FEDERAL REGISTER: 53 FR 38868 (October 3, 1988)

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

30 CFR Part 773
Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior (DOI) is amending its regulations dealing with the approval of a permit for surface coal mining operations. This rule adds definitions of the terms "owns or controls" and "owned or controlled" as these concepts are used in section 510(c) of the Surface Mining Control and Reclamation Act of 1977 (the Act, the Surface Mining Act, or SMCRA). It also revises the scope of review of a permit applicant's environmental compliance record prior to the issuance of a new permit. These revisions will greatly reduce the possibility of violators obtaining permits in violation of the permit approval provisions of the Act.

EFFECTIVE DATE: November 2, 1988.

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SUPPLEMENTARY INFORMATION:

I. BACKGROUND

This rule amends OSMRE's regulations dealing with the permit approval process by adding definitions of the terms "owns or controls" and "owned or controlled" in 30 CFR Part 773 in conformance with the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201* et seq. The concepts of "ownership" and "control" are used in, but are not defined by, section 510(c) of the Act, *30 U.S.C. 1260*(c).

The rule also revises 30 CFR 773.15, which specifies the review by the regulatory authority of the compliance record of the permit applicant and related parties with certain environmental laws which is required prior to the issuance of a permit for surface coal mining operations.

This rule also amends the regulations governing the permitting process by expanding the scope of the review that must be made prior to the issuance of a permit concerning any willful pattern of violations.

This rule is intended to secure greater compliance with the Act by preventing mining permits from being issued to persons who, either by themselves or through related persons, own or control violators of the Act. By defining the terms "owns or controls" and "owned or controlled" and by revising the scope of the compliance review, OSMRE will gain an effective tool to encourage persons who own or control a violator to ensure that all violations are abated or are in the process of being abated. Authority for the rule derives from sections 101, 102, 201(c)(1), 201(c)(2), 412(a), 501, 507(b), 510 and 701 of the Act.

In the past, some operators evaded the requirements of the Act and obtained a new permit while past violations remained unabated or money remained unpaid. In some instances, they formed new corporations, partnerships or other business entities, and through them applied for permits for new operations without correcting the violations or paying the fees and penalties resulting from old operations. If allowed to persist, these practices could seriously weaken enforcement of the Act and impede mine site reclamation. This could result in an unfair competitive advantage to operators who fail to comply with the requirements of the law and thereby lower their coal production costs.

This rule will also assist in implementing a court order in the case of Save Our Cumberland Mountains, Inc. et al. v. Clark, No. 81-2134 (D.D.C. January 31, 1985) (Parker J.), relating to enforcement measures that can be taken against operators with unabated cessation orders and unpaid civil penalties. Under the court order, the Secretary of the Interior is required to improve the enforcement and implementation of section 510(c) of the Act, and to establish a computerized Applicant Violator System which will match permit applicants and their owners and controllers with current violators of the Act. This rule establishes standards by which matches will be made by the computer.

This final rule contains revisions to Section 773.15(b) which were proposed in two separate rulemaking actions. They are combined to assist readers in better comprehending the regulatory scheme being established.

A proposed rule amending 30 CFR 773.5 and 773.15(b)(1) was published on April 5, 1985 *(50 FR 13724)*. On June 7, 1985 *(50 FR 24122)*, the comment period was extended to June 28, 1985. On April 16, 1986 *(51 FR 12879)*, the comment period was reopened and extended to June 16, 1986. On June 25, 1986 *(51 FR 23085)*, the comment period was reopened and extended until August 11, 1986. On May 4, 1987 *(52 FR 16275)*, the comment period was again reopened and extended until June 3, 1987, and on October 5, 1987 the comment period was again reopened and extended until November 4, 1987. During the comment periods, four public hearings were held, one on June 20, 1985 and another on July 15, 1986 in Big Stone Gap, Virginia; one on June 21, 1985 in Columbus, Ohio; and one on July 29, 1986 in Denver, Colorado.

A proposed rule amending 30 CFR 773.15 (b)(1)(ii), (b)(2) and (b)(3) was published on July 16, 1986 *(51 FR 25822)*. On September 24, 1986 *(51 FR 33905)*, the comment period was extended to October 24, 1986. No request was received for a public hearing and none was held.

II. DISCUSSION OF FINAL RULE AND COMMENTS

A. SECTION 773.5 -- DEFINITIONS

The proposal published on April 5, 1985 contained the following proposed definitions:

"Control means ownership or any other relationship which gives one person express or implied authority to determine the manner in which that person or another person mines, handles, sells, or disposes of coal. Being an officer or director of a corporation shall constitute control. Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining shall establish a rebuttable presumption of control of such other person.

Ownership means holding the proprietary interest in a sole proprietorship, being a general partner in a partnership, being a contributor of capital or services in a joint venture, or having record or beneficial ownership of 10 percent or more of any class of voting stock in a corporation. In addition, being a limited partner owning 10 percent or more of the assets in a partnership creates a rebuttable presumption of ownership."

50 FR 13724.

The April 16, 1986, notice described an option for the definitions which would have contained the following features:

"(1) The rule would have contained a definition for "ownership" which would track through various levels of a corporate structure. Ownership would have been defined as holding the proprietary interest in a sole proprietorship, being a general partner in a partnership, or having a 10 percent or greater interest in an entity either directly or indirectly through one or more intermediary companies. Under this definition, a 10 percent or greater interest in an entity would have constituted ownership regardless of the number of levels "up" or "down" through the corporate structure between the parent and the subsidiary.

(2) The rule would have contained a definition for "control" which would have included any relationship which gave one person authority to determine the manner in which an applicant, or an operator if other than an applicant, conducted surface coal mining operations. Being an operator would have constituted control. Being a chief executive officer or chief operating officer of a corporation would have constituted control of that corporation. Being a director or any other

officer of a corporation would have created a rebuttable presumption of control of that corporation. Being a director or officer of a corporation would also have created a rebuttable presumption of control over other entities owned by that corporation. The rebuttable presumptions of control could be overcome by clear and convincing evidence that such person had no authority to determine the manner in which the surface coal mining and reclamation operations were conducted."

On May 4, 1987, in response to comments submitted on the April 16, 1986 option, OSMRE published another option for a final rule which addressed the many concerns raised by commenters. The May 4, 1987 option contained the following definition:

"Owned or controlled and owns or controls mean any relationship which gives one person authority to determine the manner in which an applicant, or an operator if other than an applicant, conducts surface coal mining operations, and includes but is not limited to the following:

(1) Being a chief executive officer, chief operating officer, or chairman of the board of an entity constitutes control of the entity.

(2) Being an officer, director, operator of an entity, or having the ability to commit the financial or real property assets or working resources of an entity creates a presumption of control.

(3) Based on the instruments of ownership or the voting securities of an entity:

(a) Ownership in excess of 50 percent constitutes control;

(b) Ownership of 20 through 50 percent creates a presumption of control; and

(c) Ownership of less than 20 percent creates a presumption of noncontrol."

52 FR 16275.

On October, 1987, OSMRE published another option for the definitions which contained the following language:

"Owned or controlled and owns or controls means --

(a)(1) Being a permittee of a surface coal mining operation;

(2) Based on instruments of ownership or voting securities, owning of record in excess of 50 percent of an entity; or

(3) Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations.

(b) The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

(1) Being an officer or director of an entity;

(2) Being the operator of a surface coal mining operation;

(3) Having the ability to commit the financial or real property assets or working resources of an entity;

(4) Being a general partner in a partnership; or

(5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity."

52 FR 37164.

The final definitions of the terms "owned or controlled" and "owns or controls" at 30 CFR 773.5 are based in large part on the October 5, 1987 proposal. The definition is being adopted over other options considered because it focuses on those relationships which allow one person to compel action by another person. It allows persons who would ordinarily exercise control because of their positions to prove they do not or cannot exercise control. Specific rule language has been added to cover certain control relationships discussed in the October 5, 1987 Federal Register notice, but for which rule language was not specifically delineated.

1. INTRODUCTORY LANGUAGE

Introductory language has been added to the definition. The addition clarifies that the definition applies to both directly or indirectly related entities. Where two entities are indirectly related, control is established using any appropriate combination of the relationships specified in the definition, including the presumptions in paragraph (b). For instance, a director of a parent company is presumed to control wholly owned subsidiaries of the parent company using the combination of the relationships specified in paragraph (b)(1) and (a)(2). This provides explicit regulatory language to implement the policy OSMRE proposed in preceding notices for this rulemaking.

2. PARAGRAPH (a)

PARAGRAPH (a)(1) -- PERMITTEES. Paragraph (a)(1) of the final rule expressly includes the permittee as a controller of a surface coal mining operation. This was implicit in the options published on April 5, 1985, April 16, 1986 and May 4, 1987, and was explicitly proposed in the October 5, 1987 option. No objections were received to this aspect of the proposal.

PARAGRAPH (a)(2) -- MAJORITY SHAREHOLDERS. Paragraph (a)(2) of the definition specifies that record ownership in an entity of greater than 50 percent, based upon instruments of ownership or voting securities, always constitutes ownership or control because a majority interest will always be a controlling interest. (As will be subsequently discussed, direct ownership interests of from 10 to 50 percent will only presumptively establish ownership or control.)

Inclusion of ownership only where control also exists has been done for a number of reasons. The definition should reflect the primary purpose for which the Congress enacted section 510(c) of the Act. Under section 510(c), where a permit applicant has a current violation, the regulatory authority cannot approve a permit unless the applicant "submits proof that such violation has been corrected or is in the process of being corrected * * *." Thus, by its own terms, section 510(c) is intended to induce persons to correct, or be in the process of correcting, violations. For the rules to accomplish that purpose, an applicant should be denied a permit when it, its owners or controllers, or the entities they own or control, are or have been in a position to have outstanding violations corrected, and did not do so. No compelling reason exists to block permit issuance, however, where control never existed.

No comments were received objecting to a determination of ownership or control when a majority interest is owned.

The specific references in the April 5, 1985 proposed ownership definition to sole proprietors, joint venturers and limited partners are not included in the final definition. Sole proprietors would be included in paragraph (a)(2). Joint venturers and limited partners will be regulated through whichever paragraphs of the rule are applicable and, if not covered elsewhere, can be included under paragraph (a)(3).

If approached in a literal sense, the term "owned" could have been defined to span a range from a few shares of common stock in a large publicly-held corporation to a sole proprietorship. An all inclusive definition, however, would unfairly treat widely-held corporate applicants that could be denied permits based upon small holdings by persons with outstanding violations, and would be difficult to administer. Absent some reasonable minimum threshold of ownership, regulatory authorities would face the monumental task of tracing every applicant through every thread of common ownership with every current violator, no matter how small the interest involved. The number of remote ownership interests that could exist between applicants and violators under such a definition would be enormous. And absent some reasonable minimum threshold, mere chance occurrences, such as small investors purchasing stock in two otherwise unrelated coal mining companies, could play an unreasonably significant role in the withholding of permits under section 510(c).

Given the congressional finding that "effective and reasonable regulation of surface coal mining operations" is appropriate and necessary (emphasis added), *30 U.S.C. 1201*(e), the Congress could not have intended to produce such cumbersome and inequitable results. Thus, OSMRE has concluded that the definition should not cover all degrees of ownership, but only those where control exists.

PARAGRAPH (a)(3) -- ANY OTHER RELATIONSHIPS. Paragraph (a)(3) of the definition includes as ownership or control any relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations. This general functional category applies

to persons who exercise control over a surface coal mining and reclamation operation without regard to title or official position. This category applies when persons are not otherwise covered by the definition. The primary difference between relationships that would be covered under this category and those relationships enumerated in paragraph (b) is that under paragraph (a)(3) the regulatory authority has to establish that control exists, whereas persons covered under paragraph (b) have to establish that control does not exist.

Some commenters objected to the use of the phrase "mines, handles, sells or disposes of coal" that was proposed in April 1985 *(50 FR 13727)* as the general functional requirement to determine whether control exists. They suggested that it was vague and could result in situations where coal brokers or others with no control over a surface coal mining operation would be considered to exercise control over the operation. Other commenters stated that the definition of control should be based on total control of a surface coal mining operation, and not on control of one aspect such as handling or selling coal.

OSMRE agrees that paragraph (a)(3) should be written in terms of control over surface coal mining operations rather than control over specific activities, because section 510(c) of the Act addresses ownership or control over surface coal mining operations. Thus, instead of the phrase "mines, handles, sells or disposes of coal," OSMRE employs the phrase "conducts surface coal mining operations," the latter being a term defined at 50 CFR 700.5. In some instances, control over certain aspects of an operation, such as the manner or rate of mining, or the marketing, sale, or disposition of the coal can provide control over the conduct of surface coal mining operations.

Some commenters objected that the proposed phrase "any other relationship" *(52 FR 37165)* was too broad or inclusive and that its use undermined the credibility of (and the need for) the remainder of the definition.

OSMRE disagrees that the phrase "any other relationship" is too broad. The phrase is needed to cover extremely diverse patterns of ownership and control and consequently must be broadly inclusive. Whether a particular relationship provides authority to determine the manner in which a surface coal mining operation is conducted will be determined on a case-by-case basis after careful examination of the facts.

OSMRE intends that under paragraph (a)(3) the regulatory authority can examine any relationships and the facts surrounding them, such as informal agreements, personal relationships, and the mining history of the parties in question to determine if the relationship results in control over a surface coal mining operation. The regulatory authority may also consider any of the circumstances surrounding a surface coal mining operation to determine control. Such circumstances might include, for example, the fact that a person has financed the operation, or owns the equipment or the rights to the coal, or directs on-site operations.

One commenter requested that the final rule clarify that the examples given in the October 5, 1987 notice were examples of relationships that should be scrutinized for purposes of determining if ownership or control exists and should not be construed as relationships that always would constitute ownership or control.

OSMRE's statement in the October 5, 1987 notice *(52 FR 37165)* that "any relationship" can include one between family members, a lessor and a lessee, and an owner of coal and a contract miner was intended to be illustrative. The degree to which particular types of relationships will presumptively establish control is set forth in paragraph (b) of the definition. Examples of other relationships includable under paragraph (a)(3) are family relationships, contract mining situations not covered by paragraph (b)(6) and employees of business entities holding positions other than that of officer or director.

One commenter asserted that the rule should contain an irrebuttable presumption of control for mine managers, subcontractors, and mine foremen.

OSMRE agrees that in certain circumstances such persons could control a surface coal mining operation, but has chosen to regulate such persons under paragraph (a)(3) of the rule rather than establish specific presumptions. If OSMRE were to create a specific presumption for every possible relationship which might result in control of a surface coal mining operation, the definition would be longer than is reasonable. If OSMRE incorporated the terms "mine manager" or "foreman", new positions could easily be created to circumvent the rule. Furthermore, it would be incorrect to assume that such persons exercise control in all situations.

ACTUAL AUTHORITY. As originally proposed, the rule would have defined "control" as "any relationship which gives one person express or implied authority to determine the manner in which that person or another person mines, handles, sells or disposes of coal * * *" (Emphasis added.) Some commenters stated that it was not clear what was meant by "express or implied authority." They suggested that control should turn on "actual" authority, as opposed to "express or implied" authority. OSMRE agrees, and has not included the phrase "expressed or implied" in the final definition. Paragraphs (a)(3) and (b) simply use the term "authority," which is intended to mean actual authority.

