

## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 724, 773, 774, 778, 842, 843, and 846

RIN 1029-AB94

## Application and Permit Information Requirements; Permit Eligibility; Definitions of Ownership and Control; the Applicant/Violator System; Alternative Enforcement Actions

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.  
**ACTION:** Proposed rule.

**SUMMARY:** We are proposing revised permit eligibility requirements for surface coal mining operations under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). In particular, we propose to revise how ownership and control of mining operations is determined under section 510(c) of the Act so that applicants who are responsible for unabated violations do not receive new permits. We have designed this proposal to be effective, fair, and consistent with a 1997 decision by the U.S. Court of Appeals for the D.C. Circuit addressing ownership and control issues.

In addition, we are proposing other changes to other aspects of our regulations in response to comments we received when we sought public participation in developing this proposed rule. Our intent is to improve, clarify, and simplify current regulations as well as to reduce duplicative and burdensome permit information requirements.

**DATES:** *Written comments:* We will accept written comments on the proposed rule until 5 p.m., Eastern time, on February 19, 1999.

*Public hearings:* Upon request, we will hold public hearings on the proposed rule at dates, times and locations to be announced in the **Federal Register** prior to the hearings. We will accept requests for public hearings until 5 p.m., Eastern time, on January 11, 1999. If you wish to attend, but not testify at, any hearing, you should contact the person identified under **FOR FURTHER INFORMATION CONTACT** before the hearing date to verify that the hearing will be held. If you wish to attend and testify at any hearing, you should follow procedures under I. Public Comment Procedures—*Public hearings*.

**ADDRESSES:** If you wish to provide written comment, you may submit your comments by any one of several

methods (see Public Comment Procedures). We will make comments available for public review during regular business hours. You may mail or hand-deliver comments to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 101, 1951 Constitution Avenue, NW, Washington, D.C. 20240. You may also submit comments to OSM via the Internet at: [osmrules@osmre.gov](mailto:osmrules@osmre.gov).

You may submit a request for a public hearing orally or in writing to the person and address specified under **FOR FURTHER INFORMATION CONTACT**. We will announce the address, date and time for any hearing in the **Federal Register** prior to the hearing. If you are disabled and require special accommodation to attend a public hearing, you should contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**FOR FURTHER INFORMATION CONTACT:** Earl D. Bandy, Jr., Office of Surface Mining Reclamation and Enforcement, Applicant/Violator System Office, 2679 Regency Road, Lexington, Kentucky 40503. Telephone: (606) 233-2796 or (800) 643-9748. E-Mail: [ebandy@osmre.gov](mailto:ebandy@osmre.gov).

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## I. Public Comment Procedures

*Sixty (60) Day Comment Period:* In view of the extensive outreach activity conducted in advance of this rulemaking and in order to expedite the publication of final rules, we will not extend the comment period beyond the usual 60 days.

*Written comments:* Written comments on the proposed rule by mail, electronically, or in person, should be specific, confined to issues pertinent to the proposed rule, and explain the reason for any recommended change. Submit three copies of your comments.

We will consider only those comments sent within the allowed time period (see **DATES**). We will log into the administrative record for the rulemaking all comments sent to the addresses listed above (see **ADDRESSES**). Comments delivered to addresses other than those listed above (see **ADDRESSES**) may not be logged in.

Comments over the Internet should be in an ASCII file, and you should avoid using special characters and any form of encryption. Please also include "Attn: RIN 1029-AB94" and your name and return address in your Internet message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at 202-208-2847.

*Public hearings:* We will hold a public hearing on the proposed rule only upon request. We will announce the time, date, and address for any hearing in the **Federal Register** at least 7 days prior to the hearing.

If you are interested in participating at a hearing, you need to inform Mr. Bandy (see **FOR FURTHER INFORMATION CONTACT**) by 5:00 p.m., Eastern time, on January 11, 1999. If no one has contacted Mr. Bandy to express an interest in participating in a hearing by that date, we will not hold a hearing. If only one person expresses an interest, we may hold a public meeting rather than a hearing and include the results in the Administrative Record. We will determine the location of the hearing, if one is held, after reviewing the number of requests received and the locations desired.

If we hold a hearing, it will be transcribed, and it will continue until all persons wishing to testify have been heard. To ensure that we have an accurate record of the hearing, we ask that you provide a written copy of your testimony to the transcriber at the beginning of the hearing. We also

request that you send an advance copy of your testimony to us at the address specified for submitting written comments (see ADDRESSES).

We will make comments, including names and addresses of commenters, available in our Administrative Record for public review during regular business hours.

## II. Background to Proposed Rules

In this Background section, we use a question-and-answer format to provide some of the history of this rulemaking and to explain the concepts we are introducing in the proposed rule. In Section III, Discussion of Proposed Rules, we have put together a section-by-section description of the proposed changes and the effects they would have if they were to become final rules. The proposed regulatory text is included in its entirety in the latter portion of this publication.

In 1998, the President ordered Federal agencies to begin writing public documents, including regulations, in plain language. Today's proposal introduces some plain language principles into OSM's body of regulations.

For example, there are numerous references to "you" and "we" in this document. In the regulatory text, "you" refers to the applicant for a surface coal mining operation, and "we" refers to the regulatory authority charged with enforcing the requirements in the regulations. In all but a few States, "we" means the State regulatory authority approved by the Secretary of the Interior to carry out the Surface Mining Act's requirements within the State's boundaries. In some cases, however, "we" means the Office of Surface Mining Reclamation and Enforcement (OSM)—the regulatory authority on Indian Lands and in the few States that do not have an approved State regulatory program. Where the regulatory text specifically refers to "OSM" or "the State," it is usually in reference to separate roles or responsibilities as the regulatory authority.

While "we" means the regulatory authority in the text of the regulation, it has a different meaning in the introductory text—also known as the preamble. Because the preamble describes how OSM has developed the regulation, the use of "we" in the preamble always refers to OSM.

### A. What is the Permit-Block Sanction in the Surface Mining Control and Reclamation Act?

The Surface Mining Control and Reclamation Act of 1977 (SMCRA or the

Act), 30 U.S.C. 1201 *et seq.*, establishes requirements for the regulation of active surface coal mining and reclamation and for the restoration of abandoned mine lands. The Act authorizes OSM to review and approve a State program so that the State may become the regulatory authority and have primary responsibility to enforce the Act's requirements within its borders. The Act also contains numerous provisions governing the permitting of mining operations. One of the most powerful tools provided in SMCRA is the permit-block sanction in section 510(c).

Under Section 510(c), the regulatory authority may not issue a permit for a new operation when another surface coal mining operation "owned or controlled by the applicant" is in current violation of SMCRA. Such violators may have mined coal and left behind unreclaimed, on-the-ground, environmental problems. They may have forfeited their surety bonds. Some may owe the government for unpaid Abandoned Mine Land fees or civil penalty assessments. Still others may have multiple infractions in all of these areas. Section 510(c)'s intent is to prohibit the regulatory authority from issuing new permits to applicants who own or control operations with violations until they abate the violations for which they are responsible.

As a first step in this process, regulatory authorities must determine whether an applicant for a surface coal mining permit owns or controls an operation with a violation. This ownership or control determination is key to deciding whether an applicant should be held responsible for violations that do not appear in violation records under the applicant's name. Because individuals may apply for permits under different corporate names, it is easy to avoid being linked to violations at mines that the applicant may have controlled—violations that they should have abated.

### B. How has OSM Implemented the Permit-Blocking Requirement?

Unfortunately, for most of the decade following enactment of SMCRA in 1977, neither States nor the Federal Government had devised an effective means of determining ownership and control to effectively implement section 510(c). While some States had attempted to set up mechanisms for tracking violators and their controllers, they relied heavily on the manual interpretation of paper files which were difficult to access and keep up-to-date. Even if an individual State had developed an effective method of tracking violators within its boundaries,

it still had to consult with other regulatory authorities to determine if out-of-State violators were trying to set up operations locally. These consultations often lacked consistency and relied on different filing systems and data standards. There was no national or regional system in place for keeping up with violators who moved from State to State leaving behind the mining and reclamation problems they had created.

In 1981, environmental groups sued the Secretary of the Interior alleging a nationwide failure to enforce section 510(c). The parties eventually negotiated a settlement (*Save Our Cumberland Mountains, Inc., et al. v. Clark*, No. 81-2134 (D.D.C. 1985) (Parker, J.)) under which OSM established the computer system now known as the Applicant/Violator System (AVS). The AVS became the central repository for violation information, as well as ownership and control information, enabling regulatory authorities to more effectively implement section 510(c).

During the two years following the settlement, we designed and built the AVS and negotiated Memoranda of Understanding with each of the primary States detailing how States would use the AVS and how they would assist OSM in maintaining and updating system data. Over the same period of time, we developed proposed rules to implement section 510(c) and related sections of SMCRA. We issued those rules in final form in 1988 and 1989 in Title 30, Chapter VII of the Code of Federal Regulations. They were known as the "ownership and control" rule (53 FR 38868 (1988)), the "permit information" rule (54 FR 8982 (1989)) and the "permit rescission" rule (54 FR 18438 (1989)). Under those rules, a regulatory authority would deny an application for a surface coal mining permit if the applicant owned or controlled an operation that was in violation of the Act, or if others who were in violation owned or controlled the applicant.

Specifically, the 1988 rule defined "ownership and control" at § 773.5 and required the regulatory authority to review violations associated with the applicant at § 773.15(b) so that regulatory authorities could determine who was eligible for a permit. The "permit information" rule published in 1989 described the requirements for the applicant to provide information on interests at § 778.13 and violations at § 778.14 needed by the regulatory authority to review the application. The "permit information" rule, while separate from the original ownership

and control rule, complemented it by requiring the applicant to supply the information necessary for the regulatory authority to make a permitting decision. The "permit rescission" rule, also published in 1989, included requirements at §§ 773.20, 773.21, and 843.21 for dealing with improvidently issued permits "those permits that must be rescinded due to the existence of a violation that would have prevented issuance of the permit had the regulatory authority been aware of it.

### C. What is the Applicant/Violator System and how is it Used in Permit-Blocking?

The AVS is a computerized system containing two large banks of data. One bank houses information on owners and controllers of mining operations. As part of the permit application requirements, companies and individuals provide this information to the regulatory authority, which then loads the information in the AVS. The other bank houses information on violations, including failure to pay required fees and penalties, which we get primarily from regulatory authorities and our own financial management records.

Under current regulations, the regulatory authority checks the AVS during the review of each application for a mining permit. The AVS automatically compares the ownership and control information with the violation information to determine if links exist between the applicant and any outstanding violations. If the applicant is linked to certain violations in the AVS, OSM recommends to the regulatory authority that it deny the application unless the applicant submits proof that the violation has been corrected, is being corrected, or is being appealed through proper channels. By matching permit applicants to outstanding violations that they own or control, the AVS helps regulatory authorities implement section 510(c) faster, easier, and more reliably than was possible before AVS.

### D. What Happened to the Regulations OSM Issued in 1988 and 1989?

The National Mining Association (NMA) and National Wildlife Federation filed suit challenging the validity of all three sets of OSM's rules implementing section 510(c). On August 31, 1995, the U.S. District Court for the District of Columbia upheld the three challenged rules in their entirety. See *National Wildlife Fed'n v. Babbitt*, Nos. 88-3117, 88-3464, 88-3470 (consolidated) (D.D.C. Aug. 31, 1995); *National Wildlife Fed'n v. Babbitt*, Nos. 89-1130, 89-1167 (consolidated) (D.D.C. Aug. 31,

1995); *National Wildlife Fed'n v. Babbitt*, Nos. 89-1751, 89-1811 (consolidated) (D.D.C. Aug. 31, 1995).

The NMA appealed the ruling and, on January 31, 1997, the U.S. Court of Appeals for the D.C. Circuit reversed the district court's decision. See *National Mining Ass'n v. Department of Interior*, 105 F.3d 691 (D.C. Cir. 1997) (hereinafter *NMA v. DOI*).

### E. What did the Appeals Court Say was Wrong With OSM's Regulations?

The Appeals Court held that section 510(c) of SMCRA authorizes OSM to deny a permit only when "any surface coal mining operation owned or controlled by the applicant" is currently in violation of SMCRA. Thus, because under OSM's 1988 ownership and control rules the regulatory authority could also deny a permit when any person who owned or controlled the applicant was in violation of the Act, the Appeals Court invalidated OSM's ownership and control rule in its entirety. In addition, the court held that because OSM's permit information and permit rescission rules "are centered on the ownership and control rule \* \* \*, they too must fall." *Id.* at 696.

Although the Appeals Court found only one aspect of OSM's rules to be flawed, it invalidated the entire ownership and control rule as well as the two related sets of regulations, including many provisions which were not inconsistent with the rationale in the court's decision. At the same time, nothing in the court's decision eliminated the responsibility of OSM and State regulatory authorities to implement the permit-blocking requirements of section 510(c) and the requirement in section 507(b) of the Act to collect certain permit information. This meant that OSM and the States faced the prospect of making permitting decisions as required in the Act without any regulations to support those decisions. The Appeals Court's action created a great deal of uncertainty among State regulatory authorities about how to continue to meet their responsibility to determine who was eligible to receive a permit.

### F. What did OSM do in Response to the Appeals Court Decision?

Immediately following the Appeals Court decision, we made adjustments in our process for responding to regulatory authorities' requests for permit recommendations. In each case, before we recommended that a permit be denied based on the AVS check, we determined if the recommendation would be consistent with the court's decision. In those cases where it would

have been inconsistent—those where the recommendation would be based on the violations of those who owned or controlled the applicant—we informed the regulatory authority that we could no longer recommend that it deny the permit.

Soon after the Appeals Court decision, we formed a team of Department of the Interior employees with experience in ownership and control issues. We instructed the team to evaluate the court's decision and determine what we needed to do to comply with it. As a first step, to remove the uncertainty created by the decision, and to ensure there would be no lapse in approved State programs, we published interim final rules (the IFR) on an emergency basis on April 21, 1997 (62 FR 19451). The IFR were consistent with the rationale in the Appeals Court decision. The rules did not authorize the regulatory authority to deny permits because of outstanding violations of an applicant's owners and controllers.

We determined that we had "good cause" to publish the IFR without notice and comment because of the need to have regulations in place. At the same time, we committed to propose further rulemaking "in accordance with standard notice and comment procedures."

### G. How has OSM Met its April 1997 Commitment to Propose Additional Regulations?

In June of 1997, our ownership and control team met with State regulatory authorities to discuss rulemaking options. As a result of those discussions, further deliberations within the Department of the Interior, and input from citizens and the regulated industry, we decided to take full advantage of the opportunity to re-evaluate all aspects of the ownership and control rules and related regulations, to propose improvements, to clarify requirements, and to reduce unnecessary burdens wherever possible.

On October 29, 1997, we issued an Advance Notice of Proposed Rulemaking in the **Federal Register** our intent to propose rules, hold public meetings and solicit comments from all interested parties on a wide range of topics related to ownership and control. 62 FR 56,139 (1997). Also on October 29, OSM Director Kathy Karpan held a press conference to announce a new and innovative rulemaking process that would include extensive public outreach and consideration of any suggestions that could improve the ownership and control rules.

Representatives from the coal industry, environmental groups, State

regulatory authorities, the press, and a congressional authorizing subcommittee with responsibility for OSM's programs participated in the Director's press conference. The Director promised a "no-holds-barred" approach in which all aspects of OSM's ownership and control rules would be open for discussion. Though the task was considerable, the goal was simple: develop the best possible rules that would be fair, effective and legally defensible.

The Ownership and Control Team conducted the Director's public outreach initiative from October 29, 1997, through January 16, 1998. The Team invited about 900 people and organizations to participate and provided everyone with a topics paper to elicit ideas, comments, and suggestions on possible regulatory changes. Seventy people attended seven public meetings held in different locations throughout the U.S. We offered to meet separately with any person or group requesting a meeting. Based upon such a request, members of the Team met with the National Mining Association. We also held individual discussions with several environmental advocates. In addition to holding the public meetings, the team received written comments.

At the conclusion of the outreach, the team began developing rulemaking options and recommendations to present to the Director on dozens of regulatory provisions related to ownership and control. As the team developed proposed rule language, members continued discussions with our State partners and kept them informed of the team's progress, including holding a formal States-OSM meeting to discuss the results of the outreach. Today's proposal is the culmination of months-long review, analysis and deliberation that fulfills our commitment in the IFR to proposed further rules with full public notice and opportunity for comment.

#### *H. How Does This Proposal Relate to the Appeals Court Decision and Interim Final Rule?*

This proposal is consistent with the IFR and the January 31, 1997, Appeals Court decision in that it would not authorize the denial of permits based on outstanding violations of an applicant's owners and controllers. However, it goes farther in reflecting our decision to take full advantage of the opportunity to re-evaluate all aspects of the ownership and control rules, propose improvements, clarify requirements, and reduce any unnecessary burdens placed on States and the regulated

industry. It also reflects suggestions and ideas presented to us during the public outreach period.

In addition to ensuring that the current proposal is consistent with the scope of section 510(c) as described by the Appeals Court, we have looked to the court's decision for guidance in interpreting other aspects of SMCRA and implementing regulations. For example, the court explained that, while we may only block permits based on the violation histories of operations owned or controlled by the applicant, we have "leeway in determining who the applicant is" and may "pierce the corporate veil" when appropriate to identify the "true applicant." *NMA v. DOI*, 105 F. 3d at 695.

Keeping in mind the Appeals Court's commentary, and in consultation with our State partners, and fully considering the views expressed during public outreach, we have evaluated our existing authorities to determine how we can more effectively address violations of the Act. While the permit-block sanction authorized in section 510(c) will continue to be the primary tool for determining who is eligible to mine, it will be much less effective without the ability to consider the violations of those who own or control the applicant. This makes it even more important that we effectively use our other authorities under SMCRA to deter mining by those who are either unwilling or unable to meet the obligations of their permits. Indeed, during the public outreach, some commenters suggested that we make more use of enforcement authorities already granted under the Act and in regulations rather than relying so heavily on permit blocking. In this vein, the Appeals Court noted that "blocking permits under section 510(c) is not the only regulatory mechanism under SMCRA." *Id.* at 695.

#### *I. How Would These Rules Help Bring About More Effective Regulation of Mining?*

In assessing how we could use available authorities to improve compliance with SMCRA, we have focused on four key areas: (1) improving the quality and usefulness of the information gathered during the permit application process and holding applicants fully accountable for providing all required information; (2) ensuring that permit eligibility determinations include consideration of all information indicating the likelihood of an applicant meeting the obligations of the permit; (3) verifying, through the increased use of investigations, that applicants have provided complete and

accurate information; and (4) more effectively using currently available alternative enforcement capabilities to ensure compliance by those who own, control or direct mining operations in cases where conventional enforcement mechanisms prove inadequate. We have concluded that these tools can be used more effectively to achieve greater overall compliance with SMCRA.

#### *J. What Would be the Major Effects of This Proposal?*

The major effects of this proposal are as follows:

- Consistent with the January 1997 Appeals Court decision, regulatory authorities would continue to deny applications for permits when the applicant has an outstanding violation or when the applicant owns or controls an operation with an outstanding violation.
- An applicant also would not be eligible for a permit if an owner or controller of the applicant has demonstrated such disregard for the environment that such person has been barred, disqualified, restrained, enjoined, or otherwise prohibited from mining by a Federal or State court.
- The controllers of an applicant would be on notice of their duty to comply with the requirements of the Act and the rules would require them to attest to this fact.
- The regulatory authority would more thoroughly review and verify violation and ownership and control information.
- Uncorrected violations of the Act and Federal and State regulations that remain uncorrected would be subject to enforcement actions, including the alternative enforcement mechanisms already available in regulations.
- The regulatory authority would more heavily focus enforcement resources on those operators who lack a demonstrated history of compliance and place less emphasis on those who have a demonstrated history of compliance.
- The information the regulatory authority would require from applicants would more closely conform to the information requirements of section 507(b) of the Act.
- The definitions of "ownership" and "control" in the rules would aid both the applicant and the regulatory authority in identifying all parties with obligations under a permit.
- Duplicative and burdensome information requirements that applicants and regulatory authorities must currently meet would be eliminated.
- The current presumptions that ownership or control exists would be

replaced with a requirement that the regulatory authority make a finding of actual ownership or control.

- Regulatory authorities would condition permits to ensure compliance based on how long the applicant has been mining, whether the applicant has a successful environmental compliance record, and whether the applicant has owners or controllers with outstanding violations.

#### *K. How Would Conditioning Permits Based on Compliance History Work?*

In this proposal, we introduce the concept of having additional permit conditions for applicants depending on how well each has demonstrated a commitment to sound mining and reclamation practices. Possibly the best predictor of the likelihood that an applicant will meet the obligations of a permit is the record of how well the applicant has met them for past operations. Applicants with good environmental compliance records have earned a greater degree of trust than those who have not practiced sound mining and reclamation, or who have limited surface coal mining experience, or who have owners and controllers linked to outstanding violations. While all permittees would still be subject to the same on-the-ground mining and reclamation requirements, we propose that some of the administrative and procedural requirements or permit conditions would differ depending on the record of past mining.

Specifically, we propose that regulatory authorities place additional conditions in the permits of applicants who *do not have* established a record of successful environmental compliance. Such additional conditions also would apply to applicants whose owners or controllers have links to outstanding violations. Those additional conditions would include payment of all civil penalties, AML reclamation fees, and AML audit debts within the 30-days after we provide specific notice that they are due. These permittees also must take all possible steps to abate any outstanding violation within the period set for abatement. And, the permittee must maintain uninterrupted compliance with all provisions of any abatement plan or payment schedule or other settlement agreement.

Under our proposal, establishing a record of successful environmental compliance would be demonstrated if the applicant (1) has mined and reclaimed under approved permits for at least five years before the date of application; (2) has no outstanding violations; and (3) does not have owners

or controllers who are linked to any outstanding violations.

We also propose that the regulatory authority may presume that a notice of violation existing at the time of application is being corrected for applicants *having* established a record of successful environmental compliance, as long as the period allowed for abatement of the notice of violation has not yet expired. This presumption would *not apply* to applicants who *do not have* an established record of successful environmental compliance.

The proposed rule provides that failure to comply with any permit condition by a permittee who was found not to have established a record of successful compliance at the time the permit was issued may result in a regulatory finding that the permittee is unable or unwilling to comply with the mining and reclamation plan. Further, such a finding would constitute adequate reason for the regulatory authority to promptly issue an order for the permittee to show cause why the permit should not be suspended or revoked.

#### *L. What are Some Examples of how the New Rules Would Treat Different Applicants?*

The following examples illustrate how this rule changes permit eligibility and permit conditions. Six hypothetical mining companies—Able, Baker, Austin, Charley, Destiny and Eagle—have applied for permits to mine. Able, Baker and Austin are denied permits, while Charley, Destiny and Eagle are issued permits. Charley's and Destiny's permits have the additional permit conditions described in this proposed rule, while the permit issued to Eagle does not. Here's why:

1. Able Coal Company has been mining coal for 12 years and has one outstanding violation from a prior operation. Regardless of Able's overall compliance record or the number of years the company has been mining, Able is ineligible for a permit under section 510(c) of SMCRA until the violation is remedied.

2. Baker Industries has been mining coal for 14 years and has no outstanding violations; however, a company that Baker controls—Farthing Coal—does. Under section 510(c), Baker is ineligible for a permit because it owns or controls an operation with a violation. As with Able Coal, regardless of Baker's overall compliance record or the number of years the company has been mining, Baker is ineligible for a permit under section 510(c) of SMCRA until Farthing's violation is remedied.

3. Austin Coal has been in operation without compliance problems for 10 years. Six months ago, Austin was purchased by Owens Enterprises. John Owens, president of Owens Enterprises, was recently issued a permanent injunction by a State court prohibiting him from mining due to numerous environmental problems at a half-dozen Owens mining operations. Issuing a permit to Austin would be inconsistent with the state court order in that it would again place John Owens in a position of control over a mining operation. Austin's application would be denied.

4. Charley Mining Company has been mining coal for six years without any compliance problems. However, Charley is controlled by Fickle Commodities, which has an outstanding violation. Charley would be eligible for a permit because it does not own or control the operation with the violation. However, the control that Fickle exercises over Charley puts Charley at an increased risk of not meeting all the requirements of its permit. The permit issued to Charley would be conditioned as described in this proposed rule.

5. Destiny Mining, which began mining operations three years ago, also has been mining without any compliance problems. Destiny is controlled by Fathom, Inc., which has no outstanding violations. Destiny would be eligible for a permit because it does not own or control any operations with violations. However, despite the good compliance record of Destiny and the violation-free status of its controller, the permit issued to Destiny would have to be conditioned as described in this proposed rule because the company has not yet accumulated the minimum required five years of successful compliance experience.

6. Eagle Coal Works also has been mining without any compliance problems for six years. Eagle is controlled by Frisk Mining, which is controlled by F&A Enterprises, which is a wholly owned subsidiary of the Faithful Corporation. None of the owners or controllers—Frisk, F&A or Faithful—has any outstanding violations. Eagle would be eligible for a permit because it does not own or control any operations with violations. Further, because of Eagle's successful compliance record over a period of at least five years, and the violation-free status of the three companies that own or control Eagle, the company's permit would not have the additional permit conditions described in this proposed rule.

*M. Would This Rule Affect Other Documents That OSM has Published in the Past?*

OSM proposes to incorporate into the regulations the provisions of the existing Memoranda of Understanding (MOUs) with primacy States regarding use of the AVS. Thus, requirements for State regulatory authorities related to ownership and control will be consolidated for improved clarity and ease of reference. The MOUs have been widely accepted by the States and OSM as effective mechanisms for working together in operating and maintaining the AVS.

In addition, as part of today's action, we formally withdraw our June 28, 1993, proposal (58 FR 34652 *et seq.*). Our 1993 proposal would have amended the regulations invalidated by the Appeals Court but, as a result of the court's decision, has been rendered moot.

*N. Would the Rule Affect State Primacy?*

In the process of re-evaluating our ownership and control procedures, and in response to concerns raised during public outreach, we will be changing the recommendation process that we use in response to State requests for AVS checks. Currently, when information in the AVS indicates that the regulatory authority should deny an application, we review the relevant data to confirm that the recommendation to deny is based on accurate and recent information. If we do not discover anything that would call the recommendation into question, we recommend to the regulatory authority that it deny the permit, except in instances where the recommendation would be inconsistent with the court ruling.

A long-standing issue concerning the use of AVS has been our permitting recommendations to State regulatory authorities. Frequently, State regulatory authorities were perceived as considering our recommendations as dictates, rather than as advice, on how States were to make permitting

decisions. While our intent in making recommendations to States has been to ensure quality control of AVS-generated information, we believe that a change would help to clarify our role and the role of the States in permitting. Instead of providing permit eligibility recommendations, we propose to use AVS to provide a variety of reports, including ownership and control and violation reports. State regulatory authorities would then perform their own analysis of applicants' legal identity information, permit history, and compliance history and make permitting decisions without an OSM recommendation.

This revised approach should leave no doubt that it is OSM's responsibility to operate the AVS and maintain the integrity of the data in the system, and it is the State's responsibility to decide whether to issue the permit (of course, OSM would make the permitting decisions in Federal program States). As with other aspects of the implementation of approved State programs, this activity would be subject to our oversight reviews.

Although our policy concerning whether or not to provide recommendations to regulatory authorities is not established in regulations, and the change described here would not require any revision to our regulations, we are mentioning this change here for the public's information because it arose in large part from the public outreach process for this rulemaking.

