

December 3, 2007

U.S. Office of Surface Mining Reclamation and Enforcement

Ownership and Control; Permit and Application Information; Transfer, Assignment, or Sale of Permit Rights – Final Rule (O&C/TAS Rule)

Frequently Asked Questions

Why did OSM eliminate the examples of control that used to be part of the regulatory definition of “control or controller”?

The lengthy definition of “control or controller” was cumbersome, unwieldy and vague because the listed examples were not necessarily controllers. The new definition in this final rule is clear and concise and removes ambiguity, yet retains the same scope and reach as the prior definition. The examples of control, which continue to be instructive, are contained in the preamble supporting the final rule.

Will the rule’s new permit application information requirements reduce the effectiveness of permit eligibility determinations?

No. The final rule’s information requirements allow regulatory authorities to fully implement SMCRA’s ownership and control provisions. The prior rule required permit applicants to identify all of their controllers, as that term is defined in our regulations. Because that definition was subject to interpretation by the applicant and because we desired purely objective permit application information requirements, we proposed to remove the requirement for applicants to identify their controllers. We have replaced the prior requirement with information disclosure standards that will provide regulatory authorities with the necessary information to identify controllers and the ability to reach wherever control may lead. This information is necessary to allow regulatory authorities, when necessary, to pursue enforcement actions.

Did OSM’s settlement with the National Mining Association require OSM to adopt the provisions of this final rule?

No. This final rule is the product of extensive review and has been shaped by public comments. We settled NMA’s litigation over our prior rules by agreeing to publish two proposed rules. We did not agree to finalize any of the provisions as proposed. After issuing the two proposed rules to satisfy our settlement obligations, we decided to combine the subject matters of the two proposed rules and issue one, new proposed rule. After careful review and serious consideration of the public comments, we decided to issue this final rule. The final rule reflects input from all commenters and interested parties and deviates, in significant ways, from our settlement with NMA. While the final rule does contain concepts included in the settlement agreements, it represents the results

of a deliberative and dynamic process that resulted in changes from the settlement and the proposed rules.

How does this rule enhance State primacy?

Several provisions of the final rule emphasize the important role the States play in implementing SMCRA. For example:

- In order to clarify the Federal/State relationship with regard to permitting, we have removed the provision that provided for direct Federal enforcement against a permittee with a State-issued permit based on an allegation that the State should not have granted the permit in the first instance. This amendment recognizes that, in primacy States, the States have exclusive jurisdiction over permitting matters;
- The rule restores the regulatory authority's discretion over certain enforcement actions. This amendment comports with SMCRA and traditional notions of prosecutorial discretion, avoids unnecessary mandatory obligations on regulatory authorities while giving them all of the tools they need to pursue violators, and permits the States to determine the best use of their resources, on a case-by-case basis.