One commenter argued that the phrase "authority directly or indirectly to determine" used in paragraph (a)(3) should be changed for clarity to the phrase "control or have the power to control."

OSMRE did not adopt the suggestion. The language contained in the rule is sufficient and is no less inclusive than the suggested phrase.

3. PARAGRAPH (b) -- RELATIONSHIPS PRESUMPTIVELY ESTABLISHING OWNERSHIP OR CONTROL

PARAGRAPH (b) OF THE DEFINITION CREATES A PRESUMPTION OF CONTROL FOR CERTAIN RELATIONSHIPS. Under paragraph (b) the following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

(1) Being an officer or director of an entity;

(2) Being the operator of a surface coal mining operation;

(3) Having the ability to commit the financial or real property assets or working resources of an entity;

(4) Being a general partner in a partnership;

(5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity; or

(6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

Paragraph (b) of the definition includes those persons who, by virtue of their relationship to an entity, would ordinarily be in a position to exercise control over that entity. Paragraphs (b)(1), (b)(2), (b)(4) and (b)(5) include persons required to be reported on a permit application pursuant to section 507(b)(4) of the Act. A primary purpose of establishing the presumptions is to shift the burden of persuasion from the regulatory authority to the persons more likely to have access to the information necessary to establish whether control exists.

PRESUMPTIONS. If an applicant and a violator have a relationship specified in paragraph (b), the permit will be blocked unless the applicant can rebut the presumption of control. A person need not hold the same position in each entity to establish the presumptions, so long as he or she controls the applicant and also controls or controlled the violator. A person presumed to be in control of an entity can rebut the presumption by submitting evidence which establishes to the satisfaction of the regulatory authority that he or she has or had no control of the entity. For any entity with unabated violations or unpaid penalties or fees, some person is responsible for the occurrence of the violation or the failure to abate the violation or to pay monies owed. In some cases, more than one person may be in control, such as in a partnership composed of two individuals.

The April 5, 1985 proposal would have established an irrebuttable determination of control for all officers, directors, general partners, and anyone having record or beneficial ownership of ten percent or more of any class of voting stock in a corporation. The April 16, 1986 option would have expanded this group to also include operators.

Many comments were received on these proposals. A few approved, but the majority objected to a conclusive presumption of control for such persons.

OSMRE agrees with commenters who asserted that not all officers, directors, general partners, operators and ten percent owners of record are in a position to exercise control over a surface coal mining operation. Rather than have an irrefutable standard, therefore, OSMRE has included rebuttable presumptions in paragraph (b) of the final rule.

OSMRE has concluded that an irrebuttable presumption of control for all officers, directors, general partners, operators and 10 percent shareholders would raise due process concerns. If the presumption of control is not necessarily or universally true for each member of a class and a reasonable alternative procedure for making the determination exists, an irrebuttable presumption should not be established. See *Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974);* and *Vlandis v. Kline, 412 U.S. 441 (1973).*

Several commenters objected to the use of presumptions in the proposed definitions, criticized OSMRE's standards for presuming control, and argued that the presumptions were contrary to well-established business law and to the realities of the marketplace with regard to who actually exercises control of a business.

OSMRE does not agree. The presumptions in the definition do not determine who ultimately is responsible for the manner in which a surface coal mining operation is conducted. The presumptions determine who has the burden of proof, and have been established on the basis of those classes of persons who have apparent authority over the conduct of surface coal mining operations. The burden of proof properly should rest with those who have access to the information on which a control determination can be accurately made -- the officers, directors, general partners, operators, those with the ability to commit the financial or real property or working resources of an entity, owners of a ten through fifty percent interest, and owners and lessors of coal. Neither OSMRE nor regulatory authorities have easy access to the information which is needed to make an accurate determination of control in such circumstances, whereas persons subject to the presumptions would have better access to the information needed to show control does not exist.

One commenter stated that immediate family members should be the subject of rebuttable presumptions of control with the exception of minor children for which there should be an irrebuttable presumption. The commenter further stated that immediate family members should include members of the same household, husbands, wives, direct descendants and ancestors, siblings, aunts, uncles, nephews, nieces and first cousins, and include relationships by blood and adoption.

OSMRE disagrees. Such relationships can be effectively regulated under paragraph (a)(3), should the need arise. Under paragraph (a)(3), "any other relationship" can include family relationships. The regulatory authority may use paragraph (a)(3) to regulate family relationships if it has reason to believe that such relationships are being used to mask control of surface coal mining operations. Such information may come to the attention of the regulatory authority during the public participation process provided by 30 CFR 773.13.

Concerning minor children, OSMRE is unaware of any situation where a minor child has applied for a permit, and questions whether a minor child would be able to enter into a contract, or obtain the necessary bond, without the assistance and consent of a legal guardian, who would then be regulated under paragraph (a)(3).

PARAGRAPH (b)(1) -- OFFICERS AND DIRECTORS. Commenters asserted that while a corporate board of directors exercises general control over a corporation when acting as a unit, it may have little impact on day-to-day operations. The commenters stated that individual directors may exert little or no control, or may disagree with the board's majority, but under the corporate bylaws or standards may be unable to influence it. A commenter argued to the contrary that "complete" or "absolute" control over a company's activities should not be required before an officer or director is considered in control. By "complete" or "absolute" control the commenter meant control or an ownership interest large enough to allow a person to compel compliance by his or her actions alone.

A person, such as a director, cannot escape responsibility merely by asserting that he or she is a member of a group, and the group, collectively, can exercise authority, but not any one individual. The information needed to establish whether a particular director can exercise control of a corporation likely relates to the internal workings of the corporation. A director may have access to such information. Access by a regulatory authority is likely to be difficult. OSMRE is establishing the presumption of control for directors to encourage such information to be brought forward to the regulatory authority if the director wishes to establish that control does not exist.

Commenters opposing the presumption of control for officers and directors asserted that it is unlikely as a general matter that a treasurer or junior officer of a corporation could exercise control.

As stated above, OSMRE agrees that every officer of a corporation may not control the relevant surface coal mining operation. An officer in a large corporation may rebut the presumption by demonstrating that his or her responsibilities preclude such control. In small closely held corporations, however, control can be exercised in a number of ways and the mere restatement of official responsibilities may be insufficient to overcome the presumption.

IRREBUTTABLE PRESUMPTION ALTERNATIVE FOR OFFICERS REJECTED. One commenter preferred a conclusive presumption of control for officers, but stated that if OSMRE rejects this approach, an alternative could be structured which establishes an irrebuttable presumption in the following three situations where an irrebuttable presumption for officers would be particularly compelling.

The first situation specified by the commenter would apply to businesses over a certain size, and include an irrebuttable presumption for "line of authority" officers dealing with surface coal mining and reclamation operations, and would always include the chief executive officer and the chief operating officer. Non-"line" officers would not be subject to any presumption, because in large corporations, non-"line" officers may not be involved with the conduct of surface coal mining and reclamation operations. The commenter suggested that "line of authority" officers could be initially identified by requiring companies to specify which of their officers are included, subject to the regulatory authority's discretion to add others.

OSMRE agrees that in most instances officers with "line" authority over a surface coal mining operation are in control of the operation. The problem with establishing an irrebuttable presumption, however, is twofold. First, within a particular entity, actual authority could be exercised by a person without "line" authority, and the person in apparent control should be given opportunity to demonstrate that he or she cannot exercise control. Second, a person with line authority in an entity which controls, but is not conducting, a surface coal mining operation perhaps can demonstrate that he or she does not control the activities of the surface coal mining operation. OSMRE does not expect in either situation that a person in a line position will generally rebut the control presumption.

OSMRE also agrees that non-"line" officers in large corporations often will not control the organization. OSMRE's problem in this regard was establishing the size standard for removing the presumption of control. Rather than selecting an arbitrary cutoff, OSMRE has decided to establish the control presumption for all officers, recognizing that for very large corporations a non-line officer will easily be able to provide adequate rebuttal.

The second situation would include corporations with less than 500 employees. The commenter suggested that all officers in such corporations should be subject to an irrebuttable presumption, because lines of authority are likely to be blurred, with all officers intimately involved in various aspects of business. The commenter selected the 500-employee threshold from the Small Business Administration size standard of five hundred employees for small businesses in coal mining, at 48 CFR 19.102(g).

OSMRE simply does not agree that a size threshold exists for corporations below which every officer will always control the corporation. OSMRE cannot justify an irrebuttable presumption, particularly with regard to officers who are not in the chain of command over the conduct of a surface coal mining operation.

The commenter's suggested size threshold is based on the Federal Acquisition Regulations (FAR) at 48 CFR Part 19. Part 19 implements the acquisition-related sections of the Small Business Act, the purposes of which are different from SMCRA. Although the FAR address whether entities are affiliated or under common control, they do not establish an irrebuttable presumption of control for all officers of small corporations. To the contrary, instead of conclusively providing that an individual who serves as an officer of two corporations controls both corporations, the FAR require interlocking management so that the officers, directors, employees, or principal stockholders of one concern serve as a working majority of the board of directors or officers of another concern. (48 CFR 19.101(f)(1)).

Although the commenter focused on particular aspects of the FAR, in many ways OSMRE's regulatory scheme will result in greater scrutiny of an applicant than would the provisions of the FAR. For instance, although the commenter asserted that OSMRE must collect extensive information on all officers, the FAR simply requires that an officer represent in good faith that it is a small business, without the requirement to submit supporting information. 48 CFR 19.301.

In the third situation suggested by the commenters, the following officers would be subject to an irrebuttable presumption of control: (1) Those who serve as directors ("inside directors"); (2) those who own substantial amounts of a corporation's stock or debt; (3) those who rent facilities or equipment to or from a corporation; (4) those who "share" employees with a corporation; (5) those who organized a corporation; (6) those who commingle their assets with those of a corporation; or (7) those who work for a corporation that is undercapitalized or that disregards corporate formalities. The commenter asserted that the above standards would cover situations where an officer is the driving force behind a "shell" company, or has such a relationship with a company that he or she is in control.

OSMRE rejects these suggestions for several reasons. The complexity of the commenter's suggestions would make implementation extremely difficult. Implementation of any regulatory scheme is dependent upon the quality and availability of the information needed. The two principal sources of information for compliance review are OSMRE's Applicant Violator System and permit applications. With the exception of officers who are also directors or large shareholders, neither source can presently provide information needed to establish the third set of categories suggested by the commenter. Information on items such as the commingling of assets, undercapitalization of corporations, corporate organizers or sharing of employees is not easily collectible. Future modification of permit application requirements is not likely to make such information available, particularly with regard to the owners or controllers of permit applicants.

The commenter's suggested alternative would unreasonably increase the information collection burden imposed on the public. Under the Federal Paperwork Reduction Act of 1980, *44 U.S.C. 3501* et seq., Federal agencies are required to minimize or, where possible, reduce the information collection burden it imposes on the public. In addition each Federal agency is given an information collection "budget." Although statutory information collection requirements, such as mandated by 507 of SMCRA, must be satisfied, OSMRE must consider the amount of information to be collected from the public when imposing discretionary requirements.

As to the exception where information is likely to be available, the rebuttable presumption established by this final rule satisfactorily deals with officers who are also directors or large shareholders. In such situations, the aggregation of factors that tend to establish control will make rebuttal difficult. Factors, such as an officer being both an officer and director, or financing the operation, will be considered when the officer or director attempts to rebut the presumption. Thus a rebuttable presumption in such cases will likely yield the same result as the proposal suggested by the commenters, but will be more fair and provide individuals a chance to show that control does not exist.

In addition, OSMRE is not sure what the commenter meant by the concept of corporations that disregard corporate formalities or officers who organized the corporation, which could include persons who performed technical tasks. A rebuttable presumption will allow persons to come forward to demonstrate whether he or she is in control in such circumstances.

OSMRE agrees that many of the factors the commenter enumerated are valuable indications of control which will certainly be considered during the permitting process. This rule will prove no less effective than the commenter's suggested alternative, however, without imposing undue complexity.

Finally, many of the commenter's suggestions are significant departures from the options proposed by OSMRE, which would have required an additional opportunity for public comment. This would have further delayed the adoption of a final rule.

PARAGRAPH (b)(2) -- OPERATORS. As described earlier, the definition establishes a rebuttable presumption of control for operators. This has been a difficult and controversial issue for OSMRE, and one about which members of Congress inquired as to the basis the agency had for proposing an irrebuttable presumption of control for operators and the basis for changing that position.

Prior to promulgating this rule, OSMRE considered several alternatives. In the April 5, 1985, proposal *(50 FR 13724),* operators were not specifically mentioned in the definition, but would have been regulated under the phrase "any other relationship." The second alternative was published on April 16, 1986 *(51 FR 12879).* It did not contain specific rule language but stated that being an operator would constitute control. This option was added in response to comments which argued that the person really controlling the mining operation is the operator (administrative record document no.

6). Under another alternative, published on May 4, 1987 *(52 FR 16275);* reiterated on October 5, 1987 *(52 FR 37164),* and included in this final rule, being an operator creates a presumption of control.

Part of OSMRE's difficulty in determining the degree to which an operator controls a surface coal mining operation results from ambiguities in the Act. Even though the terms "permittee" and "operator" are defined in the Act, the Act sometimes uses the terms interchangeably from one section or subsection to another. For example, "permittee" in section 518(a) and "operator" in section 518(c) appear to be used interchangeably.

OSMRE is concerned about the inequities that could result from a conclusive presumption for operators that may not always be true. Although permittees are responsible for everything that happens on the site, non-permittee operators are responsible only for their own conduct. Thus an operator may be able to show that a violation was caused by the permittee or someone else other than itself.

Further, courts have construed operators to include entities which do not physically engage in coal removal. See *United States v. Rapoca Energy Co., 613 F. Supp. 1161 (1985)* (Rapoca). Thus although OSMRE agrees that entities physically engaged in surface coal mining operations will almost universally control such operations, the term operator includes more than such entities.

The proper focus of a compliance review inquiry should be whether a person controls the operation, not whether the person is the "operator." Therefore OSMRE is reluctant to establish an irrebuttable presumption based upon the definition in section 701(13).

One commenter asked whether the rule would apply to the owners and controllers of operators in the same fashion as to the owners and controllers of permittees.

The ownership and control definition provides a means of evaluating the relationship between any two entities, regardless of whether a permittee or operator is involved. When an operator controls a surface coal mining operation, the compliance review must consider the owners and controllers of the operator.

PARAGRAPH (b)(3) -- PERSONS WHO CAN COMMIT ASSETS OR RESOURCES. Paragraph (b)(3) creates a presumption for anyone having the ability to commit the financial or real property assets or working resources of an entity. OSMRE considers such an ability sufficient to imply control and therefore has included a rebuttable presumption for such persons.

PARAGRAPH (b)(4) -- GENERAL PARTNERS. Paragraph (b)(4) establishes a rebuttable presumption of control for each general partner in a partnership.

Several commenters pointed out that while it is true that general partners control a partnership as a group, an individual partner may have only a small voice in management. The commenters pointed out that under sections 18 (e) and (h) of the Uniform Partnership Act, unless the partners agree otherwise, all partners have an equal voice in management. Therefore, unless a provision covering voting exists in the partnership agreement, ordinary matters are decided by a majority vote of the partners.

