

In order to settle this claim, we agreed to propose revisions to the definition of *own*, *owner*, or *ownership* at current 30 CFR 701.5 and the provision at current 30 CFR 773.12(a)(2) that governs the downstream reach of the definition. The first revision is to the definition itself. The current definition, at 30 CFR 701.5, includes persons “possessing or controlling in excess of 50 percent of the voting securities or other instruments of ownership of an entity.” This definition could be confusing in that it uses the word “controlling,” which is a separately defined term. In order to remove any potential confusion, we propose to add the term “owning of record” in place of “possessing or controlling.” The term “owning of record” is a variant of “owners of record,” which is found in section 507(b) of the Act. Thus, regulatory authorities and the regulated industry will be familiar with the term and its meaning. This proposed revision would not change the substance of the definition of *own*, *owner*, or *ownership*.

The second proposed revision is at current 30 CFR 773.12(a)(2), which addresses the downstream reach of the rule. In *NMA v. DOI II*, the U.S. Court of Appeals for the Federal Circuit clearly held that we can deny a permit based on limitless “downstream” control relationships. *NMA v. DOI II*, 177 F.3d at 4–5. That is, if the applicant indirectly controls an operation with a violation, through its ownership or control of intermediary entities, it is not eligible for a permit. *Id.* at 5. The operation with a violation can be limitlessly downstream from the applicant. While we believe the court’s logic arguably extends to ownership, the *NMA v. DOI II* decision is not entirely clear on this point.

At present, the 2000 final rule allows us to reach downstream with regard to both ownership and control. Thus, under the current rule, we can deny a permit if the applicant indirectly *owns* an operation in violation of SMCRA or other applicable laws. The operation in violation can be infinitely downstream from the applicant—meaning that ownership of the operation can be indirect, through intermediary entities—as long as there is an uninterrupted chain of ownership between the applicant and the operation. NMA argued that this provision is contrary to the plain meaning of SMCRA and violates principles of corporate law. NMA claimed that ownership of a corporation does not equate to ownership of the corporation’s assets (including mining operations). Thus, according to NMA, we should only be able to block a permit based on

ownership if one of the applicant’s own operations has a violation.

While we do not necessarily agree with NMA’s analysis, in order to settle this claim, we agreed to propose a regulatory revision at 30 CFR 773.12(a), the effect of which would be to limit the reach of permit blocking based on ownership to “one level down” from the applicant. For example, if an applicant *directly* owns an entity with an unabated or uncorrected violation of SMCRA or other applicable laws—meaning there are no intermediary entities between the applicant and the entity with a violation—the applicant would not be eligible for a permit. In other words, the rule would reach one level down from the applicant to the entity the applicant owns. However, if the applicant *indirectly* owns an entity with a violation—meaning that there is at least one intermediary entity between the applicant and the entity with a violation—the applicant would not be ineligible for a permit based on ownership of a violator entity. Of course, the same applicant would be ineligible for a permit if it controlled the violator entity.

While we do not believe this approach is compelled by SMCRA or the decision in *NMA v. DOI II*, it is a reasonable interpretation of the Act. Moreover, as it pertains to control, the rule will continue to reach limitlessly “downstream.” That is, in determining an applicant’s eligibility for a permit, we may continue to consider violations at “downstream” operations, as long as there is control by the applicant. Because we can still deny a permit based on indirect *control* of an operation with a violation, through intermediary entities, the proposed modification to the downstream reach of *ownership* will not impair our ability to adequately enforce section 510(c) of the Act.

The proposed revision at 30 CFR 773.12(a) that pertains to the downstream reach of the definition of *own*, *owner*, or *ownership* is further discussed below in 30 CFR 773.12.

30 CFR 773.8—General Provisions for Review of Permit Application Information and Entry of Information Into AVS

We propose to revise current 30 CFR 773.8 by removing the phrase “ownership and control” from paragraph (b)(1). The proposed revision at (b)(1) would read: “We will enter into AVS the information you submit under §§ 778.11 and 778.12(c) of this subchapter.” We note that this proposed revision would require regulatory authorities to enter into AVS one piece

of information that they typically have not loaded into the system in the past: the identity of the person(s) responsible for submitting the Coal Reclamation Fee Report (Form OSM–1) and for remitting the reclamation fee payment to OSM. See current 30 CFR 778.11(a)(4). With this one minor exception, this is a non-substantive proposed revision that flows logically from our proposed revision to 30 CFR 778.11, discussed below.

30 CFR 773.9—Review of Applicant, Operator, and Ownership and Control Information

We propose to revise 30 CFR 773.9 by removing the phrase “applicant, operator, and ownership and control” where it occurs in paragraph (a). Revised paragraph (a) would read: “We, the regulatory authority, will rely upon the information that you, the applicant, submit under § 778.11 of this subchapter, information from AVS, and any other available information, to review your and your operator’s business structure and ownership or control relationships.” This non-substantive proposed revision flows logically from our proposed revision to 30 CFR 778.11, discussed below.

30 CFR 773.10—Review of Permit History

We propose to revise sections 30 CFR 773.10(b) and (c). In paragraph (b), we would remove the phrase “any of your controllers disclosed under §§ 778.11(c)(5) and 778.11(d)” and replace it with the phrase “your designated controller disclosed under § 778.11(d).” Paragraph (b) would then read: “We will also determine if you, your operator, or your designated controller disclosed under § 778.11(d) of this subchapter have previous mining experience.” In paragraph (c), we would remove the language “your controllers, or your operator’s controllers” from the first sentence and replace it with “or your designated controller.” In the second sentence of paragraph (c), we would remove “and was not disclosed under § 778.11(c)(5) of this subchapter.” Paragraph (c) would then read: “If you, your operator, or your designated controller do not have any previous mining experience, we may conduct additional reviews under § 774.11(f) of this subchapter. The purpose of this review will be to determine if someone else with mining experience controls the mining operation.” These proposed revisions flow logically from our proposed revision to 30 CFR 778.11, discussed below.