) Person who will pay the abandoned mine land reclamation fee.

(c) For each person who owns or controls the applicant under the definition of "owned or controlled" and "owns or controls" in § 773.5 of this chapter, as applicable:

- (1) The person's name, address, social security number, and employer identification number;
- (2) The person's ownership or control relationship to the applicant, including percentage of ownership and location in the organizational structure; and
- (3) The title of the person's position, the date that the person assumed the

position, and, when submitted under § 773.17(h) of this chapter, the date of departure from the position.

(d) For the applicant and each partner or principal shareholder of the applicant, each name and identifying number, including employer identification number, Federal or State permit number, and MSHA number with date of issuance, under which the person owns or controls, or previously owned or controlled, a surface coal mining and reclamation operation in the United States within the 5 years preceding the date of the application.

(e) The application number or other identifier of, and the regulatory authority for, any other pending surface coal mining operation permit application filed by the applicant in any State in the United States.

(f) For any surface coal mining operation owned or controlled by the applicant under the definition of "owned or controlled" and "owns or controls" in § 773.5 of this chapter, the operation's:

- (1) Name, address, identifying numbers, including employer identification number, Federal or State permit number and MSHA number, the date of issuance of the MSHA number, and the regulatory authority; and
- (2) Ownership or control relationship to the applicant, including percentage of ownership and location in organizational structure.

(g) The name and address of each legal or equitable owner of record of the surface and mineral property to be mined, each holder of record of any leasehold interest in the property to be mined, and any purchaser of record under a real estate contract for the property to be mined.

(h) The name and address of each owner of record of all property (surface and subsurface) contiguous to any part of the proposed permit area.

(i) The Mine Safety and Health Administration (MSHA) numbers for all mine-associated structures that require MSHA approval.

(j) A statement of all lands, interest in lands, options, or pending bids on interests held or made by the applicant for lands contiguous to the area described in the permit application. If requested by the applicant, any information required by this paragraph which is not on public file pursuant to State law must be held in confidence by the regulatory authority, as provided under § 773.13(d)(3)(ii) of this chapter.

(k) After an applicant is notified that his or her application is approved, but before the permit is issued, the applicant must, as applicable, update, correct or indicate that no change has

occurred in the information previously submitted under paragraphs (a) through (f) of this section.

(l) The applicant must submit the information required by this section and by § 778.14 of this part in any format that OSM prescribes.

10. § 778.14 is revised to read as follows:

§ 778.14 Violation information

Each application must contain the following information:

(a) A statement of whether the applicant or any subsidiary, affiliate, or persons controlled by or under common control with the applicant has:

(1) Had a Federal or State coal mining permit suspended or revoked in the 5 years preceding the date of submission of the application; or

(2) Forfeited a performance bond or similar security deposited in lieu of bond.

(b) A brief explanation of the facts involved in any such suspension, revocation, or forfeiture referred to in paragraphs (a)(1) and (a)(2) of this section has occurred, including:

(1) Identification number and date of issuance of the permit, and the date and amount of bond or similar security;

(2) Identification of the authority that suspended or revoked the permit or forfeited the bond and the stated reasons for the action;

(3) The current status of the permit, bond, or similar security involved;

(4) The date, location, and type of any administrative or judicial proceedings initiated concerning the suspension, revocation, or forfeiture; and

(5) The current status of the proceedings.

(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 the applicant under the definition of "owned or controlled" and "owns or controls" in § 773.5 of this chapter. For each notice of violation issued pursuant to § 843.12 of this chapter 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 corrected to the satisfaction of the agency with jurisdiction over the violation. For each violation notice reported, the list must include the following information, as applicable:

(1) Any identifying numbers for the operation, including the Federal or State

permit number and MSHA number, the dates of issuance of the violation notice and MSHA number, the name of the person to whom the violation notice was issued, and the name of the issuing regulatory authority, department or agency;

(2) A brief description of the violation alleged in the notice;

(3) The date, location, and type of any administrative or judicial proceedings initiated concerning the violation, including, but not limited to, proceedings initiated by any person identified in paragraph (c) of this section to obtain administrative or judicial review of the violation;

(4) The current status of the proceedings and of the violation notice; and

(5) The actions, if any, taken by any person identified in paragraph (c) of this section to abate the violation.