Under the commenters' reasoning, no partner will be a controller. OSMRE rejects this position on the basis that individuals cannot escape responsibility merely because a group collectively has control and the person is but a part of the group. OSMRE has established a presumption to enable a partner to show that he or she cannot exercise control. Mere assertion of group responsibility is insufficient to overcome the presumption.

PARAGRAPH (b)(5) -- 10 TO 50 PERCENT OWNERS. Paragraph (b)(5) presumes control in situations where a person owns less than a majority interest in an entity (i.e., ten through fifty percent). This is consistent with rulings in which several courts have found that actual control can exist when the largest shareholder owns less than half of the voting stock in a corporation. See *Securities and Exchange Commission v. R. A. Holman & Co., 377 F.2d 665, 667 (2d Cir. 1967); Gottesman v. General Motors Corp., 279 F. Supp. 361, 368 (S.D.N.Y. 1967).* If a person with a ten through fifty percent interest in an entity believes that his interest does not constitute control, then he will be given an opportunity to submit evidence rebutting the presumption. For example, the presumption of control can be rebutted by evidence

which establishes that the shareholder in question has consistently been denied control of the entity by block voting of other shareholders, or that there is a majority shareholder who controls the entity.

The presumption in paragraph (b)(5) will be used in determining whether control exists between indirectly related corporate entities and will apply at each level of a corporate structure. For example, if Company "A" owns a forty-five percent interest in Company "B," and Company "B" owns a twenty percent interest in Company "C" (the applicant), then Company "A" will be presumed to own or control the applicant, even though Company "A" has an indirect interest in the applicant of only nine percent. The determining factor is not the percentage owned, but whether control exists. In such an example, if company "A" owned or controlled Company "D" which had a violation, the applicant will not be issued a permit unless it submits evidence proving that it is not controlled by Company "B," Company "B" is not controlled by Company "A", Company "A" does not own or control Company "D", or Company "D" is not a violator.

As originally proposed in April 1985, "ownership" would have been defined as, among other things, "ownership of 10 percent or more of any class of voting stock in a corporation." In the corresponding definition of "control," the proposed rule stated that "Control means ownership * * *." Because of this linkage between the definitions, a ten percent interest in a corporation would have resulted in a determination of control under the rule. OSMRE received numerous comments objecting to a definition of "ownership based on an interest that was insufficient to establish any control over a violating entity. Several commenters asked OSMRE to explain how a ten percent interest resulted in control, and requested examples of such situations. They stated that ten percent stock ownership generally does not constitute control of a corporation, and that a higher standard such as fifty percent should be adopted. The commenters asserted that the purpose of the permit blocking provisions of section 510(c) is to compel compliance with the Act and certain other environmental laws by withholding approval of a permit until outstanding violations under an old permit are corrected. They argued that it would serve no useful purpose to block a permit merely because someone listed in the permit application owned, directly or indirectly, a ten percent or greater interest in a violator if that interest gave insufficient control to effect compliance.

Several commenters objecting to the ten percent option stated that under the rules of statutory construction, words should be given their common meaning in the absence of evidence that some other meaning was intended or manifested. Since the Congress did not define the term "owned" in section 510(c) of the Act, they argued, it is appropriate to assume that the Congress intended the term to be used in its usual and ordinary sense. As one commenter pointed out, the term "own" is defined by the American Heritage Dictionary as "to have or possess," while "control" is defined as "to exercise authority or dominating influence over." Therefore, as used together in the Act, the commenter concluded both of these terms should be defined to imply an ability to direct the manner in which a company conducts the surface mining of coal.

For the reasons described earlier, OSMRE agrees with the commenters' conclusion that only controlling ownership interests should block permits. OSMRE also agrees with the comments that ownership of less than fifty percent may not always constitute control. The definition adopted today addresses these concerns by eliminating a mandatory determination of ownership and control for ownership interests of less than fifty percent.

In addition, no presumption is included in paragraph (b)(5) for ownership of less than 10 percent because it is unlikely that an ownership interest of less than ten percent would generally be sufficient to give control of an operation without other factors. A situation involving less than 10 percent ownership can constitute control under paragraph (a)(3), if the regulatory authority can establish the necessary facts.

Several commenters, citing "11 Fletcher, Cyclopedia of the Law of Private Corporations (rev. perm. ed. 1986)" as authority, stated that a ten percent shareholder does not "own" a corporation; he merely owns one-tenth of its shares, and has the rights to vote one-tenth of its shares and to collect one-tenth of its dividends. In the commenter's view, the shareholder does not own any of the corporation's assets or capital directly, and therefore does not "own" the corporation as that term is used in section 510(c).

OSMRE disagrees with the commenters' analysis. The commenter's focus on direct ownership of assets and capital is not determinative as to whether a certain percentage ownership of a corporation's shares can establish control of the corporation. If direct ownership of assets and capital had to exist, a majority shareholder would not necessarily be considered an owner of the corporation. That result is not plausible.

Relation to section 507(b)(4) of the Act. Section 507(b)(4) requires an applicant which is a partnership, corporation, association, or other business entity to include in its application for a surface coal mining and reclamation permit:

"T]he names and addresses of every officer, partner, director, or person performing a function similar to a director, of the applicant, together with the name and address of any person owning, of record 10 percentum or more of any class of voting stock of the applicant and a list of all names under which the applicant, partner, or principal shareholder previously operated a surface mining operation * * * within the five-year period preceding the date of submission of the application."

Some commenters argued that the legislative history of section 507(b)(4) indicates that the Congress did not intend that all persons named by an applicant under section 507(b)(4) should be held ultimately responsible as owners or controllers. They argued that the information submitted pursuant to section 507(b)(4) does not define who owns or controls an applicant for the purposes of section 510(c) permit blocking, but simply requires the submission of data from which OSMRE must determine those ultimately responsible for the mining operation, either because of their official position or because of their controlling ownership interest in a corporation. OSMRE agrees.

One commenter favoring the position that ten percent ownership establishes ownership or control asserted that the information reporting requirements of section 507(b)(4) indicate who the Congress considered "ultimately responsible" for a mining operation, and therefore everyone named by an applicant pursuant to section 507(b)(4) should be considered either an "owner" or a "controller" for permit blocking under section 510(c). OSMRE initially was inclined to adopt this position. However, a careful reading of the legislative history and the inequitable results that would flow from such a position has led OSMRE to a different conclusion.

The legislative history of section 507(b)(4) includes the statement that "[t]he information required by [section 507(b)(4)] is a key element of the operator's affirmative demonstration that the environmental protection provisions of the Act can be met as stipulated in Section 510 and includes: (1) Identification of all parties, corporations, and officials involved to allow identification of parties ultimately responsible * * *." H.R. Rep. No. 94-896, 94th Cong., 2nd Sess. 111 (1976). (Emphasis added.) See also S. Rep. No. 94-28, 94th Cong., 1st Sess. 206 (1975). The report does not state that the information submitted pursuant to section 507(b)(4) identifies all parties ultimately responsible, but only that it is collected "to allow identification" of such parties. Thus, the Congress intended to give the regulatory authority discretion to determine whether any person named under section 507(b)(4) owns or controls the applicant.

In the April 5, 1985 proposed rule, OSMRE requested comments as to how far up and down the vertical chain of corporate ownership the rule should apply. Some commenters stated that it should apply up and down the ownership chain until all ten percent stock owners were identified.

Commenters opposed to a rule including indirect owners pointed out that section 507(b)(4) of the Act required only the applicant's shareholders of record to be listed on a permit application, but not indirect owners. The commenters argued that this indicated that the Congress intended that a permit should be blocked only for direct ownership.

OSMRE disagrees with the latter commenters' conclusion. Their focus on the scope of section 507(b)(4) of the Act does not answer the question of the proper reach of OSMRE's rule. Section 507(b)(4) is an information collection provision that does not govern the scope of the compliance review under section 510(c) of the Act. This rule, moreover, is an exercise of authority under more than just section 510(c). For instance, sections 201(c)(1), 201(c)(2), 412(a) and 501, provide ample authority for the Secretary to include as many corporate levels as necessary within the concepts of ownership or control. Thus, the proper reach of OSMRE's rule is a matter for the exercise of its discretion in a reasonable manner.

OSMRE views the primary purpose of the withholding of permits based upon ownership or control to be the correction of violations and the payment of monies owed. Accordingly, OSMRE has adopted a rule which focuses on the ability to achieve these goals, rather than on a specific number of indirect ownership levels and will track ownership up and down a corporate chain so long as control is present.

As required by section 507(b)(4), OSMRE and state regulatory authorities will collect information on persons holding at least a ten percent interest in the applicant, and will use the information to determine who in fact is ultimately responsible for the operation. OSMRE also will include such information in the Applicant Violator System. Under the

rule, a person holding an ownership interest of between ten and fifty percent will be presumed to qualify as an owner or controller unless it can be demonstrated that the person's relationship to the entity does not provide control over the conduct of the relevant surface coal mining operation. Based upon such a demonstration, the regulatory authority lawfully may conclude that a person named under section 507(b)(4) does not own or control the applicant.

One commenter objected to the rule and stated that it incorrectly interpreted the informational requirements of section 507 as establishing a new class of persons subject to penalties, both in the form of civil or criminal penalties and of permit blocking under the Act. The commenter argued that section 507 should not be read as defining "ownership or control" for penal purposes under section 510(c). The commenter argued that section 507 sets forth only a comprehensive informational requirement that is broad enough to cover all of the Act's informational needs, such as the conflict of interest provisions, the inspection and enforcement provisions, and the provisions setting forth certain exemptions from the Act's requirements such as the small operator exemption. The commenter further argued that the rule subjected a new class of persons to liability for civil penalties and reclamation work incurred by another separate, and possibly unrelated, corporate permittee.

OSMRE agrees in part and disagrees in part. Certainly OSMRE may use the information furnished pursuant to section 507(b)(4) of the Act to perform the compliance review required by section 510(c) of the Act. The House Report quoted earlier links the reporting requirements of section 507 with the compliance review required by section 510. Similarly, the information reported pursuant to section 507(b)(4) of the Act may be used for more than the compliance review required by section 510(c) of the Act. For example, section 518(f) of the Act authorizes the assessment of individual civil penalties against officers, directors and agents of a corporate permittee who knowingly and willfully authorize violations of the Act. The information supplied pursuant to section 507(b)(4) may be used to identify the officers, directors and agents of the corporate permittee against whom an individual civil penalty may be assessed.

OSMRE disagrees with the commenter's assertion that the rule will subject a new class of persons to liability for civil penalties and reclamation work incurred by another separate, and possibly unrelated, corporate permittee. The rule does not transfer liability for civil penalties and reclamation work to the permit applicant. Those responsibilities remain with the persons who originally incurred the obligation. If the commenter intended the term "liability" to mean that an applicant would be unable to receive a permit until reclamation is performed and penalties and fees paid, the commenter is correct. The rule is justified because it is a powerful means of inducing remedial action in situations where such action is possible.

Relation to section 518 of the Act. A commenter asserted that section 518 of the Act establishes the class of persons and entities subject to penalties and responsible for violations of the Act's provisions. The commenter argued that section 510(c) must be read as requiring the regulatory authority to withhold the privilege of obtaining a surface mining permit only from individuals or entities determined to be in violation of the Act's requirements pursuant to the penalty provisions of section 518 or under similar provisions of other environmental laws. As an example, the commenter argued that section 518(f) establishes clear standards for when a corporate officer, director or agent is in violation of the Act's requirements. The commenter argued that the officer, director or agent must have willfully and knowingly authorized, ordered or carried out the violation before he or she can be held personally liable and a permit be denied because of a common link between a permit applicant and a violator.

OSMRE disagrees. Section 518 establishes the civil and criminal penalty provisions of the Act; it does not establish the criteria for permit blocking under section 510(c). For example, section 518(f) specifies the type of conduct, knowing and willful, for which a corporate official will be assessed an individual civil penalty. No such requirement is set forth in the relevant portion of section 510(c).

Moreover, OSMRE has discretion to use a range of enforcement options to achieve compliance and may find it more effective to take action against a corporate entity rather than to assess an individual civil penalty under section 518(f). Therefore, a determination that an individual is in violation of section 518 is not a prerequisite to blocking a permit under section 510(c) or under this rule. The determining factors under final Section 773.15(b)(1) are: (1) Whether the common officer was in control of the violator at the time the violation occurred and is therefore responsible for the violation; or (2) whether the common officer presently controls the violator and, therefore, can order abatement.

SUCCESSOR RESPONSIBILITY. In the notice of proposed rulemaking, OSMRE requested comments as to whether parent corporations which acquire subsidiaries should be responsible for violations committed by the subsidiaries

prior to their acquisition. Some commenters opposed making parent corporations responsible for the violations. Other commenters favored responsibility. Commenters opposing responsibility argued that it might have a negative effect on an acquisition even though the acquisition could result in any acquiring company abating a violation or reclaiming an abandoned mine site. Commenters favoring responsibility stated that it was reasonable for the acquiring parent to assume the liabilities of a subsidiary as well as its assets. One commenter favored responsibility after a grace period in which the parent could bring the subsidiary into compliance.

OSMRE concludes that it is reasonable and proper to hold an acquiring company liable for the violations for which a subsidiary was responsible prior to its acquisition in a number of circumstances. When the acquiring company acquires a share in excess of 10 percent of an entity, under the rule it will presumptively own or control the entity and therefore can compel the correction of a violation in the same manner as its predecessors in interest.

When a company acquires only assets of an entity, its responsibilities will depend upon a number of factors. For instance, if the assets purchased include the mine site and equipment where outstanding violations exist, the acquiring company would be responsible for the violations under the theory that the acquiring company has purchased the liabilities in connection with the transferred assets of the other entity and that the purchase price for the entity would reflect any liabilities transferred. In other instances, assets may be transferred without transferring responsibility for violations. However in these instances the contract of sale or other legal instrument must clearly establish that responsibility remains with the selling entity.

THE LAW OF SUCCESSOR LIABILITY IS COMPLEX. Although the general rule is that where a corporation sells all its assets to another company, the buyer is not liable for the obligations of the seller, significant exceptions exist. As one Federal Court stated:

Four exceptions to the general rule of nonliability are widely recognized * * * . Thus, where (1) the purchaser of assets expressly or impliedly agrees to assume obligations of the transferror; (2) the transaction amounts to a consolidation or de facto merger; (3) the purchasing corporation is merely a continuation of the transferror corporation; or (4) the transaction is fraudulently entered into to escape liability, a successor corporation may be held responsible for the debts and liabilities of its predecessor. See *Shane v. Hobam, Inc., 332 F. Supp. 526 (E.D. Pa. 1971); Granthum v. Textile Machine Works, 230 Pa. Super. 199, 326 A.2d 449 (1974).* See generally 15 W. Fletcher, Cyclopedia of the Law of Private Corporations section 7122 (rev. perm. ed. 1983). A fifth circumstance, sometimes included as an exception to the general rule, is where the transfer was without adequate consideration and provisions were not made for creditors of the transferror. *Husak v. Berkel., Inc., 234 Pa. Super. 452, 457, 341 A.2d 174, 176 (1975)* * * * ."

