

A Message About OSM's 2000 "Ownership and Control" Rulemaking

On **December 19, 2000**, the Office of Surface Mining Reclamation and Enforcement published final rules in the Federal Register addressing issues of ownership and control of surface coal mining operations. The new rules, which were proposed for public comment on December 21, 1998, improve the effectiveness of the surface mining regulatory program in areas including application and permit information requirements; permit eligibility and issuance; regulatory definitions, including ownership and control; improvidently issued permits; the Applicant/Violator System; and alternative enforcement. OSM's final ownership and control rules take effect on January 18, 2001.

The following questions and answers describe some of the key provisions of the final rules and their impact.

QUESTIONS AND ANSWERS

Ownership and Control Final Rule

1. What do we mean by "ownership and control?"

In this context, we use "ownership and control" as shorthand for the regulations governing or related to eligibility for a permit for surface coal mining operations under section 510(c) of the Surface Mining Control and Reclamation Act (SMCRA or the Act). That paragraph of the Act provides that persons who own or control an operation with an outstanding violation of the Act or other air or water environmental protection laws or regulations are not eligible to receive a permit unless the violation is being corrected to the satisfaction of the agency with jurisdiction over the violation. To assist in implementing this provision of the Act, we have established the Applicant/Violator System (AVS), a nationwide computerized database of information pertaining to the identity of applicants and permittees, corporate relationships, permit history, and violations. The regulations require regulatory authorities to review AVS information for each permit application.

2. Why are we adopting a new rule concerning ownership and control?

On January 31, 1997, the United States Court of Appeals for the District of Columbia Circuit invalidated OSM's rules for determining permit eligibility based on ownership and control of surface mining operations. The court held that section 510(c) allows permit denials only in cases where an applicant, or operations an applicant owns or

controls, has a violation. OSM's rules were inconsistent with this provision to the extent they authorized a permit denial when an applicant's owners or controllers were linked to a violation. On the basis of this defect, the court invalidated the entire ownership and control rule, which had been in effect since 1988, as well as two related 1989 rules.

On April 21, 1997, to fill the regulatory gap that the court decision had created, we adopted an interim final rule on an emergency basis (without opportunity for public review and comment). However, in the preamble to that rule, we committed to develop a replacement for the interim final rule using the standard rulemaking process, including full public notice and opportunity to comment. We proposed new ownership and control rules on December 21, 1998. This final rule represents the culmination of the effort that we began in 1997.

3. On May 28, 1999, the U.S. Court of Appeals for the D.C. Circuit invalidated certain provisions of the interim final rule. Does the final rule reflect this decision even though it was handed down after publication of the proposed rule?

Yes. We reopened the comment period to allow public input on how the proposed rule should be revised to reflect the court decision. We also revised the final rule to make it fully consistent with the court decision.

4. How will the final rule change existing standards, practices, and procedures?

In general, the final rule streamlines the existing requirements and narrows their scope consistent with the two appeals court decisions. Among other things, the final rule:

- C Reorganizes and rewords the regulations to more fully comply with plain language principles, as required by section 501(b) of SMCRA and Presidential and Departmental requirements.
- C Provides additional opportunities for public participation.
- C Provides new definitions of ownership and control and clarifies the scope and applicability of those definitions.
 - Eliminates presumptions of ownership and control.
- C Eliminates requirements for submission of duplicative permit application information concerning ownership and control and permit and compliance history.
- C Continues and expands requirements for regulatory authorities to use AVS during permitting and related processes and to maintain and update AVS. In this respect, the rule largely continues existing regulatory requirements and codifies existing regulatory authority practices in using and updating the AVS.

- C Revises the section 510(c) permit eligibility criteria to be consistent with the two court of appeals rulings.
- C Requires regulatory authorities to use alternative enforcement procedures when appropriate.
- C Revises the procedures related to suspension or rescission of improvidently issued permits to enhance due process and the opportunity for public participation.
- C Requires that permit applicants certify which of their controllers has the greatest level of effective control over the entire operation.
- C Requires that permittees notify the regulatory authority within 60 days of any change in ownership or control.
- C Authorizes regulatory authorities to identify and list in AVS owners or controllers who have not been properly disclosed by the applicant or permittee.
- C Revises the procedures by which we will remedy improvidently issued State permits to conform with section 521(a) of the Act and to enhance the opportunity for public participation.
- C Revises the challenge procedures for ownership or control listings or findings to enhance State primacy, due process, and the opportunity for public participation.

5. Will States have to adopt counterparts to this rule as part of their surface coal mining regulatory programs?

Yes. Although State programs need not necessarily include provisions identical to the Federal rule, they must be no less effective than the Federal regulations in achieving the requirements of the Act. We will make this determination on a case-by-case basis through the State program amendment process.