*O. How Does OSM Address the Information Collection Burdens of This Rule?*

Sections 773.10, 774.10 and 778.10 address information collection requirements and the appropriate Office of Management and Budget (OMB) clearance numbers for each part. We propose to amend these sections by updating the data in each section and estimating the burden of complying with the information collection requirements for each response. The proposal also includes the addresses of

OSM and OMB officials where comments on the information collection requirements may be sent.

*P. What Provisions in SMCRA Authorize These Proposed Changes?*

The proposed rules are based on the following sections of SMCRA:

Section 201—Creation of the Office  
Section 402—Reclamation Fee  
Section 506—Permits  
Section 507—Application Requirements  
Section 510—Permit Approval or Denial  
Section 511—Revision of Permits  
Section 518—Penalties  
Section 521—Enforcement

**III. Discussion of Proposed Rules**

This proposal affects the following sections of OSM's current regulations: §§ 701.5, 724.5, 773.5, 773.10, 773.15, 773.16, 773.17, 773.18, 773.20, 773.21, 773.22, 773.23, 773.24, 773.25, 774.10, 774.13, 774.17, 778.5, 778.10, 778.13, 778.14, 842.11, 843.5, 843.11, 843.13, 843.21, 843.24, and part 846.

Below is a table listing changes to the rules. We have included it here to describe briefly where the rules are proposed to be changed, the nature of the changes, and the intended effect. The table is arranged in the same sequence as the text of the proposed rule and the section-by-section description of rule changes, which follows the table. It is an important cross-reference in identifying provisions that are proposed to be added, revised, deleted, and moved.

In trying to understand the proposed changes, it is best to start with the table. For many of the proposed changes, the table will be sufficient to understand what we are proposing and its intended effect. For those changes where more explanation is needed, additional description is included in the discussion of our proposal following the table. And, to further clarify the proposed changes, we have included the full text of the regulatory changes at the end of this publication.

BILLING 4310-05-P

Part	Section	Description of proposed change
Part 701-- Permanent Regulatory Program	701.5	<p>Definitions added or amended for the following terms:</p> <ul style="list-style-type: none"> <li>- <u>Applicant/Violator System</u> or AVS (from 773.5; amended) to make clear that States make permitting decisions and clarify the purpose of the AVS and to bring the definition into compliance with the Court of Appeals decision.</li> <li>- <u>Federal violation notice</u> (from 773.5)--the definition is unchanged but is moved to this section to have broader applicability and utility under the regulations.</li> <li>- <u>Knowing</u> or <u>Knowingly</u> (from 724.5 and 846.5; amended)--definition is amended to broaden the scope of its applicability to persons or entities other than a corporate permittee.</li> <li>- <u>Link to a violation</u> (new; formed from "Ownership or control link")--definition will identify individuals with outstanding violations at other mine sites in an owner/controller capacity to the current applicant.</li> <li>- <u>Outstanding violation</u> (new)--refers to any and all violations that have not been abated or corrected and the time for abatement has expired.</li> <li>- <u>State violation notice</u> (from 773.5)--the definition is unchanged but is moved for broader applicability and utility under the regulations.</li> <li>- <u>Successful environmental compliance</u> (new) definition is proposed to establish a standard for measuring timely environmental compliance including payment of fees and any penalties.</li> <li>- <u>Successor in interest</u> (amended)--definition is amended to apply</li> </ul>

Part	Section	Description of proposed change
		<p>to persons who apply for and are approved under a change in the permittee.</p> <ul style="list-style-type: none"> <li>- <u>Violation notice</u> (from 773.5; amended)--definition is expanded in scope to apply to, among other things, bond forfeiture where the cost of reclamation exceeds the amount of the forfeited bond or, in bond pool states, that additional reclamation or reimbursement is required before the violation would be deemed abated.</li> <li>- <u>Willful</u> or <u>Willfully</u> (from 724.5 and 846.5; amended)--the definition has been expanded in scope to apply to other persons or entities other than a corporate permittee.</li> <li>- <u>Willful violation</u> is removed as inconsistent with definition of <u>willful</u> or <u>willfully</u>.</li> </ul>
Part 724-- Individual Civil Penalties	724.5	Definitions for <u>knowingly</u> and <u>willfully</u> are removed from 724.5 and moved to 701.5.
Part 773-- Requirements for Permits and Permit Processing	773.5	<p>Definitions for <u>Applicant/Violator System</u> or <u>AVS</u>, <u>Federal violation notice</u>, <u>State violation notice</u>, and <u>Violation notice</u> are moved to section 701.5.</p> <p>Definition for <u>Ownership or control link</u> is removed from the section and replaced in section 701.5 with a definition for <u>Link to a violation</u>.</p> <p>Definition for <u>Owned or controlled</u> and <u>owns or controls</u> is removed from this section, amended, and moved to new section 778.5 under <u>Ownership</u> and <u>Control</u>.</p>



Part	Section	Description of proposed change
	773.10	Information collection estimates are updated and revised to reflect the changes under the proposed rule.
	773.15	Amended section 773.15 Review of Permit Applications--revises the general requirements, permit eligibility criteria, and relevant procedures to include the requirements for accurate and complete information and other informational criteria.
	773.16	Added New Section--Permit Eligibility Determination--this new section contains the provisions for a permit eligibility determination.
	773.17	Amended to add controller certification.
	773.18	Added New Section--Additional permit conditions--this section will apply to applicants who cannot meet the successful environmental compliance definition or who have less than 5 years of experience in surface mining operations.
	773.20	Amended section on Improvidently Issued Permits to be consistent with proposed 773.15 and 773.16.
	773.21	Amended section on Rescission Procedures for Improvidently Issued Permits to be consistent with proposed 773.15 and 773.16.
	773.22	Current 773.22 is removed.  New 773.22 is created to add provisions to give OSM the authority to show violations attributable to applicants, permittees, surface coal mining operations, and controllers of surface coal mining operations.
	773.23	Current 773.23 is removed because the provisions are based on presumptions of common control as the basis for permit eligibility.

Part	Section	Description of proposed change
	773.24	Amended to remove references to challenging ownership or control links and to provide procedures for challenging whether a person had the ability to control a surface coal mining operation that has outstanding violations.
	773.25	Amended to remove references to challenging ownership or control links and to provide standards for challenging whether a person had the ability to control a surface coal mining operation that has outstanding violations.
Part 774-- Revision; Renewal; and Transfer, Assignment, or Sale of Permit Rights	774.10	Information collection estimates are updated and revised to reflect the changes under the proposed rule.
	774.13	Paragraph (e) was added to require the regulatory authority be notified when a person not requiring approval is changed or added under the permit.
	774.17	Revised to clarify who is subject to regulatory approval under transfer, assignment, or sale of permit rights. Revised to amend the requirements for a successor in interest.
Part 778-- Permit Applications- - Minimum Requirements for Legal, Financial, Compliance, and Related Information	778.5	Added to provide for amended definitions of <u>ownership</u> and <u>control</u> . The definitions are moved to part 778 to emphasize that ownership and control relate to the information disclosure requirements for permit applications.
	778.10	Amended to show any change in the public reporting and record keeping burden for part 778 as a result of this proposal.
	778.13	Amended to (1) more closely reflect the requirements of section 507(b) of the Act, (2) require applicants to disclose all persons having the ability to control the proposed operation, and (3) provide for reductions in the information collection burden for applicants. The heading of 778.13 is amended to Legal identity and identification of interests.
	778.14	Amended to remove the current requirement that an applicant must certify as to the status of notices of violation.

Part	Section	Description of proposed change
Part 842-- Federal Inspections and Monitoring	842.11	Amended paragraph (e)(3)(i) to remove reference to owners and controllers of a permittee and operator and to clarify to whom the provision applies.
Part 843-- Federal Enforcement	843.5	Deleted § 843.5, definition of <u>unwarranted failure to comply</u> was moved to § 846.5 and definition of <u>willful violation</u> was deleted as inconsistent with definition under § 701.5 of <u>willful</u> or <u>willfully</u> .
	843.11	Amended paragraph (g) to show correct cross-references in this proposal and to delete the reference to owners or controllers of the permittee.
	843.13	Suspension or revocation of permits: Pattern of violations. Section is moved to § 846.14 and amended.
	843.21	Amended to address inaccurate, incomplete, or false information.
	843.24	Deleted. Oversight to be conducted in concert with normal permitting oversight.
Part 846-- Individual Civil Penalties	846.5	Definitions of knowingly and willfully are moved to 701.5  Part 846 is amended, expanded and reorganized to show the provisions for all alternative enforcement actions.

## BILLING CODE 4310-05-C

Following is the section-by-section description of the proposed changes to OSM's regulations.

*A. Section 701.5—Definitions*

We propose "Applicant/Violator System or AVS" to mean the automated information system of applicant, permittee, operator, violation, and related data OSM maintains to achieve compliance with, and to implement, the purposes of SMCRA. The amended definition clarifies the purpose of the computerized system of data and information in light of the January 31, 1997 Appeals Court decision, including removing language from the current definition to make it more consistent with the court's ruling.

We propose "knowing or knowingly" to mean that an individual knew or had reason to know in authorizing, ordering, or carrying out an act or omission that

such an act or omission constituted a violation of the Act, or a failure or refusal to comply with the Act.

We also propose the related term "willful or willfully" to mean that an individual acted either intentionally, voluntarily or consciously, and with intentional disregard or plain indifference to legal requirements in authorizing, ordering or carrying out an action or omission that constituted a violation of the Act, or a failure or refusal to comply with the Act.

We propose to define "knowing" and "knowingly" together, and "willful" and "willfully" together, and to expand the scope of the definitions so that they apply to persons in addition to corporate permittees.

We propose to delete "willful violation" from §§ 701.5 and 843.5. We believe that the definition of "willful violation" is inconsistent with the definition of "willfully." By deleting

"willful violation" and adding "willful" to the definition of "willfully," we intend to make the terms "willful" and "willfully" consistent in their meaning.

We propose to add "link to a violation" to the regulatory definitions at § 701.5. "Link to a violation" is proposed to mean that a person owning or having the ability to control a proposed surface coal mining operation has owned or had the ability to control surface coal mining operations at another site at the time a violation existed at that operation. In proposing this definition, we emphasize an important distinction in both coverage and use. It does not cover an applicant's ownership or control of operations that are in violation of the Act—a relationship to violations considered in determining permit eligibility under section 510(c) of the Act. Instead, it covers the relationship between an applicant and an outstanding violation

where the two operations share the same controller—a relationship that we propose should serve as the basis for conditioning a permit once it is issued. We also propose that a “link to a violation” is the basis for determining the proper means of enforcement to achieve abatement or correction of an outstanding violation, including alternative enforcement.

We propose to add “outstanding violation” to the regulatory definitions at § 701.5 to mean a violation notice that remains unabated or uncorrected beyond the abatement or correction period. The definition encompasses all violation notices that remain unabated or uncorrected after all regulatory provisions for abatement or correction have expired. We propose to define “outstanding violation” so that the regulatory definition coincides with how the term is commonly used and widely accepted.

We propose “successful environmental compliance” to mean having no outstanding violations and demonstrating consistent abatement and other correction of violations, payment of civil penalties, and payment of reclamation fees within the time frames established for abatement and payment, allowing for administrative due process. We are adding this definition to § 701.5 to assist regulatory authorities in making a finding regarding an applicant’s or other person’s history of compliance with the Act, State laws, and any other relevant laws, regulations, or requirements. The definition of “successful environmental compliance”, and the provisions proposed at §§ 773.15(b)(3), 773.16, and 773.17, are intended to assist regulatory authorities in making the distinction between persons who have a record of successful environmental compliance and those who do not.

We propose “successor in interest” to mean a person who applies to the regulatory authority for approval under a change in an existing permittee. This change reflects the distinction we propose to make between those instances of a transfer, assignment, or sale of the rights granted under a permit that require only approval for a modification of the existing permit information and where a new permit is required as a result of a successor in interest.

We intend this change in the definition and the changes in proposed § 774.17 to be more consistent with the permitting requirements for a successor in interest in section 506(b) of the Act. Section 506(b) of the Act requires that the person proposing to continue mining and reclamation operations

under the existing permittee’s approved mining and reclamation plans must apply for a new permit within 30 days of succeeding to the interests of the existing permittee. The person also must be able to obtain bond coverage equivalent to the coverage obtained by the existing permittee.

We propose “violation notice” to mean any written notification from a governmental entity of a violation of the Act or any Federal regulation issued under the Act, a State program, or any Federal or State law, or regulation pertaining to air or water environmental protection in connection with a surface coal mining operation. The definition includes, but is not limited to: (1) a notice of violation; (2) an imminent harm cessation order; (3) a failure-to-abate cessation order; (4) a final order, bill, or demand letter pertaining to a delinquent civil penalty; (5) a bill or demand letter pertaining to delinquent reclamation fees; (6) a notice of bond forfeiture where one or more violations upon which the forfeiture was based have not been corrected; (7) a notice of bond forfeiture where the cost of reclamation has exceeded the amount forfeited, or in States with bond pools, a determination that additional reclamation or reimbursement is required.

In addition to moving the definition of “violation notice” from § 773.5 to § 701.5, we are proposing several amendments. The phrase “delinquent abandoned mine reclamation fees,” which is in the current definition, is changed to “delinquent reclamation fees” to be more consistent with language in section 402 of the Act. The definition also would apply to a notice of bond forfeiture where the cost of reclamation has exceeded the amount forfeited and, in States with bond pools, a determination that additional reclamation or reimbursement is required. This is intended to cover additional circumstances of bond forfeiture in response to information gathered in the public outreach.

We propose to move the definitions of “Federal violation notice” and “State violation notice” from § 773.5 to § 701.5.

#### *B. Section 773.5—Definitions*

We propose to move each regulatory definition currently contained in § 773.5, with the exception of “ownership or control link,” “owned or controlled” and “owns or controls” to § 701.5. We propose to eliminate definition of the “ownership or control link.” “Ownership or control link” is too closely associated with the way we implemented the 1988 “ownership or control” and related rules that the

Appeals Court invalidated. Our reasons for proposing to move and amend the definition of “owned or controlled” or “owns or controls” to § 778.5 are discussed below, in that section. The net result of these proposed changes to § 773.5 means is that this section is no longer required under part 773.

#### *C. Section 773.10—Information Collection*

We propose to amend the information collection provision in § 773.10. Consistent with the Paperwork Reduction Act, we note in paragraph (a) that the Office of Management and Budget (OMB) has approved the information collection requirements of this part. The regulatory authorities will use this information in processing surface coal mining permit applications. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB clearance number for this part is 1029–NEW.

In proposed paragraph (b) we estimate that the public reporting burden for this part will average 34 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 210, 1951 Constitution Avenue, NW, Washington, DC 20240; 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–NEW in any correspondence.

#### *D. Section 773.15—Review of Permit Applications*

At § 773.15, we propose to revise the general requirements to be consistent with other changes we are proposing today and to include additional responsibilities for regulatory authorities in reviewing permit applications. These responsibilities include determining permit eligibility and requiring information to be accurate and complete. We also propose to ensure that applicants, and those persons who certify themselves to be the

owners and controllers of an applicant, comply with these requirements in order to obtain a permit for surface coal mining and reclamation operations.

Paragraph (a)(1) is proposed to be amended by changing the reference to a hearing in the last sentence from (b)(2) of this section to part 775. Part 775 provides requirements for administrative and judicial review of decisions on permits.

Proposed paragraph (a)(3) requires that the regulatory authority make a determination under proposed § 773.15 as to the eligibility of every applicant under § 773.16 before an applicant may receive a permit. Proposed § 773.16 provides for a determination of permit eligibility and is discussed below.

Proposed paragraph (a)(3)(i) provides that the regulatory authority must evaluate each application for a permit to determine whether it contains accurate and complete information to make the finding required under § 773.15(c)(1).

Proposed paragraph (a)(3)(ii) provides that if, at any time during the review process, the regulatory authority determines that the applicant has omitted, or provided inaccurate or incomplete, legal identity, compliance, or technical information, the regulatory authority must require the applicant to correct the omission, inaccuracy, or inconsistency. It also provides that the regulatory authority may discontinue review of the application until the issue is resolved. Such failure to provide accurate and complete information will result in, at a minimum, a delay in the approval of an application for a permit.

Proposed paragraph (b) requires that the regulatory authority review each applicant's legal identity information, permit history, and compliance history. We have restructured and amended the provisions at § 773.15(b) to enable regulatory authorities to evaluate an applicant based upon a three-part review. In reviewing the permit application and deciding whether to place additional conditions on a permit, the regulatory authority will evaluate the applicant's (1) legal identity information, (2) permit history, and (3) compliance history. This evaluation process incorporates the use of investigations to build a body of findings in the assessment of an applicant's eligibility.

Proposed paragraph (b)(1), the first part of the permit eligibility review process, requires the regulatory authority to make an initial determination whether the applicant's legal identity information submitted under § 778.13 is accurate and complete based upon the best information available. Within 30 days after the

preliminary determination that the information is accurate and complete, regulatory authorities are required to update the relevant records in AVS. The determination and update of AVS records would have to occur before any regulatory authority request for applicant compliance reports from AVS under paragraph (b)(3) in this section. This preliminary determination should not be confused with the finding the regulatory authority makes on all information in the permit application under § 773.15(c)(1).

Proposed paragraph (b)(1)(i) requires that, if the regulatory authority finds that an applicant, permittee, operator, or any owner, controller, principal, or agent of the applicant, permittee, or operator has knowingly or willfully concealed information about any person owning or having the ability to control the applicant, permittee, or operator, the regulatory authority will follow the courses of action described in paragraph (b)(1)(i)(A) and (B).

Proposed paragraph (b)(1)(i)(A) requires the regulatory authority to inform the applicant in writing of the regulatory authority's finding; request that the applicant, permittee, or operator disclose all persons owning or having the ability to control the applicant; and convey to the applicant, permittee, or operator that the information must be provided to the regulatory authority before it makes a decision on the application.

Proposed paragraph (b)(1)(i)(B) requires the regulatory authority to investigate the applicant, permittee, or operator and the information provided to determine if the request made under paragraph (b)(1)(i)(A) has been met with full disclosure. This provision is the first instance where we have incorporated investigation into the review of permit applications. Investigation is one of the four key elements of this redesigned approach to our regulatory program, in addition to permit information, permit eligibility, and alternative enforcement. In this provision, we intend that the regulatory authority actively determine whether the applicant, permittee, or operator has complied with the regulatory authority's request to fully disclose all relationships under proposed § 778.13.

Proposed paragraph (b)(1)(i)(B)(1) provides that, depending on the results of the applicant's response to the provision in paragraph (b)(1)(i)(A) and the investigation under (b)(1)(i)(B), the regulatory authority may deny approval of the application. We believe that if the applicant, permittee, or operator fails to comply with the regulatory authority's request to fully disclose all relationships

under proposed § 778.13, the applicant, permittee, or operator has not complied with the requirements of § 778.13, and therefore, the application is incomplete. On that basis, the regulatory authority may elect to deny approval of the application.

Proposed paragraph (b)(1)(i)(B)(2) provides that, if the regulatory authority denies the application under paragraph (b)(1)(i)(B)(1), the regulatory authority may refer the applicant, or owner, controller, principal, or agent of the applicant, to the Attorney General or equivalent State office for prosecution under section 518(g) of the Act and proposed § 846.11 of the regulations.

Proposed paragraph (b)(2), the second part of the permit eligibility review process, provides for the review of the applicant's permit history. First, proposed paragraph (b)(2)(i) requires the regulatory authority to use AVS and any other available databases or information to review the permit history of the applicant, and that of any person with the ability to control the applicant. The purpose of the review is to determine how long they have conducted surface coal mining operations and whether their conduct is in compliance with applicable requirements of the Act, Federal regulations and equivalent State regulations.

Proposed paragraph (b)(2)(ii) provides that an applicant with five or more years of experience as a permittee or operator of a surface coal mining operation will not be subject to additional permit conditions proposed at § 773.18 unless any person with the ability to control the applicant or the operation is responsible for an outstanding violation.

In proposed § 773.15, we introduce the concept of considering past mining experience and placing additional conditions on issued permits for those applicants lacking successful experience. We propose that five years is the minimum amount of experience that an applicant should have in order for a regulatory authority to be reasonably confident that a surface coal mining and reclamation operation will be successful and not become a burden to the regulatory authority and the general public. We propose the experience criterion to provide regulatory authorities with an indicator of the potential success of a surface coal mining operation.

Proposed paragraph (b)(2)(iii) provides that, if it appears that none of the persons identified in the application has any previous mining experience, the regulatory authority must request that the applicant affirmatively state that neither the applicant nor any person owning or having the ability to control

the proposed operation possesses mining experience. This provision also requires that the regulatory authority investigate to determine whether any person other than those identified in the application will control the proposed operation as either an operator or other controller. As with paragraph (b)(2)(ii) above, we propose paragraph (b)(2)(iii) to provide regulatory authorities with an indicator of the potential success of a surface coal mining operation.

Failed mining operations place increased burdens on State programs to reclaim such sites. We believe that permittees that fail, and their owners and controllers, must be required to comply with special conditions in order to continue to receive approval for additional permits. We received comments during the public outreach preceding the development of this proposal that stressed the need for some form of distinguishing criteria to apply to applicants for permits. It was suggested that we consider giving an advantage in the permitting process to applicants with successful compliance records and impose additional requirements on applicants who do not meet the criteria.

We invite comments on the two criteria proposed here in § 773.15—five or more years of mining experience and successful environmental compliance—as well as suggestions for other criteria that may be used to distinguish among proposed operations that are likely to be successful and those that are not. We also invite comments on the criterion proposed in § 773.16—withholding of the presumption of abatement of a notice of violation—and other suggestions as to how the distinctions may be implemented. For example, should the criteria apply to the owners and controllers of applicants in addition to the applicant itself?

Paragraph (b)(3), the third part of the permit eligibility review process, provides for the review of an applicant's compliance history. We propose that this review include a review of violations and an examination of the applicant's controllers.

Proposed paragraph (b)(3)(i) provides that the regulatory authority must request a report from AVS on the applicant's history of compliance with SMCRA for an application for a permit; revision; renewal; transfer, assignment, or sale of the rights granted under a permit; and an application from a successor in interest to the rights granted under a permit. This provision specifies all of the circumstances under which a review of violations must be conducted and includes each of the relevant permitting or approval

processes. We intend that an applicant under each of these processes must prove eligible to hold a permit under the permit eligibility standard of section 510(c) of the Act. In the case of an application for a renewal of a permit, the burden of proof to find that an applicant is not eligible under section 510(c) rests with the regulatory authority, as provided under § 774.15(c)(2).

Paragraph (b)(3)(i) also would replace OSM's current policy that requires regulatory authorities to obtain permit eligibility recommendations on pending applications from AVS through a two-step process. Currently, the regulatory authority first uses the AVS to obtain a computer system-generated recommendation of permit eligibility. Second, to ensure that AVS data is reliable and up-to-date, OSM reviews the system recommendation and supporting data and uses AVS to provide a final recommendation to the regulatory authority.

In the future, instead of providing permit eligibility recommendations, we would use AVS to provide a variety of reports, including a report on applicants and violations on the operations they own or control, for use by the regulatory authority in reviewing applications and permits. Consistent with the principle of State primacy, regulatory authorities would then perform their own analyses of an applicant's legal identity information, permit history, and compliance history, and make permitting decisions based on their findings without receiving a recommendation from OSM. Our role would be to administer and operate the AVS and maintain the integrity of the system data. The State, subject to OSM oversight reviews, would have full authority in deciding whether to issue a permit. As discussed below at § 773.15(b)(3)(ii), the AVS report on the compliance history of the applicant and the AVS report on the applicant's owners and controllers will be used for distinctly different purposes.

Proposed paragraph (b)(3)(i)(A) provides that the regulatory authority will rely upon the applicant's compliance history, and the history of operations owned or controlled by the applicant, to make a permit eligibility finding under section 510(c) of SMCRA, unless there is an indication that the history of persons other than the applicant should be included as well. This provision has been expressly crafted to reflect the January 31, 1997, ruling in *NMA v. DOI*. The Appeals Court ruled that OSM could not apply section 510(c) of the Act to the individual owners or controllers of an

applicant. In other words, OSM could not deny permits under section 510(c) based upon the violations of those who controlled the applicant.

In proposed § 773.15, we have provided for regulatory authorities to obtain compliance history reports on persons in addition to the applicant for the purposes of determining permit eligibility. As described in (b)(3)(i)(G) below, when certain persons who own or control an applicant are, themselves, barred from mining, that prohibition could be sufficient to warrant denial of the permit application under provisions other than § 510(c). The regulatory authority may identify such persons by way of investigation or through other information available to the regulatory authority.

Proposed paragraphs (b)(3)(i)(B)(1) through (3) provide that if the applicant, or any surface coal mining operation owned or controlled by the applicant, has an outstanding violation, the regulatory authority may not approve the application unless one of the following apply:

- the applicant obtains a properly executed abatement plan or payment schedule that is approved by the regulatory authority with jurisdiction over the violation;
- the violation is in the process of being abated;
- the violation is the subject of a good faith administrative or judicial appeal contesting the validity of the violation; or
- the violation is subject to the presumption of NOV abatement under proposed § 773.16(b).

In addition, proposed paragraph (b)(3)(i)(C) requires that any application approved with outstanding violations must be conditioned in accordance with § 773.17(l).

These provisions describe the actions an applicant must take in order to obtain approval when the applicant, or an operation owned or controlled by the applicant, has outstanding violations. "Outstanding violation" is proposed to be defined at § 701.5 and means a violation notice that remains unabated or uncorrected beyond the abatement or correction period. A proposed change in the definition of "violation notice" will add a new violation type to the more typical violations under this review process. An applicant will be ineligible for a permit if the applicant has forfeited a performance bond and has failed to reimburse the regulatory authority for any costs in excess of the amount forfeited to achieve full reclamation under the applicable reclamation standards in § 800.50(d)(1). Similarly, in States with bond pools—a type of

bonding where many operators contribute to a combined fund—an applicant will not be eligible for a permit if a determination is made that additional reclamation or reimbursement is required beyond any existing reclamation or the amount contributed to the bond pool by the applicant. This is intended to provide relief to regulatory authorities from the harmful effects of bond forfeiture on their programs, especially from permittees responsible for repeated bond forfeiture. In instances where States have been required to complete reclamation at an additional cost to the State, an applicant would not be eligible if it failed to reimburse the State for the cost of reclamation in excess of the amount of the performance bond. The provisions proposed here are based, in part, upon the current regulation at § 773.15(b)(1), (b)(1)(i), and (b)(1)(ii).

Proposed paragraph (b)(3)(i)(D) is the first of two provisions that describe circumstances under which an applicant or other person will be found ineligible to hold a permit. This paragraph provides that OSM will serve a preliminary finding under 43 CFR § 4.1351 upon an applicant or operator if (1) the applicant or operator is found to have owned or controlled mining operations with a demonstrated pattern of willful violations of the Act and its implementing regulations, and (2) the violations are of such nature and duration that they result in irreparable harm to the environment, so as to indicate an intent on the part of the applicant or operator not to comply with the Act or implementing regulations.

Proposed paragraph (b)(3)(i)(E) provides that the applicant or operator may request a hearing under 43 CFR § 4.1350 *et seq.*, with the Office of Hearings and Appeals within 30 days of receipt of the preliminary finding. It further provides that, if the applicant or operator files a request for a hearing under 43 CFR 4.1350 *et seq.*, the Office of Hearings and Appeals will give written notice of the hearing to the applicant or operator and must issue a decision within 60 days of the filing of the request for a hearing.