Philadelphia Electric Co. v. Hercules, Inc., 762 F.2d 303, 308-309, (3d Cir. 1985). See also *Pulis v. United States Electrical Tool Co., 561 P.2d 68 (OK. 1977); Kemos, Inc. v. Bader, 545 F.2d 913 (5th Cir. 1977), Golden State Bottling Company, Inc. v. National Labor Relations Board, 414 U.S. 168 (1973).* Each of these exceptions may be applicable, alone or in combination, to possible ownership or control relationships where a successor may be held responsible under the Act.

The "grace" period suggested by the commenter is unnecessary because a regulatory authority may conditionally issue a permit under 30 CFR 773.15(b)(1)(i), if a violation is being abated to the satisfaction of the regulatory authority. Consequently, any company which has acquired a subsidiary with an outstanding violation may receive a conditional permit in appropriate circumstances.

PARAGRAPH (b)(6) -- CONTRACT MINING. Paragraph (b)(6) covers contract mining operations in which the person controlling the mining operation may be neither the permittee nor the operator, but instead is the owner or lessor of the coal. Specific regulatory language governing contract mining operations was added in response to comments discussed below.

As proposed on April 5, 1985, the rule contained a rebuttable presumption of control for those with the right to receive coal to be mined by another under a lease, sublease or other contract. *(50 FR 13727.)* Numerous comments were received on this proposal.

The constituent positions surrounding contract mining are not surprising. Citizen and environmental groups desire that reclamation and other responsibilities arising under the Act be as wide-ranging as possible and that de facto control by

one entity over another, through a contract or other means, is sufficient to establish responsibility by the controlling entity. These groups prefer such widespread responsibility because, typically, the controlling entity has greater resources, stability, and the ability to abate violations than does the entity controlled.

Industry groups take the opposite view and assert that an entity mining under a contract is an independent entity who should bear sole responsibility for its actions. Several industry commenters objected to a rebuttable presumption of control by the owner or lessor of the coal in a contract mining operation, asserting that contract mining is a legitimate business arrangement that has been utilized for generations to finance and mine coal and in the majority of cases is not used to evade the requirements of the Act. One commenter stated that it was unfair to make a coal company responsible for the conduct of its contract operators, especially with regard to past unpaid fines and fees.

In paragraph (b)(6) of the final definition of "owned or controlled," OSMRE has established a rebuttable presumption of control for "captive" contractors of coal owners or lessors. Control over the conduct of a surface coal mining operation will exist by those "[o]wning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation." In situations covered by paragraph (b)(6), applicants would have to prove that a contract mining relationship with a coal lessor does not establish control. In situations involving contract mining where paragraph (b)(6) does not apply, control can be established under one of the other paragraphs of the definition.

OSMRE has adopted the presumption because, in contract mining operations, the owner or lessor of the coal more often than not is controlling the mining operation even though the owner or lessor of the coal purportedly employs "independent contractors." This was the situation in *Rapoca, supra,* discussed below. To the extent that a coal company controls or can exercise control over a contract operator it should be held responsible for any outstanding violations of the Act which it could have prevented or corrected.

RAPOCA. The Rapoca case support the presumption in paragraph (b)(6). In Rapoca, OSMRE sued under section 402(a) of the Act, *30 U.S.C. 1232*(a), to collect reclamation fees from the Rapoca Energy Company, which had contracted with others to mine the coal it owned. The issue was "whether a large coal company that contracts with independent companies to produce coal that it owns or leases is an 'operator' responsible for the payment of [such] fees."*Id. at 1163.*

Finding the Rapoca was liable for payment of the fees, the court stated:

“Because of the degree of control which Rapoca Energy Company exerts over the mining companies with respect to crucial aspects of the mining process, along with the corresponding lack of freedom regarding the mining companies ability to sell to anyone other than Rapoca, this court must conclude that the "independent contractors" are no more than Rapoca's agents.”

Id. at 1164.

PROOF NEEDED TO REBUT CONTRACT MINING PRESUMPTION; Relevance of Contract Terms. Commenters objected to OSMRE's statement in the 1985 preamble to the proposed rule *(50 FR 13726)* that the terms of the contract may not be sufficient to rebut the presumption of control in a contract mining operation and argued that permit applicant would be required to submit "negative" proof to rebut the presumption. The commenters asserted that, by considering factors other than contract terms, OSMRE ignores the integrity of small business entities, and stated that contract miners are often utilized for small coal reserves that cannot be mined economically by larger companies, or by the landowners who own the coal but lack the means to mine it. The commenter stated that the contracts are very precisely worded to specify the responsibilities of all the parties involved.

OSMRE disagrees. The terms of a contract may establish the rights of the parties among themselves, but are not a conclusive determination of the responsibility of the parties under the Act. OSMRE will look to the actual relationship between the parties. Important factors to be considered in determining the actual relationship of the parties include whether the mining company is free to sell the coal it extracts to whenever it wishes and the degree of involvement of the coal owner or lessor in the mining operation. Information which can be used to rebut a presumption of control can include, but is not limited to, data on who provides engineering services, who determines the placement and method of

driving entries or making cuts, and to whom the coal may be sold and at what price. As with all of the presumptions contained in the rule, submission of adequate information that is available to the parties involved will suffice to rebut the presumption.

Some commenters objected to the rebuttable presumption of contract mining operations on the grounds that it would allow OSMRE to modify or annual the terms of contracts.

OSMRE disagrees. Contact terms many continue to govern rights as among the parties to a contract. However, the terms of private contracts are not necessarily determinative of obligations under the Act.

RELATION TO TWO-ACRE DEFINITION OF CONTROL. One commenter asked why, with regard to contract mining, OSMRE has deviated from the position it has taken on control in the "two-acre rulemaking."

The final rule on the two-acre exemption, to which the question relates, appears at 30 CFR 700.11(b), and was promulgated on August 2, 1982 *(47 FR 33431).* The two-acre rule derives from former section 528(2) of the Act, which was repealed by the Congress on May 7, 1987, Pub. L. 100-34, 100 Stat. 300. For purposes of the two-acre exemption, section 700.11(b)(2)(iii) defines control as:

[O]wnership of 50 percent or more of the voting shares of, or general partnership in, an entity; any relationship which gives one person the ability in fact or law to direct what the other does; or any relationship which gives one person express or implied authority to determine the manner in which coal at different sites will be mined, handled, sold or disposed of.

The definition of control in section 700(b)(2)(iii), with an exception related to general partners, is consistent with the definition adopted by this rule. The principal difference as to contract mining relates to the manner of proving control, not to the relationship covered. In 1982, OSMRE elected not to include any rebuttable presumptions, choosing instead that the regulatory authority has to establish control. Clearly, however, under the tow-acre definition of control a contract mining relationship could constitute control. In the preamble to Section 700.11b(2)(iii), OSMRE explained that:

“If one person exercises sufficient authority over another (whether by contract, lease, other agreement, or implied authority) to determine how that person mines, handles, sells or disposes of coal from a site, there is "control."”

47 FR 33428 (August 2, 1982).

As to general partners, OSMRE has decided to allow such persons to attempt to rebut a presumption, rather than to create a conclusive determination of ownership or control.

One commenter cited an example in the preamble to the proposed two-acre definition in support of its assertion that OSMRE had changed its position on control for contract miners. In the two-acre proposal, OSMRE stated that

“if company A, by agreement with operators X, Y, and Z, requires all coal mined at those sites to be sold to company A and delivered to a prescribed tipple, then company A would "control" the operation under the proposed definition.”

47 FR 52 (January 4, 1982). The commenter concluded that this example raised an irrebuttable presumption of control which was lacking in the May 4, 1987 and October 5, 1987 options, and therefore OSMRE had changed its position with respect to contract miners.

OSMRE disagrees. The two-acre definition does not contain an irrebuttable presumption of control for contract miners. The regulatory language specifies in general terms the circumstances which constitute control. The cited passage was not intended to establish an irrebuttable presumption, but was intended to be an example of the application of the proposed definition under particular circumstances. One salient fact missing from the example was how Company A derived the authority, such as by being the coal owner or lessor, to require where the coal was to be sold. Depending upon all of the circumstances, the same conclusion would likely result from applying this rule.

RELATION TO IBLA DECISION. One commenter inquired as to how the standards set forth in *S & M Coal Co. and Jewell Smokeless Coal Co. V. Office of Surface Mining Reclamation and Enforcement, 79 IBLA 350 (1984)* (S &

M Coal) relate to this rule.

The S & M Coal decision supports the presumption established by paragraph (b)(6) of the "owned or controlled" definition. In the S & M Coal case, the DOI Office of Hearings and Appeals (OHA) held a lessor of coal liable for violations at a mining site even though the coal produced at that site was mined by another party pursuant to an oral contract. In reaching its decision, OHA noted that the lessor's employees took an active part in the planning and engineering functions in support of the mining operations. OHA also held that while the amount of control actually exercised is indicative of the relationship between the owner of the coal and the company or individual extracting the coal, the determination regarding exercise of control should not solely be based on past exercise of control and that it is important to determine the extent that a party can exercise control.

Irrebuttable and Broader Presumptions Rejected. One commenter wanted an irrebuttable presumption of control in contract mining situations. The commenter argued that contract mining is a major method of mining in various regions of the country. The commenter argued that contract mining has caused untold environmental damage through irresponsible conduct on the part of both the contractor and the entity arranging to have the coal extracted. The commenter further argued that while contract mining is a legitimate method of mining, and in certain cases plainly desirable, there is no question but that contracting has been and is being used on a widespread basis to evade compliance with the Act. The commenter objected to leaving open the issue of lessor/owner liability through a rebuttable presumption when in fact total or almost total control exists in contracting mining situations.

OSMRE does not agree that an irrebuttable presumption is warranted. If in all contract mining operations, the conduct of the relevant surface coal mining operation were controlled by the coal owner or lessor, than a conclusive presumption would be warranted. However, such is not the case. OSMRE agrees that when an owner or lessor of coal controls salient features of an operation performed by a contractor, a determination of control over the whole surface coal mining operation is justified and should be established. This is a reasonable position, which will accomplish the goals which were contemplated by the Act. Because control by the owner or lessor does not always exist, however, it would be inequitable for OSMRE to adopt a rule which conclusively presumes control in all situations.

One commenter suggested that having the right to receive coal under a lease, sublease, or other contract is too restrictive a standard to use to determine control and suggested that a standard using any benefit received from mining and/or marketing of the coal would be more appropriate to determine control.

OSMRE has decided not to establish a standard whereby a coal owner or lessor would be presumed to control the conduct of a surface coal mining operation if it receives any economic benefit from the mining or marketing of coal. Such a presumption would be too broad because in almost every contract mining situation the coal owner or lessor derives some economic benefit from the mining and marketing of the coal produced. What is more relevant is whether the coal owner or lessor can control the manner in which the surface coal mining operation is conducted. A coal lease combined with the right to receive the coal generally establishes such control.

IN-KIND ROYALTIES. One commenter asked for clarification of the rebuttable presumption as it applied to lease situations, especially where payment for the lease was in-kind.

OSMRE does not intend that the reference to the right to receive coal in the rebuttable presumption contained in paragraph (b)(6) be construed as applying to royalty payments, such as those received by the Federal government on Federal coal leases. However, simply labeling the receipt of coal as an in-kind royalty payment will not automatically except the operation from the provisions of (b)(6) if the payment is more than a simple royalty or if the lessor otherwise controls the conduct of the surface coal mining operation.

EFFECT ON BUSINESS PRACTICES. Some commenters pointed out that the rule might cause companies to eliminate contract mining operations to avoid liability for the violations of the contract miners at other unrelated sites.

OSMRE agrees that this may happen in specific instances. OSMRE does not believe, and no evidence has been presented, that this rule will eliminate contract mining as a business practice in the coal industry. As with any rule of law, many companies seek prudent ways to comply. One way would be not to contract with companies with outstanding violations. This rule does not preclude any company, however, from entering into a contract with any other entity. Whether this rule affects the ability of a particular contract miner to enter into contracts with coal owners or lessors

could be dependent on the business reputation of the contract operator. Those who have reputations for operating in compliance with the law should have few problems.

One commenter said the rule would be unfair to a contract miner who may have had difficulties in the past and was trying to rehabilitate himself.

OSMRE disagrees. The rule is necessary to prevent violators from obtaining new permits. The contract miner wishing to rehabilitate himself and obtain a new permit may always enter into an abatement agreement or payment schedule with the regulatory authority.

One commenter stated that the proposed rule might discourage companies from buying coal from other companies because the purchaser might be deemed in control of that company, and thus be liable for any outstanding violations the latter might have.

OSMRE disagrees that the rule will establish responsibility for violations without ownership or control of the violator. In situations covered by Paragraph (b)(6), the rule provides the opportunity to show that control does not exist. In situations covered by paragraph (a)(3), the regulatory authority would have to establish that control does exist. The existence of a contract to purchase coal, without any other relevant factors, would be unlikely to establish control.

PROCEDURES. One commenter was concerned because the proposed rule did not discuss the manner, standard or forum for rebutting the presumptions, and requested clarification.

OSMRE recognize that the reasonableness of the ownership and control definition and of the compliance review required by revised Section 773.15(b) is dependent upon the rules being implemented in a fair and effective manner. OSMRE also realizes that permitting decisions by both OSMRE and state regulatory authorities will be based in part upon the information contained in OSMRE's computerized Applicant Violator System (AVS). To assure that recommendations by the AVS are correct, OSMRE has established a clearinghouse to verify recommendations and to respond to queries. Moreover, OSMRE has taken system-wide measures to verify the AVS information. Notwithstanding these precautions, additional procedures exist for adversely affected persons to ensure that determinations of ownership or control and other compliance review related issues are properly made. These are described below.

OSMRE AS REGULATORY AUTHORITY. In applying the rule in situations where OSMRE is the regulatory authority, OSMRE will use the procedures it currently has in place for reviewing permit applications. When a permit application is received, a preliminary check is made for outstanding violations or unpaid fees or penalties incurred by the applicant, its owners or controllers, or entities they own or control. If a present or past ownership or control link to a violator exists, or if other circumstances exist which would block permit issuance, notice is sent to the permit applicant. The applicant is informed of the links to the violator and that the relationship will result in withholding issuance of a permit unless the violation is abated or is on appeal, or is in the process of being abated, or the permit applicant can demonstrate that the requisite ownership or control relationships between the owners and controllers of the applicant and the violator do not exist. Upon receiving such a notice, the applicant may submit evidence concerning any relevant factors which would rebut an applicable presumption.

The measure of proof needed to rebut a presumption under this rule is a preponderance of the evidence, the standard ordinarily required in civil matters. Any applicant denied a permit by OSMRE may file a request for review with the Hearings Division of the Department of the Interior's Office of Hearings and Appeals in accordance with 43 CFR 4.1360 et seq.

STATES AS REGULATORY AUTHORITIES. When a permit application is filed with a State regulatory authority, the Applicant Violator System is checked by the regulatory authority to determine whether an ownership or control relationship exists between the permit applicant and a current violator. If the permit is denied by the regulatory authority based on a determination that a relationship to a current violator exists, the permit applicant may petition the regulatory authority for review of the permit denial. The petitioner may challenge any basis for the denial, including an outstanding violation or the relationship to the violator. If the petition challenges a State regulatory authority's determination that a relationship to a violator exists, the petition shall be reviewed in a State forum. Challenges to State determinations of ownership or control should be reviewed in a State forum, because rebutting the presumptions in 30 CFR 773.5(b) may be dependent on State laws.