(d) After an applicant is notified that his or her application is approved, but before the permit is issued, the applicant must, as applicable, update, correct or indicate that no change has occurred in the information previously submitted under this section.

PART 843—FEDERAL ENFORCEMENT

11. The authority citation for part 843 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended and Pub. L. 100-34.

12. In § 843.11, paragraph (g) is revised to read as follows:

§ 843.11 Cessation orders.

* * * * *

(g) Where OSM is the regulatory authority, within 60 days after issuing a cessation order, OSM will notify in writing any person who has been identified under §§ 773.17(h) and 778.13(c) of this chapter as owning or controlling the permittee that the cessation order was issued and that the

person has been identified as an owner or controller.

13. § 843.21 is revised to read as follows:

§ 843.21 Procedures for improvidently issued State permits.

(a) *Initial notice.* If OSM has reason to believe that a State surface coal mining and reclamation permit meets the criteria for an improvidently issued permit in § 773.20(b) of this chapter, or the State program equivalent, and the State has failed to take appropriate action on the permit under State program equivalents of §§ 773.20 and 773.21 of this chapter, OSM will issue to the State, and should provide to the permittee, an initial notice stating in writing the reasons for that belief.

(b) *State response.* Within 30 days of the date on which an initial notice is issued under paragraph (a) of this section, the State must demonstrate to OSM in writing either that:

(1) The permit does not meet the criteria of § 773.20(b) of this chapter, or the State program equivalent; or

(2) The State is in compliance with the State program equivalents of §§ 773.20 and 773.21 of this chapter.

(c) *Ten-day notice.* If OSM finds that the State has failed to make the demonstration required by paragraph (b) of this section, OSM will issue to the State a ten-day notice stating in writing the reasons for that finding and requesting that within 10 days the State take appropriate action under the State program equivalents of §§ 773.20 and 773.21 of this chapter.

(d) *Federal enforcement.* After 10 days from the date on which a ten-day notice is issued under paragraph (c) of this section, if OSM finds that the State has failed to take appropriate action under the State program equivalents of §§ 773.20 and 773.21 of this chapter, or to show good cause for such failure, OSM will take appropriate remedial

action. Such remedial action may include the issuance to the permittee of a notice of violation requiring that by a specified date all mining operations must cease and reclamation of all areas for which a reclamation obligation exists must commence or continue unless, to the satisfaction of the responsible agency, any violation, penalty, or fee on which the notice of violation was based is abated or paid, an abatement plan or payment schedule is entered into, or the permittee and all persons owned or controlled by the permittee are no longer responsible for the violation, penalty, or fee. Under this paragraph, good cause does not include the lack of State program equivalents of §§ 773.20 and 773.21 of this chapter.

(e) *Remedies to notice of violation.* Upon receipt from any person of information concerning the issuance of a notice of violation under paragraph (d) of this section, OSM will review the information and:

(1) Vacate the notice of violation if it resulted from an erroneous conclusion under this section; or

(2) Terminate the notice of violation if:

(i) All violations have been abated and all penalties or fees have been paid;

(ii) The permittee or any person owned or controlled by the permittee has filed and is pursuing a good faith appeal of the violation, penalty, or fee, or has entered into and is complying with an abatement plan or payment schedule to the satisfaction of the responsible agency; or

(iii) The permittee and all persons owned or controlled by the permittee are no longer responsible for the violation, penalty, or fee.

(f) *No civil penalty.* OSM will not assess a civil penalty for a notice of violation issued under this section.

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