Proposed paragraph (b)(3)(i)(F) provides that the decision of the administrative law judge may be appealed to the Interior Board of Land Appeals under procedures set forth in 43 CFR 4.1271 *et seq.* within 20 days of receipt of the decision.

We propose this amendment, which is based upon the current regulation at § 773.15(b)(3), to more fully state the administrative remedies and due process rights of persons preliminarily

found to be permanently ineligible for a permit. We believe a full description of the remedies and rights is important because regulatory authorities should be able to implement the second part of section 510(c) of the Act to permanently withhold the benefit of a surface coal mining permit from those persons who have committed the most flagrant violations and have not made a reasonable attempt to rectify the resulting environmental damage. However, we also recognize that upholding a preliminary finding under this proposed provision would have very serious consequences. We intend to ensure full due process and those rights are expressly addressed in the implementing regulation.

Proposed paragraph (b)(3)(i)(G) is the second of three provisions that describe circumstances under which an applicant will be found ineligible to hold a permit. It provides that an applicant will not be eligible for a permit if the applicant or anyone proposing to engage in or carry out operations on the proposed permit has been barred, disqualified, restrained, enjoined, or otherwise prohibited from mining under § 773.15(b)(3)(i)(D) or proposed § 846.16 by a Federal or State court. Proposed § 846.16, civil actions for relief, is discussed below in part 846.

We cannot deny a permit under section 510(c) of the Act based upon the violations of an applicant's owners or controllers at other operations. However, we can and should withhold permit approval if the person controlling the operation has been barred, disqualified, restrained, enjoined, or otherwise prohibited from mining by administrative or judicial decision.

We must seek to protect the benefit to hold a surface coal mining permit for those persons who have demonstrated compliance with statutory and regulatory requirements. In cases where a person is adjudicated to have demonstrated such disregard for the environment that the person has been barred, disqualified, restrained, enjoined, or otherwise prohibited from mining, the presence of such a person as an owner, controller, or agent of an applicant is sufficient basis for denying the permit. To decide otherwise would result in actions that would contravene the administrative or judicial decision issued against such a person.

Paragraph (b)(3)(ii) provides for the examination of the controllers of the applicant to determine if any controller is responsible for outstanding violations. The provisions at (b)(3)(ii) are intended to enable regulatory authorities to compel compliance to

rectify or otherwise resolve outstanding violations. We intend that the eligibility of its controllers based on outstanding violations will not impair the eligibility of the applicant. However, we also intend that regulatory authorities will identify persons who have failed to fulfill their environmental and debt obligations under the Act and its implementing regulations.

Proposed paragraph (b)(3)(ii)(A) provides that the regulatory authority will request a report from AVS to identify whether the owners or controllers of an applicant are also owners or controllers of a surface coal mining operation at the time a violation notice was issued and such violation notice remains outstanding. Unlike the report required for the applicant, the report required for owners and controllers will not be used as a basis to determine the eligibility of the applicant for a permit. Instead, it will be used to identify whether the owners or controllers of an applicant should be subject to investigation to determine whether remedial enforcement, including alternative enforcement actions, are appropriate to compel compliance with SMCRA and its implementing regulations. This provision establishes that OSM will no longer provide recommendations regarding the eligibility of applicants, either from AVS or from our quality assurance activities. Instead, we will provide reports of organized information generated from AVS. Regulatory authorities must use this information to formulate their own determinations.

Proposed paragraph (b)(3)(ii)(B) requires that the appropriate regulatory authority investigate each person and violation to determine whether alternative enforcement action is appropriate, as discussed below under part 846. OSM and the State regulatory authority will make the appropriate determination or referral for violations under their jurisdiction and must enter the results of each determination or referral into the AVS. Paragraph (b)(3)(ii)(B) enables regulatory authorities to compel the owners and controllers of applicants to fulfill their environmental and debt obligations where they are found to be responsible for violations. We believe that regulatory authorities must still compel compliance from these persons. To accomplish this, we are amending part 846 to provide for remedies available to regulatory authorities to compel compliance from the owners and controllers of applicants who are responsible for outstanding violations.

Proposed paragraph (b)(3)(ii)(C) provides that if the regulatory authority finds that an applicant has less than five years experience in surface coal mining operations or has owners or controllers that are linked to outstanding violations, the regulatory authority will consider the applicant to have insufficient or unsuccessful environmental compliance and therefore be subject to additional permit conditions under proposed § 773.18, which is discussed below. We propose to make clear distinctions between applicants that have demonstrated successful mining and reclamation experience, compliance with the Act and regulations, and those applicants that have not. As indicated above, we are interested in receiving comments specific to the proposed criteria (less than five years experience; owners or controllers linked to violations) for distinguishing among applicants eligible for permit approval in determining which applicants should be subject to additional permit conditions. We are also interested in receiving comments on what permit conditions under proposed § 773.18 would be appropriate.

Paragraph (b)(4) is unchanged from the current regulation, except to correct "September 30, 1994" to "September 30, 2004" at § 773.15(b)(4)(i)(C)(1). Paragraphs (c) and (d) are unchanged from the current regulation.

Proposed paragraph (e) provides for the final compliance review of an application. It requires that, after an applicant is determined eligible, but before the permit is issued, the regulatory authority will review any new information submitted or discovered during the permit application review. Proposed paragraph (e) further provides that, no more than three business days before permit issuance, the regulatory authority must again request a report from AVS on the applicant's history of compliance to ensure that the applicant is, or operations owned or controlled by the applicant are, not currently linked to any outstanding violations. This provision is based, in principle, on agreements with the States documented in Memoranda of Understanding (MOU) regarding AVS operation and current OSM policy regarding the frequency and timing for States to obtain permit eligibility recommendations prior to making permitting decisions. We also intend to incorporate other provisions contained in the MOUs that remain relevant to the regulatory program under this proposal, and eliminate the need for the MOUs.

This proposal also has the effect of removing the current provision at

§ 773.15(b)(2). This regulation refers to the certification of violation information provided by an applicant under § 778.14. This certification requirement is proposed to be removed from the regulations at proposed § 778.14. The current provision also refers to presumptions. One significant effect of the proposed redesign approach would be to eliminate the use of presumptions of ownership or control. We propose to eliminate the concept of the rebuttable presumption of ownership or control, discussed in more detail at § 778.5, and the effect of presumptions on permit eligibility, discussed above at § 773.15(b)(3).

With respect to current § 773.15(b)(2), the regulation is based upon the presumption of links to violations and is not in conformity with the conceptual basis of this proposal. The remaining portions of the current regulation at § 773.15(b)(2) regarding the status of violations disclosed under § 778.14 and the terms of permit issuance, have been incorporated into proposed § 773.15(b)(3)(i), discussed above, and § 773.18, discussed below.

#### *E. Section 773.16—Permit Eligibility Determination*

We propose to create § 773.16 to provide for permit eligibility determinations. These provisions represent the net effect of the regulatory authority's review of permit applications in the proposed amendments to § 773.15(b), discussed above in § 773.15.

Proposed paragraph (a) requires that the regulatory authority determines whether the applicant is eligible based upon the permit and compliance history of the applicant, operations the applicant owns or controls, and operations it owned or controlled provided for in proposed § 773.15(b).

Paragraph (a)(1) further provides that the regulatory authority will determine whether the application for a permit should be approved subject to additional permit conditions proposed in § 773.18, depending upon the applicant's permit and compliance history and the compliance history of the applicant's owners and controllers. These permit conditions are in addition to those routinely required of applicants under § 773.17. These additional conditions would be required for applicants that either fail to meet either the experience requirement or whose owners or controllers are found to be responsible for outstanding violations. We invite comments specifically addressing the criteria for distinguishing which applicants should be subject to

additional permit conditions and what type of conditions should be imposed.

Paragraph (a)(2) requires the regulatory authority to send the applicant written notice if found ineligible. The regulatory authority will include in the notice the reasons you were found ineligible and how to challenge a finding on the ability to control a surface coal mining operation.

Proposed paragraph (b) provides for the presumption of NOV abatement. The proposed provision states that, in the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation issued under § 843.12 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. Paragraph (b) further provides that permits approved utilizing the presumption of NOV abatement will be conditioned as required under proposed § 773.17(l). Paragraph (b) further provides that the presumption will not apply: (1) if the abatement period has expired; (2) to applicants subject to additional permit conditions under proposed § 773.18; (3) where evidence that the violation is not being abated is either set forth in the permit application or discovered; or (4) if the notice of violation is issued for nonpayment of reclamation fees or civil penalties.

Proposed paragraph (b)(3) provides the regulatory authority may not approve the application unless the applicant meets one of the criteria addressing the violation under paragraph § 773.15(b)(3)(i)(B).

#### *F. Section 773.17—Permit Conditions*

We have established in current regulations permit conditions that are routinely attached to all approved permits. In this proposal, we propose to amend paragraphs (h)(1) and (h)(2) and to add new conditions under paragraphs (i) through (m).

Proposed paragraph (h) provides that within thirty days after a cessation order is issued under § 843.11, or the State program equivalent, for operations conducted under the permit, the permittee must either submit to the regulatory authority updated or corrected 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 submission of such information. This provision applies except where a stay of the cessation order is granted and remains in effect.

Proposed paragraph (h)(1) provides that a permittee or operator must



provide any new information needed to update or correct information previously submitted to the regulatory authority under § 778.13(c), (e), and (g). This amendment is proposed in order to revise the cross-references to § 778.13. To the extent that provisions at § 778.13 are revised, the cross-references here in § 773.17 are amended.

Proposed paragraph (h)(1)(i) provides that if the information required in a permit application under § 778.13(c), (e), and (g) has not been previously submitted to the regulatory authority, it must be submitted. We propose to amend the current provision such that "permit applicant" is changed to "permit application".

We propose to add paragraph (i) to § 773.17. It provides that the permittee, operator, or another person named in the application as having the ability to determine the manner in which the surface coal mining operation would be conducted will be considered the controllers of the permit.

Paragraph (j) provides that: all controllers are jointly and severally responsible for compliance with the terms and conditions of the permit and regulatory program; all controllers are subject to the jurisdiction of the Secretary of the Interior; and a breach of the responsibility for compliance with the terms and conditions of the permit and the regulatory program may result in a controller's individual liability.

Paragraph (k) provides that regulatory authorities may, at any time, through investigation, determine that additional persons are controllers. Paragraph (k) also provides that, after the permit is issued, if any controllers are identified by the regulatory authority or added by the permittee or operator, the new controller will be subject to the requirement to certify under proposed § 778.13(m), discussed below.

We propose to add this condition to all approved permits to accomplish several purposes. First, and most notably, all persons named in an application that have the ability to determine the manner in which the surface coal mining operation is conducted will be considered controllers of the permit. Under the redesigned approach, we are eliminating the use of rebuttable presumptions in the definitions of ownership and control. The effect of eliminating the use of the rebuttable presumption is that all persons identified as owners or controllers, or otherwise identified as having the ability to determine the manner in which operations are conducted, are all proposed to be control relationships with respect to the surface coal mining operation. This

means that certification by such persons in an application will establish their responsibility under the regulatory program. In addition, persons having the ability to determine the manner in which surface coal mining operations are conducted, however they may be identified, are made fully aware that they are subject to the jurisdiction of the Secretary of the Interior for the purposes of their compliance with all Federal and State terms and conditions under which their permit is issued.

Any breach of a controller's responsibility for compliance with the terms and conditions of the regulatory program may result in individual liability. We are enabling regulatory authorities to pursue individual liability through a variety of remedies, including pursuit of the suspension or revocation of a permit for failure to comply with the conditions under which a permit is issued, discussed below at proposed § 846.15.

We propose to add paragraph (l) to § 773.17. It provides that, as applicable, the permittee or operator must abate or correct any outstanding violation or payment, absent an administrative or judicial decision invalidating the violation. This provision conveys to the owners and controllers of a permittee that issuance of a permit does not defer the obligation of the permittee or operator to abate or correct any violation notice that may be outstanding at the time of permit issuance. This provision applies to applicants that have been approved for a permit that have also received the benefit of the presumption of NOV abatement, proposed at § 773.16(b). This provision is based upon the current regulation at § 773.20(c)(1)(ii), which is a permit condition. Therefore, we propose to move the provision from § 773.20(c)(1)(ii) to § 773.17(l).

We propose to add paragraph (m) to § 773.17. It provides that a permit will be subject to any other special permit conditions the regulatory authority determines are necessary to ensure compliance with the performance standards and regulations.

#### *G. Section 773.18—Additional Permit Conditions*

We propose to create § 773.18 to provide for the permit conditions required of applicants eligible under § 773.15(b) but that have less than five years experience in surface coal mining operations or whose controllers are responsible for outstanding violations and thus, have not demonstrated successful environmental compliance. These are permit conditions that the regulatory authority must require of

such applicants in addition to the standard permit conditions provided for in § 773.17. We propose these additional conditions to enable the regulatory authority to more closely monitor the operations of permittees with limited surface coal mining experience and whose owners and controllers have not demonstrated successful environmental compliance. We believe these permittees are a higher risk. If their operations are unsuccessful, their reclamation obligations would default to the regulatory authority. While the higher risk permittees are entitled to hold a permit under the redesigned approach, these permittees should be subject to greater scrutiny until they and their owners and controllers demonstrate their ability to comply with statutory and regulatory requirements with respect to their surface coal mining and reclamation operations.

These proposed distinctions among applicants are based on comments received during the public outreach preceding the development of this proposal. Certain comments stressed the need for some form of criteria to distinguish between applicants more likely to succeed and those that are not. It was suggested that we consider giving an advantage to applicants with demonstrated successful compliance records in the permitting process. We invite suggestions for other criteria that may be used to distinguish between proposed operations that are likely to succeed and those that are not. Also, we invite comments on how the proposed criteria should be applied. For example: would the experience criterion apply to all persons intending to engage in or carry out surface coal mining operations, including the owners and controllers of an applicant as well as to the applicant; would the experience criterion mean five consecutive years; and would the experience of a parent company count towards the experience of an applicant?

Proposed paragraph § 773.18(a) provides that a permittee's failure to comply with any additional permit condition provided for in this section may result in a regulatory finding that the permittee is unable or unwilling to comply with its mining and reclamation plan. Paragraph (a) further provides that such a finding constitutes adequate reason for the regulatory authority to promptly issue an order for the permittee to show cause why the permit should not be suspended or revoked under proposed § 846.15.

Proposed paragraph (b) provides that the permittee must pay all civil penalties assessed under part 845 within 30 days of the date of a final

order of the Secretary or State counterpart. While all permitted operations are expected to pay civil penalties in a timely manner, we believe that for higher risk operations, untimely payment of civil penalties is an indicator of the potential lack of success of the operation.

Proposed paragraph (c) provides that the permittee must take all possible steps to abate any outstanding violation before the expiration of the abatement period. As with the payment of civil penalties, all permitted operations are expected to abate violations in a timely manner. However, we believe that for higher risk operations, untimely abatement is another indicator of the potential lack of success of the operation.

Proposed paragraph (d) provides that the permittee must maintain continuous and uninterrupted compliance with any provision of an abatement plan, payment schedule or other settlement agreement. We readily enter into agreements with permittees, operators, or other persons to abate violations or to fulfill financial obligations where they are unable to abate or pay within the required time limits. We count on the good faith of these persons to adhere to the abatement plan or payment schedule or other terms of an agreement. In the case of the higher risk permittee, we believe that a lapse in compliance with an abatement plan, payment schedule, or other settlement agreement is yet another indicator of the potential lack of success of the operation.

#### *H. Section 773.20—Improvidently Issued Permits: General Procedures*

Proposed paragraph (a) provides for the permit review. The provision states that 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. Paragraph (a) further provides that, when the regulatory authority finds that the permit was improvidently issued, it must comply with paragraph (c) of this section. The language is unchanged from the current regulation.

At paragraph (b), which provides for the review criteria to determine whether a permit has been improvidently issued, the numerical identifier (1) in the paragraph is removed. The heading and language of the current regulation are unchanged.

Paragraph (b)(1)(i) of the current regulation would be re-numbered (b)(1). The language is unchanged from the current regulation.

Paragraph (b)(1)(i)(A) of the current regulation would be re-numbered (b)(1)(i) and amended. The phrase “unabated violation” would be changed to “outstanding violation.” This change is proposed because a regulatory definition for “outstanding violation,” proposed at § 701.5, defines a more inclusive set of violations and, as such, is more applicable to the circumstance described in the provision where a regulatory authority finds it should not have issued a permit.

Paragraph (b)(1)(i)(B) of the current regulation would be re-numbered (b)(1)(ii). In addition, we propose to add a provision to follow (b)(1)(ii) which also describes a circumstance where a regulatory authority finds it should not have issued a permit. Therefore, the last word in paragraph (b)(1)(ii) is proposed to be changed from “and” to “or.”

We propose to add paragraph (b)(1)(iii) to § 773.20 to provide that the failure of an applicant to disclose in its application any other relevant information that if properly disclosed at the time of the initial application would have made the applicant ineligible, is also cause for a finding that the permit was improvidently issued. We propose to add this provision to § 773.20 in keeping with the emphasis placed on permit information. The amendment is also consistent with the provisions of the MOUs with States regarding AVS operation that provide for States to require the resolution of inaccurate and incomplete application information. In this proposal, “permit information” means information required from applicants and permittees.

Paragraph (b)(1)(ii) in the current regulation would be re-numbered (b)(2). The language of the provision is unchanged from the current regulation.

Paragraph (b)(1)(ii)(A) would be re-numbered (b)(2)(i) and amended. The word “unabated” is changed to “outstanding” for the same reasons as stated above in proposed paragraph (b)(1)(i) of this section.

Paragraph (b)(1)(ii)(B) would be re-numbered (b)(2)(ii). The language in the provision is unchanged from the current regulation.

Paragraph (b)(1)(iii) would be re-numbered (b)(3). Paragraph (b)(3) also would be amended. The word “person” is changed to “operation.” We propose this change because the regulatory definition of “person” at § 700.5 includes “an individual.” The word “operation” is more in keeping with this proposal’s approach to permit eligibility.

Paragraph (b)(2), including paragraphs (b)(2)(i) and (b)(2)(ii), would be removed from § 773.20. To the extent that

§ 773.25 is amended in this proposal and §§ 773.20(b)(2) and (3) already provide for the same regulations, we believe the current § 773.20(b)(2) is an unnecessary duplication of provisions.

We propose to amend paragraph (c) of § 773.20. As discussed below in the individual provisions within paragraph (c), we propose to amend existing provisions and to add provisions to address the failure of an applicant to disclose accurate and complete information. These revisions address permit information, one of the four key elements of this proposal.

Proposed paragraph (c)(1) provides that a regulatory authority which finds that a permit was improvidently issued must use one or more of the three remedial measures that follow in the succeeding paragraphs proposed at §§ 773.20(c)(1)(i) through (c)(1)(iii). Paragraph (c)(1) is proposed to be amended to remove what we believe to be unnecessary language from the provision. As a result, proposed paragraph (c)(1) is more succinct.

Proposed paragraph (c)(1)(i) describes the first remedial measure. It provides for a plan to abate the violation, or a schedule to pay the penalty or fee, or that the regulatory authority require the permittee to correct the inaccurate information or provide the incomplete information. We propose to amend this provision by removing “with the cooperation of the responsible agency, the permittee, and persons owned or controlled by the permittee” from the provision. We believe this language is unnecessary to the provision. Instead, we propose to add “or require the permittee to correct the inaccurate information or provide the incomplete information” at the end of the provision. This change adds inaccurate or incomplete information to the criteria under which the regulatory authority may find a permit was improvidently issued. As with certain other provisions in this proposal, the concept governing sanctions for providing inaccurate and incomplete information is based upon provisions contained in the MOUs with State regulatory authorities regarding the operation of the AVS.

Paragraph (c)(1)(ii) in the current regulation would be removed from § 773.20. It provides for the imposition of a permit condition requiring the abatement of the violation or payment of the penalty or fee. We believe this requirement is more appropriate to the regulations governing permit conditions. Thus, we have proposed this provision as § 773.17(j).

Paragraph (c)(1)(iii) in the current regulation would be re-numbered (c)(1)(ii) and is the second remedial

measure. Proposed paragraph (c)(1)(ii) is largely a reorganization of current (c)(1)(iii) and provides that the regulatory authority may suspend the permit until one or more of three conditions are met. The three conditions are provided for in proposed paragraph (c)(1)(ii).

Proposed paragraph (c)(1)(ii)(A) provides that permit suspension will continue until the violation is corrected to the satisfaction of the regulatory authority or other issuing authority with jurisdiction over the violation. This provision is essentially a restatement of the first part of the condition stated in the current paragraph (c)(iii).

Proposed paragraph (c)(1)(ii)(B) provides that permit suspension will continue until the penalty or fee is paid. This provision is essentially a restatement of the second part of the condition stated in the current regulation at paragraph (c)(iii).

Proposed paragraph (c)(1)(ii)(C) provides that permit suspension will continue until the inaccurate or incomplete information is corrected or provided. We propose to add paragraph (c)(1)(iii) to be internally consistent with proposed §§ 773.20(b)(1)(iii) and (c)(1)(i) that add inaccurate or incomplete information to both the reasons for the suspension of a permit and the conditions under which the suspension could be lifted or terminated.

Paragraph (c)(1)(iv) in the current regulation would be re-numbered (c)(1)(iii) and is the third remedial measure. Proposed paragraph (c)(1)(iii) provides that the regulatory authority may rescind the permit under the provisions in § 773.21, which is also proposed to be amended. We propose to add the reference to § 773.21 to specifically reference the permit rescission procedures contained in that section.

Paragraph (c)(2) of § 773.20 is unchanged from the current regulation.

#### *I. Section 773.21—Improviently Issued Permits: Rescission Procedures*

We propose to amend the rescission procedures for improviently issued permits at § 773.21.

The proposed introductory paragraph at § 773.21 provides that a regulatory authority which, under § 773.20(c)(1)(iii), elects to rescind an improviently issued permit, must serve a notice of proposed suspension and rescission on the permittee and individuals who have the ability to control the permittee. The notice must include the reasons for the regulatory authority's finding under proposed § 773.20(b). We propose two revisions to the current regulation. We propose to change the cross-reference

from § 773.20(c)(1)(iv) to § 773.20(c)(1)(iii). We propose to add the phrase, "and individuals who have the ability to control the permittee" to the introductory paragraph. This proposal is consistent with the redesigned approach because the individual owners or controllers of an applicant or permittee that are responsible for outstanding violations will be treated separately from the applicant or permittee. The notification provision means that the permittee and the individuals that have the ability to control the permittee will be served the notice of proposed suspension and rescission.

Proposed paragraph (a) provides for the automatic suspension and rescission of a permit. The provision states that, after a specified period of time, not to exceed 90 days, the permit automatically will become suspended. Further, not more than 90 days thereafter it would be rescinded, unless within those periods the permittee submits proof, and the regulatory authority finds, consistent with the provisions of § 773.25, that one or more of the provisions in paragraphs (a)(1) through (a)(4) are met. The current regulation at § 773.21(a) is unchanged.

Proposed paragraph (a)(1) provides that the regulatory authority will not suspend or revoke the permit if the finding of the regulatory authority under § 773.20(b) of this part was erroneous. This provision is unchanged from the current regulation.

Proposed paragraph (a)(2) provides that the regulatory authority will not suspend or revoke the permit if the violation has been abated, the penalty or fee paid, or the information corrected to the satisfaction of the responsible agency. This provision is proposed to be amended such that the phrase, "or the information corrected" has been added. As we have previously indicated, the MOUs with States regarding AVS operation require States to resolve inaccurate and incomplete application information. Therefore, the amendment proposed at paragraph (a)(2) is also consistent with our intent to eliminate the need for the MOUs.

Proposed paragraph (a)(3) provides that the regulatory authority will not suspend or revoke the permit if 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. This provision in § 773.21 (a)(3) is unchanged from the current regulation.

Proposed paragraph (a)(4) provides that the regulatory authority will not suspend or revoke the permit if the

permittee and all operations owned or controlled by the permittee are no longer responsible for the violation, penalty, or fee, or for providing the information. In this provision, "operations" substitutes for "persons" and "or for providing the information" is added.

Proposed paragraph (a)(5) provides that the regulatory authority will not suspend or revoke the permit if the information is subject to a pending challenge under § 773.24. In this provision, the phrase "the information is subject to a pending challenge under § 773.24" is added.

Paragraph (b) provides for the cessation of operations following permit suspension or rescission and would be amended only slightly from the current regulation, but it is a meaningful change. The words, "and reclamation" are removed from the activities the permittee must cease after permit suspension or rescission so that it is clear that reclamation activities do, in fact, continue following the suspension or revocation of an improviently issued permit.

#### *J. Section 773.22—Identifying Entities Responsible for Violations*

We propose to withdraw current provisions in § 773.22 in their entirety and replace them with provisions for identifying entities responsible for violations. The current provisions in § 773.22 are centered on presumptions of ownership or control to create links based on common control between applicants and operations with violations. Thus, they have no meaning in the proposed redesigned approach to permit information, permit eligibility, investigation, and alternative enforcement.

Instead, we propose to use § 773.22 to establish provisions for regulatory authorities to identify in AVS outstanding violations attributable to applicants, permittees, and the controllers of surface coal mining operations. The concept governing the identification of persons responsible for violations is based upon provisions contained in the MOUs with State regulatory authorities regarding the operation of the AVS. By incorporating these provisions into this proposal, we intend to eliminate the need for the MOUs.

In the introductory paragraph of § 773.22, we propose to make clear that all persons who own or have the ability to control surface coal mining operations as a permittee, operator, owner, controller, or agent have an affirmative duty to comply with the Act, regulatory program, and approved

permit. The introductory statement sets the stage for the provisions that address the alternative to successful environmental compliance. In § 773.22, we intend to provide for the identification of persons in AVS that are responsible for violations. In addition, we intend that OSM and State regulatory authorities are obligated to enter and maintain in AVS their respective violation information so that the purposes of the Act may be effectively implemented.

Proposed paragraph (a) provides that OSM or the State regulatory authority with jurisdiction over the violation will investigate each outstanding violation of the regulatory program to determine the identity of those responsible for preventing and correcting the violation.

Proposed paragraph (b) provides that each owner, controller, principal, or agent responsible for preventing or ensuring abatement or correction of the violation will be designated in the AVS as a person OSM or the State regulatory authority may compel to comply with the Act and other applicable laws and regulations, as necessary, to correct the violation. Paragraph (b) is proposed so that persons identified as a result of the investigation in paragraph (a) are so designated in the AVS as responsible for the violation.

Proposed paragraph (c) provides that OSM and State regulatory authorities must enter into AVS all violations issued under the Act or the regulatory program no more than 30 days after the abatement or correction period has expired. It further provides that OSM and State regulatory authorities must maintain the accuracy and completeness of this information to reflect the most recent changes in status, such as abatement, correction, termination, and administrative or judicial appeal. Paragraph (c) is proposed to convey our commitment to maintain the accuracy and completeness of Federal violation data in AVS and to require that State regulatory authorities maintain the accuracy and completeness for State violation data. The integrity of Federal and State violation data is critical to the effective performance of the computer system and is therefore critical to our implementation of the regulatory program.

Proposed paragraph (d) provides that OSM and the State regulatory authorities must either pursue the appropriate alternative enforcement action under part 846 against the permittee, operator, or an owner, controller, or agent, to compel correction of the violation, or make a determination that referral for alternative enforcement action is not

warranted. Paragraph (d) further provides that the existence of a performance bond is not the sole basis for a regulatory authority's determination that alternative enforcement action is not warranted. Paragraph (d) would enable regulatory authorities, as a result of their investigation under proposed paragraph (a), to use the proposed alternative enforcement provisions to make, as appropriate, a determination under proposed § 846.12, 846.14, or 846.15, or a referral for prosecution under proposed § 846.11 or 846.16.