In some cases, Federal review may be required. OSMRE intends that challenges to determinations that Federal violations exist or that monies are owed to the Federal government be resolved in a Federal forum using national standards. The Department of the Interior is prepared to address any problems which may arise on a case-by-case if existing procedures prove insufficient to ensure due process.

PROCEDURES TO AMEND APPLICANT VIOLATOR SYSTEM INFORMATION. In addition to the procedures described above, both individuals and organizations may seek to amend the information in the Applicant Violator System, independent of the existence of a permit application if they believe that the records are not accurate, relevant, timely or complete. A notice describing the Applicant Violator System, the categories of records contained in the system and the procedures for reviewing those records was published in the Federal Register on August 10, 1987 *(52 FR 29570)*, and an amendment to that notice was published on June 16, 1988 *(53 FR 22575)*.

A determination which OSMRE makes on a request for amending information contained in the Applicant Violator System will be subject to administrative review within DOI. If the request is made by an entity other than an individual, an adverse determination will be subject to review by the Department's Office of Hearings and Appeals. Under different Department of the Interior procedures developed under the Privacy Act of 1974, if the request is filed by an individual, an adverse determination can be appealed to the Assistant Secretary -- Policy Budget and Administration, DOI, under 43 CFR 2.74. OSMRE will inform any persons requesting a review and amendment of this information of the proper forum for appeal.

STANDARDS FOR REBUTTING PRESUMPTIONS. OSMRE published a draft set of guidelines for rebutting the proposed presumptions in the October 5, 1987 notice *(52 FR 37164)*. The guidelines were not extensive and were included in the notice as a starting point for public comment. Public meetings were held on the guidelines at which representatives from the environmental community and the coal industry were present. At the meetings the participants acknowledged that it probably was not possible to achieve a comprehensive agreement on guidelines for rebutting presumptions prior to the issuance of a final rule.

Written comments were also submitted. One commenter stated that standards for rebutting presumptions constitute "rules" within the meaning of the Administrative Procedure Act and therefore cannot be advisory. The same commenter also argued that different guidelines/rules should be developed for large and small companies. It suggested that officers and directors of small companies (those with less than five hundred employees) should be held to a stricter standard of proof for rebutting presumptions, on the theory that in a small company all officers and directors are intimately involved in the management of the business.

A commenter had the following detailed suggestions for inclusion in the guidelines, reasoning that the actions specified would either bring about abatement or show that the officer or director was not in control: Any officer or director who wishes to rebut the presumption should show that he or she did everything within his or her legal authority to bring about abatement of the violation. A director should show that he or she brought the matter to the attention of the chief executive officer and the board of directors (or the partnership) and proposed abatement, including requesting a vote for compliance. This action should then be communicated promptly to the regulatory authority by the director. The communication could be a simple statement of the director's activities. An officer would be required to do everything in his legal authority to bring about abatement, and then promptly notify the regulatory authority of this action. At a minimum, all officers should bring the matter to the attention of the chief executive officer and the board of directors, in writing, advocating abatement of the violation, and should communicate the action taken to the regulatory authority.

Other commenters objected to guidelines. A state regulatory authority wanted the guidelines withdrawn or else to have it stated in the rule that they were advisory and did not have to be used by a State regulatory authority. One commenter objected on the grounds that --

“[o]nce in place, it is likely that the guidelines will operate much like final rules with one difference -- there will be little or no opportunity for the regulated industry to assure itself that the guidelines are not changed unilaterally prior to notice and comment. Nor is there any certainty that the guidelines will be "advisory only" and not subject to rigid, inflexible application by regulatory authorities who are overworked and are looking for a formula approach to regulation.”

Although OSMRE appreciates the detailed guidelines suggested by commenters, OSMRE does not believe that it is necessary or possible at this time to incorporate guidelines into the definition. As with any rule, an agency must determine just how prescriptive and detailed the rule must be and how much discretion must be afforded the implementing authorities. In this instance, neither the statute nor OSMRE's prior rules specify the relationships on which to deny permits. The rule adopted today in large measure fills the gaps and sets sufficient standards for regulatory authorities to follow.

In addition, it is difficult for OSMRE to establish guidelines specifying elements such as precisely how many employees a company need have for the directors to be in control, or the percentage of stock ownership less than 50 percent that would always constitute control. Moreover, it is unlikely that such specific standards would guide private conduct, except as to persons who may seek to use the rules to their advantage. The establishment of the presumptions themselves will impel persons wishing to rebut them to bring all relevant factors to the attention of the regulatory authority, regardless of whether OSMRE specifies such factors.

For the present, however, the proof needed to rebut the presumptions will be determined case-by-case. The data available to OSMRE for predicting what evidence might rebut the presumptions are limited, and until sufficient experience has been gained in processing permit applications under the rule, guidelines are premature.

One commenter asked whether the type of violation, and therefore the remedial action required, alter the factors which will be considered in determining whether the presumption of control has been rebutted.

All pertinent factors should be considered when making determinations of control. If the type of violation and remedial action required affect that determination, then it should be taken into consideration. To date, however, OSMRE has not encountered a permit application where the type of violation or the remedial action was a factor in determining control.

One commenter asked if the requirements for rebutting a presumption would change with different control relationships.

THE FACTUAL REQUIREMENTS FOR REBUTTING A PRESUMPTION WILL CHANGE DEPENDING ON THE PARTICULAR SITUATION. For instance, the amount of proof required to rebut a presumption of control for a chief executive officer will likely be greater than that for a junior vice-president of a corporation. Likewise, the amount and kind of proof would vary where different presumptions apply.

OTHER COMMENTS. Some commenters stated that the proposed rule was not a clarification, but a substantive change in the requirements of the Act. OSMRE disagrees. As stated earlier in this preamble, the rule implements authority granted to OSMRE under a number of sections of the Act and was promulgated in conformity with the requirements of the Administrative Procedure Act.

One commenter objected to the iterative comment periods and referred to the rule as a "rolling" proposal. OSMRE believes that the rule satisfies procedural requirements. The differing options on which OSMRE solicited comments were based upon evolving considerations in response to previous comments. The final rule is substantially like the option described in the October 5, 1987, Federal Register notice, and also embodies features from the earlier notices.

One commenter suggested defining the term "party or parties." The commenter did not explain how the definition should be used or why it was needed. The commenter proposed defining the term as follows:

"Party" or "parties" includes, but is not limited to, two or more persons with an identity of interest such as members of the same family or person with common investments in more than one concern, In determining who controls or has the power to control a concern, persons with an identity of interests may be treated as though they were one person.

ADMINISTRATIVE RECORD, DOCUMENT NO. 162(a), PAGE 33.

OSMRE did not adopt the suggestion because it considered such a definition unnecessary for the regulatory scheme being adopted. The term "party" or "parties" is not used in OSMRE's rule and therefore need not be defined.

The same commenter also suggested adding a definition for the term "entity," and defining the term as follows:

"Entity" includes but is not limited to a partnership, incorporated or unincorporated association, society, joint stock company, firm, company, or cooperative, corporation, joint venture or other business organization, whether organized for profit or not.

ADMINISTRATIVE RECORD, DOCUMENT NO. 162(a).

The commenter argued that such a definition is necessary to avoid any questions of whether an unincorporated association constitutes an entity under a particular state's law. The commenter stated that the definition would be in accord with provisions of the Act, such as the definition of "person" in Section 701(19).

OSMRE did not adopt the suggestion because it was considered unnecessary. The compliance review at Section 773.15(b)(1) uses the term "person," which is defined in Section 701(19) of the Act to mean "an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization," and covers the organizations included in the commenter's suggested definition.

B. SECTION 773.15(b)

SECTION 773.15(b)(1) -- COMPLIANCE REVIEW

Section 510(c) of the Act requires that if "any surface coal mining operation owned or controlled by the applicant is currently in violation of the Act * * * the permit shall not be issued * * * *" Final Section 773.1-5(b)(1) implements section 510(c), as well as other provisions of SMCRA. Former Section 773.15(b)(1) required the regulatory authority to make a finding that any surface coal mining and reclamation operation owned or controlled by the applicant was not currently in violation of the Act or certain other environmental laws. It did not, however, expressly require the withholding of a permit when persons who own or control the applicant own or control operations in violation of such provisions.

Under a court order in the case of Save our Cumberland Mountains, Inc. et al. v. Clark, No. 81-2134 (D.D.C. January 31, 1985), the Secretary of the Interior is required to strengthen the enforcement and implementation of section 510(c) of the Act by withholding a permit when persons who own or control the applicant own or control operations in violation of the Act or certain other environmental laws. This rule imposes such a requirement. Any expanding the scope of the compliance review, OSMRE will gain an effective tool to ensure that persons who own or control an operation will have to abate or be in the process of abating all violations before any other operation they own or control is issued a permit.

On April 5, 1985 *(50 FR 13724)* OSMRE published a proposed rule to revise the scope of the compliance review and to require the withholding of a permit when persons who own or control the applicant own or control an operation in violation of the Act or certain other environmental laws. On April 16, 1985 *(51 FR 12879)*, OSMRE published for comment another option for the revised compliance review. That option, like the April 1985 proposal, would have expanded the compliance review in Section 773.15(b)(1) to entities owning or controlling the applicant. It also included a statement in Section 773.15(b)(1) that in the absence of a failure-to-abate cessation order, a notice of violation, except a notice of violation issued for non-payment of AML fees or civil penalties, would be presumed to be in the process of being corrected to the satisfaction of the agency that had jurisdiction over the violation.

On October 5, 1987, OSMRE published another option for the compliance review, which contained the following proposed language:

“Section 773.15 Review of permit applications. (b)(1) Based on available information concerning Federal and State failure-to-abate cessation orders, unabated Federal and State imminent harm cessation order, delinquent civil penalties issued pursuant to section 518(h) of the Act, bond forfeitures, delinquent abandoned mine reclamation fees, and unabated violations of Federal and State laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation, the regulatory authority shall not issue the permit if any surface coal mining reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act or such other law, rule or regulation referred to in this paragraph. In the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation issued

pursuant to 843.12 of this chapter or under a Federal of State program, except a notice of violation issued for nonpayment of abandoned mine reclamation fees or civil penalties, is being corrected to the satisfaction of the agency with jurisdiction over the violation. If a current violation exists, the regulatory authority shall require the applicant or person who owns or controls the applicant, before the issuance of the permit, to either -- [submit proof that the violation has been or is in the process of being corrected, or that an appeal has been filed and is being pursued in good faith.]"

52 FR 37165.

The revisions to Section 773.15(b)(1) contained in this rule are based for the most part on the option published on October 5, 1987. To assist the regulatory authority in making the compliance review required by section 510(c) of the Act, OSMRE is including in Section 773.15(b)(1) a list of violations which the regulatory authority will consider. The list of violations includes Federal and State failure-to-abate cessation orders, unabated Federal and State imminent harm cessation orders, delinquent civil penalties assessed pursuant to section 518 of the Act (including penalties assessed under derivative State and Federal programs), bond forfeitures, delinquent abandoned mine reclamation fees, and unabated violations of Federal and derivative State laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation. The list of violations contained in Section 773.15(b)(1) includes all outstanding violations, regardless of whether they occurred under the interim or permanent regulatory program.

STATUTORY AUTHORITY FOR COMPLIANCE REVIEW INCLUDING OWNERS AND CONTROLLERS OF APPLICANT. The scope of the compliance review required by final Section 773.15(b)(1) includes surface coal mining operations owned or controlled by owners or controllers of the applicant.

Commenters asserted that the rule goes beyond congressional intent because section 510(c) of the Act refers only to persons owned or controlled by an applicant, and not to those who own or control the applicant. Some commenters suggested that the legislative history of the Act does not support the proposed change, and that the rule is an inappropriate extension of section 510(c). Other commenters favored the rule, asserting that it was necessary to prevent evasion of the Act through the creation of new business entities or contractual agreements.

Contrary to commenters' assertions, the final rule is not just an exercise of authority under section 510(c) of the Act. Rather it is authorized by multiple sections of the Surface Mining Act, including sections 101, 102, 201(c)(1), 201(c)(2), 412(a), 501(b), 507(b)(4), 510 (a), (b) and (c), 511, 701(16) and 701(19). It is supported by the January 1985 district court order in Save our Cumberland Mountains, supra, and avoids the major potential for abuse that would result from examination only of operations controlled by the applicant.

Section 201(c)(1) of the Act provides that:

"The Secretary acting through [OSMRE] shall * * * order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this Act or any rules and regulations adopted pursuant thereto. * * * *"

(Emphasis added.)

Section 201(c)(1) authorizes the withholding of any permit for failure to comply and is not limited to operations owned or controlled by a permit applicant.

In addition, section 201(c)(2) contains a general grant of rulemaking authority and empowers OSMRE to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act. * * *" Section 412(a) establishes rulemaking authority to administer the provisions of Title IV of SMCRA, which includes the collection of AML fees. Section 501(b) requires the Secretary to publish regulations governing the requirements of State and Federal programs. The other sections enumerated above also lend support.

It is thus proper for the Secretary acting through OSMRE to use this authority to insure that all persons comply with the Act. OSMRE has chosen to implement this authority by withholding a permit where the named "applicant" is owned or controlled by others who own or control surface coal mining and reclamation operations which are in violation of the Act and certain other environmental laws.

Moreover, this rule may be justified as an exercise of authority under section 510(c) by construing the term applicant, as used in that section, to mean more than just the entity whose name appears on the permit application. The legislative history of the Act strongly implies that the Congress intended the purview of section 510(c) to be broader than just the entity identified as the applicant.

As discussed earlier in this preamble, the legislative history of the Act connects the informational requirements in section 507(b)(4) of the Act to the permit approval provisions of section 510(c) to allow identification of the parties ultimately responsible for the operation. See H.R. Rep. No. 94-896, 94th, Cong., 2nd Sess. 111 (1976). See also S. Rep. No. 94-28, 94th Cong., 1st Sess. 206 (1976). By allowing identification in section 507(b)(4) of the "parties ultimately responsible" for purposes of section 510(c), Congress clearly contemplated that the term applicant as used in section 510(c) would not be limited to the entity named as the "applicant" in the permit application and could include persons by whom the applicant is owned or controlled.

One commenter pointed to the definition of "applicant" in section 701(16) of the Act as evidence that the Congress intended to limit responsibility for violations. Another suggested that as an alternative to the proposed rule, OSMRE should define the term "applicant" more broadly to include persons who own or control the applicant. OSMRE disagrees with the former commenter, and agrees in principle with the latter.

The definition of "applicant" does not limit the Secretary's authority under sections 201 (c)(1) and (c)(2) of the Act. The definitions of "applicant" and "person" in sections 701(16) and 701(19) of the Act indicate that the Congress intended these terms to be broadly construed. Section 701(16) defines "applicant" to mean "a person applying for a permit." "Person" is defined by section 701(19) to mean "an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." Together, these two definitions cover an unlimited range of individuals and organizations which, under appropriate circumstances, OSMRE properly may construe as an applicant. Rather than redefine applicant, however, OSMRE has chosen a regulatory scheme describing persons owned or controlled by the applicant.

