

ownership or control *finding* under 30 CFR 774.11(f) constitutes a regulatory authority's fact-specific determination that a person owns or controls a surface coal mining operation.

In its judicial challenge to our 2000 final rule, NMA claimed that 30 CFR 773.26(a) is confusing. That section explains how and where a person may challenge an ownership or control listing or finding. NMA claimed that the provision does not clearly delineate the appropriate forum in which to bring a challenge. Also, NMA was concerned that the provision seems to refer only to applicants and permittees, but not other persons who are identified in the AVS as owners or controllers.

Section 773.25 of the 2000 final rule provides that any person listed in a permit application or in the AVS as an owner or controller, or found by a regulatory authority to be an owner or controller, may challenge the listing or finding. As we explained in the preamble, our intent was, in fact, to allow any person listed in a permit application or in the AVS, or found to be an owner or controller, to initiate a challenge at *any* time, regardless of whether there is a pending permit application (or issued permit). See 65 FR 79631. Section 773.26(a) was not intended to limit in any way the universe of persons who may avail themselves of the challenge procedures under 30 CFR 773.25; rather, it merely specifies the procedure and forum in which to challenge an ownership or control listing or finding.

Nonetheless, in order to provide greater clarity and to settle NMA's claim, today we propose to amend our regulations at 30 CFR 773.26(a) to specify more clearly the forum in which to initiate an ownership or control challenge. The proposed revision specifies that challenges pertaining to a pending permit application are to be submitted to the regulatory authority with jurisdiction over the permit application. All other challenges concerning ownership or control of a surface coal mining operation are to be submitted to the regulatory authority with jurisdiction over that surface coal mining operation.

We note that, in meeting its obligations under section 510(c) of the Act and the State counterparts to that provision, each State, when it receives a permit application, must apply its own ownership and control rules to determine whether the applicant owns or controls any surface coal mining operations with violations. See *generally* 65 FR 79637. Further, we stress that an ownership or control decision by one State is not necessarily

binding on any other State. This provision comports with principles of State primacy, and recognizes that not all States will have identical ownership and control rules.

We also propose to add new 30 CFR 773.26(e) in partial satisfaction of our settlement with NMA concerning the relative burdens of proof in ownership or control challenges. This new provision would allow a person who is unsure why he or she is shown in the AVS as an owner or controller of a surface coal mining operation to request an explanation from our AVS Office. The new provision would require us to respond to such a request within 14 days. Our response would be informal and would set forth in simple terms why the person is shown in AVS. In most, if not all, cases, the explanation would be as simple as specifying that the person was found to be an owner or controller under 30 CFR 774.11(f) (of which the person should already be aware due to that section's written notice requirement) or was listed as an owner or controller in a permit application. Understanding the basis for being shown in the AVS will give persons a better sense of the type of evidence they will need to introduce in an ownership or control challenge.

30 CFR 773.27—Burden of Proof for Ownership or Control Challenges

As mentioned above, our 2000 final rule contains provisions for challenging ownership or control listings or findings. A successful challenger must prove by a preponderance of the evidence that he or she is not, or was not, an owner or controller. In its judicial challenge, NMA argued that the rule should be amended so that we must first demonstrate at least a *prima facie* case so that the challenger can know what evidence he or she must rebut. The preamble to our 2000 final rule already states:

[I]n making a finding under final § 774.11(f), the regulatory authority must indeed make a *prima facie* determination of ownership and control, based on the evidence available to the regulatory authority. In making a *prima facie* determination, the finding should include evidence of facts which demonstrate that the person subject to the finding meets the definition of *own*, *owner*, or *ownership or control* or *controller* in § 701.5. 65 FR 79640.

Nonetheless, in order to set forth more clearly the relative burdens of the parties, we agreed to propose regulatory revisions to sections 30 CFR 773.27(a) and 774.11(f), as well as a related change to 30 CFR 773.21(c), discussed above. We also agreed to propose a new

30 CFR 773.26(e), discussed above. The proposed revision to 30 CFR 774.11(f), discussed further under the proposed revisions to 30 CFR 774.11, below, clarifies that a regulatory authority's finding of ownership or control must be based on reliable, credible, and substantial evidence and establish a *prima facie* case of ownership or control. The proposed revision to 30 CFR 773.27(a) merely clarifies that a person can challenge either an ownership or control listing or a *prima facie* finding of ownership or control under 30 CFR 774.11(f).

If the challenge concerns a finding of ownership or control, the regulatory authority bears the initial burden of establishing a *prima facie* case of ownership or control based on reliable, credible, and substantial evidence. (In this context, a *prima facie* case is one consisting of sufficient evidence to establish the elements of ownership or control and that would entitle the regulatory authority to prevail unless the evidence is overcome by other evidence.) If the challenge concerns an ownership or control listing, the regulatory authority's initial burden is substantially lower: the regulatory authority must specify only the circumstances of the listing, such as who listed the person, the date of the listing, and in what capacity the person was listed. In either type of challenge, after the regulatory authority meets its initial burden, the burden shifts to the challenger to prove, by a preponderance of the evidence, that he or she does not, or did not, own or control the relevant surface coal mining operation. The challenger bears the ultimate burden of persuasion.

30 CFR 773.28—Written Agency Decision on Challenges to Ownership or Control Listings or Findings

We propose to revise the posting requirements contained in current 30 CFR 773.28. Current 30 CFR 773.28(d) requires us to post final decisions on ownership and control challenges on the AVS and on the Internet. We propose to remove the requirement to post these decisions on the Internet. However, because this section pertains to final decisions on ownership or control challenges, we propose to retain the requirement to post these decision on the AVS. Because these final findings may have permit eligibility consequences, it is appropriate to make such findings publicly available by posting them on the AVS. Our rationale for revising these and similar posting requirements is set forth more fully under the discussion of 30 CFR 843.21, below.