#### *K. Section 773.23—Review of Ownership or Control and Violation Information*

We propose to remove the provisions in § 773.23 from our regulations that provide for the review of ownership or control and violation information. The current provisions are centered on ownership or control to create links based on presumptions of common control between applicants and operations with violations. Insofar as we propose to revise definitions for "ownership" and "control" and eliminate the use of rebuttable presumptions, the current provisions in this section have no meaning in the proposed redesign.

#### *L. Section 773.24—Procedures for Challenging a Finding on the Ability to Control a Surface Coal Mining Operation*

We propose to revise the provisions at § 773.24 to provide for challenges to a finding on the ability to control a surface coal mining operation. We believe that the redesigned approach entitles persons, under certain conditions, to challenge whether they have the ability to control a surface coal mining operation. Unlike the current regulations at § 773.24, the proposed provisions are not centered on the use of the rebuttable presumption, jurisdiction based upon whether entity relationships are shown in AVS, ownership or control links, or the existence of a violation.

To further contribute to the clarity of § 773.24, we propose to add headings to improve the organization of the provisions. We also propose to amend the language and to remove references to "ownership or control links" and to add instead "a finding on the ability to control a surface coal mining operation." The provisions would be organized under the following headings: (1) who may challenge; (2) how to submit a written challenge; (3) the issuance of a written decision; (4) service procedures; (5) the relevant

procedures for appeal; and (6) a limitation on the use of the provisions.

We propose to change the title of § 773.24 from "Procedures for challenging ownership or control links shown in AVS" to "Procedures for challenging a finding on the ability to control a surface coal mining operation." The proposed change of the section's title illustrates the change in the focus of these procedures.

Proposed paragraph (a) provides for who may challenge a finding on the ability to control a surface coal mining operation. It states that any person listed as owning or controlling a surface coal mining operation in a pending permit application, or who OSM or a State regulatory authority finds as an owner or controller, may, prior to providing certification under proposed § 778.13(m), challenge the listing or finding in accordance with paragraphs (b) through (d) of proposed § 773.25. We propose to change the phrase, "[a]ny applicant or other person" to "[a]ny person" for succinctness. The definition of "person" at § 700.5 includes all entities that are entitled to make use of these procedures.

We propose to amend the current provision to clarify that persons who wish to challenge a finding on their ability to control a surface coal mining operation are entitled to do so, either (1) while the relevant application is pending before the regulatory authority, or (2) after OSM or the regulatory authority has found that a person has the ability to control an operation but was not identified to the regulatory authority either by the applicant or later by the permittee. We believe that once a person certifies, under proposed § 778.13(m), to being a controller of the applicant and under the jurisdiction of the Secretary and the regulatory program, that any attempt to challenge a finding of control is without merit.

We believe that while an application is pending before the regulatory authority, a person has sufficient knowledge and opportunity to challenge its ability to control the proposed operation. In the case of persons that OSM or the regulatory authority discovers have the ability to control the operation after a permit is issued, we believe such persons are entitled to challenge the finding. However, we also believe that such persons and the permittee are also subject to investigation, under proposed § 773.15(b)(1)(i), as to the circumstances surrounding the permittee's failure to disclose the controller.

Proposed paragraph (b) explains how a person may challenge a finding on the ability to control a surface coal mining

operation. It states that any person who wishes to challenge his status in the application, or a finding that he has or had the ability to control a surface coal mining operation, must submit a written explanation of the basis of the challenge to the agency with jurisdiction over any existing violations, or absent a violation, to the agency with jurisdiction over the pending application. The written challenge should be accompanied by supporting evidence and supporting documents.

Proposed paragraph (c) provides for the agency's written decision in response to a challenge of a finding on the ability to control a surface coal mining operation.

Proposed paragraph (c)(1) provides that the agency with jurisdiction will review any information submitted under paragraph (b) and will issue a written decision on whether the person filing the challenge has the ability to control the relevant surface coal mining operation. Proposed paragraph (c)(1) further provides that the agency issuing the decision will notify the person and any regulatory authorities with an interest in the challenge. The agency issuing the decision is also required to update, as necessary, the relevant information in AVS. By way of this provision, we intend that the agency with jurisdiction will issue a written decision, as a matter of record, on each challenge made under these procedures. In addition, we intend that each regulatory authority with an interest in the challenge should receive a copy of the decision. We also intend that the agency issuing the decision will update AVS, as necessary, should the decision affect information contained in the computer system. In keeping with our commitment to maintain the integrity of the system's data, we believe that it is important to require any necessary updates to the information in AVS under these procedures.

Proposed paragraph (c)(2) requires that the agency issuing the decision must serve a copy of the decision on the person by certified mail, or by any means consistent with the rules governing service of a summons and compliant under Rule 4 of the Federal Rules of Civil Procedure, or the equivalent State counterpart. Proposed paragraph (c)(2) further provides that service will be complete upon delivery of the notice or of the mail and will not be considered incomplete because of a refusal to accept.

Proposed paragraph (c)(3) provides for the appeals procedures afforded to persons who use these procedures. We propose that any person who is or may be adversely affected by a decision under paragraph (c)(1) may appeal the

agency's decision to the Department of the Interior's Office of Hearings and Appeals within 30 days of service of the decision in accordance with 43 CFR § 4.1380 *et seq.*, or the equivalent State counterparts. Paragraph (c)(3) further provides that the decision will remain in effect during the pendency of an appeal, unless temporary relief is granted in accordance with 43 CFR § 4.1386, or the equivalent State counterpart.

Proposed paragraph (d) provides that a permittee or operator may not use these procedures to challenge their joint and several liability to pay reclamation fees under section 402 of the Act. We have proposed this provision to clarify that challenges to the ability to control a surface coal mining and reclamation operation does not include the ability to challenge the joint and several liability of permittees and operators to pay reclamation fees.

*M. Section 773.25—Standards for Challenging a Finding or Decision on the Ability to Control a Surface Coal Mining Operation*

We propose to revise the provisions at § 773.25 to provide standards for challenging a finding on the ability to control a surface coal mining operation. We propose to change the title of § 773.25 from "Standards for challenging ownership or control links and the status of violations" to "Standards for challenging a finding or decision on the ability to control a surface coal mining operation" to be consistent with the redesigned approach.

Proposed paragraph (a) provides that the provisions of § 773.25 apply whenever a person exercises a right, under the provisions of §§ 773.20, 773.21, or 773.24 or under the provisions of part 775, to challenge a decision that he or she has the ability to control a surface coal mining operation. We are amending paragraph (a) to delete the reference to § 773.23. Section 773.23 would be deleted from our regulations as unnecessary within the proposed redesign. The phrase, "ownership or control link" is deleted because the definition for the phrase is proposed to be deleted.

Proposed paragraph (b) provides for agency responsibility in these provisions. Paragraph (b) includes four subparagraphs as follows.

Proposed paragraph (b)(1) provides that the State regulatory authority which cites a violation must make a decision on a challenge to a finding of the ability to control surface coal mining operations with respect to a State-issued citation. The proposed provision is based upon the current regulation at

§ 773.25(b)(1)(i). Current § 773.25(b)(3) assigns exclusive jurisdiction to OSM for challenges to information shown in AVS.

We propose to change the focus of the challenge procedures to whether a person has the ability to control a surface coal mining operation. In addition, we propose to remove the condition that a challenge involve a pending application. We believe the standards in proposed § 773.25 should apply regardless of whether an application is pending.

Proposed paragraph (b)(2) provides that OSM must make a decision on a challenge to a finding on the ability to control surface coal mining operations with respect to Federal violation notices. The proposed provision is based upon the current regulation at § 773.25(b)(2) but is restated within the context of a challenge of a person's ability to control a surface coal mining operation.

Proposed paragraph (b)(3) provides that the regulatory authority that processed the application or that issued the permit must make the decision on a challenge to a finding on the ability to control a surface coal mining operation where there is no outstanding violation. The proposed provision is based upon the current regulation at § 773.25(b)(2)(ii), but like proposed (b)(2), it is restated within the context of a challenge of a person's ability to control a surface coal mining operation.

Proposed paragraph (b)(4) provides that the State or Federal agency with jurisdiction over the violation determines whether the violation has been abated or corrected. The proposed provision is based upon the current regulation at § 773.25(b)(2)(iv) but is amended to streamline the language of the current provision.

Proposed paragraph (c) provides for the evidentiary standards that apply under § 773.25. The evidentiary standards are also found at paragraph (c) in the current regulation.

Proposed paragraph (c)(1) provides that in any formal or informal review of a challenge to a finding, the responsible agency will issue a written decision if it determines that the ability to control exists or existed during the relevant period. We propose to add this provision to § 773.25 to expressly require a written decision from the responsible agency.

Proposed paragraph (c)(2) provides that a person challenging a finding on his or her ability to control the relevant surface coal mining operation will have the burden of proving by a preponderance of evidence, with respect

to any relevant time period, that he or she did not have the ability to control the surface coal mining operation. Since we propose to remove the rebuttable presumption and "ownership or control link" from the regulations, we believe that it follows that the requirement for a *prima facie* determination in these standards is no longer necessary.

Proposed paragraph (c)(3) provides that in meeting the burden of proof set forth in paragraph (c)(2), the person challenging the finding on his or her ability to control the relevant surface coal mining operation must present reliable, credible, and substantial evidence and any supporting explanatory materials. Paragraph (c)(3) further provides that such evidence and materials submitted to the appropriate jurisdiction may include those described in the paragraphs that follow. The proposed provision is based upon the current regulation at § 773.25(c)(2), but it no longer requires the existence of an ownership or control link for the reasons previously stated in this section.

Proposed paragraph (c)(3)(i) provides examples of evidence and materials that may be submitted to the agency responsible for issuing the written decision under these provisions.

Proposed paragraph (c)(3)(i)(A) provides that such evidence may include notarized affidavits containing specific facts concerning the scope of the duties actually performed by the person; the beginning and ending dates of the person's control of the applicant, permittee, operator, or violator; and the nature and details of any transaction creating or severing the ability to control the applicant, permittee, operator, or violator. The proposed provision is based on the current regulation at § 773.25(c)(3)(i)(A) but is restated to be consistent with proposed provisions.

Proposed paragraph (c)(3)(i)(B) provides that such evidence may include certified copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records. The proposed provision is based on the current regulation at § 773.25(c)(3)(i)(B) but is restated to be consistent with the preceding proposed provisions.

Proposed paragraph (c)(3)(i)(C) provides that such evidence may include certified copies of documents filed with or issued by any State, Municipal, or Federal governmental agency. The proposed provision is based on the current regulation at § 773.25(c)(3)(i)(C) but is restated to be consistent with the preceding proposed provisions.

Proposed paragraph (c)(3)(i)(D) provides that such evidence may include an opinion of counsel when supported by (1) evidentiary materials; (2) a statement by counsel that he or she is qualified to render the opinion; and (3) a statement that counsel has personally and diligently investigated the facts of the matter or, where counsel has not so investigated the facts, a statement that such opinion is based upon information which has been supplied to counsel and which is assumed to be true. The proposed provision is based on the current regulation at § 773.25(c)(3)(i)(C) but is restated to be consistent with the preceding proposed provisions.

Proposed paragraph (c)(3)(ii) provides that evidence and materials presented in proceedings before any administrative or judicial tribunal reviewing the decision of the responsible agency must be admissible under the rules of the reviewing tribunal. The proposed provision is unchanged from the current regulation at § 773.25(c)(3)(ii).

Proposed paragraph (d) provides that, following any determination by a regulatory authority, or any decision by an administrative or judicial tribunal reviewing such determination, the regulatory authority will review the information in AVS to determine if it is consistent with the determination or decision. Paragraph (d) further provides that if the regulatory authority finds that the information in AVS is not consistent with the determination or decision, it will promptly revise the AVS information to reflect the determination or decision.

#### *N. Section 774.10—Information Collection*

We propose to amend the provisions for information collection in part 774, Revision, Renewal, and Transfer, Assignment or Sale of Permit Rights. Consistent with the Paperwork Reduction Act, in proposed paragraph (a) we note that OMB has approved the information collection requirements of part 774. Paragraph (a) further provides that this information will be used by regulatory authorities to determine if the applicant meets the requirements for revision, renewal, transfer, sale, or assignment of permit rights and that persons must respond to obtain a benefit. Paragraph (a) further provides that 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-NEW.

In proposed paragraph (b), we estimate that the public reporting burden for this part will average 32 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. Paragraph (b) further provides that comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, may be sent to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 210, 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-NEW in any correspondence.

We propose to amend § 774.10 to indicate the authority under which we may require collection of information for part 774. This section conforms to OMB requirements to publish the estimated time needed to collect information under certain regulatory provisions. We invite comments on the estimated average number of hours required to fulfill the information collection requirements under part 774.

#### *O. Section 774.13—Permit Revisions*

We propose to create a paragraph (e) at § 774.13 to provide for a permittee to report certain ownership or control changes to the regulatory authority. Proposed paragraph (e) requires a permittee to report changes of officers, owners, or other controllers where the permittee is not required to obtain the approval of the regulatory authority for the change under proposed § 774.17(a)(2). Changes of persons under proposed § 774.13(e) would not be subject to the certification provision under proposed § 778.13(m). However, a permittee must report such a change to the regulatory authority within 60 days after it occurs.

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

We propose to amend the provisions at § 774.17, regarding transfer, assignment, or sale of permit rights. The proposed revisions include a reorganization of the provisions in this section and various amendments to the regulatory language. We have found that there is great variance among the State regulatory authorities in the implementation of their counterparts to these regulations. In this proposal, we

intend to further clarify the use of these regulations, including distinguishing among those instances where a new permit is required and those that only require approval for modification of the existing permit information.

In proposed § 774.17, we have incorporated the effect of the change in the definition of "successor in interest" proposed in § 701.5. We believe that the proposed definition and the corresponding procedural changes proposed here in § 774.17(d) conform more to the statutory requirements for a successor in interest at section 506(b) of SMCRA. Section 506(b) of SMCRA covers the conditions under which a successor in interest may continue mining operations on an approved permit. Section 506(b) requires that the successor in interest obtain bond coverage and apply for a new permit within 30 days of succeeding to the interest of an existing permittee. The procedural change incorporates additional requirements, notably the permit eligibility requirements proposed at §§ 773.15 and 773.16, and the information and certification requirements proposed at §§ 778.13 and 778.14.

The proposed heading at paragraph (a), and paragraphs (a)(1) and (a)(2) that follow are newly-proposed provisions. As indicated above, we propose to add these provisions to § 774.17 to further clarify who must obtain approval of a transfer, assignment, or sale of permit rights.

Proposed paragraph (a) contains two significant changes. First, it seeks to resolve the identity of the applicant in the case of a transfer, assignment, or sale of permit rights. We believe that the permittee has the obligation to obtain the approval of a transfer, assignment, or sale of permit rights whenever there is a change in ownership or other effective control over the right to conduct surface coal mining operations under a permit issued by the regulatory authority. Second, although all changes in legal identity or identification of interests require notification to the regulatory authority under proposed § 774.13(e), only those changes that require certification under proposed § 778.13(m) will require written approval from the regulatory authority under this section.

Proposed paragraph (a)(1) provides that the permittee is always the applicant for a transfer, assignment, or sale of rights granted under a permit. The proposed provision further provides that the permittee has the burden of establishing that the application for transfer, assignment, or

sale of permit rights complies with the requirements of the regulatory program.

Proposed paragraph (a)(2) provides that the permittee must obtain approval of a transfer, assignment, or sale of permit rights. We believe that a change or addition of an operator, officer, owner, controller, permittee, or other person on a permit constitutes a change of the rights granted under that permit. The permittee must obtain approval of any transaction for a transfer, assignment, or sale of permit rights, by which the rights granted under a permit are transferred, assigned, or sold for any length of time, to a person not identified on the currently approved permit. The requirement for approval only applies for those whom certification under proposed § 778.13(m) will be required.

Proposed paragraph (b) specifies what information is required in the application for a transfer, assignment, or sale. We propose to create a heading for paragraph (b) to identify these provisions. Proposed paragraph (b) provides that the permittee must provide the regulatory authority with an application for approval of the proposed transfer, assignment, or sale. As proposed, the application must include the information specified in the four paragraphs that follow. This provision is proposed as a consolidation and amendment to the current regulation at § 774.17(b), (b)(1), and (b)(3).

Proposed paragraph (b)(1) provides that the name and address of the existing permittee and the relevant permit number must be provided in the application. This provision is proposed as an amendment to the current regulation at § 774.17(b)(1)(i). The phrase, "or other identifier" is proposed to be deleted because we believe that for the transfer, assignment, or sale of rights granted under a permit, an identifier other than the permit number is irrelevant.

Proposed paragraph (b)(2) provides that a brief description of the proposed action requiring approval must be provided in the application. This provision is in the current regulations at § 774.17(b)(1)(ii). The proposed language is unchanged from the current provision.

Proposed paragraph (b)(3) provides that the legal, financial, compliance, and related information and violation information required under §§ 778.13 and 778.14 for the person(s) proposed to receive permit rights by way of transfer, assignment, or sale must be provided in the application. This provision is the current regulation at § 774.17(b)(1)(iii) and is proposed to be amended. We propose to amend "Part 778" to "§§ 778.13 and 778.14." We propose to

amend "applicant for approval" to "person(s) proposed to receive permit rights by way of." The latter change is proposed to be internally consistent within the context of the provisions proposed in paragraph (a).

Paragraph (b)(4) provides that the application contain the bonding company's written acceptance of those proposed to gain permit rights. Paragraph (b)(4) is proposed as a new provision. This change is based on comments received from bonding companies during the outreach phase of this rulemaking.

The proposed heading and provisions for proposed paragraph (c) are newly-created. This section explains how the regulatory authority will review and approve applications for a transfer, assignment, or sale of permit rights. We are proposing that, as with all other permitting processes, approval of a transfer, assignment, or sale of permit rights should require a written finding by the regulatory authority and should be subject to the permit eligibility review requirements proposed in §§ 773.15 and 773.16. We propose to remove prior approval from the requirements under these procedures. Based upon our experience with this regulation, we believe that to require prior written approval of a transfer, assignment, or sale of permit rights is unnecessary. In most cases the change would have already occurred prior to the request for regulatory authority approval. The provisions in paragraph (c) also reflect the incorporation of concepts in related provisions proposed at part 846 into the procedures for transfer, assignment, or sale of permit rights.

Proposed paragraph (c)(1) provides that the regulatory authority must issue a written finding either approving or denying the transfer, assignment, or sale.

Proposed paragraph (c)(2) provides that the regulatory authority must evaluate each proposed transfer, assignment, or sale to determine whether a new permit or bond is required pursuant to the regulatory program requirements.

Proposed paragraph (c)(3) provides that the regulatory authority must add the conditions specified in proposed § 773.18 to the permit, if the transfer, assignment, or sale is to owners or controllers responsible for outstanding violations.

Proposed paragraph (c)(4) provides that the regulatory authority must not approve the transfer, assignment, or sale if applicant is ineligible for a permit under proposed §§ 773.15(b)(2) or 773.16.



Proposed paragraph (c)(5) provides that the regulatory authority must not approve the transfer, assignment, or sale if the proposed recipient is enjoined or otherwise prohibited from mining under § 846.16 or by a Federal or State court.

Proposed paragraph (d) provides for the procedures governing a successor in interest. The provisions in paragraph (d) and paragraphs that follow are based upon the current regulations at §§ 774.17(c), (d), and (f). However, the proposed provisions in paragraph (d) also reflect revisions based on what we believe conforms more with the requirements of section 506(b) of SMCRA.

Proposed paragraph (d)(1) requires a successor in interest to apply for and obtain a new permit in instances where the current permittee gives up all rights granted under the existing permit. It further requires that an existing permittee cannot give up all of its rights granted under a permit until the successor in interest is approved by the regulatory authority. Section 506(b) of the Act requires that a successor in interest obtain a new permit. We therefore propose to add this requirement in these procedures.

Proposed paragraph (d)(2) consists of the requirements a successor in interest must meet to continue operations under the existing permit. Paragraph (d)(2) is largely based upon the current regulation at §§ 774.17(d) and (f). In order to continue operations, all of the requirements must be met.

Proposed paragraph (d)(2)(i) provides that the existing permittee must first obtain written approval of the transfer, assignment, or sale to allow for the successor to continue operations for the 30 days pending submittal of a new permit application. The transfer, assignment, or sale application from the permittee and the items required from the successor under (d)(2)(i) can be submitted at the same time and processed simultaneously by us. The application and information may have to be submitted and processed rapidly to allow for continued uninterrupted operations.

Proposed paragraph (d)(2)(i)(A) requires that the successor submit the legal, financial, compliance, and related information and violation information required under §§ 778.13 and 778.14.

Proposed paragraph (d)(2)(i)(B) requires that the successor submit a performance bond, or proof of other guarantee, or obtain the bond coverage of the original permittee, as required by Subchapter J.

Proposed paragraph (d)(2)(i)(C) requires the successor submit a signed and notarized written statement

assuming the liability and reclamation responsibilities of the existing permit.

Proposed paragraph (d)(2)(ii) provides that we will review the information submitted by the successor under paragraph (d)(2)(i)(A) of this section using the criteria in §§ 773.15(b)(2) and 773.16 of this Subchapter.

Paragraph (d)(2)(iii) provides the requirements that if the successor receives preliminary written approval, they may conduct mining operations for up to 30 days.

Proposed paragraph (d)(2)(iii)(A) requires that the successor must conduct the surface coal mining and reclamation operations in full compliance with the Act and the regulatory program.

Proposed paragraph (d)(2)(iii)(B) provides that the successor must conduct the surface coal mining and reclamation operations under the terms and conditions of the existing permit and any additional terms or conditions that may be imposed by us.

Proposed paragraphs (d)(2)(i)(C), (d)(2)(iii)(A), and (d)(2)(iii)(B) are based on the current provision at § 774.17(f). They have been separated here for clarity. The language in the proposed provisions is basically unchanged from the current regulation.

Proposed paragraph (d)(2)(iii)(C) provides that the successor must meet any other requirement specified by the regulatory authority.

Proposed paragraph (d)(2)(iii)(D) provides that the successor in interest must submit an application for a new permit within 30 days of succeeding to the interests of an existing permittee.

Proposed paragraph (d)(2)(iv) provides that if the successor submits a complete permit application within 30 days of succeeding to the existing permittee's interest and meets the other requirements under paragraph (d)(2)(iii), then the successor can continue operations until we make the decision to either approve or deny the application for a permit. If we deny the successor's permit application, then the successor must cease operations.

Proposed paragraph (d)(3) is amended from the current provision at § 774.17(b)(2). The change means that the advertisement requirements will only apply to a successor in interest. Persons subject to a transfer, assignment, or sale of rights granted under a permit will no longer be required to advertise such a change.

Proposed paragraph (d)(4) is based upon the current provision at § 774.17(c). The effect of incorporating this requirement into paragraph (d) is that public participation is limited to

situations involving a successor in interest.

Proposed paragraph (d)(5) provides that the previous permittee will not be released from responsibilities for any affected area or disturbed area of the permit unless the successor engages in surface coal mining operations which affect or disturb previously affected or disturbed areas and the regulatory authority approves the successor's application for a new permit. Paragraph (d)(5) further provides that, until the successor's application for a new permit is approved, both the previous permittee and its successor will be responsible for violations created after the successor begins surface coal mining operations, but prior to the approval of the new permit. We propose to add this provision to ensure that the permit is protected under the regulations until the successor is approved as the new permittee. We believe that it is extremely important that both the previous permittee and the successor understand their environmental obligations under these regulations.

Proposed paragraph (d)(6) provides that the successor in interest's replacement bond should not form the basis for the release of the previous permittee's bond. We propose to add this provision to be consistent with the requirements for the release of a performance bond under § 800.40. We believe that bond release is a separate consideration from the eligibility of a successor and the issuance of a new permit. Therefore, the previous permittee would remain under the Secretary's jurisdiction until the permitted operation has been substantially re-disturbed or affected by the successors' operations. The regulatory authorities will continue to pursue compliance from the correct party that it finds responsible for creating any violations on the permitted area.

Proposed paragraph (e) provides for the notification procedures that apply to § 774.17. Proposed paragraph (e)(1) provides that the regulatory authority must notify the permittee and the successor, the new operator, or other person gaining permit rights and commenters of its findings. This provision is based upon the current provision at § 774.17(e)(1) and is amended to be consistent with other proposed provisions in § 774.17.

Proposed paragraph (e)(2) provides that the person must immediately provide notice to the regulatory authority when the transfer, assignment, or sale of permit rights is complete. The proposed language is based upon the current provision at § 774.17(e)(2).



Proposed paragraph (e)(3) provides that the regulatory authority must update the relevant records in the AVS with the approved transfer, assignment, or sale or successor in interest information within 30 days of approval. We propose this mechanism to ensure that the information in AVS is current.

*Q. Section 778.5—Applicability and Definitions*

We propose to amend and reorganize the current definition of “owned or controlled” and “owns or controls.” We propose separate definitions for “ownership” and “control” and would move the definitions from § 773.5 to § 778.5. We believe that the proposed concepts of ownership or control are similar to the current definition, but that reorganizing “ownership” and “control” into separate definitions will improve clarity and provide a greater understanding of the various circumstances that meet the definitions.

We have concluded that we should clarify the definitions and better define who must be disclosed in an application. This change would more appropriately support the permit information requirements of our regulations in part 778, which in turn, support the requirements under section 507 of the Act.

This proposal will eliminate the use of the rebuttable presumption as it is applied to the current definition of “owned or controlled” and “owns or controls” and as it is used in various procedures that we propose to amend. A rebuttable presumption is where OSM’s current definition of “owns or controls” presumes that a type of relationship, an officer for example, is able to control the surface coal mining operation. In our example, an officer may challenge or rebut the presumption of control under existing procedures at §§ 773.24 and 773.25.

We believe that the emphasis on accurate and complete information and the mechanisms for investigation and alternative enforcement reflected in this proposal render the rebuttable presumption unnecessary under this proposal’s redesigned approach to permit information and permit eligibility. Those persons that certify in an application under proposed § 778.13(m) that they have the ability to control the operation and are under the Secretary’s jurisdiction for compliance have established the basis of their responsibility. In this proposal at § 773.15(b), we have given regulatory authorities the ability to identify persons who have the ability to control the surface coal mining operation that have not been identified in an

application. However, we have retained amended procedures for persons to challenge a finding on their ability to control a surface coal mining operation at § 773.24 in order to protect the due process rights of such persons. Taken together, we believe these amendments eliminate the need of the rebuttable presumption of ownership or control. Accordingly, we propose to create new § 778.5 and to provide for the separate definitions of “ownership” and “control” in this new section within part 778, which provides for the information required from applicants and permittees.

We propose “ownership” to mean holding an interest in a sole proprietorship, being a general partner in a partnership, owning 50 percent or more of the stock in a corporation, or having the right to use, enjoy, or transmit to others the rights granted under a permit.

We propose “control” to mean to own, manage, or supervise surface coal mining and reclamation operations, as either a principal or an agent, such that the person has the ability, alone or in concert with others, to influence or direct the manner in which surface coal mining and reclamation operations are conducted.