Several commenters pointed out that section 507(b)(5) of the Act requires a statement whether the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant, has ever held a Federal or State mining permit which is the five-year period prior to the date of submission of the application has been suspended or revoked or has had a mining bond or similar security deposit forfeited. The commenters argued that the use of different language in section 510(c) limits the allowable review under that section to companies owned or controlled by the applicant.

The inclusion of a specific requirement in section 507 does not limit the Secretary's broad authority under sections 201 (c)(1) and (c)(2). OSMRE also disagrees with the commenters' interpretation of section 510(c). Although neither section 507(b)(4) nor section 507(b)(5) uses the same language as set forth in section 510(c), both provide regulatory authorities with information that may be used in the compliance review. The fact that the Congress required information on affiliates, subsidiaries and companies under common control indicates that the Congress intended such information to be examined by the regulatory authority when reviewing permit applications. This rule makes use of all of the information included under section 507(b), which the Congress considered necessary for processing a permit application.

In support of their interpretation of section 510(c), several commenters pointed out that in the preamble to the 1979 permanent program regulations OSMRE rejected a suggestion that 30 CFR 778.14(c) (1979), the rule requiring a listing of violation notices in permit applications, should require information on the same parties listed in Section 778.14(a) (1979). This latter section required a permit applicant to submit information on permit revocations, suspensions and bond forfeitures of the applicant and any subsidiary, affiliate, or persons controlled by or under common control with the applicant. In rejecting this suggestion OSMRE stated in 1979 that the informational requirements of Section 778.14(c) are restricted by section 510(c) of the Act, which requires a listing of violations committed by the applicant, while the informational requirements in Section 778.14(a) are governed by section 507(b)(5). *44 FR 15025* (March 13, 1979).

The 1979 statement concerning Section 778.14(c) was superseded by a later revision to that section. On September 28, 1983, OSMRE revised Section 778.14(c) and expanded the amount of information to be included in permit applications *(48 FR 44399)*. Those regulations, which were not challenged and, pending further revision, are currently in effect, require permit applicants to submit a list of all violations committed by the applicant and by any subsidiary, affiliate

or persons controlled by or under common control with the applicant. Thus, although the terminology is not the same, the scope of the compliance review in Section 773.15(b)(1) is consistent with the current information submission requirements in existing Section 778.14.

Some commenters objected to OSMRE's use of the Secretary's general authority under section 201(c)(1) to deny the issuance of a permit to entities owned or controlled by persons with outstanding violations. The commenters argued that the language of section 510(c) is clear, and that permits should only be blocked if an operation owned or controlled by the applicant is in violation.

OSMRE disagrees. So long as he acts reasonably, the Secretary may exercise all of the authority provided to him by the Congress under the Act, including that of section 201(c)(1). Regardless of whether this rule may be viewed as an exercise of authority under sections 101, 102, 201(c)(1), 201(c)(2), 412(a), 501(b), 507(b)(4), 510 or 701 of the Act, or a combination thereof, its adoption is rational, closely related to the purposes of the Act, and a reasonable exercise of the Secretary's discretion. Such secretarial discretion recently was strongly reaffirmed by the United States Court of Appeals for the District of Columbia Circuit in numerous instances in its January 29, 1988 decision in NWF v. Hodel, No. 84-5743 (D.C. Cir. 1988).

DELINQUENT CIVIL PENALTIES AND AML FEES INCLUDED AS VIOLATIONS. This list of violations is identical to the proposal published on October 5, 1987 *(52 FR 37164)*, with one exception. The October 5, 1987 list referred only to delinquent civil penalties issued pursuant to section 518(h) of the Act. The final rule includes all delinquent civil penalties assessed pursuant to Section 518 of the Act, including those issued under section 518(a). This addition makes explicit the OSMRE position that nonpayment of a civil penalty within thirty days of becoming due, like the nonpayment of delinquent AML reclamation fees, is a violation of the Act.

This was proposed as a rule on July 16, 1986 *(51 FR 25822)* in proposed Section 773.15(a)(3), which stated that nonpayment of Federal and State civil penalties within thirty days of a final order shall be considered a violation of the Act for purposes of the compliance review required by Section 773.15(b)(1). Although proposed as Section 773.15(a)(3), the provision has been modified and logically included in the list of violations in final Section 773.15(b)(1).

The inclusion of all delinquent civil penalties in the list of violations will assure that prior to permit issuance the regulatory authority makes a determination that the applicant, and any entity owned or controlled by either the applicant or by any person who owns or controls the applicant, has paid all civil penalties arising from a violation of the Act for which a final order has been issued.

Several comments were received on proposed Section 773.15(a)(3) concerning the non-payment of penalties. One commenter suggested that the language be amended by adding language indicating that the nonpayment of AML fees is a violation of the Act requiring permit denial. As proposed on July 16, 1986, Section 773.15(a)(3) stated that nonpayment of Federal and State civil penalties is a violation of the Act, but did not mention AML fees. Failure to pay AML fees was covered by proposed Section 773.15(c)(7). The same commenter also suggested that language clarifying what constitutes a violation be added to Section 773.15(b)(1) rather than being included in Section 773.15(a)(3). In response to the comment, OSMRE has included in Section 773.15(b)(1) references to both delinquent civil penalties and delinquent abandoned mine reclamation fees, the non-payment of which would be violations that would bar permit issuance.

One commenter requested clarification as to whether the reference to Federal and State civil penalties in proposed Section 773.15(a)(3) meant only those civil penalties that arise from violations of the Act, its implementing regulations, and approved State programs, and not civil penalties which may be assessed against a person pursuant to other laws.

OSMRE intends to construe the references to civil penalties in final Section 773.15(b)(1) as referring only to those civil penalties that arise from violations of the Act, its implementing regulations and approved state or Federal programs. The inclusion of a reference to section 518 of the Act in 30 CFR 773.15(b)(1) should eliminate any confusion. Whether failure to pay civil penalties arising under other laws is covered depends upon whether such failure constitutes an unabated violation of other law pertaining to air or water environmental protection.

One commenter suggested that proposed Section 773.15(a)(3) be revised to clarify that a person is not in violation for nonpayment of penalties if the person is complying with an approved payment schedule. The commenter stated that if the

suggestion were not adopted, then the applicant would be required to submit proof under existing Section 773.15(b)(1)(i) that the violation, in this case the nonpayment of civil penalty, was in the process of being corrected.

OSMRE did not adopt the suggestion. If a person has entered into a payment schedule, the violation has not been corrected, but is only in the process of being corrected and the requirements of Section 773.15(b)(1)(i) apply. Where a violation is the subject of a payment schedule, a permit may be conditionally approved in accordance with final Section 773.15(b)(2).

One commenter suggested that the term "violation" in section 510(c) of the Act be interpreted to include Federal notices of violation, cessation orders, unpaid civil or criminal penalties, and violations of all other laws, rules or regulations pertaining to air or water environmental protection.

OSMRE agrees in part and disagrees in part. As discussed, OSMRE considers the nonpayment of delinquent civil penalties a violation of the Act. Moreover, Section 773.15(b)(1) applies to cessation orders and to other Federal and derivative State laws, rules and regulations pertaining to air or water environmental protection. A notice of violation, however, although considered a violation, may be presumed to have been abated or to be in the process of correction unless a failure-to-abate cessation order is issued, or where evidence to the contrary is set forth in the permit application. This presumption is discussed below.

NO "FINDING" REQUIRED. As originally proposed on April 5, 1985, the rule would have required the regulatory authority to make a finding that any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant was not currently in violation of the Act. The proposal to require a finding of compliance prior to the issuance of a permit was based on previous Section 773.15(b)(1) that was adopted in 1983. The preceding 1979 rule did not include a finding in the counterpart regulation, 30 CFR 786.17(c) (1979).

This rule revises Section 773.15(b)(1) to require a review of available information, including the schedule of violations submitted by the permit applicant and the information contained in the Applicant Violator System. Based on that review, the regulatory authority shall not issue a permit if there is an outstanding violation. The prohibition against issuing the permit, as compared to the previous requirement for a finding, was adopted to conform the rule with the language of section 510(c) of the Act, which does not require a finding, but instead states that "the permit shall not be issued. * * *" This change is a matter of procedure rather than substance. The compliance review will be conducted for every permit. Although no finding is required, unless one of the exceptions applies no permit will be issued where a violation exists.

One commenter objected to the removal of the findings and argued that the run should require an investigatory finding to insure a thorough and complete review and determination that there are no current violations. The commenter quoted the following legislative history of the Act in support of his position:

[T]he regulatory authority must find * * * that any operation under the applicant's ownership or control currently in violation of the act * * * is in the process of being corrected in a satisfactory manner to [the] respective regulatory agency. (H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 92 (1977).

OSMRE disagrees with the commenter's interpretation. The legislative history quoted above simply requires that the regulatory authority determine that any violation of an operation owned or controlled by the applicant is in the process of being corrected. The rule does just that. The use of a "finding" is an artifice and is not needed as long as the rules embody the substantive requirement. The requirement referred to in the House Report is included in 30 CFR 773.15(B)(i). That section requires that the permit applicant submit to the regulatory authority proof that the current violation has been or is in the process of being corrected to the satisfaction of the agency that has jurisdiction over the violation.

PRESUMPTION OF ABATEMENT OF NOVS. Under the final rule, in the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation has been or is being corrected, except where evidence to the contrary is set forth in the permit application, or where the notice of violation is issued for nonpayment of abandoned mine reclamation fees or civil penalties. A presumption concerning the abatement of a notice of violation was first proposed in the April 16, 1986, Federal Register notice which reopened and extended the comment period *(51 FR 12879)* and was included in subsequent notices.

The exception concerning contrary information in the permit application has been added to the language in the October 5, 1987, notice to ensure that presumptions made by the regulatory authority do not conflict with the information included in the violations schedule required to be submitted by the applicant under section 510(c) of SMCRA. The presumption may be rebutted based upon submission of specific proof by interested persons that an NOV has not been or is not being abated.

The exception concerning Abandoned Mine Land fees or civil penalties is included to ensure that money owed the government is paid in a timely fashion. Ordinarily, NOVs are not issued with regard to monies owed unless the delinquency is clear.

Commenters were concerned that an expanded compliance review under Section 773.15(b)(1) could result in delays in the issuance of a permit where an applicant or an owner or controller of the applicant had insufficient time to complete abatement of a recently issued notice of violation at another site.

This concern is valid. One of the primary purposes for this presumption is to eliminate the disproportionate effect of NOVs issued to a related entity following application but prior to permit issuance. This is of particular concern in cases where the applicant is a subsidiary of a large corporation with many other subsidiaries under common control. In such cases, the applicant may not have ready access to information concerning specific plans to abate NOVs issued to related entities.

One commenter stated that a permit issued subject to the presumption should be issued conditioned on the abatement of the underlying violation for which the notice of violation was written. Then, if the permittee failed to abate the previous violation within the abatement period set forth in the notice of violation, the permit just received should be revoked for failing to meet the permit condition.

OSMRE agrees that where a permit is issued subject to a showing that the notice of violation is being corrected, if the notice of violation is not abated within the time specified, the permit should be subject to remedial action. As a backup to the NOV presumption, OSMRE included in its July 16, 1986, proposal *(51 FR 25822)* a section that would authorize a regulatory authority to rescind a permit where a notice of violation existed at the time the permit was issued and a failure-to-abate cessation order subsequently was issued under 30 CFR 840.12 and 843.13. This provision, which OSMRE expects to publish shortly, would provide for permit suspension and rescission. Under a revised proposal published on August 4, 1988 *(53 FR 29343)*, a determination whether to suspend or rescind a permit would be based upon the ownership and control standards of the applicable regulatory program at the time the permit was issued.

Two commenters objected to the proposed presumption because they maintained that it would weaken enforcement measures under the Act, and because the violation should not be considered abated until abatement has been achieved.

OSMRE disagrees. In the absence of evidence to the contrary, it is reasonable for a regulatory authority to presume that a violation subject to an NOV has been abated, or is being corrected to the satisfaction of the agency with jurisdiction over the violation. If a violation is not abated within the time specified in the NOVs, a regulatory authority must issue a failure-to-abate cessation order, which would block permit issuance.

EFFECT OF BOND FORFEITURE. One commenter was concerned that the reference in Section 773.15(b)(1) to bond forfeitures would result in the denial of a permit if a bond forfeiture had ever occurred.

OSMRE does not intend such a result under the rule. If a bond forfeiture has occurred but the permit site has been reclaimed and no violations remain, the person responsible for the bond forfeiture is not precluded from receiving another permit. The guiding principle is whether any unabated violation remains. The language in Section 773.15(b)(1) reflects this policy.

EXTENT OF REGULATORY AUTHORITY REVIEW. One commenter stated that state regulatory authorities will need guidance on the extent of the compliance review required for a corporate structure.

The rules does not require an investigation beyond the information in the permit application and the Applicant Violator System, or otherwise available to the regulatory authority. OSMRE intends that the regulatory authority

evaluate all available information, including: (1) Possible ownership or control relationships listed in an Applicant Violator System report, and (2) possible ownership or control relationships which the regulatory authority may become aware of through its field inspectors, knowledge of local mining practices, and information it receives through public participation in the permitting process under the State program.

One commenter objected to the burden on regulatory authorities resulting from the revised compliance review. The commenter stated that the rule will result in increased administrative burdens and delays in permitting.

OSMRE disagrees. The final rule will not impose a substantial burden on regulatory authorities, and will not result in significant delays in the permitting process. Access to the Applicant Violator System should facilitate compliance with this rule.

EFFECT OF BANKRUPTCY. One commenter asserted that permits cannot be withheld or revoked for outstanding civil penalties owed by a company which has filed for liquidation or reorganization under the bankruptcy code *(11 U.S.C. 101* et seq.) because an attempt to collect penalties or AML fees through a permit block under section 510(c) was nothing more than an attempt to circumvent an automatic stay under *11 U.S.C. 362*(a), which precludes the commencement or continuation of any judicial or other proceeding "that was or could have been commenced before the commencement of the bankruptcy case." The commenter suggested that OSMRE clarify the effect that a petition for liquidation or reorganization under the bankruptcy code would have on the issuance or revocation of a permit.

Under the bankruptcy code, certain actions are exempt from an automatic stay. They include:

" (4) * * * the commencement or continuation of an action or proceeding by a government unit to enforce such governmental unit's police or regulatory power;

(5) * * * the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; [or]

(9) * * * the issuance to the debtor by a governmental unit of a notice of tax deficiency * * * * *(11 U.S.C. 362*(b) (1982 & Supplement III, 1985).)"

Thus, some actions, while otherwise within the scope of activities stayed by *11 U.S.C. 362*(a), are exempt from a stay under *11 U.S.C. 362*(b). The effect that a petition for liquidation or reorganization will have on a particular permit application will depend on the facts surrounding the violation and the application. Because of the complexity of the bankruptcy laws and the multitude of factual situations that are possible, regulatory authorities will deal with such applications on a case-by-case basis as they arise. In situations where a petition for liquidation or reorganization has been filed and the automatic stay does not apply, as in the case of post-petition indebtedness, the regulatory authority will perform the compliance review required by Section 773.15(b)(1) and deny the permit. However, in situations where the automatic stay does apply, so that the issuance of a permit cannot be blocked on account of pre-petition indebtedness, the permit will be issued, conditioned on the payment, once the stay has expired, of any amount not discharged in bankruptcy.

