

30 CFR 773.12—Permit Eligibility Determinations

As indicated above, under our discussion of the definition of *own*, *owner*, or *ownership*, we also propose to revise 30 CFR 773.12(a), the provision in the 2000 final rule that affects the “downstream” reach of the rule. Specifically, we propose to revise paragraph (a)(2) so that we can no longer deny a permit based on indirect *ownership* of a surface coal mining operation with a violation; but we would retain the right to deny a permit based on indirect *control*. In order to simplify the rule, we also propose to merge paragraphs (a)(2) and (a)(3). The proposed revision to paragraph (a)(2), which would remove references to ownership, would provide that you, a permit applicant, are not eligible for a permit if any surface coal mining operation that “You or your operator indirectly control has an unabated or uncorrected violation and your control was established or the violation was cited after November 2, 1988.” Thus, as explained above, with regard to ownership, we could only look “one level down” from the applicant in making a permit eligibility determination.

We are also proposing to revise 30 CFR 773.12(b). Consistent with the D.C. Circuit’s ruling on retroactivity in *NMA v. DOI II*, 30 CFR 773.12(b) of our 2000 final rule provides that an applicant is eligible to receive a permit, notwithstanding the fact that the applicant or the applicant’s operator indirectly owns or controls an operation with an unabated or uncorrected violation, if both the violation and the assumption of ownership or control occurred before November 2, 1988. However, 30 CFR 773.12(b) also provides that the applicant is *not* eligible to receive a permit under this provision if there “was an established legal basis, independent of authority under section 510(c) of the Act, to deny the permit * * *.” NMA challenged 30 CFR 773.12(b), claiming that if there is an “independent authority” to deny the permit, that authority exists whether or not it is referenced in the regulatory language. According to NMA, the provision is superfluous and potentially confusing. We agree that any “independent authority” exists independent of this regulatory provision. Thus, in order to settle this claim, we propose to remove 30 CFR 773.12(b). Because we propose to remove 30 CFR 773.12(b), we also propose to redesignate paragraphs (c), (d), and (e) as (b), (c), and (d), respectively.

30 CFR 773.14—Eligibility for Provisionally Issued Permits

Section 773.14 of our 2000 final rule allows for the issuance of a provisionally issued permit if the applicant meets the criteria under 30 CFR 773.14(b). The promulgated regulatory language uses the word “*may*,” which indicates that the regulatory authority retains discretion to grant a provisionally issued permit, even if the applicant otherwise meets the eligibility criteria at 30 CFR 773.14(b). While our preamble discussion is not explicit on this point, we intended in this context that an applicant *is* eligible to receive a provisionally issued permit under the specified circumstances. *See, e.g.*, 65 FR 79618–19, 79622–24, 79632, 79634–35, and 79638.

In order to reconcile any ambiguity, and to settle a claim brought by NMA, today we propose to amend our rule language at 30 CFR 773.14(b) to clarify that an applicant who meets the 30 CFR 773.14(b) eligibility criteria will be eligible for a provisionally issued permit. We stress that an applicant must also meet all other permit application approval and issuance requirements before receiving a provisionally issued permit and that the provisional permittee must comply with all performance standards. *See generally* 65 FR 79622.

30 CFR 773.21—Initial Review and Finding Requirements for Improvidently Issued Permits

Sections 773.21 through 773.23 of our 2000 final rule set forth provisions relating to “improvidently issues permits,” which are, in this context, permits that we should not have issued in the first instance because of the applicant’s ownership or control of a surface coal mining operation with a violation. We propose two substantive revisions to 30 CFR 773.21(c).

The first revision relates to our burden of proof in making a preliminary finding that a permit was improvidently issued. This proposed revision would clarify that a preliminary finding of improvident issuance “must be based on reliable, credible, and substantial evidence and establish a *prima facie* case that [the] permit was improvidently issued.” This proposed revision flows from the related proposed revisions to 30 CFR 773.27(a), which is discussed in more detail below.

We also propose to remove current 30 CFR 773.21(c)(2), which requires us to post notices of our *preliminary* findings of improvident permit issuance at our office closest to the permit area and on

the Internet. This proposed revision is similar to one of our proposed revisions to 30 CFR 843.21; our rationale for removing these and similar posting requirements is set forth more fully under the discussion of 30 CFR 843.21, below.

30 CFR 773.22—Notice Requirements for Improvidently Issued Permits

We propose to remove current 30 CFR 773.22(d), which contains similar posting requirements to those found at current 30 CFR 773.21(c)(2), discussed above. Specifically, we propose to remove the requirement to post a notice of *proposed* suspension or rescission at our office closest to the permit area and on the Internet. Our rationale for removing these and similar posting requirements is set forth under the discussion of 30 CFR 843.21, below. Because we propose to remove paragraph (d), we further propose to redesignate current paragraphs (e) through (h) accordingly.

30 CFR 773.23—Suspension or Rescission Requirements for Improvidently Issued Permits

We propose to revise the posting requirements contained in current 30 CFR 773.23. Current 30 CFR 773.23(c)(2) requires us to post a *final* notice of permit suspension or rescission (which requires the holder of the improvidently issued permit to cease all surface coal mining operations on the permit) at our office closest to the permit area and on the Internet. As with the proposed revisions to sections 30 CFR 773.21 and 773.22, we propose to remove the requirement to post the final notices on the Internet. However, because this section pertains to *final* findings (as opposed to the *preliminary* and *proposed* findings under sections 30 CFR 773.21 and 773.22, respectively), we propose to retain the requirement to post the final notice at our office closest to the permit area. It is appropriate to post notices of such final actions for public view. Our rationale for revising these and similar posting requirements is set forth more fully under the discussion of 30 CFR 843.21, below.

30 CFR 773.26—How to Challenge an Ownership or Control Listing or Finding

Sections 773.25 through 773.28 of our 2000 final rule set forth provisions for challenging ownership or control listing or findings. Generally speaking, an ownership or control *listing* arises when a permit applicant identifies, or “lists,” a person as an owner or controller in a permit application. That information is, in turn, entered into the AVS by the regulatory authority. By contrast, an