We do not propose to provide an exhaustive list of persons who would be covered under the proposed definition of “control.” However, we propose to include in the regulation at § 778.5, that persons who engage in or carry out surface coal mining and reclamation operations as an owner or controller, include, but are not limited to: (1) the president, other officers, directors, agent or person performing functions similar to a director; (2) those persons who have the ability to direct the day-to-day business of the surface coal mining operation; (3) the permittee or an operator, if different from the permittee; (4) partners in a partnership, the general partner in a limited partnership, or the participant(s), member(s), or manager(s) of a limited liability company; (5) persons owning the coal (through lease, assignment, or other agreement) and retaining the right to receive, or direct delivery of, the coal; (6) persons who make the mining operations possible by contribution (to the permittee or operator) of capital or other resources necessary for mining to commence or to continue operations at the site; (7) persons who control the cash flow or can cause the financial or real property assets of a corporate permittee or operator to be employed in the mining operation or distributed to creditors; and (8) persons who cause operations to be conducted in anticipation of their

desires or who are the animating force behind the conduct of operations.

At (6), examples of resources include a personal guarantee to obtain the reclamation bond, the assumption of responsibility for the liability insurance, a captive coal supply contract, and mining equipment.

At (8), “persons who cause operations to be conducted in anticipation of their desires” is consistent with the holding in *S & M Coal Co. and Jewell Smokeless Coal Co. v. OSMRE*, 79 IBLA 350 (1984). Also at (8), “persons who are the animating force behind the conduct of operations” is consistent with the holding in *Citronelle-Mobile Gathering, Inc. v. Herrington*, 826 F.2d 16 (Temp. Emer. Ct. App. 1987), *cert. denied sub nom Chamberlain v. United States*, 108 S.Ct. 327 (1987).

Those who engage in or carry out surface coal mining operations by owning or controlling the manner in which mining operations are conducted are clearly within the Secretary’s regulatory jurisdiction under sections 506(a) and 510(c) of SMCRA. However, not everyone who “engages in or carries out surface coal mining operations” under section 506(a) of the Act needs to be identified in an application. The proposed definitions of “ownership” and “control” create a clear distinction between employees of mining operations and those who “engage in or carry out mining operations” by owning, controlling, or influencing the manner in which mining operations are conducted. A broad class of persons, including employees, falls under the jurisdiction of the Secretary of the Interior. However, as proposed under this redesigned regulatory concept, we would only require a permit application to identify those who engage in or carry out mining operations as owners or controllers, and not employees per se. Requiring the disclosure in an application of all those who engage in or carry out surface coal mining operations as owners or controllers is critical under the redesigned approach.

There is a valid reason for making this regulatory distinction between the different types of persons and business entities who engage in or carry out mining operations. Employees, as opposed to the owners and controllers of mining operations, have few responsibilities under the Act other than to refrain from intentional violations. See section 518(e) of SMCRA. On the other hand, persons who can influence the manner in which mining operations are conducted have much broader duties and responsibilities under the Act. Therefore, it is more important that those who can directly control or

indirectly influence mining operations be identified in a permit application.

The failure of the current regulation to require the identification in an application of persons who own, control, or influence mining operations has resulted in regulatory authorities expending significant resources to investigate and identify those who have breached their responsibilities under the Act. Additionally, many persons who engage in or carry out mining operations by owning or controlling mining operations do so without a clear understanding of their personal responsibilities under SMCRA. All persons who engage in or carry out mining operations as owners or controllers should recognize that breaches of their personal duties and obligations place their personal assets at risk under SMCRA, its implementing regulations, and the case law interpreting those statutory and regulatory provisions. The proposed definitions of "ownership" and "control" will put those persons and entities who fall within the definitions on express notice that they have personal duties and obligations under SMCRA.

#### *R. Section 778.10—Information Collection*

We propose to amend the provisions for information collection in part 778, Permit Applications— Minimum Requirements for Legal, Financial, Compliance, and Related Information. Consistent with the Paperwork Reduction Act, in proposed paragraph (a) we note that OMB has approved the information collection requirements of part 778. Section 507(b) of SMCRA is the authority for regulatory authorities to require that persons applying for a permit to conduct surface coal mining and reclamation operations must submit 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. Paragraph (a) further provides that the regulatory authority uses this information to ensure that all legal, financial and compliance requirements are satisfied prior to issuance of a permit and the persons seeking to conduct surface coal mining operations must respond to obtain a benefit. Paragraph (a) finally provides that 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 and that the OMB

clearance number for this part is 1029–0034.

In proposed paragraph (b), we estimate that the public reporting and record keeping burden for this part averages 25 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection and record keeping requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, NW, Washington, DC 20240; 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.

We propose to amend § 778.10 to indicate the authority under which we may require collection of information for part 778. This section conforms to OMB requirements to publish the estimated time needed to collect information under certain regulatory provisions. We invite comments on the estimated average number of hours required to fulfill the information collection requirements under part 778.

#### *S. Section 778.13—Legal Identity and Identification of Interests*

We propose to amend the provisions governing the required disclosure of information by applicants. We tried to provide for the complete range of information regulatory authorities may require from applicants. At § 778.13, we first propose to amend the title of the section to "legal identity and identification of interests." We propose this change to clarify that the information requirements of § 778.13 include both the information that identifies various interests of an applicant and the legal identity of the applicant. The change also emphasizes the importance of full disclosure of the applicant's identity and the identity of those who engage in or carry out surface coal mining operations as owners and controllers to the review of an application under the provisions of proposed §§ 773.15(b)(1) and (b)(3)(ii).

We also propose in § 778.13 to make the disclosure of the information required in § 778.13 easier for applicants that have existing or previous permits by using the technology afforded by AVS. Those applicants may

provide the information required under § 778.13 by certifying that the information contained in AVS at the time of application is accurate and complete. This provision substantially reduces the information collection burden for such applicants. Moreover, we expect regulatory authorities may also reduce their review of the certified information under § 778.13.

We also propose to amend the provisions at § 778.13 to require applicants to disclose the identity of any operator, known at the time of application, that is different from the applicant. We propose that the applicant provide not only the identity of the operator, but of those who engage in or carry out surface coal mining operations as the operator's owners and controllers. The entire § 778.13 is proposed here, including parts of the regulation that we are not proposing to change, so that the section may be viewed in its entirety. As discussed below, there are certain individual provisions for which no substantial changes is proposed, but that have been re-numbered to accommodate additional provisions.

We propose in the introductory paragraph of § 778.13 that an application must contain the information specified in proposed paragraphs (a) through (n), unless the applicant has existing permits, in which case certification under proposed paragraph (o) also applies.

Proposed paragraph (a) requires that an application contain a statement as to whether the applicant is a corporation, partnership, single proprietorship, association, or other business entity. This provision is unchanged from the current regulation.

Proposed paragraph (b) requires that an application contain the name, address, telephone number, and taxpayer identification number of (1) the applicant, (2) the applicant's resident agent who will accept service of process, (3) the operator (if different from the applicant), (4) person(s) responsible for submitting the Coal Reclamation Fee Report (OSM–1) and for remitting the reclamation fee payment to OSM, and (5) the identity of all other persons who will engage in or carry out surface coal mining operations as an owner or controller on the permit.

We propose three amendments in paragraph (b). First, we would delete reference to the voluntary submission of social security numbers for individuals. Instead, we will require a taxpayer identification number for each person identified in the provision. We would amend this provision under the authority of the Debt Collection

Improvement Act of 1996. The effect of this statute is that if a person wishes to conduct business with the Federal Government, then the person must supply its taxpayer identification number. Taxpayer identification number means the social security number for individuals and the employer identification number for businesses.

Second, we propose to amend "resident agent" to "resident agent who will accept service of process." We propose this change because we believe the principal function of a resident agent is to receive communications for a company that is domiciled in a State apart from where it conducts business. We also believe that it is important not to confuse a company's resident agent with those individuals who both represent the interests of the company and have the ability to control the company, and who are therefore agents of the company.

Third, we would require the identity of all persons who will engage in or carry out surface coal mining operations as owners or controllers on the proposed permit. We believe that the applicant has the responsibility to provide this information.

As indicated by way of the provisions proposed below in paragraphs (c), (e), (f), (g), and (m), there are certain inescapable obligations on the part of the applicant and those persons who propose to engage in or carry out surface coal mining operations. One such obligation is the full disclosure of persons having the ability to control the surface coal mining and reclamation operation. Therefore, the regulatory authority should have the ability to take certain actions if persons having the ability to control the operation are not identified in an application or later by the applicant or permittee, but instead, are later discovered by OSM or the State regulatory authority.

We propose that OSM and the regulatory authority take such actions against the permittee, persons identified in the application, and persons not identified in the application, for failure to fully identify the applicant or permittee. They should be subject to a range of sanctions, including those provided for in section 521(c) of the Act and proposed at § 846.16.

Proposed paragraph (c) requires that the information required in paragraphs (c)(1), (c)(2), and (c)(3).

Proposed paragraph (c)(1)(i) requires each person's name, address, and taxpayer identification number. We propose to amend the current provision to delete the language for the voluntary submission of an individual's social

security number. As explained above "taxpayer identification number" would mean either an employer identification number or a social security number, whichever is applicable.

Proposed paragraph (c)(1)(ii) requires disclosure of the person's ownership or control relationship to the applicant, including percentage of ownership and location in the organizational structure.

Proposed paragraph (c)(1)(iii) requires that the application include the title of the person's position, the date that the person assumed the position, and, when submitted under existing § 773.17(h), the date of departure from the position. This provision is unchanged from the current regulations.

Proposed paragraph (c)(2) requires the name, address, and taxpayer identification number for publicly traded corporations.

Proposed paragraphs (c)(3)(i) through (iii) require you to provide the information required by paragraphs (c)(1) or (2) of the section for every officer, director, and person performing a function similar to a director.

Proposed paragraph (c)(3)(iv) requires this information for a person who owns or controls the applicant or the operator. Paragraph (c)(3)(v) requires this information for a person who owns 10 to 50 percent of the applicant or the operator.

Proposed paragraph (d) provides that the applicant need not report any owner that is a corporation not licensed to do business in any State or territory of the United States. This is a new provision that we propose as a mechanism to reduce the information collection burden of applicants. Based upon the experience of OSM and State regulatory authorities with the information collection provisions of § 778.13, we see no need to continue to require the identity of any owner of an applicant that is not licensed to do business in any State or territory of the United States. We believe that in any communication with an applicant, or the owners or controllers of an applicant, whether it routine correspondence or the notification of a violation, it is unlikely that a business entity so far removed from the surface coal mining operation could adequately respond. It has been our experience that shareholders of applicants and permittees that are "foreign" to the States and territories of the United States have little direct knowledge of the surface coal mining operation. We believe that it is unnecessary to continue to collect information that provides little benefit to the regulatory program.

Proposed paragraph (e) requires that for the applicant and each partner or principal shareholder of the applicant and operator, the application must include each name under which the person operates or previously operated a surface coal mining and reclamation operation in the United States within the five years preceding the date of the application. Paragraph (e) is former paragraph (d) proposed in an amended form. We would revise the requirements to apply to the operation of a surface coal mining and reclamation operation instead of the ownership or control of a surface coal mining and reclamation operation, as provided in the current regulation. This amendment is internally consistent with the redesign of the regulatory program represented by this proposal.

Proposed paragraph (f) requires that the application contain 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. Paragraph (f) consists of the current regulation at § 778.13(e) and is re-numbered. The language of the provision is unchanged from the current regulation.

Proposed paragraph (g) requires that the application contain the operation's name, address, identifying numbers, including taxpayer identification number, Federal or State permit number and Mine Safety and Health Administration (MSHA) number, and the regulatory authority, for any surface coal mining operation permit held by the applicant or operator during the five years preceding the date of the application. Paragraph (g) is proposed as a revision of the current § 778.13(f) to change the focus from operations owned or controlled by the applicant to the permits held by the applicant or operator during the five years preceding the date of application. The information provided here in proposed § 778.13(g) forms the basis for a regulatory authority's review of an applicant's permit history at proposed § 773.15(b)(2). The current provision at § 778.13(f)(2) is deleted. The proposed provision requires permit information from the applicant and any operator different from the applicant. The current regulation at § 778.13(f)(2) provides for identifying ownership or control relationships to the applicant, including percentages of ownership. This information is unnecessary within this proposal's redesigned approach.

Proposed paragraph (h) requires that the application must contain 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. Paragraph (h) consists of the current regulation at § 778.13(g) and is proposed to be re-numbered. The language of the provision is unchanged from the current regulation.

Proposed paragraph (i) requires the name and address of each owner of record of all property (surface and subsurface) contiguous to any part of the proposed permit area. Paragraph (i) consists of the current regulation at § 778.13(h) and is re-numbered. The language of the provision is unchanged from the current regulation.

Proposed paragraph (j) requires the MSHA numbers for all mine-associated structures that require MSHA approval. Paragraph (j) consists of the current regulation at § 778.13(i) and is re-numbered. The language of the provision is unchanged from the current regulation.

Proposed paragraph (k) requires that an application must contain 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. Paragraph (k) further provides that, 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). Paragraph (k) consists of the current regulation at § 778.13(j) and is re-numbered. The language of the provision is unchanged from the current regulation.

Proposed paragraph (l) requires that after an applicant is notified that its 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 (k). Paragraph (l) consists of the current regulation at § 778.13(k) and is re-numbered. The provision is proposed to be amended to change the reference, "(a) through (f)" to "(a) through (k)" to conform to the revisions proposed in § 778.13.

Proposed paragraph (m) requires that, prior to permit approval, all persons who will engage in or carry out surface coal mining operations as owners or controllers on the proposed operation must certify that they have the ability to control the proposed surface coal mining operation. This certification must also include a statement that these

persons are under the jurisdiction of the Secretary of the Interior for the purposes of compliance with the terms and conditions of the permit and the requirements of the regulatory program. We intend that all persons who will engage in or carry out surface coal mining operations as owners, controllers, or persons having the ability to control a proposed operation, should be fully aware of their statutory and regulatory obligations under the Act, the regulatory program, and the permit. It is important they understand that they will be held accountable for compliance with the Act and the regulatory program under the authority of the Secretary of the Interior. We propose to require that all such persons attest to their knowledge of these obligations in the application for a surface coal mining and reclamation permit. By acknowledging and attesting to their obligations under the Act, the regulatory program, and the permit prior to approval and issuance, such certification will establish the basis of their responsibility.

Proposed paragraph (n) provides that the applicant must submit the information required by this section and § 778.14 of this part in the format that OSM prescribes. Paragraph (n) consists of the current regulation at § 778.13(l) and is proposed to be re-numbered. The language of the provision is essentially unchanged from the current regulation.

Proposed paragraph (o) provides that applicants who have previously applied for permits and for whom relevant data resides in AVS may certify to the regulatory authority that the information in AVS is complete, accurate, and up-to-date. Paragraph (o) further provides that only information that has changed from a previous application or site-specific information needs to be provided in the current application. We propose to add this provision in response to comments received during the public outreach. We believe that the AVS computer system offers many as yet unused benefits. The most beneficial advantage to the regulated community is the use of the system's data to relieve certain information collection burdens, notably the information requirements in § 778.13.

Proposed paragraph (p) provides that the regulatory authority may establish a central file to house the legal identity information for each applicant, rather than placing duplicate information in each permit application file. This provision is proposed in response to comments received during the public outreach effort conducted before the development of this proposal. We believe that the provision could

effectively reduce the amount of duplicate information required from applicants by the regulatory authorities. It is important to note, however, that the establishment of such files by a regulatory authority is voluntary.

#### *T. Section 778.14—Violation information*

We propose to retain the current provisions in § 778.14, except to amend paragraph (c). However, the entire § 778.14 is proposed here, in order that the section may be viewed in its entirety. There are no substantive changes proposed in the provisions at paragraphs (a), (b), and (d). At paragraph (c), we propose to remove reference to § 773.5, reference to the definition of "owned or controlled" and "owns or controls," and to confine the information requirement, regarding violation notices and outstanding violation notices, to the applicant and to surface coal mining operations owned or controlled by the applicant. The reason for this change is sufficiently explained elsewhere in this preamble, notably at §§ 773.5 and 778.5. We also propose to eliminate the requirement that an applicant certify that violation notices are in the process of being corrected. Applicants who must prove that violation notices are in the process of being corrected would be identified in proposed § 773.18(b). We believe that experience with this regulation has raised the question as to the benefits of the certification requirement. By proposing to eliminate the certification requirement, we intend to reduce the information collection burden for applicants under § 778.14. In this proposal, the current provision at § 773.15(b)(2) containing the cross-reference to the certification requirement here in § 778.14 is removed and replaced with new provisions.

We propose that the introductory statement of § 778.14 provide that each application must contain the information required in the section. This statement is unchanged from the current regulation.

Proposed paragraph (a) requires that an application must state whether the applicant or any subsidiary, affiliate, or persons controlled by or under common control with the applicant has either had a Federal or State coal mining permit suspended or revoked in the five years preceding the date of submission of the application or forfeited a performance bond or similar security deposited in lieu of bond. This provision is unchanged from the current regulation.

Proposed paragraph (b) requires the application contain 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) the 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. The provisions of paragraph (b) and its five subparagraphs are unchanged from the current regulation.

Proposed paragraph (c) requires that an application contain 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 owned or controlled by the applicant. Proposed paragraph (c) further provides that for each violation notice reported, the list must include the information, as applicable, described in the five subparagraphs that follow. In addition to the proposed changes described above, we propose to amend paragraph (c) by deleting the phrase "that is deemed or presumed to be" from the provision. A significant effect of the changes to the definitions of "ownership" and "control" at § 778.5, as discussed above in that section, is that presumptions of ownership or control will no longer exist in these regulations. Therefore, we believe that any reference to a deemed or presumed relationship of the applicant to operations the applicant owns or controls here in § 778.14 is unnecessary.

Proposed paragraph (c)(1) provides that for each violation notice reported, the list must include any identifying numbers for the operation, including the Federal or State permit number and MSHA number, the date of issuance of the violation notice, the name of the person to whom the violation notice was issued, and the name of the issuing regulatory authority, department or agency. We would amend the provision by deleting the requirement to provide the date of issuance of the MSHA number. We intend this change to mean that only the identifying numbers are required. OSM believes that the list need not include the date an MSHA number was issued, since the actual

MSHA number should provide sufficient identifying information.

Proposed paragraph (c)(2) provides that for each violation notice reported, the list must include a brief description of the violation alleged in the notice. This provision is unchanged from the current regulation.

Proposed paragraph (c)(3) provides that for each violation notice reported, the list must include 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. This provision is unchanged from the current regulation.

Proposed paragraph (c)(4) provides that for each violation notice reported, the list must include the current status of the proceedings and of the violation notice. This provision is unchanged from the current regulation.

Proposed paragraph (c)(5) provides that for each violation notice reported, the list must include the actions, if any, taken by any person identified in paragraph (c) of this section to abate the violation. This provision is unchanged from the current regulation.

Proposed paragraph (d) provides that 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. This provision is unchanged from the current regulation.

#### *U. Section 842.11—Federal inspections and monitoring*

We propose to amend paragraph (e)(3)(i) at § 842.11. It provides that OSM will take action to ensure that the permittee and operator will be precluded from receiving future permits while violations continue at the site. This provision is a consequence of an OSM finding, in writing, that a surface coal mining operation has been abandoned and at least one notice of violation has been cited. Paragraph (e)(3)(i) is proposed to be amended to remove the phrase, "and owners and controllers of the permittee and operator" from the provision. This change is consistent with the redesigned approach represented by this proposal. The phrase proposed to be removed indicates that future applications by an applicant whose principals include the owners or controllers of a permittee or operator of a site having been abandoned with violations will not be found permit ineligible based solely

upon the violations at the abandoned site. We propose no changes for the remaining provisions in § 842.11.

#### *V. Section 843.5—Definitions*

We propose to delete the entire § 843.5 which contains two definitions. The definition for "unwarranted failure to comply" is proposed to be moved to § 846.5 under alternative enforcement. The definition for "willful violation" is proposed to be deleted as inconsistent with the proposed definition of "willful" or "willfully" under § 701.5.

#### *W. Section 843.11—Cessation Orders*

We propose to amend paragraph (g) at § 843.11. It provides that where OSM is the regulatory authority, OSM will provide written notice within 60 days after issuing a cessation order to any person who has been identified under proposed §§ 773.17(h) and 778.13(c) as a controller or who has the ability to control the operation against which the cessation order was issued. We propose this amendment to revise the cross-references to §§ 773.17 and 778.13 to be consistent with the amendments proposed in those sections. No other revisions to § 843.11 are proposed.

#### *X. Section 843.13—Suspension or Revocation of Permits: Pattern of Violations*

We propose to move § 843.13, the provisions for suspension or revocation of permits for a pattern of violations, from part 843 to § 846.14 of part 846, which is proposed to be devoted to alternative enforcement actions. We have consistently considered suspension or revocation for a pattern of violations to be one of the remedial measures that we call alternative enforcement actions. Accordingly, we propose to move the provisions governing suspension or revocation of permits for a pattern of violations to part 846. Proposed amendments to the provisions are discussed below, at part 846.

#### *Y. Section 843.21—Procedures for Improvidently Issued State Permits*

We propose to amend paragraphs (d) and (e) of the provisions at § 843.21, procedures for improvidently issued State permits. We propose no changes to the current regulations in paragraphs (a), (b), (c), and (f) at § 843.21, but have re-proposed these provisions to provide the opportunity for public review and comment. We propose to amend the Federal enforcement provision at paragraph (d) to add accurate and complete information to the reasons for not taking remedial action. We propose to amend the remedies to a notice of

violation at paragraph (e) to add accurate and complete information to the reasons a notice of violation might be terminated.

Proposed paragraph (a) of § 843.21 provides for the initial notice. It provides that, 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), 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, OSM will issue to the State, and should provide to the permittee, an initial notice stating in writing the reasons for that belief. This provision is unchanged from the current regulation.

Proposed paragraph (b) provides for the State's response to the initial notice. It provides that 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: (1) the permit does not meet the criteria of § 773.20(b), or the State program equivalent; or (2) the State is in compliance with the State program equivalents of §§ 773.20 and 773.21. This provision is unchanged from the current regulation.

Proposed paragraph (c) provides for the issuance of a ten-day notice. It provides that 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. This provision is unchanged from the current regulation.

Proposed paragraph (d) provides for Federal enforcement under these procedures. After 10 days from the date on which a ten-day notice is issued under paragraph (c) of § 843.21, if OSM finds that the State has failed to take appropriate action under the State program equivalents of §§ 773.20 and 773.21, or to show good cause for such failure, OSM will take appropriate remedial action. Paragraph (d) further provides that such remedial action may include the issuance of a notice of violation to the permittee or operator 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. This requirement would apply unless certain conditions were met to the satisfaction of the responsible agency. These conditions would include: (1) abatement of any violation, or the payment of any

penalty, or fee; (2) execution of a plan to abate the violation or a schedule to pay the penalty or fee; (3) the information questions have been resolved; or (4) the permittee, operator, and all operations owned or controlled by the permittee and operator are no longer responsible for the violation, penalty, fee, or information. Paragraph (d) further provides that, under this paragraph, good cause does not include the lack of State program equivalents of §§ 773.20 and 773.21. We propose to amend paragraph (d) to clarify that the regulatory authority will not take remedial action if the information questions are resolved to the satisfaction of the responsible agency.

Proposed paragraph (e) provides for the remedies to a 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 either vacate or terminate the notice as provided for in the subparagraphs that follow.

Proposed paragraph (e)(1) provides that OSM will vacate the notice of violation if it resulted from an erroneous conclusion under this section or if ownership or control has been refuted. We propose to amend this provision to add "or if ownership or control has been refuted" to allow for a successful challenge to the ability to control a surface coal mining operation under proposed § 773.24. A successful challenge under § 773.24 would also result in the vacation of the notice of violation.

Proposed paragraph (e)(2) provides that OSM will terminate the notice of violation if the three criteria discussed in the subparagraphs that follow are met.

Proposed paragraph (e)(2)(i) provides that the notice of violation will be terminated if all violations have been abated, all penalties or fees have been paid, and all information questions have been resolved. As with paragraph (d) above, we propose to add information to the issues covered by this provision. This change is consistent with the proposed changes at §§ 773.20 and 773.21.

Proposed paragraph (e)(2)(ii) provides that the notice of violation will be terminated if the permittee or any operation owned or controlled by the permittee has filed and is pursuing a good faith appeal of the violation, penalty, fee, or information request, or has entered into and is complying with an abatement plan or payment schedule to the satisfaction of the responsible agency. As with paragraphs (d) and (e)(2)(i) above, we propose to add

information to the issues covered by this provision.

Proposed paragraph (e)(2)(iii) provides that the notice of violation will be terminated if the permittee and all operations owned or controlled by the permittee are no longer responsible for the violation, penalty, fee, or information. As with paragraphs (d), (e)(2)(i), and (e)(2)(ii) above, we propose to add information to the issues covered by this provision.

Proposed paragraph (f) provides for no civil penalty under the provisions at § 843.21. OSM will not assess a civil penalty for a notice of violation issued under this section. This provision is unchanged from the current regulation.

#### *Z. Section 843.24—Oversight of State Permitting Decisions With Respect to Ownership or Control or the Status of Violations*

We would remove the provisions for the oversight of State permitting decisions with respect to ownership or control or the status of violations at § 843.24 from the regulations. Our approach to permit eligibility and permitting decisions would be redesigned by way of this proposal. Therefore, provisions for oversight of a State's permitting decisions in the context of presumptions of ownership or control or the status of a violation are no longer required. However, this change in no way alters our oversight obligations with respect to permit information, permitting decisions or the use of the AVS. Provisions for States to maintain data on State-issued violations in AVS is provided for in proposed § 773.22. Accordingly, § 843.24 is proposed to be removed from our rules.

#### *AA. Part 846—Alternative Enforcement*

We have devoted considerable time and effort to eliciting comments and suggestions from a broad range of interested parties prior to the development of a conceptual framework for this proposal. As the concepts for permit information, permit eligibility, and investigation evolved, it became apparent that another element was required to complete the conceptual framework of the redesigned approach. That key element is alternative enforcement.

In the current regulations, provisions exist for alternative enforcement at 30 CFR § 845.15(b)(2). Those provisions provide for appropriate action under sections 518(e), 518(f), 521(a)(4), and 521(c) of SMCRA whenever a violation has remained unabated for 30 days.

We propose to amend part 846 to provide further regulatory authority for the use of certain enforcement actions

that we collectively call "alternative enforcement." We view alternative enforcement actions as those enforcement measures provided for under sections 518 and 521 of SMCRA. These actions would be in addition to those provided for in § 845.15(b)(2), and would include provisions for individual civil penalties, currently the whole of part 846. Additionally the proposed regulations make it clear that we will pursue all appropriate remedies to correct SMCRA violations. Permittees have occasionally acted as if a regulatory authority may pursue only one of the alternative enforcement options set out in 30 CFR § 845.15(b)(2). This proposed rule makes it clear that we may pursue more than one option and are not limited to any single remedy to correct SMCRA violations.

We have concluded that under the January 31, 1997, Court of Appeals' ruling, an applicant's owners or controllers with violations might be able to continue unimpeded, in the surface coal mining business, although not as a permittee. Therefore, we have sought through alternative enforcement to compel compliance from those who would ignore, fail, or refuse to meet their affirmative duty to comply with the Act and regulatory program. We propose to rely upon the powerful statutory provisions in the Act which authorize alternative enforcement. The proposal provides the regulatory means whereby those statutory remedies are implemented to compel compliance under the regulatory program. State regulatory authorities have similar alternative enforcement remedies available under State-law counterparts to SMCRA. Under this proposal the regulatory authorities will more readily be able to invoke the remedies available to them.