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

OSMRE disagree with the commenter's position. Although the statute of limitations may provide a defense to suit for the collection of money filed five years following the entry of a final order, it does not invalidate the final order or cancel the underlying debt, which will continue to be listed in the Applicant Violator System and will result in blocking the issuance of a permit. Also, under Rule 8(c) of the Federal Rules of Civil Procedure, a defense based on the statute of limitations is an affirmative defense which may be waived, and it therefore does not automatically prohibit an action for the collection of unpaid civil penalties.

VIOLATION PATTERN UNNECESSARY FOR SECTION 773.15(b)(1). One commenter suggested that to eliminate the possibility of permit block due to a remote ownership interest in an affiliated corporation, OSMRE should

incorporate into the rule a "triggering mechanism" based on a clearly defined violation pattern with "successive ownerships" present.

OSMRE has not adopted this suggestion. Section 510(c) contains two prohibitions against permit issuance. One prohibition is based on the existence of an outstanding violation (one is sufficient) and requires the blocking of a permit until the violation has been corrected or is in the process of being corrected. The other is based on a pattern of violations and specifies that "no permit shall be issued" where the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of the Act of such a nature and duration and with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of the Act. The first prohibition is implemented by regulation at 30 CFR 773.15(b)(1). The other, based on a pattern of violations, is implemented by regulation at 30 CFR 773.15(b)(3). To require a pattern of violations in all instances would substantially weaken the rule and contravene the intent of section 510(c).

NO TRANSFER OF CORPORATE LIABILITY. Some commenters stated that the proposed definition would modify established corporate law with regard to limited liability and corporate separateness. The commenters argued that under the "alter ego" doctrine, any disregarding of the corporate entity must occur on a case-by-case basis and not under a formula similar to OSMRE's proposal. The commenter argued that the presumption should remain that each corporation is separate for purposes of liability, and the burden for displacing that presumption should rest with those who seek to disregard the corporate form.

It is not OSMRE's intent to alter established principles of corporate and business law. This rule does not alter the doctrine of limited liability and does not attempt to "pierce the corporate veil" and shift liability for unabated violations or unpaid money from a corporation or business entity to its owners or controllers. Instead, the rule requires regulatory authorities to consider the compliance history of those who own or control a permit applicant prior to deciding whether to issue a new permit for future mining.

Several commenters asserted that the rule, if finalized, eventually would be expanded to make those deemed to be owners or controllers responsible for reclamation.

OSMRE disagrees with the commenters' characterization. Although this rule provides an incentive for owners and controllers of the applicant to have unabated violations corrected, such persons are not compelled to conduct reclamation. The responsibility for reclamation will continue to fall on the permittee and its agents, as the law requires. This rule does not change that responsibility. OSMRE does intend, however, to encourage owners and controllers of permit applicants to take a more active role in assuring that related entities reclaim in accordance with the Act.

DUE PROCESS PROVIDED. Commenters argued that the proposed rule was unconstitutional because remotely related or unrelated companies would be subject to sanctions for the alleged violations of other companies, but would not be afforded due process through the opportunity for a hearing to contest the alleged violations.

OSMRE disagrees. The rule provides due process. As part of the permitting process, a permit applicant may submit information germane to any of the findings necessary for permit issuance. If a permit is denied because of an ownership or control link between the applicant and a violator, the applicant may contest the basis for the denial. If the applicant has not been previously provided an opportunity for review, it may contest the ownership or control link and also the existence of the violation. If companies are either totally unrelated or remotely related, then the applicant may show that no control exists. In some instances, however, an applicant may be prohibited from relitigating an issue that has already been decided. For example, an applicant who has been a party to an earlier administrative or judicial proceeding would be bound by the results of the initial challenge. Further, an applicant cannot create a right of review if earlier it had failed to exhaust its administrative remedies.

BASIS AND PURPOSE NOT LIMITED. One commenter objected to the proposed rule on the basis that its only purpose was to satisfy an agreement entered into by OSMRE and private environmental groups.

OSMRE disagrees. As stated previously, this rule will help OSMRE implement a court order in the case of Save Our Cumberland Mountains, Inc., et al. v. Clark, No. 81-2134 (D.D.C. January 31, 1985), relating to enforcement measures that can be taken against certain entities with unabated Federal cessation orders and unpaid civil penalties. In addition to

satisfying this court order, however, the rule provides an additional means to bring about more effective enforcement of the Act.

One commenter stated that the court order in Save Our Cumberland Mountains, supra, only requires OSMRE to track companies with unabated cessation orders and that OSMRE has failed to distinguish between unabated cessation orders and failure-to-abate cessation orders. The commenter stated that OSMRE should only block a permit for unabated cessation orders, and not for an outstanding failure-to-abate cessation order which has not run for thirty days.

OSMRE disagrees. A cessation order may be issued either for the failure to abate a violation for which a notice of violation has been issued, or for a situation which creates imminent danger to the health or safety of the public, or is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources. In either case the violation represented by the cessation order is a sufficient basis for withholding a permit pursuant to the Act until the violation has been abated even if the period for abatement has not expired.

RESPONSIBILITY OF APPLICANTS. One commenter suggested that the applicant should not bear the burden of investigating the conduct of persons who own or control it.

OSMRE disagrees that the rule will make this happen. Neither this rule nor existing permitting rules require the investigation of the conduct of related entities. Although 30 CFR 778.14(c) requires an applicant to furnish information concerning the compliance history of related entities, such information should be obtainable from the applicant's owners or controllers. OSMRE proposed a separate rulemaking on May 28, 1987 *(52 FR 20032)*, which would revise the amount of information that must be included in permit applications. OSMRE expects this rule to be published in final shortly.

Some commenters objected to the proposed rule on the grounds that it would be physically impossible for a large company to provide a daily listing of all violations nationwide. They stated that the rule would result in the erroneous issuance of permits and their eventual invalidation by any group opposed to their issuance.

OSMRE disagrees with the commenters' assertions. Because the compliance review will not be based on notices of violation unless failure-to-abate cessation orders are issued, an applicant, and its owners and controllers, will have time to learn of and abate violations which might affect the issuance of a permit.

PROPOSED ALTERNATIVE NOT ADOPTED. In April 1985, OSMRE specifically requested comments on a less expansive alternative to the proposed rule. *50 FR 13726.* The alternative would have included in Section 773.15(b)(1) a requirement for a finding pertaining to mining operations owned or controlled by the applicant, but the finding would have applied to those who own or control the applicant only with respect to outstanding failure-to-abate cessation orders, unpaid civil penalties imposed by OSMRE, and unpaid AML fees.

Commenters favoring the alternative proposal stated that it would be easier to implement, and therefore would lessen the administrative burden on State regulatory authorities.

OSMRE has decided to adopt the language proposed for Section 773.15(b)(1), and not the less expansive alternative to maintain a consistent permit blocking policy with regard to all violations encompassed in the compliance review. No justification exists for limiting the review of violations of particular entities, but not others. Also, confusion would have resulted from examining a different set of violations for the applicant than for its owners or controllers.

RELATION TO SECTION 778.14(a). Some commenters stated that 30 CFR 778.14(a) provides sufficient information to prevent fraud, and therefore this rule was not needed.

OSMRE disagrees. This rule establishes a mechanism for the withholding of permits based on all information available to OSMRE. Section 778.14(a), which governs the submission of information pertaining to the previous suspension or revocation of permits, and the forfeiture of bonds or similar securities, is not a substitute for this rule. In deciding whether to issue a permit, the regulatory authority is not restricted in its investigation by 30 CFR 778.14 (a), (b) or (c). Where the record indicates that it is necessary, a regulatory authority may request from an applicant additional information or clarification.

STATISTICAL SUPPORT FOR RULE. Some commenters questioned whether there were any data indicating that a problem exists and that a rule is needed to solve it.

The statistics available to OSMRE indicate that there indeed has been a problem, and that without close scrutiny permits could be issued to applicants owned or controlled by persons with outstanding violations. For instance, from March 1985 to April 1986 it was found during the permit review process that approximately fifty-six percent of all Federal permit applicants had problems such as unpaid AML fees, unabated violations, or unpaid penalties, or were the subject of a pending appeal. Operation of the Applicant Violator System since October 1987 has also shown that in a number of instances at the state level, permit applicants have been related to violators.

SELF-ENFORCEMENT ENCOURAGED. Regardless of statistical support, this rule is intended, in part, to foster a future self-enforcement policy whereby actual and potential applicants will strive to ensure that entities which they own or control operate in compliance with the Act. This deterrent aspect of the rule, as much as any permits actually withheld, will contribute to overall compliance with the Act.

One commenter stated that any OSMRE intent for industry to police itself by refusing to enter into business with violators of the Act exceeded OSMRE's statutory authority.

OSMRE disagrees with the commenter's characterization of the rule. Although the rule may affect private conduct, OSMRE is not directing any person to refuse to enter into business with any other person.

CONSIDERATION OF PAST VIOLATIONS. Some commenters opposed applying the rule to violations that occurred prior to its promulgation. One commenter favored this approach.

OSMRE intends this rule to apply prospectively to pending permit applications whenever it becomes effective in particular States. Although not based upon the time violations first occurred, the rule will apply only to those violations that remain unabated at the time the regulatory authority performs the compliance review required by Section 773.15(b)(1). A violation may be abated and debts may be paid at any time, and once the violation is abated and debts are paid, their past existence will not prevent the regulatory authority from issuing a permit.

The Act requires regulatory authorities to consider past conduct in the permitting process. For example, sections 507 (b)(4) and (b)(5) require information from an applicant concerning the five-year period prior to the submission of the application and section 510(c) requires violation information for the three years preceding the date of the application. In view of these provisions of the Act, it is clear that the Congress both contemplated and authorized holding applicants accountable for past violations.

REMEDY FOR IMPROVIDENTLY ISSUED PERMITS. One commenter suggested that the rule should contain a provision allowing for the revocation of a permit if an outstanding violation existed at the time the permit was issued.

OSMRE agrees that a rule addressing the issue is appropriate. On July 16, 1986 *(51 FR 25822),* OSMRE proposed a rule under which regulatory authorities could rescind certain improvidently issued permits. OSMRE expects to publish this proposal in final shortly.

BOND TO GUARANTEE PAYMENT OF PENALTIES AND FEES REJECTED. One commenter suggested that OSMRE impose an incremental bond to guarantee payment of penalties and AML fees as a method to correct abuses.

The Act requires the submission of a reclamation performance bond prior to the issuance of a permit. Requiring operators to post a bond to cover the payment of fees and penalties is outside the scope of the proposal.

SECTION 773.15(b)(1)(ii) -- GOOD FAITH APPEAL. This rule amends Section 773.15(b)(1)(ii) by deleting the provision terminating the conditional approval of a permit upon the denial of a stay, and by requiring the submission of proof by the applicant within thirty days of a judicial decision that the violation has been or is in the process of being corrected. These revisions were proposed on July 16, 1986 *(51 FR 25822).* In addition, the rule adds language to clarify that the responsibility for appealing the violation may lie with another person who is owned or controlled by the applicant, or who owns or controls the applicant.

CONDITIONAL PERMIT NOT AFFECTED BY DENIAL OF STAY. Section 510(c) of the Act requires with regard to a surface coal mining operation currently in violation of the Act:

"the permit shall not be issued until the applicant submits proof that the violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority."

By previous regulation at 30 CFR 773.15(b)(1)(ii) OSMRE allowed a regulatory authority to conditionally approve and issue a permit where an applicant established that an outstanding violation was the subject of a good faith administrative or judicial appeal. This regulation implemented the intent of the Congress as expressed in the following excerpt from the Act's legislative history:

It is not the intention of the Committee that an operator who is charged with the types of violation described in section 510(c) be collaterally penalized through denial of a mining permit if he is availing himself, in good faith, of whatever administrative and judicial remedies may be available to him.

S. Rep. No. 95-128, 95th Cong., 1st Sess. 79 (1977).

Previous Section 773.15(b)(1)(ii) required the permittee to promptly submit proof that the violation under appeal had been or was in the process of being corrected if "the initial judicial review authority under Section 775.13 either denie[d] a stay applied for in the appeal or affirmed the violation." (Emphasis added.) The provision requiring proof upon the denial of a stay treated such a denial as strongly indicating that the violation would be affirmed. However, the denial of a stay should not be considered a determination that the operator is not acting in good faith in pursuing administrative or judicial review. Moreover, the previous provision may have unfairly discouraged the filing of a request for a stay. In the interest of fairness, this final rule allows a conditionally approved permit to remain in force pending the initial judicial affirmation of the violation, regardless of the result of any request for a stay.

One commenter objected to the elimination of a denial of a stay as a trigger for requiring the submission of proof that the violation has been or is being corrected. The commenter argued that elimination of the stay provision would encourage violators to request a stay to protract the administrative process. As an alternative, the commenter suggested that where a stay is denied because the applicant cannot demonstrate a substantial likelihood of prevailing on the merits, the denial should trigger the submission of proof requirement under Section 773.15(b)(1)(i).

OSMRE declined to adopt these suggestions. Discouraging a person from applying for a stay is inconsistent with congressional intent in enacting section 525(c) which authorizes stays. As discussed above, Section 773.15(b)(1)(ii) implements congressional intent that permits not be blocked where a violation is the subject of a good faith appeal. Whether a stay is granted or denied, or even whether one has been applied for, is not determinative of whether a good faith appeal exists. OSMRE believes, therefore, that the revision is justified.

THIRTY-DAY PERIOD IMPOSED. Revised Section 773.15(b)(1)(ii) also requires that if the initial judicial review authority affirms the violation, then the holder of a conditional permit shall within thirty days of such decision submit to the regulatory authority proof that the violation has been or is in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation. The previous rule required submission "promptly" but did not impose a specific deadline. Requiring operators to submit proof within thirty days will preserve a permittee's conditional right to mine while a violation is being appealed, but will put a definite limit on the duration of that right. The thirty-day period requests the time reasonably required for an applicant to demonstrate to the regulatory authority that the violation has been or is being corrected.

One commenter approved of the substitution of a definite time period for the term "promptly," but suggested that the period of time allowed for submission of proof be fifteen days instead of thirty. The commenter stated that thirty days is acceptable for submitting proof that the violation is in the process of being corrected, but that fifteen days is sufficient for the submission of proof that the violation has been corrected. The commenter also stated that fifteen days is a more accurate substitution for the term "promptly" because OSMRE has interpreted "promptly" as meaning "immediately."

OSMRE disagrees. Since the thirty days allowed for the submission of proof will begin to run from the date of the decision, part of the time allowed will be lost in transmitting the decision to the applicant. Consequently, the fifteen days proposed by the commenter might be insufficient time for the submission of proof, especially if the respondent is a large

corporation with numerous offices and departments. Having two different time periods, fifteen days for the submission of proof that the violation has been corrected, and thirty days if the violation is in the process of being corrected, would unnecessarily complicate the regulatory scheme.

Another commenter agreed with the substitution of the thirty day period for the term "promptly," but suggested that the thirty days should run from the date of receipt of the judicial decision, because of delays that might result between the date the decision is issued and the date it is received by the appellant.

OSMRE has declined to adopt this suggestion because the regulatory authority would have no way of knowing when the decision was received by the applicant, and therefore could not keep accurate count of the thirty day period.

