

a regulatory authority “may,” but is not obligated to, refer a particular matter for alternative enforcement.

#### Clarifications to the Preamble to Our 2000 Final Ownership and Control Rule

As explained above, as part of our settlement with NMA, we agreed to publish certain clarifications to the preamble supporting our 2000 final rule. Like the corresponding preamble provisions in our 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.

1. In *NMA v. DOI I*, the court of appeals explained that, as a general rule, we may not deny a permit based on violations of persons who own or control the applicant (so-called “upstream” owners and controllers). However, the court explained: “OSM has leeway in determining who the applicant is. As [NMA] concedes, OSM has the authority, in instances where there is subterfuge, to pierce the corporate veil in order to identify the real applicant.” *NMA v. DOI I*, 105 F.3d at 695. Thus, the court held, “once OSM has determined that it has the true applicant before it, OSM’s power is constrained by the specific statutory language of section 510(c)—only those violations of operations owned or controlled by the applicant are relevant.” *Id.*

At 65 FR 79609 through 79611 of the preamble of our 2000 final ownership and control rule, there is substantial discussion of the “true applicant” concept and a related discussion of corporate veil-piercing. In that portion of the 2000 final rule’s preamble, our intent was to explain why we chose not to define the term “true applicant,” as well as to identify a non-exclusive list of theories that may be available to a regulatory authority in attempting to ascertain the identity of the true applicant. This general preamble language was not intended to impose any regulatory requirement on regulatory authorities.

Nonetheless, confusion has arisen as to whether we are directing State regulatory authorities, via preamble language, to use any of the identified theories to identify the true applicant. To settle a claim brought by NMA in its judicial challenge to our 2000 final rule, we today clarify that we are not directing State regulatory authorities to use any of the three identified tools, or any other particular means, in ascertaining whether the nominal permit applicant is also the true

applicant. Should a State attempt to pierce a corporate veil or otherwise ascertain the identity of the true applicant, it is for the State to decide which legal authorities it can and will advance. Ultimately, however, each permitting authority—whether State or Federal—must be satisfied that it indeed has the “true applicant before it.” *NMA v. DOI I*, 105 F.3d at 695. As we stated in the preamble of the 2000 final rule:

In most cases, the nominal applicant (the person whose name appears on the permit application) will also be the true applicant. \* \* \* However, if the regulatory authority has reason to believe that the nominal applicant is not the true applicant, the regulatory [authority] should conduct an investigation to determine the identity of the true applicant. In short, each regulatory authority should consider the totality of circumstances in determining whether the nominal applicant is also the true applicant. 65 FR 79610–11.

2. Section 773.12 of our 2000 final rule requires regulatory authorities to determine whether permit applicants are eligible to receive a permit under section 510(c) of SMCRA, based on certain ownership or control relationships. At 65 FR page 79616 of the preamble, in response to public comments, we explained that permit revisions and renewals are not necessarily exempt from the requirements of section 510(c) of SMCRA. Specifically, we stated that regulatory authorities may evaluate all permitting actions, including revisions and renewals, for eligibility under section 510(c). Confusion has arisen as to whether we are directing States to conduct a section 510(c) permit eligibility review for permit revisions and renewals.

To settle a claim brought by NMA, today we clarify that we are not requiring States to conduct such a review for permit renewals and revisions other than transfers, assignments, or sales of permit rights under 30 CFR 774.17. However, in our view, States retain the discretion to require section 510(c) reviews for any revision or renewal. Nonetheless, we do not believe a section 510(c) review is necessarily warranted when a regulatory authority orders a revision under 30 CFR 774.10. In that circumstance, we believe that it would make little sense to conduct a section 510(c) review if such a review would preclude the permittee from correcting the problem that resulted in issuance of the revision order. Other than the clarification we announce today, the 2000 final rule’s preamble discussion on this topic, including the legal rationale supporting our position, remains in force.

#### III. Public Comment Procedures

*Electronic or Written Comments:* If you submit written comments, they should be specific, confined to issues pertinent to the proposed rule, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on a final rule will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

Except for comments provided in an electronic format, you should submit three copies of your comments if practicable. We will not consider anonymous comments. Comments received after the close of the comment period (*see DATES*) or at locations other than those listed above (*see ADDRESSES*) will not be considered or included in the Administrative Record.

*Availability of Comments:* Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours at the OSM Administrative Record Room (*see ADDRESSES*). Individual respondents may request that we withhold their home address from the rulemaking record. We will honor this request to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent’s identity, to the extent allowed by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

*Public hearings:* We will hold a public hearing on the proposed rule upon request only. The time, date, and address for any hearing will be announced in the **Federal Register** at least 7 days prior to the hearing.

Any person interested in participating in a hearing should inform Mr. Earl Bandy (*see FOR FURTHER INFORMATION CONTACT*), either orally or in writing by 5 p.m., Eastern time, on January 20, 2004. If no one has contacted Mr. Bandy to express an interest in participating in a hearing by that date, a hearing will not be held. If only one person expresses an interest, a public meeting rather than a