

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)

What are the purposes of this rule?

To clarify our O&C/TAS rules and enhance regulatory stability for State regulatory authorities, the coal mining industry and the public by:

- Removing ambiguity from the rules, including unnecessary and potentially confusing verbiage and conflicting regulatory requirements;
- Providing clarity by simplifying the definition of “control” while retaining full ability to find controllers wherever they are in a business chain;
- Establishing a “bright line,” objective standard for permit application information requirements and clarifying which actions require the application of the transfer, assignment, or sale rules;
- Clarifying the challenge procedures for those identified as owners and controllers of surface coal mining operations;
- Removing unnecessary mandatory obligations on regulatory authorities by restoring State regulatory discretion over certain enforcement actions;
- Complying with relevant court decisions; and
- Clarifying the Federal/State relationship with regard to permitting decisions in primacy States.

How do these rules differ from the 2000 O&C rules?

Because reasonable people could differ as to who met the definition of “control or controller,” as defined in our regulations, we have replaced the requirement for applicants to interpret and disclose their controllers with Surface Mining Control and Reclamation Act (SMCRA) based information disclosure standards that are based on purely objective criteria. For example, rather than identifying “controllers,” applicants will have to identify persons holding various positions in a business structure, such as officers and directors. The resulting requirements will be easily understood by both permit applicants and regulatory authorities.

The rule also simplifies the definition of “control,” without limiting the scope or reach of the prior definition. The primary change to our prior definition involves the elimination of examples of possible control that were included in the regulatory text. We concluded that the lengthy definition was cumbersome, unwieldy and ambiguous. As such, we reduced the definition to its core: any person who has the ability to determine the manner

in which a surface coal mining operation is conducted. Importantly, as with the prior definition, the new rule will allow regulatory authorities to identify controllers wherever they are in a business chain.

How does this rule change the previous TAS rules?

Obtaining regulatory approval for a TAS was a sometimes lengthy and costly process, requiring much of the same paperwork as an application for a new permit. Our prior rules were related to our ownership and control rules. For example, “transfer, assignment, or sale of permit rights” was defined as a change of ownership or other effective control over the right to conduct surface coal mining operations. Because our prior definition was vague, implementation of the TAS provisions varied widely among the regulatory authorities. We have revised the definition by removing references to ownership and control. Under the new definition, a TAS will be triggered only when the permittee changes. Permittees will still have to inform the regulatory authority of certain additions, changes, and departures within the permittee’s and operator’s organizational structures. The new provision will end uncertainty and confusion surrounding our TAS rules.

What other aspects of the O&C regulations have been amended?

While this rule touches on many aspects of our O&C regulations, some of the more notable changes are as follows:

- Restoration of the regulatory authorities’ discretion to pursue certain types of enforcement actions consistent with SMCRA. The new rule 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;
- Clarification of the Federal/State relationship relative to State permitting decisions. 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;
- Removal of rule provisions requiring the posting of certain information on the Internet. This revision avoids unnecessary, often duplicative and unduly burdensome mandatory obligations on regulatory authorities; and
- Modification of certain burden of proof provisions to comport more closely with the burdens of proof that generally apply with respect to our other regulations under SMCRA.