CONDITIONAL PERMIT ALLOWED FOR APPEALS BY OWNERS OR CONTROLLERS. One commenter pointed out that the proposed revision overlooked the expanded ownership or control concept in Section 773.15(b)(1), and that not only the applicant, but also any person who owns or controls the applicant or who is owned or controlled by the applicant might be pursuing a good faith administrative or judicial appeal of an applicable violation.

OSMRE agrees and has incorporated the commenter's suggestion into the final rule. OSMRE has added language allowing the conditional issuance of a permit not just where the applicant has filed an appeal, but also where an appeal has been filed by any person owned or controlled by either the applicant or any person who owns or controls the applicant. Where any such person is pursuing a good faith appeal, conditional permit issuance should be authorized.

OTHER COMMENTS. One commenter suggested that a good faith appeal of a violation should also include a proceeding contesting the amount of the penalty.

OSMRE did not adopt the suggestion. Before a person may contest the amount of a penalty, 30 CFR 845.19 requires that an amount equal to the penalty be paid into an escrow account. Therefore, in such circumstances, the amount in dispute would not be considered an unpaid civil penalty and would not result in permit blocking. Appeals of individual civil penalties, for which no prepayment requirement exists, will allow conditional permit issuance.

A commenter suggested that a provision be added to Section 773.15(b)(1)(ii) requiring OSMRE to carefully examine those situations where an administrative or judicial appeal is pending to ensure that such appeals are not frivolous efforts to avoid the requirements of section 520(c).

OSMRE did not adopt the suggested provision because Section 773.15(b)(1)(ii) already requires the applicant to establish that the administrative or judicial appeal was filed in good faith. Any appeal which is clearly frivolous and which was filed merely for the sake of avoiding the requirements of section 510(c) would not be considered to have been filed in good faith, and in such circumstances the regulatory authority could block the issuance of a permit. OSMRE does not expect regulatory authorities to conduct extensive inquiries, however, on the collateral issue of whether pending appeals were filed in good faith. Typically such appeals could be pending in other forums outside of the jurisdiction in which the permit application was filed, and the intent of the appellant could be difficult to establish.

One commenter suggested that OSMRE include a provision delaying the requirement for the submission of proof if an appeals court grants a stay from a lower court decision affirming the violation. OSMRE declined to adopt the suggestion because it is outside the scope of the proposed revisions. Also, OSMRE continues to believe that a conditional approval of a permit should terminate following affirmation of the violation at both the administrative and initial judicial levels. Allowing the conditional approval to continue beyond that time could enable operators to complete their operations prior to a ruling in the appellate judicial proceeding.

SECTION 773.15(b)(2) -- CONDITIONAL ISSUANCE OF A PERMIT. Previous Section 773.15(b)(2) allowed conditional permit issuance when a violation which would otherwise prevent permit issuance is subject to a good faith appeal. This rule revises Section 773.15(b)(2) to allow the conditional issuance of a permit also whenever an existing violation is being corrected to the satisfaction of the appropriate agency. Previous Section 773.15(b)(2) provided that the regulatory authority "may issue a permit conditionally pending the outcome of an appeal * * *." (Emphasis added.) Confusion has arisen regarding the meaning of the term "may." The intent of the previous rule was to allow the issuance of a permit under the circumstance of a good faith appeal, while recognizing that the regulatory authority has other obligations associated with the review of a permit, and thus is not required to issue a permit if other problems exist. To

clarify the intent, revised Section 773.15(b)(2) provides that any permit issued pending the outcome of a good faith appeal shall be conditionally approved.

The proposed rule would have revised Section 773.15(b)(2) to specify that the regulatory authority will issue a notice of rescission, requiring the immediate cessation of mining operations and the commencement of reclamation of all areas for which a reclamation obligation exists.

This portion of the proposal has not been adopted because it is not needed. Even without a specific rule, a conditional approval implies that if the condition is not satisfied, the approval will be withdrawn. This is not a new concept and was expressly recognized when Section 773.15(b)(2) was initially adopted in 1983. See *48 FR 44365*.

Several comments were received on proposed Section 773.15(b)(2).

One commenter stated that the proposed revision failed to follow through on the ownership and control concept, and that where the rule states that the applicant who is issued such a permit fails to comply with the provisions of paragraph (b)(1)(i) or (b)(1)(ii), it should include "the applicant or anyone who owns or controls the applicant or who is owned or controlled by the applicant."

OSMRE disagrees. Although another person may be responsible for correcting the violation, the applicant must comply with paragraphs (b)(1)(i) and (b)(1)(ii). Under paragraph (b)(1)(i), the applicant is responsible for submitting proof that the violation is being corrected, whether or not the applicant is directly responsible for the corrective activities. Similarly, when the violation is affirmed, under paragraph (b)(1)(ii) the applicant is responsible for demonstrating to the regulatory authority within thirty days that the violation is in the process of being corrected, whether or not the applicant is directly responsible for the corrective measures.

One State regulatory authority objected to this provision allowing the conditional issuance of a permit because under its State program a good faith appeal of an existing violation does not allow the conditional permit issuance. The commenter was concerned that requiring conditional permit issuance would eliminate an effective tool the State has to obtain compliance before a permit is issued.

A change in the rule is not needed to address the commenter's concerns. The final rule does not require that a permit has to be issued in the situation addressed by the commenter. It just provides that if a permit is issued at all, the permit must be conditional. Additionally, a State program need not provide for conditional approval of a permit pending appeal of a violation. Pursuant to 30 CFR 730.5(b), the laws and regulations of a State must be no less effective than the Secretary's regulations in meeting the requirements of the Act, and pursuant to section 505(b) of the Act may be more stringent. A State program without a provision for conditional permit approval would be more stringent and no less effective than Section 773.15(b)(2).

One commenter suggested that a conditionally issued permit should specify that it is conditionally issued, should list the conditions, and should specify that it is subject to rescission.

OSMRE agrees, and already has a policy of listing conditions in federally issued permits. However, this degree of detail need not be incorporated in the rule.

One commenter opposed conditional permit issuance if the violation that is being corrected is the payment of AML fees or civil penalties. The commenter asserted that no reason exists why an applicant cannot pay delinquent fees or fines prior to permit issuance. The commenter further stated that if the applicant is so insolvent that payment of penalties and fees is impossible prior to permit issuance, it may not be prudent to allow further surface disturbance under a new permit to generate moneys to pay such debts.

OSMRE disagrees. If an applicant is paying penalties or AML fees pursuant to a payment schedule, such a person is in the process of correcting a violation to the satisfaction of the responsible agency. Such payment indicates that the applicant intends to comply with the requirements of a new permit. Paying money on an installment basis does not necessarily mean that a person is insolvent. It could represent many things, including, for instance, a tight cash flow situation resulting from start-up costs for a new operation. If the applicant does need the new permit to generate moneys to pay debts, then issuing a permit would be in the public interest.

One commenter said that the rule should be "modified to include a requirement that the State regulatory authority periodically review and update information on outstanding violations which led to the conditioning of a permit and any administrative or judicial proceedings regarding such violations, to assure that the violations have been abated, to monitor the compliance of the operator with the duty to submit proof of correction and to abate outstanding violations, and to allow for prompt rescission in the event of operator default in these duties."

No specific review requirement is needed because state regulatory authorities are ordinarily expected to monitor permits as part of their program implementation responsibilities.

A commenter requested that explicit requirements be incorporated into the rule to insure that State regulatory authorities comply with the permit rescission provisions in Section 773.15(b)(2).

State regulatory authorities are required to comply with all provisions of their state programs, including those in Section 773.15(b)(2). Moreover, OSMRE verifies such compliance as part of its permitting oversight activities.

SECTION 773.15(b)(3) -- PATTERN OF VIOLATIONS. On July 16, 1986 *(51 FR 25826)*, OSMRE proposed a revision to 30 CFR 73.15(b)(3), concerning applicants and operators with patterns of violations. Section 773.15(b)(3) implements the part of section 510(c) of the Act which states:

[N]o permit shall be issued to an applicant after a finding by the regulatory authority, after opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this Act of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this Act.

The previous rule required the regulatory authority to withhold the granting of a permit if it made a finding corresponding with the above-quoted provision. This rule amends Section 773.15(b)(3) by expanding the scope of the finding to include anyone who owns or controls the applicant. The purpose of this revision is to prevent evasion of the requirements of section 510(c) and to enhance overall compliance with the Act. OSMRE also has revised the previous phrase, "the application shall not be granted," to read "no permit shall be issued" to track the language of section 510(c).

Several comments were received on the proposed revision. One commenter approved of the change. Several commenters objected to the revised finding on the grounds that it exceeded the authority granted by the Act.

OSMRE's response to this objection is similar to its response to objections to its authority to promulgate revised Section 773.15(b)(1). See the earlier discussion of Section 773.15(b)(1).

Another commenter objected to the lack of criteria for making a determination that there is a demonstrated pattern of willful violations of the Act of such nature and duration, and with such resulting irreparable damage to the environment as to indicate an intent not to comply with the Act. The commenter did not suggest any criteria.

OSMRE has not included criteria in this rulemaking because such criteria are addressed by 30 CFR 843.13 and are not within the scope of the proposal.

One commenter requested that OSMRE clarify that nonpayment of AML fees cannot provide the basis for a determination under Section 773.15(b)(3), since it does not fall within the criteria for irreparable damage to the environment.

OSMRE agrees. The nonpayment of AML fees, alone, would not be sufficient to make such a determination. Nevertheless, under the compliance review required by Section 773.15(b)(1), a current failure to pay AML fees is sufficient to block permit issuance.

MISCELLANEOUS COMMENTS. One commenter considered the rule too broad and vague, and questioned how the States would implement it.

The rule is neither too broad nor too vague. The rule clearly specifies what regulatory authorities must examine during the compliance review and the standards for determining owners or controllers. In most instances, the compliance review will require case-by-case determinations, to insure that permit decisions are supported by the facts which is essential to insure due process is provided. In addition, OSMRE has met with the States on a regular basis to answer questions and provide guidance.

Some commenters argued that OSMRE did not comply with Executive Order 12291 in proposing the rule. Others stated that OSMRE did not comply with the requirements of the Regulatory Flexibility Act.

The requirements of Executive Order 12291 and the Regulatory Flexibility Act were complied with in promulgating the rule. The conclusions reached as a result of the analyses required by Executive Order 12291 and the Regulatory Flexibility Act are discussed in the Procedural Matters portion of this preamble.

Some commenters argued that the proposed rule would make it more difficult for United States-based industry to meet foreign competition, and would impose major new costs on the coal industry and on consumers.

OSMRE disagrees. Because the rule imposes no new regulatory burden on operators, who are already required to comply with the Act, it will not affect the ability of United States-based industry to compete with foreign operators, and will not add to the costs of industry or of consumers.

Another commenter stated that the rule would cost jobs. OSMRE has analyzed the effects of the rule on jobs, small entities, and on other economic factors, and found that the effects will be minimal, if any.

EFFECT OF THE RULE IN FEDERAL PROGRAM STATES AND ON INDIAN LANDS. The rule will apply through cross-referencing to the following Federal program States: California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively. No comments were received concerning any unique conditions which exist in any of these States which would have required changes to the national rules or a State-specific amendment to any or all of the Federal programs.

The rule will also apply through cross-referencing in 30 CFR Part 750 to surface coal mining and reclamation operations on Indian lands.

EFFECT OF THE RULE ON STATE PROGRAMS. Following promulgation of this rule, OSMRE will evaluate State programs to determine whether any changes in these programs will be necessary. If the Director determines that any State program will be necessary. If the Director determines that any State program provisions should be amended to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with of 30 CFR 732.17.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under *44 U.S.C. 3501* et seq.

Executive Order 12291

The DOI has examined this rule according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not a major rule and does not require a regulatory impact analysis because it will impose only minor costs, if any, on the coal industry and coal consumers. This rule will not add new regulatory burdens on operators. It will provide regulatory authorities with definitions to be used in performing the compliance review required by section 510(c) of the Act prior to the issuance of a permit. Therefore, the rule will not add to the cost of operating a mine in compliance with an approved regulatory program.

Regulatory Flexibility Act

The DOI also has determined, pursuant to the Regulatory Flexibility Act, *5 U.S.C. 601* et seq., that the proposed rule will not have a significant economic impact on a substantial number of small entities for the same reasons as discussed in

the previous paragraph.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA), and has made a finding (FONSI) that the rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 NEPA), *42 U.S.C. 4332*(2)(C). The rule should result in better compliance with the environmental standards of the Act, and therefore result in better protection of the environment. The EA and the FONSI are on file in the OSMRE Administrative Record at the address specified previously (see "ADDRESSES").

Author

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LIST OF SUBJECTS IN 30 CFR PART 773

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

Accordingly, 30 CFR Part 773 is amended as follows:

Dated: August 9, 1988.
J. Steven Griles, Assistant Secretary, Land and Minerals Management.

PART 773 -- REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

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

Authority: *30 U.S.C. 1201* et seq., *16 U.S.C. 470* et seq., *16 U.S.C. 1531* et seq., *16 U.S.C. 661* et seq., *16 U.S.C. 703* et seq., *16 U.S.C. 668a* et seq., *16 U.S.C. 469* et seq., *16 U.S.C. 470aa* et seq., and Pub. L. 100-34.

2. Section 773.5 is added to read as follows:

SECTION 773.5 - DEFINITIONS.

For purposes of this subchapter:

OWNED OR CONTROLLED AND OWNS OR CONTROLS mean any one or a combination of the relationships specified in paragraphs (a) and (b) of this definition --

(a)(1) Being a permittee of a surface coal mining operation;

(2) Based on instrument of ownership or voting securities, owning of record in excess of 50 percent of an entity; or

(3) Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations.

(b) The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

(1) Being an officer of director of an entity;

(2) Being the operator of a surface coal mining operation;

(3) Having the ability to commit the financial or real property assets or working resources of an entity;

(4) Being a general partner is a partnership;

(5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity; or

(6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation;

3. Section 773.15 is amended by revising paragraphs (b)(1) introductory text, (b)(1)(ii), (b)(2) and (b)(3) to read as follows:

SECTION 773.15 - REVIEW OF PERMIT APPLICATIONS.

* * * * *

(b) Review of violations.

(1) Based on available information concerning Federal and State failure-to-abate cessation orders, unabated Federal and State imminent harm cessation orders, delinquent civil penalties issued pursuant to section 518 of the Act, bond forfeitures where violations upon which the forfeitures were based have not been corrected, delinquent abandoned mine reclamation fees, and unabated violations of Federal and State laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation, the regulatory authority shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act or any other law, rule or regulation referred to in this paragraph. In the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation issued pursuant to Section 843.12 of this chapter or under a Federal or State program has been or is being corrected to the satisfaction of the agency with jurisdiction over the violation, except where evidence to the contrary is set forth in the permit application, or where the notice of violation is issued for nonpayment of abandoned mine reclamation fees or civil penalties. If a current violation exists, the regulatory authority shall require the applicant or person who owns or controls the applicant, before the issuance of the permit, to either --

* * * * *

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

(2) Any permit that is issued on the basis of proof submitted under paragraph (b)(1)(i) of this section that a violation is in the process of being corrected, or pending the outcome of an appeal described in paragraph (b)(1)(ii) of this section, shall be conditionally issued.

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

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