#### AA.1. Section 846.1—Scope

We propose to amend § 846.1, the scope of part 846. It states that part 846 will govern the use of measures provided for in the Act at sections 201(c)(1), 510(c), 518(e), 518(f), 518(g), 521(a)(4), and 521(c), that we collectively call "alternative enforcement" measures or actions. OSM and State regulatory authorities will use these measures to compel compliance whenever any person engaging in or carrying out surface coal mining operations as an owner, controller, agent, permittee, or operator has failed in his or her duty to promptly correct violations. A determination, finding, or conviction made under these provisions must be so designated in the AVS by OSM or the State regulatory authority for the person for whom the

determination, finding, or conviction is made.

#### AA.2. Section 846.5—Definitions

We propose to amend § 846.5 by moving the definitions of "knowingly" and "willfully" to § 701.5 and amend them. The definition of "unwarranted failure to comply" is proposed to be moved from § 843.5 to § 846.5 to support the provisions for suspension or revocation of a permit for a pattern of violations.

"Unwarranted failure to comply" would mean the failure of a permittee, operator, agent, or owner or controller of a permittee or operator to prevent the occurrence of any violation of his or her permit or any requirement of the Act or regulations due to indifference, lack of diligence, or lack of reasonable care. It also would mean the failure to abate any violation of such permit or any requirement of the Act or regulations due to indifference, lack of diligence, or lack of reasonable care. This amended definition would pertain to an operator, owner, controller, or agent of a permittee or operator in addition to the permittee. We also propose to add "or any requirement" between "any violation of such permit" and "of the Act or regulations." This revision addresses an apparent typographical error in the current definition. We believe the definition of "unwarranted failure to comply" is more meaningful within the provisions for alternative enforcement.

The definition of "violation, failure, or refusal" in § 846.5 would mean: (1) A violation of a condition of a permit issued under a Federal program, a Federal lands program, Federal enforcement under section 502 of the Act, or Federal enforcement of a State program under section 521 of the Act; or (2) a failure or refusal to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under sections 518(b) or 703 of the Act. This language is unchanged from the current definition.

#### AA.3. Section 846.11—Criminal Penalties

We propose to create § 846.11 to contain the provisions for criminal penalties. It would provide OSM and State regulatory authorities with regulatory language to implement the statutory provisions of section 518(e) of the Act. The language in the proposed provisions is taken directly from the statutory provisions in section 518(e). Use of these provisions would entail a

finding by the regulatory authority for a person meeting the criteria for criminal prosecution and the referral of that finding to the Attorney General, as appropriate, to pursue prosecution under the provisions of the Act and these regulations.

Proposed paragraph (a) provides that the regulatory authority may pursue criminal sanctions against any person who willfully and knowingly (1) violates a condition of a permit; or (2) fails or refuses to comply with any order issued under section 521 or 526 of the Act or any order incorporated into a final decision issued by the Secretary; or (3) makes any false statement, representation, or certification, or fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to the regulatory program or any order or decision issued by the Secretary under the Act.

Proposed paragraph (b) provides that the regulatory authority may pursue criminal sanctions against a permittee, operator, or any owner, controller, principal or agent of the permittee or operator if the violation, failure or refusal under paragraph (a) of this section remains uncorrected for more than 30 days after (1) the suspension or revocation of a permit under § 846.14 of this part, or (2) the issuance of a violation notice to an unpermitted operation.

Proposed paragraph (c) provides that any person convicted under proposed § 846.11 may be subject to punishment by a fine of not more than \$10,000 or imprisonment of not more than one year, or both.

#### AA.4. Section 846.12—Individual Civil Penalties

We propose to replace current § 846.12 with the provisions for individual civil penalties. Proposed § 846.12 is based on the existing provisions for individual civil penalties which are currently the entire part 846 and which, in turn, are based upon the statutory requirements of section 518(f) of the Act. We propose to re-number the existing regulations governing individual civil penalties, with only minor edits to the language of the provisions. We propose these provisions to authorize the regulatory authority to make a determination for persons who meet the criteria for the assessment of an individual civil penalty.

Proposed paragraph (a) introduces the two criteria that must be met in order for an individual civil penalty to be assessed. The heading is provided for at current § 846.12.



Proposed paragraph (a)(1) provides that, except as provided in paragraph (a)(2) of this section, the regulatory authority may assess an individual civil penalty against any corporate director, officer or agent of a corporate permittee or operator who knowingly and willfully authorized, ordered or carried out a violation, failure or refusal. This provision is currently at § 846.12(a). The cross-reference "paragraph (b)" is changed to "paragraph (a)(2)" in the proposed provisions. In addition, we propose to add "or operator" to paragraph (a)(1) to indicate that any corporate director, officer, or agent of an operator may also be assessed an individual civil penalty. This amendment is consistent with other revisions in this proposal, notably at §§ 773.15 and 778.13, where we propose to provide for the responsibilities and obligations of operators, different from the permittee, in the conduct of surface coal mining and reclamation operations.

Proposed paragraph (a)(2) provides that the agency will not assess an individual civil penalty in situations resulting from a permit violation by a corporate permittee until the agency issues a cessation order to the corporate permittee for the violation, and the cessation order has remained unabated for 30 days. The proposed language is unchanged from the current regulation at § 846.12(b).

Proposed paragraph (b) provides for the amount of individual civil penalty. The proposed heading is unchanged from the current heading at § 846.14.

Proposed paragraph (b)(1) provides that in determining the amount of an individual civil penalty assessed under paragraph (a) of this section, the regulatory authority will consider the criteria specified in section 518(a) of the Act, including (i) the individual's history of authorizing, ordering or carrying out previous violations, failures or refusals at the particular surface coal mining operation; (ii) the seriousness of the violation, failure or refusal (as indicated by the extent of damage and/or the cost of reclamation), including any irreparable harm to the environment and any hazard to the health and safety of the public; and (iii) the demonstrated good faith of the individual charged in attempting to achieve rapid compliance after notification of the violation, failure or refusal. The current provision is at §§ 846.14(a)(i) through (a)(iii). Except for the amended cross-reference in paragraph (b)(1), the proposed language is unchanged from the current regulation.

Proposed paragraph (b)(2) provides that the penalty will not exceed \$5,000 for each violation. Paragraph (b)(2)

further provides that each day of a continuing violation may be deemed a separate violation and the regulatory authority may assess a separate individual civil penalty for each day the violation, failure or refusal continues, from the date of service of the underlying notice of violation, cessation order or other order incorporated in a final decision issued by the Secretary, until abatement or compliance is achieved. The proposed language is unchanged from the current regulation at § 846.14(b).

Proposed paragraph (c) provides for the procedure for the assessment of an individual civil penalty. The heading is unchanged from the current regulation at § 846.17.

Proposed paragraph (c)(1) provides for the notice of an individual civil penalty. It states that the regulatory authority will serve on each individual to be assessed an individual civil penalty a notice of proposed individual civil penalty assessment, including a narrative explanation of the reasons for the penalty, the amount to be assessed, and a copy of any underlying notice of violation and cessation order. The proposed language is unchanged from the current regulation at § 846.17(a).

Proposed paragraph (c)(2) provides for the final order and the opportunity for review. It provides that the notice of proposed individual civil penalty assessment will become a final order of the Secretary, 30 days after service upon the individual, unless the individual files within 30 days of service of the notice of proposed individual civil penalty assessment a petition for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (Phone: 703-235-3800), in accordance with 43 CFR 4.1300 *et seq.*; or the OSM and the individual or responsible corporate permittee agree within 30 days of service of the notice of proposed individual civil penalty assessment to a schedule or plan for the abatement or correction of the violation, failure or refusal. The proposed language is based on the current regulations at §§ 846.17(b)(i) and (b)(ii).

Proposed paragraph (c)(3) provides for the service of an individual civil penalty. Paragraph (c)(3) provides that for purposes of this section, OSM will perform service on the individual to be assessed an individual civil penalty by certified mail or by any alternative means consistent with the rules governing service of a summons or complaint under Rule 4 of the Federal Rules of Civil Procedure. Service is complete upon tender of the notice of

proposed assessment and included information or of the certified mail and is not deemed incomplete because of refusal to accept. The proposed language is based on the current regulation at § 846.17(c).

Proposed paragraph (d) provides for the conditions under which an individual civil penalty is paid. The proposed heading is unchanged from the current heading § 846.18.

Paragraph (d)(1) provides for the payment of an individual civil penalty when there has been no abatement or appeal of the penalty. It provides that if a notice of proposed individual civil penalty becomes a final order in the absence of a petition for review or abatement agreement, the penalty will be due upon the issuance of the final order. The proposed language is unchanged from the current regulation at § 846.18(a).

Proposed paragraph (d)(2) provides for the payment of an individual civil penalty when the individual subject to the penalty appeals the penalty. It provides that if an individual named in the notice of proposed individual civil penalty assessment files a petition for review in accordance with 43 CFR 4.1300 *et seq.*, the penalty becomes due upon issuance of a final administrative order affirming, increasing, or decreasing the proposed penalty. The proposed language is unchanged from the current regulation at § 846.18(b).

Proposed paragraph (d)(3) provides for the payment of an individual civil penalty when an abatement agreement has been executed. It provides that where the regulatory authority and the corporate permittee or individual have agreed in writing on a plan for the abatement of, or compliance with, the unabated order, an individual named in a notice of proposed individual civil penalty assessment may postpone payment until receiving either a final order from the regulatory authority stating that the penalty is due on the date of such final order, or written notice that abatement or compliance is satisfactory and the penalty has been withdrawn. This provision is currently at § 846.18(c). Except for punctuation, the proposed provision is unchanged from the current regulation.

Proposed paragraph (d)(4) provides for instances of delinquent payment. It provides that following the expiration of 30 days after the issuance of a final order assessing an individual civil penalty, any delinquent penalty is subject to interest at the rate established quarterly by the U.S. Department of the Treasury for use in applying late charges on late payments to the Federal government, under Treasury Financial



Manual 6-8020.20. Paragraph (d)(4) further provides that the Treasury current value of funds rate is published by the Fiscal Service in the notices section of the **Federal Register** and that interest on unpaid penalties will run from the date payment first was due until the date of payment. Paragraph (d)(4) further provides that failure to pay overdue penalties may result in one or more of the actions specified in §§ 870.15(e)(1) through (e)(5) and that delinquent penalties are subject to late payment penalties specified in § 870.15(f) and processing and handling charges in § 870.15(g). The proposed language is unchanged from the current regulation at § 846.18(d).

#### AA.5. Section 846.14—Suspension or Revocation of Permits: Pattern of Violations

We propose to replace current § 846.14 with provisions to allow the regulatory authority to suspend or revoke permits for a pattern of violations. The provisions proposed in § 846.14 are based upon the current provisions at § 843.13 which, in turn, are based upon the statutory requirements of section 521(a)(4) of the Act.

Proposed paragraph (a)(1) provides that the Director will issue an order to a permittee, requiring them to show cause why the permit and their right to mine under the Act should not be suspended or revoked, if the regulatory authority determines that a pattern of violations of any requirements of the Act, this Chapter, the applicable program, or any permit condition required by the Act exists or has existed, and that the violations were caused by the permittee willfully or through unwarranted failure to comply with those requirements or conditions.

Paragraph (a)(2) further provides that violations committed by any person conducting surface coal mining operations on behalf of the permittee would be attributed to the permittee, unless the permittee establishes that the violations were: (1) acts of deliberate sabotage or in direct contravention of the expressed orders of the permittee; or (2) willful and knowing violations of a contract provision which the permittee actively tried to prevent.

Paragraph (a)(3) provides that if OSM determines that a pattern of violations exists, it will promptly file a copy of any order to show cause with the Office of Hearings and Appeals. We believe that the permittee should be protected from a determination under the provisions of proposed § 846.14 in instances where a violation resulted from activities that occur in direct opposition to orders or

direction given by the permittee and where the permittee actively tried to prevent a violation that results from the willful and knowing disregard of a provision in a contract between the permittee and its operator.

Proposed paragraph (a)(4) provides that the regulatory authority may determine that a pattern of violations exists or has existed after considering the circumstances, including: (1) the number of violations, cited on more than one occasion, of the same or related requirements of the Act, the regulations, the applicable program, or the permit; (2) the number of violations, cited on more than one occasion, of different requirements of the Act, the regulations, the applicable program, or the permit; and (3) the extent to which the violations were isolated departures from lawful conduct. We would remove the language in the current provision whereby a determination of a pattern of violations is based upon two or more Federal inspections within any 12-month period. We have concluded that the Act at section 521(a)(4) does not contain specific criteria as set out in the current regulation. However, we invite comments on this proposed change.

Proposed paragraph (a)(5) provides that the regulatory authority will promptly review the history of violations of any permittee or operator who has been cited for violations of the same or related requirements of the Act, this Chapter, the applicable program, or the permit. Paragraph (a)(5) further provides that if, after such review, the regulatory authority determines that a pattern of violations exists or has existed, the regulatory authority will issue an order to show cause as provided in paragraph (a)(1) of this section. This provision is currently at § 843.13(a)(3). We would amend the provision to add that we will review a history of violations for the operator in addition to the permittee. We propose this change to provide for the responsibilities and obligations of operators, different from the permittee, in the conduct of surface coal mining and reclamation operations. We would further amend the provision to remove the language whereby the review of violations is based upon three or more Federal inspections within any 12-month period. As discussed above in proposed paragraph (a)(4), we have concluded that the Act at section 521(a)(4) does not contain specific criteria as set out in the current regulation. Therefore, we propose to remove the criteria in the proposed rule. We also invite comments on this proposed change.

Proposed paragraph (a)(6) provides that, in determining whether a pattern exists or has existed, OSM will consider only violations issued as a result of: (1) the enforcement of the provisions of Title IV of the Act, or a Federal program or a Federal lands program under Title V; (2) a Federal inspection during the interim program and before the applicable State program was approved under sections 502 or 504 of the Act; or (3) Federal enforcement of a State program in accordance with sections 504(b) or 521(b) of the Act. This provision is currently at § 843.13(a)(4)(i) and includes paragraphs (A), (B), and (C). We would amend the current regulation at § 843.13(a)(4) by revising the language and reorganizing the provisions. In proposed paragraph (a)(6), the phrase, "the number of violations within any 12-month period" is replaced with "whether a pattern exists or has existed." This revision is consistent with the amendments to provisions here in proposed § 846.14 in paragraphs (a)(1) and (a)(3). We would delete the last clause in paragraph (a)(4) to make the language in paragraph (a)(6) more concise. In addition, we are re-proposing current subparagraph (a)(4)(i)(A) as subparagraph (a)(6)(i) to require that the provision applies not only to Title V, but also to Title IV of the Act.

As indicated above in proposed paragraphs (a)(5) and (a)(6), we invite comments on what constitutes a pattern of violations. Specifically, we ask whether the review of the history of violations and a determination of whether a pattern exists is permit-specific. Alternatively, should it include a controller's compliance history at prior operations. For example, if a controller has been associated with two previous mining operations that have failed to pay reclamation fees and the current operation is delinquent in paying reclamation fees, would this constitute a pattern of violations?

We have not re-proposed the current provision at § 843.13(a)(4)(ii) in § 846.14. We believe that this provision is inconsistent with our proposal to eliminate the pre-determined number of inspections and the defined time frame for the occurrence of the violations in order to establish a pattern of violations.

Proposed paragraph (b) provides for the hearing and order in the procedures for suspension or revocation of a permit for a pattern of violations. A heading would be inserted at paragraph (b) identifying that the provisions that follow pertain to the hearing and order under these regulations.

Proposed paragraph (b)(1) provides that if the permittee files an answer to

the show cause order and requests a hearing under 43 CFR Part 4.1190 *et seq.*, a public hearing will be provided as set forth in that part. Paragraph (b)(1) corresponds to the current regulation at § 843.13(b). Paragraph (b)(1) would be amended to provide for the specific regulatory citation in 43 CFR Part 4.

Proposed paragraph (b)(2) provides that within the time limits set forth in 43 CFR Part 4.1190 *et seq.*, the Office of Hearings and Appeals will issue a written determination as to whether a pattern of violations exists and, if appropriate, an order. Paragraph (b)(2) further provides that if the Office of Hearings and Appeals revokes or suspends the permit and the permittee's right to mine under the Act, the permittee must immediately cease surface coal mining operations on the permit and must comply with whichever of the two following paragraphs is applicable. This provision is revised from the current regulation at § 843.13(c). We would amend the provision by deleting "sixty days" and thereby deferring to 43 CFR Part 4.1190 *et seq.* for the time period within which the Office of Hearings and Appeals will issue a written determination and order.

Proposed paragraph (b)(2)(i) provides that if the permit and the right to mine under the Act are revoked, the permittee must complete reclamation within the time specified in the order. The proposed language is unchanged from the current regulation at § 843.13(c)(1).

Proposed paragraph (b)(2)(ii) provides that if the permit and the right to mine under the Act are suspended, the permittee must complete all affirmative obligations to abate all conditions, practices, or violations as specified in the order. The proposed language is unchanged from the current regulation at § 843.13(c)(2).

Proposed paragraph (c) provides for the review of violations under the procedures for suspension or revocation of a permit for a pattern of violations. It provides that whenever a permittee fails to abate a violation contained in a notice of violation or cessation order within the abatement period set in the notice or order or as subsequently extended, the regulatory authority will review the permittee's history of violations to determine whether a pattern of violations exists and will issue an order to show cause as appropriate. This provision is currently at § 843.13(d). We propose to add a heading to identify the content of the provision and to delete the cross-reference to § 845.15(b)(2) from the current regulation. Insofar as we are proposing fully-developed regulatory provisions for alternative enforcement

actions here in part 846, we believe the cross-reference to § 845.15(b)(2) in the regulations for suspension or revocation of a permit for a pattern of violations is no longer required.

Proposed paragraph (d) provides for the service of the show cause order under the procedures for suspension or revocation of a permit for a pattern of violations. Paragraph (d) provides that for purposes of this section and § 846.15 of this part, the permittee and/or operator, or owner, controller, principal, or agent of the permittee or operator must be served by certified mail, or by any alternative means consistent with the rules governing service of a summons or complaint under Rule 4 of the Federal Rules of Civil Procedure. Paragraph (d) further provides that service is complete upon delivery of the order or of the certified mail and is not considered incomplete because of a person's refusal to accept.

#### AA.6. Section 846.15—Suspension or Revocation of Permits: Failure to Comply With a Permit Condition

We propose to create § 846.15 to provide procedures for the suspension or revocation of a permit for failure to comply with a permit condition. We believe these provisions are required under the redesigned approach and are included under alternative enforcement actions. One of the aspects of the redesign proposed today is an increased emphasis on the obligations and responsibilities of persons after a permit is approved and issued. We believe that all persons who engage in or carry out surface coal mining operations, including permittees and operators, have an affirmative duty to comply with every condition under which a permit is issued in order to continue to have the benefit of an approved permit. We also believe that regulatory authorities must have the ability to compel compliance of persons who fail to comply with permit conditions. Moreover, we have concluded that the statutory provisions in section 201(c) of the Act provide the authority for proposed § 846.15.

Paragraph (a) of proposed § 846.15 provides the general provision for suspension or revocation for failure to comply with a permit condition. It states that if the regulatory authority finds that a permittee or operator, or any owner, controller, principal, or agent of a permittee or operator, has failed to comply with any condition imposed on an approved permit, the agency will order the permittee or operator, or any owner, controller, principal, or agent of the permittee or operator, to show cause why the permit should not be suspended or revoked.

Proposed paragraph (b) provides procedures for suspension or revocation for failure to comply with additional permit conditions provided for in proposed § 773.18. Paragraph (b) provides that if the regulatory authority finds: (1) a permittee has less than five years experience or controllers without demonstrated successful environmental compliance; and (2) the permittee or operator, or any owner, controller, principal, or agent of the permittee or operator has failed to comply with the additional permit conditions imposed under § 773.18 and the permittee is unable or unwilling to comply with the mining and reclamation plans. We have proposed this provision to provide regulatory authorities with an administrative remedy to use when a permittee or operator or other person subject to the additional permit conditions under § 773.18 fails to comply with the additional conditions. We also invite comments on the proposal in § 846.15, especially the criteria the regulatory authority would use to find a permittee unable or unwilling to comply with the mining and reclamation plan.

Proposed paragraph (c) provides for the hearing and order under the procedures for suspension or revocation of a permit for failure to comply with a permit condition.

Proposed paragraph (c)(1) provides that if the permittee files an answer to the show cause order and requests a hearing under 43 CFR part 4 Subpart L, a public hearing may be provided as set forth in that part.

Proposed paragraph (c)(2) provides that if the Office of Hearings and Appeals revokes the permit, the permittee and the operator, if any, must immediately cease surface coal mining operations on the permit and must complete reclamation within the time specified in the order.

Proposed paragraph (c)(3) provides that if the permit is suspended, the permittee and operator must complete all affirmative obligations to abate all conditions, practices, or violations as specified in the order.

Proposed paragraph (c)(4) provides that if the right of an owner, controller, principal or agent of the permittee or operator to engage in or carry out surface coal mining operations is suspended or revoked, such person is prohibited from owning, controlling, or serving as a principal or agent for any surface coal mining operation as specified in the order.

Proposed paragraph (d) provides for the service of the show cause order under the procedures for suspension or revocation of a permit for failure to

comply with a permit condition. Paragraph (d) provides that the provisions for service in § 846.14 also govern service under § 846.15.

#### AA.7. Section 846.16—Civil Actions for Relief

We propose to create § 846.16 to provide procedures whereby OSM and State regulatory authorities may pursue civil actions for relief under the authority of section 521(c) of the Act. We propose to add these provisions to part 846 to complement administrative determinations and referrals for prosecution. Under each remedial action, whether administrative, civil, or criminal, we would seek compliance from those who would ignore, fail, or refuse to meet their affirmative duty to comply with the Act and the regulatory program. The use of the regulations in § 846.16 entails a finding by the regulatory authority that a person meets the proposed criteria and referral to the Attorney General, as appropriate, to pursue one or more appropriate civil actions under the Act and these regulations.

Proposed paragraph (a) provides that under section 521(c) of the Act, OSM will request the Attorney General to institute civil action for relief according to these procedures. Civil actions for relief include a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the surface coal mining operation is located or in which the permittee or operator has its principal office. OSM or the State regulatory authority will seek such civil action whenever a permittee or operator, or owner, controller, principal, or agent of the permittee or operator is found to have committed any one of six actions described in the paragraphs that follow.

Proposed paragraph (a)(1) provides that OSM or a State regulatory authority may pursue a civil action for relief if the permittee or operator, or owner, controller, principal, or agent of the permittee or operator has: (i) violated or failed or refused to comply with any order or decision issued by OSM or the State regulatory authority with jurisdiction under the Act; or (ii) interfered with, hindered, or delayed the agency with jurisdiction in carrying out the provisions of the Act or its implementing regulations.

Proposed paragraph (a)(1)(iii) provides that OSM or a State regulatory authority may pursue a civil action for relief if the permittee or operator, or owner, controller, principal, or agent of the permittee or operator has refused to

admit the agency's authorized representative onto the mine site.

Proposed paragraph (a)(1)(iv) provides that OSM or a State regulatory authority may pursue a civil action for relief if the permittee or operator, or owner, controller, principal, or agent of the permittee or operator has refused to allow inspection of the mine by the agency's authorized representative.

Proposed paragraph (a)(1)(v) provides that OSM or a State regulatory authority may pursue a civil action for relief if the permittee or operator, or owner, controller, principal, or agent of the permittee or operator has refused to furnish any information or report requested by the agency under the provisions of the Act or its implementing regulations.

Proposed paragraph (a)(1)(vi) provides that OSM or a State regulatory authority may pursue a civil action for relief if the permittee or operator, or owner, controller, principal, or agent of the permittee or operator has refused to allow access to, and copying of, such records as the agency determines necessary to carry out the provisions of the Act and its implementing regulations.

Proposed paragraph (b) provides that temporary restraining orders will be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended.

Proposed paragraph (c) provides that any relief granted by the court to enforce an order under paragraph (a)(1)(i) of this section will continue in effect until completion of all proceedings for review of such order under the Act or its implementing regulations unless, beforehand, the district court granting such relief sets aside or modifies the order.

We also propose to incorporate the current provisions at §§ 846.17 and 846.18 into the provisions proposed at § 846.12, as noted in that section.

#### IV. Procedural Determinations

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

This document is not a significant rule and is not subject to review by the Office of Management and Budget under Executive Order 12866.

a. This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

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

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

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

##### 2. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This determination is based on the findings that the regulatory additions in the rule will not significantly change costs to industry or to the Federal, State, or local governments. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

##### 3. Small Business Regulatory Enforcement Fairness Act

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

a. Does not have an annual effect on the economy of \$100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because the rule does not impose major new requirements on the coal mining industry or consumers.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises for the reasons stated above.

##### 4. Unfunded Mandates

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531, *et seq.*) is not required.

##### 5. Executive Order 12630—Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. This determination is based on the fact that the rule will not have an impact on the use or value of private property and so,

does not result in significant costs to the government.

**6. Executive Order 12612—Federalism**

In accordance with Executive Order 12612, the rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment for the reasons discussed in the Record of Compliance on file in OSM's Administrative Record. The proposed rule does not meet the threshold criteria for requiring a Federalism Assessment because it would not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government."

**7. Executive Order 12988—Civil Justice Reform**

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and

meets the requirements of sections 3(a) and 3(b)(2) of the Order.

**8. Paperwork Reduction Act**

In accordance with 44 U.S.C. 3507, OSM has submitted the information collection and record keeping requirements of 30 CFR Parts 773, 774, and 778 to the Office of Management and Budget (OMB) for review and approval.

**30 CFR Part 773**

*Title:* Requirements for Permits and Permit Processing.

*OMB Control Number:* 1029-NEW.

*Abstract:* The regulations at 30 CFR 773 implement section 510 (c) of the Act by requiring information from permit applicants, the coordination and regulatory review of information regarding ownership and control of the applicant and violation history, and the public participation in the approval process for a surface coal mining permit. It also establishes notification requirements and decision criteria for

the agency responsible for making decisions on applications.

*Need for and Use:* OSM and State regulatory authorities use the information collected under 30 CFR Part 773 to ensure that persons planning to conduct surface coal mining operations meet the criteria for permit approval under section 510(b) of the Act, and is eligible to receive a permit under section 510(c).

*Respondents:* Persons who prepare the approximately 300 applications for permits for surface coal mining operations that OSM and State regulatory authorities receive each year, and the 24 State regulatory authorities who must evaluate the permit applications.

*Total Annual Burden:* OSM estimates that a person will need an average of 34 hours to prepare the portion of the permit application required under part 773, including the regulatory review time. The burden placed on respondents by section is as follows:

BILLING CODE 4310-05-P

SECTION	RESPONSES	HOURS PER RESPONSE	TOTAL HOURS
773			
13	324	2.5	825
15(b)(1)	295	31	9,145
19(b)(1)	295	.5	148
19(e)(2)	124	10	1,000
22(b-c)	0	0	0
TOTALS	324	34	11,118

**30 CFR Part 774**

*Title:* Revision; Renewal; and Transfer, Assignment, or Sale of Permit Rights.

*OMB Control Number:* 1029-NEW.

*Abstract:* Sections 506 and 511 of the Act provide that persons seeking permit revisions, renewals, transfer, assignment, or sale of permit rights for surface coal mining activities submit relevant information to the regulatory authority to determine whether the applicant meets the requirements for the action anticipated.

*Need For and Use:* OSM and State regulatory authorities use the information collected to determine whether the application meets the statutory and regulatory standards for approval of a permit revision, renewal,

or transfer, assignment or sale of permit rights.

