

*30 CFR 774.11—Post-permit Issuance Requirements for Regulatory Authorities and Other Actions Based on Ownership, Control, and Violation Information*

We propose several revisions to 30 CFR 774.11 of our 2000 final rule, which contains, among other things, requirements for regulatory authorities after a permit is issued. The first proposed revision is to current 30 CFR 774.11(a)(3), which requires the regulatory authority to enter into AVS all “[c]hanges of ownership or control within 30 days after receiving notice of a change.” We propose to revise 30 CFR 774.11(a)(3) by removing “Changes of ownership or control” and replacing it with “Changes to information initially required to be provided by the applicant under 30 CFR 778.11.” This proposed change flows from the proposed revision to 30 CFR 778.11, discussed under 30 CFR 701.5 (definition of *control* or *controller*), above, and under 30 CFR 778.11, below.

The second proposed revision is to current 30 CFR 774.11(e). Under the specified circumstances, 30 CFR 774.11(c) of our 2000 final rule requires us to make a preliminary finding of permanent permit ineligibility. Section 30 CFR 774.11(d) provides for administrative review of the preliminary finding. Section 30 CFR 774.11(e), as promulgated, reads as follows: “We must enter the results of the finding and any hearing into AVS.” Confusion has arisen as to whether a preliminary finding must be entered into AVS before administrative resolution.

To settle a claim brought by NMA, we today clarify that a finding of permanent permit ineligibility may only be entered into AVS if it is affirmed on administrative review or if the person subject to the finding does not seek administrative review and the time for seeking administrative review has expired. We propose to revise 30 CFR 774.11(e) to effectuate this clarification. At paragraph (e), we propose to create a subheading “Entry into AVS.” Revised paragraph (e)(1) would then read, “If you do not request a hearing, and the time for seeking a hearing has expired, we will enter our finding into AVS.” Revised paragraph (e)(2) would read, “If you request a hearing, we will enter our finding into AVS only if that finding is upheld by the Office of Hearings and Appeals.”

The next proposed revision relates to a regulatory authority’s finding of ownership or control. As explained above, under the discussion of the burden of proof provisions in 30 CFR 773.27, we propose to revise 30 CFR 774.11(f) to clarify that a regulatory

authority’s written 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 written finding requirement is found at current 774.11(f)(1); we propose to incorporate the requirement into revised 30 CFR 774.11(f). In the preamble to our 2000 final rule, we already explained that a finding of ownership or control must be based on a *prima facie* determination of ownership or control (65 FR 79640); the proposed revision makes this requirement explicit. The proposed revision would add the requirement that a finding of ownership or control must be based on reliable, credible, and substantial evidence.

Another proposed revision to 30 CFR 774.11 concerns NMA’s claim that our 2000 final rule denies a person the right to challenge a decision to “link” it by ownership or control to a violation before the link is entered into AVS, which is an “automated information system of applicant, permittee, operator, violation and related data OSM maintains to assist in implementing the Act.” 30 CFR 701.5. In order to settle this claim, we agreed to propose a new paragraph (g) at 30 CFR 774.11 and related regulatory revisions.

The new paragraph (g) would provide that after we make a finding of ownership or control under 30 CFR 774.11(f), and before we enter the finding into AVS, we will allow the person subject to the finding 30 days in which to submit information tending to demonstrate a lack of ownership or control. After reviewing any information submitted, if we are persuaded that the person is not an owner or controller, we will serve the person with a written notice to that effect; if we still find the person to be an owner or controller, we will enter the finding into AVS and require the person to satisfy the requirements of 30 CFR 778.11(d), if appropriate. The latter two requirements—entry of the decision into AVS and compliance with 30 CFR 778.11(d)—are found, in substance, at 30 CFR 774.11(f)(2) and (f)(3); we propose to incorporate them into proposed sections 30 CFR 774.11(g)(1) and (g)(2). The process envisioned in proposed paragraph (g) will be informal and non-adjudicatory.

Finally, we propose to add new paragraph (h). This new paragraph would provide that we do not need to make a finding of ownership or control before entering into AVS the information that permit applicants are required to disclose under sections 30 CFR 778.11(b) and (c). For example, if we find that an applicant failed to

disclose the operator in a permit application, we can enter the operator into AVS without making a finding of ownership or control. This is so because the applicant is required to identify the operator under section 507(b)(1) of the Act, 30 U.S.C. 1257(b)(1), and under 30 CFR 778.11(b)(3). However, proposed paragraph (h) would also make clear that the *mere listing* of a person in the AVS pursuant to 30 CFR 778.11(b) or (c) does not create a presumption or constitute a determination that such person owns or controls a surface coal mining operation. Of course, some of the persons required to be disclosed under sections 30 CFR 778.11(b) and (c) *will* be owners or controllers, but that is because they meet the definition of *own*, *owner*, or *ownership* or *control* or *controller* at 30 CFR 701.5, not because they are listed in AVS. We propose to make non-substantive revisions to current paragraph (g) and redesignate that provision as paragraph (i).

*30 CFR 778.11—Providing Applicant, Operator, and Ownership and Control Information*

We are proposing several revisions in 30 CFR 778.11. First, we propose to remove the term “ownership and control” from the heading of the section. Thus, the heading for 30 CFR 778.11 would be revised to read “Providing applicant and operator information.” We are proposing this revision largely because we are also proposing to remove current 30 CFR 778.11(c)(5), which requires an applicant to disclose all of its owners and controllers in a permit application (*see* discussions under 30 CFR 701.5, definition of *control* or *controller*, and below). As a result of this change, together with the proposed revisions discussed below, revised 30 CFR 778.11 would comport more closely with certain of the permit information requirements contained in section 507(b) of the Act. 30 U.S.C. 1257(b). While some of the persons identified in revised 30 CFR 778.11 will in fact be owners or controllers, we believe the broad term “applicant and operator information” more aptly describes the range of information an applicant would be required to disclose under revised 30 CFR 778.11.

Current 30 CFR 778.11(a)(1) requires an applicant to identify whether it and its operator are “corporations, partnerships, sole proprietorships, or other business entities.” We propose to add “associations” to this list of business entities to conform the provision more closely to section 507(b)(4) of the Act. Similarly, an applicant must provide certain information for the persons identified in