

Administrative Procedure Act's standard notice and comment procedures. We did not agree to finalize any of the provisions as proposed. We also agreed to publish—in this proposed rulemaking—certain clarifications to our preamble supporting the 2000 final rule.

We are not obligated, as a result of the settlement agreement, to issue a final rule based on this proposal. We will give due consideration to any public comments received on the proposed rule before deciding whether to issue a final rule and whether to finalize any provisions as proposed. However, we do view this rulemaking effort as an opportunity to ensure that we have the tools we need to enforce SMCRA, clarify ambiguous provisions, and reduce any unnecessary reporting burdens on industry and regulatory authorities. We are hopeful that any final rule flowing from this proposal will introduce a measure of regulatory stability to an area that has been in flux since at least 1988. As stated earlier, this proposed rule does not suspend any of the provisions of the 2000 final rule.

II. Discussion of the Proposed Rule

In this section, we discuss the proposed regulatory revisions to each section of the Code of Federal Regulations (CFR). The revisions include both those we propose in accordance with our settlement with NMA as well as certain non-substantive modifications that flow logically from the settlement proposals.

At the end of this section, we include certain clarifications to the preamble to our 2000 final rule. Although these aspects of the 2000 preamble did not impose any regulatory requirements, we agreed to publish clarifications as part of our settlement with NMA. Like the corresponding preamble provisions in the 2000 final rule, the clarifications we announce today do not impose regulatory requirements. As such, we are not seeking public comments on these issues, and we do not plan to address these topics again in a final rule.

30 CFR 701.5—Definitions

Control or Controller

In the 2000 final rule, we defined *control* or *controller* in terms of certain relationships that establish control of a surface coal mining operation. We also provided examples of persons who may be, but are not necessarily, controllers. NMA challenged the definition on multiple grounds, including that the definition is vague, arbitrary and capricious, and contrary to *NMA v. DOI II*. Given the alleged vagueness of the

definition, NMA also objected to the requirement that a permit applicant must list all of its controllers in the permit application.

In order to settle this claim, we agreed to propose removing from the definition of *control* or *controller* at 30 CFR 701.5 the following: all of paragraph (3)—general partner in a partnership; all of paragraph (4)—person who has the ability to commit financial or real property assets; from paragraph (5), the phrase “alone or in concert with others,” the phrase “indirectly or directly,” and the list of examples at paragraphs (5)(i) through (5)(vi). Both parties agreed that if the proposed revisions were finalized, the remaining portion of the definition would still allow the regulatory authority to reach any person or entity with the “ability” to determine the manner in which a surface coal mining operation is conducted. Both parties also agreed that standard could encompass indirect and direct control, as well as control in concert with others, where there is actual ability to control.

While we are proposing to remove from the regulatory text two categories of controllers (general partner in a partnership; person who has the ability to commit financial or real property assets), as well as the list of examples of persons who may be controllers, we stress that, under this proposal, all of these persons may still be controllers. In fact, general partners and persons who can commit assets are almost always controllers. *See, e.g., NMA v. DOI II*, 177 F.3d at 7. However, because these persons are already covered under the “ability to control” standard, we propose to remove them from the regulatory text in order to simplify the definition. Likewise, although we propose to remove the examples of controllers, these persons may still be controllers if they in fact have the ability to control a surface coal mining operation. In our experience implementing section 510(c) of the Act since 1977, the persons identified in the examples are often controllers. Therefore, our discussion of these examples in the preamble to the 2000 final rule remains instructive, though it is important to remember that these examples are not exhaustive. *See* 65 FR 79598–600.

The proposed modification of the definition of *control* or *controller* is coupled with a proposal to remove the requirement to list all controllers in a permit application under current 30 CFR 778.11. Instead, we propose that only the natural person that is expected to have the greatest level of control must be disclosed as a controller. Permit

applicants will continue to be required to include in a permit application the information required to be disclosed under sections 507 and 510(c) of SMCRA. We propose this modification to the permit application information requirements in order to establish a “bright line,” objective standard for both applicants (who must submit certain information in a permit application) and regulatory authorities (who review applications for completeness and compliance with the Act). The “ability to control” standard discussed above gives regulatory authorities flexibility to consider all of the relevant facts, on a case-by-case basis, in determining whether control is present; regulatory authorities also have the leeway to follow control wherever it may exist in a series of business relationships. However, while it is important for regulatory authorities to retain this flexibility and leeway, it is difficult, or impossible, to have an objective information disclosure standard based on this type of definition. By removing the requirement for applicants to list all of their controllers in a permit application, this proposal would greatly reduce any uncertainty or subjectivity associated with the relevant permit information disclosure requirements. In sum, the proposals discussed above would give regulatory authorities the flexibility they need to enforce the Act, while simultaneously making the permit information requirements more objective.

Own, Owner, or Ownership

In its judicial challenge, NMA claimed that the definition of *own*, *owner*, or *ownership* at 30 CFR 701.5 in our 2000 final rule is inconsistent with SMCRA, arbitrary and capricious, and contrary to *NMA v. DOI II*. NMA also took issue with the “downstream” reach of the rule, as it pertains to ownership. The term “downstream,” as used by the D.C. Circuit in the *NMA v. DOI I* and *NMA v. DOI II* litigation, refers to surface coal mining operations that are down a corporate (or other business) chain from the applicant. For example, if the applicant has a subsidiary, the subsidiary would be considered “downstream” from the applicant; by contrast, if the applicant has a parent company, the parent company would generally be considered “upstream” from the applicant. NMA's claim pertained to how far downstream the regulatory authority can look when making a permit eligibility determination based on ownership (as distinct from control) of a surface coal mining operation.