*Respondents:* Persons who prepare the approximately 5,370 annual permit revisions, renewals, and requests for approval of permit transfers, sales or assignments and the 24 State regulatory authorities that process these permit changes.

*Total Annual Burden:* The estimated annual burden for this part totals 97,214 hours. Specifically, OSM estimates that 4,000 permit revisions will be received annually, requiring 8 hours for each respondent to prepare, and an additional 8 hours for each State regulatory authority to review and approve or deny. OSM anticipates receiving 725 permit renewals annually requiring 16 hours for operators to prepare, and an additional 16 hours for

each State regulatory authority to review and approve or deny. Finally, OSM estimates that 645 applications for transfer, assignment, or sale of permit rights will be received annually requiring 8 hours to prepare and 8 hours to review by the appropriate regulatory authority. Therefore, OSM estimates that respondent burden will be 32 hours for the average request for permit renewals, revisions, or transfers, assignments or sales, in addition to the time required for regulatory review.

**30 CFR Part 778**

*Title:* Permit Applications—Minimum Requirements for Legal, Financial, Compliance, and Related Information.

*OMB Control Number:* 1029-NEW.

*Abstract:* Part 778 implements section 507(b) of the Act which 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 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 to promote public participation.

*Need For and Use:* OSM and State regulatory authorities use the information collected to insure that all legal, financial and compliance requirements are satisfied prior to issuance of a permit.

*Respondents:* Persons who prepare the approximately 300 annual permit applications to conduct surface coal mining and reclamation operations, and the 24 State regulatory authorities who

process the information prior to approval or denial of the application.

*Total Annual Burden:* The estimated annual burden for this part totals 8,223 hours, which translates to an approximate burden of 25 hours for respondents to complete this portion of the permit application, in addition to the time required for regulatory review. The burden placed on respondents by section is as follows:

BILLING CODE 4310-05-P

INFORMATION COLLECTION SUMMARY FOR 30 CFR PART 778			
SECTION	RESPONDENTS	HOURS PER RESPONDENT	TOTAL HOURS
778.13	324	6	1,800
778.14	324	6	1,800
778.15	324	6	1,795
778.16	224	9	1,798
778.17	324	3	895
778.22	69	3	135
TOTALS	324	25	8,223

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of OSM and State regulatory authorities, including whether the information will have practical utility;

(b) The accuracy of OSM's estimate of the burden of the proposed collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of collection on the respondents.

Under the Paperwork Reduction Act, OSM must obtain OMB approval of all information and record keeping requirements. No person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control (clearance) number. These numbers appear in section xxx.10 of 30 CFR Parts 700 through 955. To obtain a copy of OSM's information collection clearance requests, explanatory information, and related forms, contact John A. Trelease at (202) 208-2783 or by e-mail at jtreleas@osmre.gov.

By law, OMB must submit comments to OSM within 60 days of publication of this proposed rule, but may respond as soon as 30 days after publication. Therefore, to ensure consideration by OMB, you must send comments regarding these burden estimates or any other aspect of these information collection and record keeping requirements by January 20, 1999, to 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 the appropriate OMB Control Numbers in any correspondence.

#### 9. National Environmental Policy Act

OSM has prepared a draft environmental assessment (EA) of this proposed rule and has made a tentative finding that it would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C). It is anticipated that a finding of no significant impact (FONSI) will be made for the final rule in accordance with OSM procedures under NEPA. The draft

EA is on file in the OSM Administrative Record at the address specified previously (see ADDRESSES). The EA will be completed and a finding made on the significance of any resulting impacts prior to promulgation of the final rule.

#### 10. Clarity of this regulation.

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "S" and a numbered heading; for example, § 773.15). (5) Is the description of the proposed rule in the SUPPLEMENTARY INFORMATION section of this preamble helpful in

understanding the proposed rule? What else could we do to make the proposed rule easier to understand?

Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW, Washington, DC 20240. You may also e-mail the comments to this address: Execsec@ios.doi.gov

#### 11. Authors

The proposed rule has been developed by the Ownership and Control Redesign Team. Earl Bandy is the Team Leader. The principal authors from the Team were Ann Singleton, Gary Kitzmiller, Sherry Wilson, and Steve McEntegart. Editing the proposed rule was coordinated by Steve McEntegart, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, N.W., Washington, D.C. 20240.

#### List of Subjects

##### 30 CFR Part 701

Law enforcement, Surface mining, Underground mining.

##### 30 CFR Part 724

Administrative practice and procedure, Penalties, Surface mining, Underground mining.

##### 30 CFR Part 773

Administrative practice and procedure, Reporting and record keeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 774

Reporting and record keeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 778

Reporting and record keeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 842

Law enforcement, Surface mining, Underground mining.

##### 30 CFR Part 843

Administrative practice and procedure, Law enforcement, Reporting and record keeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 846

Administrative practice and procedure, Penalties, Surface mining, Underground mining.

Dated: December 4, 1998.

**Sylvia V. Baca,**

*Acting Assistant Secretary, Land and Minerals Management.*

For the reasons given in the preamble, OSM proposes to amend 30 CFR Parts 701, 724, 773, 774, 778, 842, 843, and 846 as set forth below:

#### PART 701—PERMANENT REGULATORY PROGRAM

1. Revise the authority citation for part 701 to read as follows:

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

2. Amend § 701.5 as follows:

a. Remove the definition of *Willful violation*.

b. Revise the definition of *Successor in interest* to read as set forth below:

c. Add the following definitions in alphabetical order to read as set forth below:

##### § 701.5 Definitions.

*Applicant/Violator System* or *AVS* means the automated information system of applicant, permittee, operator, violation, and related data OSM maintains to achieve compliance with SMCRA.

\* \* \* \* \*

*Federal violation notice* means a violation notice issued by OSM or by another agency or instrumentality of the United States.

\* \* \* \* \*

*Knowing* or *knowingly* means that an individual knew or had reason to know in authorizing, ordering, or carrying out an act or omission that such an act or omission constituted a violation of the Act, or a failure or refusal to comply with the Act.

\* \* \* \* \*

*Link to a violation* means that a person owning or having the ability to control the proposed surface coal mining operation has owned or had the ability to control surface coal mining operations at another site at the time a violation existed at that other operation.

\* \* \* \* \*

*Outstanding violation* means a violation notice that remains unabated or uncorrected beyond the abatement or correction period.

\* \* \* \* \*

*State violation notice* means a violation notice issued by a State regulatory authority or by another agency or instrumentality of State government.

\* \* \* \* \*

*Successful environmental compliance* means having no outstanding violations and demonstrating consistent abatement

and other correction of violations, payment of civil penalties, and payment of reclamation fees within the time frames established for abatement and payment, allowing for administrative due process.

*Successor in interest* means a person who the regulatory authority approves as the new permittee when there is a permittee change.

\* \* \* \* \*

*Violation notice* means any written notification from a governmental entity of a violation of the Act or any Federal regulation issued under the Act, a State program, or any Federal or State law or regulation pertaining to air or water environmental protection, in connection with a surface coal mining operation. It includes, but is not limited to, a notice of violation; an imminent harm cessation order; a failure-to-abate cessation order; a final order, bill, or demand letter pertaining to a delinquent civil penalty; a bill or demand letter pertaining to delinquent reclamation fees; a notice of bond forfeiture, where one or more violations upon which the forfeiture was based have not been corrected; a notice of bond forfeiture where the cost of reclamation has exceeded the amount forfeited, or in States with bond pools, a determination that additional reclamation or reimbursement is required.

\* \* \* \* \*

*Willful* or *willfully* means that an individual acted either intentionally, voluntarily or consciously, and with intentional disregard or plain indifference to legal requirements in authorizing, ordering or carrying out an action or omission that constituted a violation of the Act, or a failure or refusal to comply with the Act or any Federal or State law or regulation applicable to surface coal mining operations.

#### Part 724—INDIVIDUAL CIVIL PENALTIES

3. Revise the authority citation for part 724 to read as follows:

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

##### § 724.5 [Amended]

4. In § 724.5 remove the definitions of *Knowingly* and *Willfully*.

#### PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

5. Revise the authority citation for part 773 to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*, 16 U.S.C. 470 *et seq.*, 16 U.S.C. 661 *et seq.*, 16 U.S.C. 703 *et seq.*, 16 U.S.C. 668a *et seq.*, 16 U.S.C. 469 *et seq.*, and 16 U.S.C. 1531 *et seq.*

**§ 773.5 [Removed]**

6. Remove § 773.5.

7. Revise § 773.10 to read as follows:

**§ 773.10 Information Collection.**

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Regulatory authorities will use this information in processing surface coal mining permit applications. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB clearance number for this part is 1029-NEW.

(b) We estimate that the public reporting burden for this part will average 34 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 210, 1951 Constitution Avenue, NW, Washington, DC 20240; 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-NEW in any correspondence.

8. Amend § 773.15 as follows:

a. In the last sentence of paragraph (a)(1) remove the reference to "paragraph (b)(2) of this section" and add "part 775 of this chapter" in its place.

b. Add paragraph (a)(3) to read as set forth below.

c. Revise paragraphs (b)(1), (b)(2), and (b)(3) to read as set forth below.

d. In paragraph (b)(4)(i)(C)(I) remove the date "September 30, 1994" and add "September 30, 2004" in its place.

e. Revise paragraph (e) to read as set forth below.

**§ 773.15 Review of permit applications.**

(a) \* \* \*

(3) We, the regulatory authority, will determine whether you, the applicant, are eligible under § 773.16 to receive a permit.

(i) We will evaluate whether your application contains accurate and

complete information, to make the finding required under paragraph (c)(1) of this section.

(ii) If we find that you have submitted inaccurate, incomplete, or inconsistent legal identity, compliance, or technical information, you must correct the omission, inaccuracy, or inconsistency. We may stop review of the application until the issue is resolved.

(b) *Review of the applicant's legal identity information.* (1) We will make an initial determination whether your legal identity information submitted under § 778.13 of this chapter is accurate and complete, based upon information provided in the permit application, an AVS check, and all other reasonably available information. Once we make a preliminary determination that the information is accurate and complete, we will update the relevant records in the AVS with any previously unreported legal identity information within 30 days. This update must occur before requesting a report from the AVS on the applicant's compliance history under paragraph (b)(3)(i) of this section.

(i) If we find that you, the operator, or any owner, controller, principal, or agent of you or your operator has knowingly or willfully concealed information about any person owning or having the ability to control you or your operator we will—

(A) Inform you in writing of our finding and ask you or the operator to disclose all persons having such a relationship to you or the operator before making a decision on a permit application; and

(B) Investigate to determine if your response under paragraph (b)(1)(i)(A) of this section is a full disclosure.

(1) Depending on the results of your response to paragraph (b)(1)(i)(A) of this section and the investigation under paragraph (b)(1)(i)(B), we may deny the permit application; and

(2) Refer our finding to the Attorney General or equivalent State office for prosecution under section 518(g) of the Act and § 846.11 of this chapter.

(2) *Review of the applicant's permit history.* (i) We will use AVS and any other available information to review your permit history and the permit history of any person with the ability to control you. Our review will determine how long you or those with the ability to control you or the operation have conducted surface coal mining operations and whether such conduct has been in compliance with applicable requirements.

(ii) If you have 5 years or more experience as a permittee or operator of a surface coal mining operation, you are not subject to additional permit

conditions under § 773.18 unless any person with the ability to control you or the operation is linked to an outstanding violation.

(iii) If we determine from the information provided in the application under § 778.13 of this chapter that none of the persons identified in the application has had any previous mining experience, we will ask you to affirm that neither you nor any person with the ability to control you has mining experience. We will investigate whether any person not identified in the application will control the proposed surface coal mining operation as either an operator or other controller as defined in § 778.5 of this chapter.

(3) *Review of the applicant's compliance history.* (i) *Review of violations.* We will request a report from AVS on your history of compliance with SMCRA whenever there is an application for a permit or revision, renewal, transfer, assignment, or sale of permit rights.

(A) We will rely upon your compliance history, and the history of operations you owned or controlled, to make a permit eligibility finding under section 510(c) of SMCRA, unless there is an indication that the history of persons other than you also should be included.

(B) If you, or any surface coal mining operation you owned or controlled, has an outstanding violation, we may not approve the application unless:

(1) The regulatory authority with jurisdiction over the violation approves a properly executed abatement plan or payment schedule; or

(2) The violation is being abated or is the subject of a good faith administrative or judicial appeal, contesting the validity of the violation; or

(3) The violation is subject to the presumption of NOV abatement under § 773.16(b).

(C) Any application approved with outstanding violations must be conditioned under § 773.17(j).

(D) OSM will serve a preliminary finding of permanent permit ineligibility under 43 CFR 4.1351 on you or an operator if we find that:

(1) You owned or controlled mining operations with a demonstrated pattern of willful violations of the Act and its implementing regulations, and

(2) The violations are of such nature and duration that they result in irreparable damage to the environment so as to indicate your or your operator's intent not to comply with the Act or implementing regulations.

(E) You or your operator may request a hearing under 43 CFR 4.1350 through

4.1356 with the Office of Hearings and Appeals within 30 days of receiving a preliminary finding under paragraph (3)(i)(D) of this section. If you or your operator files a request for a hearing under 43 CFR 4.1350 through 4.1356, the Office of Hearings and Appeals will:

(1) Give written notice of the hearing to you or the operator and

(2) Issue a decision within 60 days of the filing of the request for a hearing.

(F) You or your operator may appeal the decision of the administrative law judge to the Interior Board of Land Appeals under procedures in 43 CFR 4.1271 through 4.1276 within 20 days after you or your operator receives the decision.

(G) You are not eligible for a permit if you or anyone proposing to engage in or carry out operations on the proposed permit has been barred, disqualified, restrained, enjoined, or otherwise prohibited from mining under §§ 773.15(b)(3)(i)(C) or 846.16 of this chapter or by a Federal or State court.

(ii) *Examination of the applicant's controllers.* (A) We ask for an AVS report on your owners or controllers that shows:

(1) If they owned or controlled a surface coal mining operation when a violation notice was issued regarding that operation; and

(2) If the violation remains outstanding.

(B) We will investigate each person and violation to determine whether alternative enforcement action under part 846 of this chapter is appropriate. We will enter the results of each determination or referral into AVS.

(C) If we find that you have less than 5 years experience or have owners or controllers that are linked to outstanding violations:

(1) We will consider you to have insufficient or unsuccessful environmental compliance and

(2) You will be subject to additional permit conditions under § 773.18.

\* \* \* \* \*

(e) *Final compliance review.* After we determine you are eligible for a permit, but before the permit is issued, we will review any new information submitted or discovered during the permit application review. No more than 3 business days before permit issuance, we will again request a report from AVS on your history of compliance with SMCRA to ensure that you are not currently linked to any outstanding violations.

9. Add § 773.16 to read as follows:

**§ 773.16 Permit eligibility determination.**

(a) We will determine whether you are eligible for a permit based upon your

permit and compliance history, operations you own or control, and operations you owned or controlled.

(1) If we find you eligible based upon your permit and compliance history and the compliance history of your owners and controllers under § 773.15, then we will determine whether we should impose additional conditions under § 773.18 before permit issuance.

(2) If we find you ineligible, we will send you written notice of our decision. The notice will tell you why you are ineligible and how to challenge a finding on the ability to control a surface coal mining operation.

(b) *Presumption of NOV abatement.* This paragraph applies to a notice of violation (NOV) issued under § 843.12 of this chapter or under a Federal or State program. If the requirements in paragraph (b)(1) of this section are met, we may presume that an NOV is being corrected. We then will add conditions to an approved permit using the presumption of NOV abatement as required under § 773.17(l).

(1) We may presume that an NOV is being corrected to the satisfaction of the agency with jurisdiction over the violation if:

(i) There is no failure-to-abate cessation order; and

(ii) The abatement period for the notice of violation has not yet expired.

(2) The presumption in paragraph (b) of this section does not apply:

(i) If the abatement period has expired;

(ii) If applicants are subject to additional permit conditions under § 773.18;

(iii) Where evidence that the violation is not being abated appears in the permit application or otherwise discovered; or

(iv) If the notice of violation is issued for nonpayment of reclamation fees or civil penalties.

(3) Where the conditions in paragraph (b)(2) of this section apply, we may not approve the application unless you meet one of the criteria under § 773.15(b)(3)(i)(B).

10. In § 773.17 revise paragraph (h) and add paragraphs (i) through (m) to read as follows:

**§ 773.17 Permit conditions.**

\* \* \* \* \*

(h) Within 30 days after a cessation order is issued under § 843.11 of this chapter, you, the applicant, must comply with the requirements of this paragraph.

(1) You must submit to us, the regulatory authority, either:

(i) All of the information required from a permit application by § 778.13(c), (e) and (g) of this chapter; or

(ii) If you have already submitted the information required by paragraph (h)(1)(i) of this section:

(A) Any new information needed to correct or update your previous submission; or

(B) A written notification that there has been no change since the last time you submitted the information.

(2) You do not have to make a submission under paragraph (h) of this section if a stay of the cessation order is granted and remains in effect.

(i) We assume that you are a controller under the permit if:

(1) You are the permittee, operator, or another person named in the application; and (2) You are named in the application as having the ability to determine the manner in which the surface coal mining operation is conducted.

(j) All controllers are jointly and severally responsible for compliance with the terms and conditions of the permit and the regulatory program. All controllers are subject to the jurisdiction of the Secretary of the Interior. A breach of their responsibility for compliance with the terms and conditions of the permit and the regulatory program may result in individual liability for a controller.

(k) We may determine at any time that additional persons are controllers. After the permit is issued, if we identify any additional controllers or they are added by you or the operator, the new controller will be subject to the requirement to certify under § 778.13(m) of this chapter.

(l) As applicable, you or the operator must abate or correct any outstanding violation or payment or receive an administrative or judicial decision invalidating the violation.

(m) The permit is subject to any other special permit conditions we determine necessary to ensure compliance with the performance standards and regulations.

11. Add § 773.18 to read as follows:

**§ 773.18 Additional permit conditions.**

We, the regulatory authority, will include additional permit conditions in any permit issued to you, the applicant, if you have less than 5 years experience in surface coal mining operations, or if your controllers have not demonstrated successful environmental compliance.

(a) If you fail to comply with additional permit conditions under this section, we may find that you are unable or unwilling to comply with the mining and reclamation plan. This finding constitutes adequate reason for us to promptly issue an order for you to show cause why we should not suspend or



revoke the permit under § 846.15 of this chapter.

(b) You must pay all civil penalties assessed under part 845 of this chapter within 30 days of the date of a final order of the Secretary. You must pay all Abandoned Mine Land (AML) reclamation fees under part 870 of this chapter within 30 days of the end of the calendar quarter for which they are due. You must pay AML audit debts within 30 days of the date of the demand letter sent from OSM.

(c) You must take all possible steps to abate any violation within the period set for abatement.

(d) You must maintain continuous and uninterrupted compliance with any provision of an abatement plan or payment schedule or other settlement agreement.

12. Revise § 773.20 to read as follows:

**§ 773.20 Improvidently issued permits: General procedures.**

(a) *Permit review.* If a regulatory authority believes that it improvidently issued a surface coal mining and reclamation permit, it must review the circumstances under which the permit was issued, using the criteria in paragraph (b) of this section. If we, the regulatory authority, find that the permit was improvidently issued, we will take remedial measures under paragraph (c) of this section.

(b) *Review criteria.* We will find that a surface coal mining and reclamation permit was improvidently issued if:

(1) Under the violations review criteria of the regulatory program at the time the permit was issued:

(i) The permit should not have been issued because of an outstanding violation or a delinquent penalty or fee; or

(ii) 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; or

(iii) You, the applicant, failed to disclose any other relevant information that, if properly disclosed at the time of the initial application, would have made you ineligible; and

(2) The violation, penalty, or fee:

(i) Remains outstanding or delinquent; and

(ii) 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

(3) You or any operation owned or controlled by you continues to be responsible for the violation, penalty, or fee.

(c) *Remedial measures.* (1) If we find that a permit was improvidently issued, we will use one or more of the following remedial measures:

(i) Implement a plan for abatement of the violation, establish a schedule for payment of the penalty or fee, or require you to correct the inaccurate information or provide the incomplete information;

(ii) Suspend the permit until:

(A) The violation is corrected to the satisfaction of the regulatory authority or other issuing authority with jurisdiction over the violation; or

(B) The penalty or fee is paid; or

(C) The inaccurate or incomplete information is corrected or provided; or

(iii) Rescind the permit under § 773.21.

(2) If we decide to suspend the permit, we will give you written notice at least 30 days before the suspension is effective. If we decide to rescind the permit, we will issue you a notice under § 773.21. In either case, we will give you the opportunity to request administrative review of the notice under 43 CFR 4.1370 through 4.1377. Our decision will remain in effect during the pendency of the appeal, unless you receive temporary relief under 43 CFR 4.1376.

13. Revise § 773.21 to read as follows:

**§ 773.21 Improvidently issued permits: Rescission procedures.**

If we, the regulatory authority, elect under § 773.20(c)(1)(iii) to rescind an improvidently issued permit, we will serve you, the permittee, and persons who have the ability to control the operation, a notice of proposed suspension and rescission. The notice will include the reasons for our finding under § 773.20(b) and state that:

(a) *Automatic suspension and rescission.* If we determine that your permit was improvidently issued, after a period of time we specify (but not to exceed 90 days), the permit is automatically suspended. We will rescind your permit within 90 days after the suspension date. However, we will not suspend or rescind your permit if you submit proof, and we find, consistent with the provisions of § 773.25, that:

(1) Our finding under § 773.20(b) was erroneous;

(2) The violation has been abated, the penalty or fee paid, or the information corrected 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;

(4) You and all operations owned or controlled by you are no longer responsible for the violation, penalty, fee or for providing the information; or

(5) The information is subject to a pending challenge under § 773.24.

(b) *Cessation of operations.* After a permit suspension or rescission under paragraph (a) of this section, you must cease all surface coal mining operations under the permit, except for violation abatement and for reclamation and other environmental protection measures we require.

14. Revise § 773.22 to read as follows:

**§ 773.22 Identifying entities responsible for violations.**

If you own or have the ability to control a surface coal mining operation, you have an affirmative duty to comply with the Act, the regulatory program, and the approved permit.

(a) OSM or the State regulatory authority with jurisdiction over the violation will investigate each outstanding violation of the regulatory program to determine the identity of those responsible for preventing and for correcting the violation.

(b) We will designate you in the AVS as a person we may compel to correct the violation through compliance with the Act and applicable laws and regulations if you are an:

(1) Owner;

(2) Controller;

(3) Principal; or

(4) Agent responsible for preventing or ensuring abatement or correction of the violation.

(c) We will enter into AVS all outstanding violation notices issued under the Act and regulatory program no later than 30 days after the abatement or correction period has expired. We will update violation data in AVS to reflect the most recent change in status, such as abatement, correction, termination, and administrative or judicial appeal.

(d) If there is a violation, we will decide whether to pursue the appropriate alternative enforcement action under part 846 of this chapter against you, the operator, or an owner, controller, or agent, to compel correction of the violation. The existence of a performance bond can not be used as the sole basis for our determination that alternative enforcement action is not warranted.

**§ 773.23 [Removed]**

15. Remove § 773.23.

16. Revise § 773.24 to read as follows:

**§ 773.24 Procedures for challenging a finding on the ability to control a surface coal mining operation.**

(a) *Who may challenge.* Any person listed as owning or controlling a surface coal mining operation in a pending permit application, or who we find as an owner or controller, may, before certification under § 778.13(m) of this chapter, challenge the listing or finding in accordance with paragraphs (b) through (d) of this section and § 773.25.

(b) *How to challenge.* If you wish to challenge your status in the application or a finding that you have or had the ability to control a surface coal mining operation, you must submit a written explanation of the basis for the challenge to the agency with jurisdiction over any existing violations. Include any supporting evidence and supporting documents with your explanation. If there is no violation, submit your written explanation to the agency with jurisdiction over the pending permit application.

(c) *Written decision.* (1) We will review any information you submit under paragraph (b) of this section and issue a written decision on whether you have the ability to control the relevant surface coal mining operation. The agency issuing the decision will notify you and any regulatory authorities with an interest in the challenge, of the decision and will update, as necessary, the relevant information in AVS.

(2) *Service.* The agency making the decision will serve a copy of the decision on you by certified mail, or by any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure, or the equivalent State counterparts. Service is complete upon delivery of the notice or of the mail and is not incomplete because of a refusal to accept.

(3) *Appeals procedures.* Any person who is or may be adversely affected by a decision under paragraph (c)(1) of this section may appeal OSM's decision to the Department of the Interior's Office of Hearings and Appeals within 30 days of service of the decision in accordance with 43 CFR 4.1380 through 4.1387, or the equivalent State counterparts. The decision will remain in effect during the pendency of an appeal, unless temporary relief is granted in accordance with 43 CFR 4.1386, or the equivalent State counterpart.

(d) *Limitations.* No person, including a permittee or operator, may use these procedures, the procedures in § 773.25, or the procedures in 43 CFR 4.1380 through 4.1387 to challenge the liability of a permittee, operator, or other person

for reclamation fees assessed under Title IV of SMCRA.

17. Revise § 773.25 to read as follows:

**§ 773.25 Standards for challenging a finding or decision on the ability to control a surface coal mining operation.**

(a) *When do these provisions apply.* The provisions of this section apply whenever you challenge a decision that you have the ability to control a surface coal mining operation under the provisions of §§ 773.20, 773.21, or 773.24 or under the provisions of part 775 of this chapter.

(b) *Agencies responsible.* (1) The State regulatory authority will make a decision on a challenge to a finding on the ability to control surface coal mining operations with respect to a State-issued citation.

(2) OSM will make a decision on a challenge to a finding on the ability to control surface coal mining operations with respect to a Federal violation notice issued under SMCRA.

(3) The regulatory authority (OSM or the State) which processed the application or which issued the permit will make a decision on a challenge to a finding on the ability to control surface coal mining operations not associated with a violation.

(4) The State or Federal agency with jurisdiction over the violation will determine whether the violation has been abated or corrected.

(c) *Evidentiary standards.* (1) In any formal or informal review of a challenge to a finding, the responsible agency will issue a written decision if it determines that the ability to control exists or existed during the relevant period.

(2) When you challenge a finding on your ability to control the relevant surface coal mining operation, you must prove by a preponderance of the evidence, for any relevant time period, that you did not have the ability to control the surface coal mining operation.

(3) In meeting the burden of proof in paragraph (c)(2) of this section, you must present reliable, credible, and substantial evidence and any explanatory materials.

(i) Evidence and supporting material that you present before the responsible agency may include—

(A) Notarized affidavits containing specific facts concerning the duties you performed; the beginning and ending dates of your control of the applicant, permittee, operator, or violator; and the nature and details of any transaction creating or severing the ability to control that person;

(B) Certified copies of corporate minutes, stock ledgers, contracts,

purchase and sale agreements, leases, correspondence, or other relevant company records;

(C) Certified copies of documents filed with or issued by any State, Municipal, or Federal governmental agency;

(D) An opinion of counsel, when supported by: evidentiary materials; a statement by counsel that he or she is qualified to render the opinion; and a statement that counsel has personally and diligently investigated the facts of the matter or, where counsel has not investigated the facts, a statement that the opinion is based upon information which has been supplied to counsel and which is assumed to be true.

(ii) Evidence and supporting material that you present before any administrative or judicial tribunal reviewing the decision of the responsible agency, may include any evidence admissible under the rules of such tribunal.

(d) Following any regulatory authority determination or any decision by an administrative or judicial tribunal reviewing such a determination, the regulatory authority will review the information in AVS to determine if it is consistent with the determination or decision. If it is not, the regulatory authority will promptly revise the information in AVS to reflect the determination or decision.

**PART 774—REVISION; RENEWAL; AND TRANSFER, ASSIGNMENT, OR SALE OF PERMIT RIGHTS**

18. Revise the authority citation for part 774 to read as follows:

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

19. Revise § 774.10 to read as follows:

**§ 774.10 Information Collection.**

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Regulatory authorities will use this information to determine if the applicant meets the requirements for revision, renewal, transfer, sale, or assignment of permit rights. Persons must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB clearance number for this part is 1029-NEW.

(b) We estimate that the public reporting burden for this part will average 32 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the

data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 210, 1951 Constitution Avenue, NW, Washington, DC 20240; 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-NEW in any correspondence.

20. In § 774.13 add paragraph (e) to read as follows:

**§ 774.13 Permit revisions.**

\* \* \* \* \*

(e) *Notice to regulatory authority.* You must report changes in interests required under § 778.13 of this chapter but that do not require our written approval under § 774.17. You must report this type of information to us within 60 days of the change. This type of change includes a change or addition of an officer or other person not identified on the currently approved permit and not requiring certification under § 778.13(m).

21. Revise § 774.17 to read as follows:

**§ 774.17 Transfer, assignment, or sale of permit rights.**

(a) *Who must obtain approval of a transfer, assignment, or sale of permit rights?*

(1) You, the permittee, must apply to us for a transfer, assignment, or sale of permit rights. You must be able to show that your application complies with the requirements of the regulatory program.

(2) You must obtain our approval for changes—including the change or addition of an operator, officer, owner, other controller, or permittee—by which the rights granted under a permit are transferred, assigned, or sold to a person not identified under the currently approved permit and requiring certification under § 778.13(m) of this chapter.

(b) *What must your application contain?* You must submit an application to us requesting approval of any proposed transfer, assignment, or sale, of rights granted under a permit described in paragraph (a)(2) of this section including—

- (1) Your name, address, and permit number;
- (2) A brief description of the proposed action requiring approval;
- (3) The legal, financial, compliance, and related information and violation

information required under §§ 778.13 and 778.14 of this chapter for the person proposed to receive permit rights by way of the transfer, assignment, or sale; and

(4) The bonding company's written acceptance of those gaining permit rights.

(c) *How will the regulatory authority review and approve applications for transfer, assignment, or sale?*

(1) We, the regulatory authority, will issue written findings either approving or denying any application for a transfer, assignment, or sale of rights granted under a permit described in paragraph (a)(2) of this section.

(2) We will evaluate your application for a transfer, assignment, or sale to determine whether a new permit or bond is required under the regulatory program requirements.

(3) We will impose additional permit conditions under § 773.18 of this chapter, if the permit is not already subject to the additional conditions and if the transfer, assignment, or sale involves a person responsible for outstanding violations or an operator with owners or controllers responsible for outstanding violations.

(4) We will disapprove the permittee's request for a transfer, assignment, or sale of rights under the permit, if the applicant is ineligible for a permit under §§ 773.15(b)(2) or 773.16 of this chapter.

(5) We will disapprove the permittee's request for a transfer, assignment, or sale of rights under the permit, if the person, operator, or any owner or controller of the person or operator, proposed to receive rights under the permit is enjoined or otherwise prohibited from mining under § 846.16 of this chapter or by a Federal or State court.

(d) *Successor in interest.* (1) A permittee cannot give up all rights granted under an existing permit until the successor in interest to the existing permit obtains a new permit.

(2) *Continued operations under existing permit.* (i) In order for the successor in interest to continue uninterrupted operations under the existing permit, the permittee must obtain our written approval of the transfer, assignment, or sale of permit rights and the successor in interest must submit the following:

(A) The legal, financial, compliance, and related information and violation information required under §§ 778.13 and 778.14 of this chapter;

(B) A performance bond, or proof of other guarantee, or obtain the bond coverage of the original permittee, as required by subchapter J of this title; and

(C) A signed and notarized written statement assuming the liability and reclamation responsibilities of the existing permit.

(ii) We will review the information submitted by the successor in interest under paragraph (d)(2)(i)(A) of this section using the criteria in §§ 773.15(b)(2) and 773.16 of this chapter.

(iii) If the successor in interest receives preliminary written approval, mining operations may commence and continue for up to 30 days. The successor must:

(A) Conduct the surface coal mining and reclamation operations in full compliance with the Act and the regulatory program;

(B) Conduct the surface coal mining and reclamation operations under the terms and conditions of the existing permit and any additional terms or conditions that may be imposed by us;

(C) Meet any other requirements specified by us; and

(D) Submit an application for a new permit within 30 days of succeeding to such interest.

(iv) If the successor submits a complete permit application under subchapter G of this title within 30 days of succeeding to such interest and meets the other requirements under paragraph (d)(2)(iii) of this section, then the successor can continue operations until we make the decision to either approve or deny the application for a permit. If we deny the successor's permit application, then the successor must cease operations.

(3) *Advertisement.* The successor in interest must advertise the filing of the permit application in a newspaper of general circulation in the local area of the operation. The advertisement must indicate the name and address of the applicant, permittee, and regulatory authority where comments may be sent, the permit number, mine name generally associated with the permit, geographic location of the permit, and the date the regulatory authority requires receipt of comments.

(4) *Public participation.* Any person having an interest which is or may be adversely affected by a decision on the successor in interest's application, including an official of any Federal, State, or local government agency, may submit written comments on the application to the regulatory authority within the time specified by the regulatory authority and announced in the advertisement.

(5) We will not release the previous permittee from responsibilities for any affected or disturbed area of the permit until the successor in interest engages in

surface coal mining operations which substantially re-affect or re-disturb the areas previously mined and not before the successor's application for a new permit is approved. Until such time, both the previous permittee and its successor are responsible for violations created after the successor begins surface coal mining operations.

(6) The successor in interest's replacement of the previous permittee's performance bond needed under paragraph (d)(2)(ii) of this section does not form the basis for a release of the previous permittee's bond under § 800.40 of this chapter. Bond release for the previous permittee is a separate consideration from the issuance of a new permit to its successor.

(e) *Notification.* (1) We will notify the permittee, the successor, the new operator, or other person gaining permit rights, and commenters, of our findings.

(2) The person gaining permit rights must immediately notify us when the transfer, assignment, or sale of permit rights or successor in interest transaction is complete.

(3) We will update the relevant records in the AVS with the approved transfer, assignment, or sale or successor in interest information within 30 days of approval.

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

22. Revise the authority citation for part 778 to read as follows:

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

23. In part 778, add § 778.5 to read as follows:

##### **§ 778.5 Applicability and definitions.**

(a) *Applicability.* This part applies to any person who engages in or carries out mining operations as an owner or controller. An owner or controller includes, but is not limited to, the following:

(1) The president, other officers, directors, agents or persons performing functions similar to a director.

(2) Those persons who have the ability to direct the day-to-day business of the surface coal mining operation.

(3) The permittee, or an operator if different from the permittee.

(4) Partners in a partnership, the general partner in a limited partnership, or the participants, members, or managers of a limited liability company.

(5) Persons owning the coal (through lease, assignment, or other agreement) and retaining the right to receive or direct delivery of the coal.

(6) Persons who make the mining operations possible by contribution (to the permittee or operator) of capital or other resources necessary for mining to commence or for operations to continue at the site. Examples of resources include a personal guarantee to obtain the reclamation bond, the assumption of responsibility for the liability insurance, a captive coal supply contract, and mining equipment.

(7) Persons who control the cash flow or can cause the financial or real property assets of a corporate permittee or operator to be employed in the mining operation or distributed to creditors.

(8) Persons who cause operations to be conducted in anticipation of their desires or who are the animating force behind the conduct of operations.

(b) For the purposes of this subchapter:

(1) *Ownership* means holding an interest in a sole proprietorship, being a general partner in a partnership, owning 50 percent or more of the stock in a corporation, or having the right to use, enjoy, or transmit to others the rights granted under a permit.

(2) *Control* means to own, manage, or supervise surface coal mining and reclamation operations, as either a principal or an agent, such that the person has the ability, alone or in concert with others, to influence or direct the manner in which surface coal mining operations are conducted.

24. Revise § 778.10 to read as follows:

##### **§ 778.10 Information collection.**

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Section 507(b) of 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 ensure that all legal, financial and compliance requirements are satisfied before issuance of a permit. Persons seeking to conduct surface coal mining operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB clearance number for this part is 1029-NEW.

(b) We estimate that the public reporting and record keeping burden for this part averages 25 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection and record keeping requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, N.W., 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-NEW in any correspondence.

25. Revise § 778.13 to read as follows:

##### **§ 778.13 Legal identity and identification of interests.**

Your permit application must contain the following information (if you have existing permits, paragraph (o) of this section applies to you):

(a) A statement as to whether you are a corporation, partnership, single proprietorship, association, or other business entity.

(b) The name, address, telephone number, and taxpayer identification number of the:

(1) Applicant;

(2) Your resident agent who will accept service of process;

(3) Operator (if different from applicant);

(4) Person(s) responsible for submitting the Coal Reclamation Fee Report (OSM-1) and for remitting the reclamation fee payment to OSM; and

(5) All other persons who will engage in or carry out surface coal mining operations as an owner or controller on the permit.

(c) You must provide the information required by paragraphs (c)(1) through (3) of this section.

(1) You must provide for every person (except a publicly traded corporation) specified in paragraph (c)(3) of this section:

(i) The person's name, address, and taxpayer identification number;

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

(iii) 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.

(2) If a person specified in paragraph (c)(3) of this section is a publicly traded corporation, you must provide the corporation's:

- (i) Name;
- (ii) Address; and
- (iii) Taxpayer identification number.

(3) You must provide the information required by paragraph (c)(1) or (2) of this section for every:

- (i) Officer;
- (ii) Director;
- (iii) Person performing a function similar to a director;
- (iv) Person who owns or controls the applicant or the operator under the definitions of "ownership" and "control" in § 778.5, if that person is different from the applicant; and
- (v) Person who owns 10 to 50 percent of the applicant or the operator.

(d) You don't need to report any owner that is a corporation not licensed to do business in any State or territory of the United States.

(e) For each of your or your operator's partners or principal shareholders, all names under which those persons operate or previously operated a surface coal mining and reclamation operation in the United States within the 5 years preceding the date of the application.

(f) The application number or other identifier of, and the regulatory authority for, any other pending surface coal mining operation permit application either you or your operator filed in any State in the United States.

(g) For any surface coal mining operation permit held by you or your operator during the 5 years preceding the date of the application, the operation's name, address, identifying numbers, including taxpayer identification number, Federal or State permit number and MSHA number, and the regulatory authority.

(h) 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.

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

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

(k) A statement of all lands, interests in lands, options, or pending bids on interests you held or made for lands contiguous to the area described in the

permit application. If you request, we will hold as confidential any information required by this paragraph which is not on public file under State law as provided under § 773.13(d)(3)(ii) of this chapter.

(l) After we notify you that we have approved your application, but before the permit is issued, you must, as applicable, update, correct, or indicate that no change has occurred in the information previously submitted under paragraphs (a) through (k) of this section.

(m) Before approval, the persons that will engage in or carry out surface coal mining operations as owners or controllers of the proposed operation (e.g., those persons identified under paragraph (c) of this section) must certify that they have the ability to control and that they are under the jurisdiction of the Secretary for the purposes of compliance with the terms and conditions of the permit and the requirements of the regulatory program.

(n) You must submit the information required by this section and § 778.14 in the format that we prescribe.

(o) If you have previously applied for permits and the data required under this section is in AVS, you may certify to us that the information in AVS is complete, accurate, and up to date. Or, if only some of the information is different, tell us what to change.

(p) We may establish a central file to house your legal identity information, rather than place duplicate information in each of your permit application files.

26. Revise § 778.14 to read as follows:

#### § 778.14 Violation information.

You, the applicant, must include the following information in your permit application:

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

(1) Had a Federal or State coal mining permit suspended or revoked in the five 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 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 you received during the three-year period preceding the application date, and a list of all outstanding violation notices you received before the date of the application for any surface coal mining operation you owned or controlled. For each violation notice reported, you 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 issue date of the violation notice, 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 we notify you that we have approved your application, but before we issue the permit, you must, as applicable, update, correct, or indicate that no change has occurred in the information previously submitted under this section.

## PART 842—FEDERAL INSPECTIONS AND MONITORING

27. Revise the authority citation for part 842 to read as follows:

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

28. In § 842.11, revise paragraph (e)(3)(i) to read as follows:

#### § 842.11 Federal inspections and monitoring.

\* \* \* \* \*

(e) \* \* \*

(3) \* \* \*

(i) Is taking action to ensure that the permittee and operator will be precluded from receiving future permits

while violations continue at the site;  
and

\* \* \* \* \*

#### PART 843—FEDERAL ENFORCEMENT

29. Revise the authority citation for part 843 to read as follows:

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

##### § 843.5 [Removed]

30. Remove § 843.5.

31. In § 843.11, revise paragraph (g) to read as follows:

##### § 843.11 Cessation orders.

\* \* \* \* \*

(g) 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 an owner or controller of the operation that the cessation order was issued.

##### § 843.13 [Removed]

32. Remove § 843.13.

33. Revise § 843.21 to read as follows:

##### § 843.21 Procedures for improvidently issued State permits.

(a) *Initial notice.* If OSM believes 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 failed to take appropriate action on the permit under State program equivalents of §§ 773.20 and 773.21, OSM will issue to the State and the permittee an initial notice stating in writing the reasons for that belief.

(b) *State response.* Within 30 days of the date that OSM notifies the State under paragraph (a) of this section, the State must demonstrate to OSM in writing that either:

(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.

(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 10-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.* (1) OSM will take appropriate remedial action after 10 days from the date OSM issues a 10-day notice under paragraph (c) of this section, if OSM finds that the State has failed to:

(i) Take appropriate action under the State program equivalents of §§ 773.20 and 773.21 of this chapter; or

(ii) Show good cause for not taking action under State program equivalents of §§ 773.20 and 773.21.

(2) Remedial action may include issuing to the permittee or the operator a notice of violation requiring that by a specified date:

(i) All mining operations must cease; and

(ii) Reclamation of all areas for which a reclamation obligation exists must commence or continue.

(3) OSM will not take remedial action if:

(i) Any violation, penalty, or fee on which the notice of violation was based is abated or paid;

(ii) An abatement plan or payment schedule is entered into;

(iii) All inaccurate or incomplete information questions are resolved; or

(iv) The permittee and the operator, and all operations owned or controlled by the permittee and the operator, are no longer responsible for the violation, penalty, fee, or information.

(4) Under this paragraph, good cause does not include the absence of State program equivalents of §§ 773.20 and 773.21.

(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 ownership and control has been refuted; or

(2) Terminate the notice of violation if:

(i) All violations have been abated, all penalties or fees have been paid, and all informational questions have been resolved;

(ii) You, or any operation owned or controlled by you, have filed and are pursuing a good faith appeal of the violation, penalty, fee, or information request, or have entered into and are complying with an abatement plan or payment schedule to the satisfaction of the responsible agency; or

(iii) You, and all operations owned or controlled by you, are no longer responsible for the violation, penalty, fee, or requested information.

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

##### § 843.24 [Removed]

34. Remove § 843.24.

35. Revise part 846 to read as follows:

#### PART 846—ALTERNATIVE ENFORCEMENT

Sec.

846.1 Scope.

846.5 Definitions.

846.11 Criminal penalties.

846.12 Individual civil penalties.

846.14 Suspension or revocation of permits: Pattern of violations.

846.15 Suspension or revocation of permits: Failure to comply with a permit condition.

846.16 Civil actions for relief.

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

##### § 846.1 Scope.

This part governs the use of measures provided for in the Act at sections 201(c)(1), 510(c), 518(e), 518(f), 518(g), 521(a)(4), and 521(c), that we collectively call "alternative enforcement" measures or actions that we may use to compel compliance with any provision of the Act. These measures are available to us whenever any person engaging in or carrying out surface coal mining operations has allowed a violation notice to remain outstanding and has thus failed to comply with the provisions of the Act and its implementing regulations. Whenever we make a determination, finding, or conviction under these provisions, we will designate the person determined, found, or convicted in the AVS.

##### § 846.5 Definitions.

*Unwarranted failure to comply* means the failure of a permittee, operator, agent, or owner or controller of a permittee or operator—

(1) To prevent the occurrence of any violation of his or her permit or any requirement of the Act or regulations due to indifference, lack of diligence, or lack of reasonable care, or

(2) To abate any violation of such permit or any requirement of the Act or regulations due to indifference, lack of diligence, or lack of reasonable care.

*Violation, failure, or refusal* means—

(1) A violation of a condition of a permit issued under a Federal program, a Federal lands program, Federal enforcement under section 502 of the Act, or Federal enforcement of a State program under section 521 of the Act; or

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

**§ 846.11 Criminal penalties.**

(a) We may pursue criminal sanctions against any person who willfully and knowingly:

- (1) Violates a condition of a permit, or
- (2) Fails or refuses to comply with:
  - (i) Any order issued under section 521 or 526 of the Act; or
  - (ii) Any order incorporated into a final decision issued by the Secretary.
- (3) Makes any false statement, representation, or certification, or fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the regulatory program or any order or decision issued by the Secretary under the Act.

(b) We may pursue criminal sanctions against a permittee, operator, or any owner, controller, principal, or agent of the permittee or operator if the violation, failure, or refusal under paragraph (a) of this section remains uncorrected for more than 30 days after—

- (1) Suspension or revocation of a permit under § 846.14; or
  - (2) Issuance of a violation notice to an unpermitted operation.
- (c) Any person convicted under this section may be subject to punishment by a fine of not more than \$10,000 or imprisonment of not more than one year, or both.

**§ 846.12 Individual civil penalties.**

(a) *When an individual civil penalty may be assessed.* (1) Except as provided in paragraph (a)(2) of this section, we may assess an individual civil penalty against any corporate director, officer, or agent of a corporate permittee or operator who knowingly and willfully authorized, ordered, or carried out a violation, failure, or refusal.

(2) We will not assess an individual civil penalty in situations resulting from a permit violation by a corporate permittee until we issue a cessation order to the corporate permittee for the violation, and the cessation order has remained unabated for 30 days.

(b) *Amount of individual civil penalty.* (1) In determining the amount of an individual civil penalty assessed under paragraph (a) of this section, we will consider the criteria in section 518(a) of the Act, including:

- (i) The individual's history of authorizing, ordering or carrying out previous violations, failures or refusals at the particular surface coal mining operation;
- (ii) The seriousness of the violation, failure or refusal (as indicated by the extent of damage and/or the cost of reclamation), including any irreparable

harm to the environment and any hazard to the health and safety of the public; and

(iii) The demonstrated good faith of the individual charged in attempting to achieve rapid compliance after notification of the violation, failure, or refusal.

(2) The penalty will not exceed \$5,000 for each violation. We may assess a separate individual civil penalty for each day the violation, failure, or refusal continues, from the date of service of the underlying notice of violation, cessation order, or other order incorporated in a final decision issued by the Secretary, until abatement or compliance is achieved.

(c) *Procedure for assessment of individual civil penalty.* (1) *Notice.* We will serve on each individual to be assessed an individual civil penalty a notice of proposed individual civil penalty assessment, including a narrative explanation of the reasons for the penalty, the amount to be assessed, and a copy of any underlying notice of violation and cessation order.

(2) *Final order and opportunity for review.* The notice of proposed individual civil penalty assessment becomes a final order of the Secretary 30 days after service upon the individual unless:

(i) The individual files within 30 days of service of the notice of proposed individual civil penalty assessment a petition for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (Phone: 703-235-3800), in accordance with 43 CFR 4.1300 through 4.1309; or

(ii) We and the individual or responsible corporate permittee agree within 30 days of service of the notice of proposed individual civil penalty assessment to a schedule or plan for the abatement or correction of the violation, failure or refusal.

(3) *Service.* For purposes of this section, service must be performed on the individual to be assessed an individual civil penalty by certified mail, or by any alternative means consistent with the rules governing service of a summons or complaint under Rule 4 of the Federal Rules of Civil Procedure. Service is complete upon tender of the notice of proposed assessment and included information or of the certified mail and is not incomplete because of refusal to accept.

(d) *Payment of penalty.* (1) *No abatement or appeal.* If a notice of proposed individual civil penalty becomes a final order in the absence of a petition for review or abatement

agreement, the penalty is due upon issuance of the final order.

(2) *Appeal.* If an individual named in the notice of proposed individual civil penalty assessment files a petition for review in accordance with 43 CFR 4.1300 through 4.1309, the penalty is due upon issuance of a final administrative order affirming, increasing or decreasing the proposed penalty.

(3) *Abatement agreement.* Where we and the corporate permittee or individual have agreed in writing on a plan for the abatement of, or compliance with, the unabated order, an individual named in a notice of proposed individual civil penalty assessment may postpone payment until receiving either a final order from us stating that the penalty is due on the date of the final order, or written notice that abatement or compliance is satisfactory and the penalty has been withdrawn.

(4) *Delinquent payment.* Any delinquent penalty is subject to interest beginning 30 days after the final order assessing a civil penalty is issued.

(i) Interest will be charged at the rate established quarterly by the U.S. Department of the Treasury for use in applying late charges on late payments to the Federal government, under Treasury Financial Manual 6-8020.20. The Treasury current value of funds rate is published by the Fiscal Service in the notices section of the **Federal Register**.

(ii) Interest on unpaid penalties will run from the date payment first was due until the date of payment.

(iii) Failure to pay overdue penalties may result in one or more of the actions specified in §§ 870.15(e)(1) through (e)(5) of this chapter.

(iv) Delinquent penalties are subject to late payment penalties specified in § 870.15(f) and processing and handling charges in § 870.15(g).

**§ 846.14 Suspension or revocation of permits: Pattern of violations.**

(a) *Issuing an order.* (1) We will issue an order to you, requiring you to show cause why your permit and right to mine under the Act should not be suspended or revoked, if we determine that:

(i) A pattern of violations of any requirements of the Act, this chapter, the applicable program, or any permit condition required by the Act exists or has existed; and

(ii) The violations were caused by you willfully or through unwarranted failure to comply with those requirements or conditions.

(2) We will attribute to you violations by any person conducting surface coal mining operations on your behalf,



unless you establish that the violations were:

(i) Acts of deliberate sabotage or in direct contravention of your expressed orders, or

(ii) Willful and knowing violations of a contract provision which you actively tried to prevent.

(3) If we determine that a pattern of violations exists, we will promptly file a copy of any order to show cause with the Office of Hearings and Appeals.

(4) We may determine that a pattern of violations exists or has existed after considering the circumstances, including:

(i) The number of violations, cited on more than one occasion, of the same or related requirements of the Act, this chapter, the applicable program, or the permit;

(ii) The number of violations, cited on more than one occasion, of different requirements of the Act, this chapter, the applicable program, or the permit; and

(iii) The extent to which the violations were isolated departures from lawful conduct.

(5) We will promptly review your history of violations or the history of violations of an operator who has been cited for violations of the same or related requirements of the Act, this chapter, the applicable program, or the permit. If we determine that a pattern of violations exists or has existed, we will issue an order to show cause as provided in paragraph (a)(1) of this section.

(6) In determining whether a pattern exists or has existed, we will consider only violations issued as a result of:

(i) Enforcement of the provisions of Title IV of the Act, or a Federal program or a Federal lands program under Title V;

(ii) Federal inspection during the interim program and before the applicable State program was approved under sections 502 or 504 of the Act; or

(iii) Federal enforcement of a State program in accordance with sections 504(b) or 521(b) of the Act.

(b) *Hearing and order.* (1) If you file an answer to the show cause order and request a hearing under 43 CFR 4.1190 through 4.1196, a public hearing will be held as set forth in those sections.

(2) Within the time limits in 43 CFR 4.1190 through 4.1196, the Office of Hearings and Appeals will issue a written determination as to whether a pattern of violations exists and, if appropriate, an order. If the Office of Hearings and Appeals revokes or suspends the permit and your right to mine under the Act, you must

immediately cease surface coal mining operations on the permit.

(i) If the permit and the right to mine under the Act are revoked, you must complete reclamation within the time specified in the order.

(ii) If the permit and the right to mine under the Act are suspended, you must complete all affirmative obligations to abate all conditions, practices, or violations as specified in the order.

(c) *Review of violations.* Whenever you fail to abate a violation contained in a notice of violation or cessation order within the prescribed abatement period, we will review your history of violations to determine whether a pattern of violations exists under this section, and will issue an order to show cause as appropriate.

(d) *Service of show cause orders.* For purposes of this section and § 846.15, we must serve you and/or the operator, or owner, controller, principal, or agent of the permittee or operator by certified mail, or by any alternative means consistent with the rules governing service of a summons or complaint under Rule 4 of the Federal Rules of Civil Procedure. Service is complete upon delivery of the order or of the certified mail and is not considered incomplete because of a person's refusal to accept.

**§ 846.15 Suspension or revocation of permits: Failure to comply with a permit condition.**

(a) *General.* If we find that you, or your operator, or any owner, controller, principal, or agent of you or your operator, have failed to comply with any condition imposed on an approved permit, then we may order you to show cause why we should not suspend or revoke the permit.

(b) *Additional permit conditions.* We will order you to show cause why the permit should not be suspended or revoked if:

(1) You have less than 5 years experience, or have controllers without demonstrated successful environmental compliance; and

(2) We find that you have failed to comply with additional permit conditions imposed on an approved permit under § 773.18(a) of this chapter, and find you are unable or unwilling to comply with the mining and reclamation plan.

(c) *Hearing and order.* (1) If you file an answer to the show cause order and request a hearing under 43 CFR part 4, subpart L, then a public hearing may be provided as set forth in that subpart.

(2) If the Office of Hearings and Appeals revokes the permit, then you must immediately cease surface coal

mining operations on the permit and complete reclamation within the time specified in the order.

(3) If the Office of Hearings and Appeals suspends the permit, then you must abate all conditions, practices, or violations as specified in the order.

(4) If your right to engage in or carry out surface coal mining operations is suspended or revoked, then you are prohibited from owning, controlling, or serving as a principal or agent for any surface coal mining operations as specified in the order.

(d) *Service.* The provisions for service set out in § 846.14 govern service under this section.

**§ 846.16 Civil actions for relief.**

(a) Under section 521(c) of the Act, we will request the Attorney General to institute civil action for relief whenever you or your operator, or any owner, controller, principal, or agent of you or your operator are found to have met the criteria in this section.

(1) We will request action under this section whenever you or your operator, or any owner, controller, principal, or agent of you or your operator are found to have—

(i) Violated or failed or refused to comply with any order or decision issued by OSM or the State regulatory authority with jurisdiction under the Act; or

(ii) Interfered with, hindered, or delayed the agency with jurisdiction in carrying out the provisions of the Act or its implementing regulations; or

(iii) Refused to admit our authorized representative onto the mine; or

(iv) Refused to allow inspection of the mine by our authorized representative; or

(v) Refused to furnish any information or report that we have requested; or

(vi) Refused to allow access to, and copying of, such records as we determine necessary to carry out the provisions of the Act and its implementing regulations.

(2) Civil action for relief includes a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the surface coal mining operation is located or in which you have your principal office.

(b) Temporary restraining orders will be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended.

(c) Any relief the court grants to enforce an order under paragraph (a)(1)(i) of this section will continue in effect until completion or final termination of all proceedings for



review of such order under the Act or its implementing regulations unless, beforehand, the district court granting such relief sets aside or modifies the order.

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