

FEDERAL REGISTER: 59 FR 54306 (October 28, 1994)

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 701, 773, 778, 840, and 843

Use of the Applicant/Violator Computer System (AVS) in Surface Coal Mining and Reclamation Permit Approval; Standards and Procedures for Ownership and Control Determinations; Part III

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) establishes new regulations to require regulatory authorities to use OSM's Applicant/Violator Computer System (AVS) and other information sources to identify ownership or control links between permit applicants and violators.

The regulations establish the procedures, standards, and type of proof required to challenge ownership or control links and to disprove violations.

OSM also amends a number of regulations affecting blocking of permits, abatement of notices of violation, improvidently issued permits, and permit application information.

The regulations reduce the possibility of violators receiving and retaining permits in violation of the permit approval provisions of SMCRA. Finally, the rules establish enhanced due process procedures for the regulated community.

EFFECTIVE DATE: November 28, 1994.

ADDRESSES: Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Russell Frum, Acting Chief, Applicant/Violator System Office, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1849 C Street NW., Washington, DC 20240. Telephone: 202-208-4655.

SUPPLEMENTARY INFORMATION:

- I. Background.
- II. Rules Adopted and Responses to Public Comments.
- III. Procedural Matters.

I. BACKGROUND

Section 510(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) and 30 CFR part 773 establish certain requirements for permits and permit processing. These requirements include the identification of ownership or control links between permit applicants and individuals or entities who are responsible for unabated violations of certain Federal or State laws and rules. See 30 CFR 773.5; 30 CFR 773.15(b). The purpose of such inquiry is to determine whether a permit applicant is linked to unabated violations of the Act and related air and water quality requirements. See 30 CFR 773.15(b). In the event that a permit applicant is so linked, the regulatory authority may not issue a permit to the applicant unless the applicant submits proof that the violation has been or is in the process of being corrected to the satisfaction of the agency that has jurisdiction over the violation. In the alternative, the applicant may establish that the violation is the subject of a good faith, direct, administrative or judicial appeal which contests the validity of the violation. *Id.* In the event that a permit applicant is so linked and proof of the violation's correction or good faith appeal is not submitted, issuance of a permit to the applicant may constitute improvident issuance and may subject the permittee to certain remedial measures including suspension or rescission of the permit. See 30 CFR 773.20 and 30 CFR 773.21.

Under a court order in the case of *Save Our Cumberland Mountains, Inc. et al. v. Clark*, No. 81-2134 (D.D.C. January 31, 1985) (Parker, J.), the Secretary of the Interior was required to improve the enforcement and implementation

of Section 510(c) of SMCRA, and to establish a computerized Applicant/Violator System ("AVS") to match permit applicants and their owners and controllers with current violators of SMCRA. OSM has developed such a computer system to enable OSM and State regulatory authorities to comply effectively with the responsibilities prescribed by Section 510(c) of SMCRA and 30 CFR part 773.

On January 24, 1990, OSM and DOI entered into a Settlement Agreement attempting to resolve litigation with Save Our Cumberland Mountains ("SOCM") and other plaintiffs. The Settlement Agreement was approved by the U.S. District Court on September 5, 1990, and became effective, by its own terms, on that date. See Memorandum of the Court, *Save Our Cumberland Mountains, Inc., et al., v. Lujan*, No. 81-2134 (D.D.C. September 5, 1990). That Settlement Agreement contained provisions whereby OSM agreed to propose rules to implement Section 510(c) of SMCRA and the AVS. Accordingly, on September 6, 1991, OSM proposed rules whose purpose was:

“to require that, prior to issuing permits to applicants, regulatory authorities consider complete ownership and control information in conducting the analysis mandated by section 510(c) of SMCRA and 30 CFR 773.15(b). The proposed rules would mandate the use of AVS as a critical component of the ownership and control information consideration process.”

See Proposed Rule, *Use of the Applicant/Violator Computer System in Surface Coal Mining and Reclamation Permit Approval*, 56 FR 45780, 45781 (September 6, 1991). While the proposal of the rules fulfilled certain provisions of OSM's Settlement Agreement with SOCM, OSM indicated that:

“it must be emphasized that OSM independently believes that the proposal and public consideration of such rules are important to assist OSM in implementing its duties under Section 510(c) of SMCRA and duties imposed by regulations such as 30 CFR 773.15. The proposed rules should be viewed as proposals that OSM would have made regardless of any litigation or settlement.”

Id. Subsequently, on March 16, 1992, the U.S. Court of Appeals (D.C. Cir.) vacated the District Court's approval of the Settlement Agreement with SOCM. *Save Our Cumberland Mountains, Inc., et al., v. Lujan*, No. 90-5374, Slip. Op. (U.S. Court of Appeals, D.C. Cir., May 22, 1992). In its decision, the Court noted that "nothing" in the Court's opinion precluded OSM's maintenance and improvement of the AVS as agency policy. *Id.*, at page 22.

As OSM indicated at the time of its proposal of September 1991, these rules are important and appropriate-independent of any litigation or settlement. OSM continues to be committed to the maintenance and improvement of the AVS as a matter of agency policy and believes that the publication of final rules is now necessary to the effective implementation of section 510(c) of the Act and the implementation of the AVS. OSM's commitment to AVS is in accord with the position recently expressed by the Senate Appropriations Committee:

“Regarding the AVS, the Committee joins the House in commending OSM for improvements made to the system. The Committee has consistently supported development and implementation of the AVS because the AVS is essential to effective enforcement of the Surface Mining Control and Reclamation Act of 1977 [SMCRA].”

Report of the Senate Appropriations Committee, Senate Report No. 103-114, at page 47 (July 28, 1993). Accordingly, OSM has determined to go forward with the final rules published today without regard to the course of litigation between OSM and SOCM or any other person. OSM has reviewed the proposed rules in light of the comments that have been made with a view towards serving the agency's commitment to protecting the environment, to implementing SMCRA, and ultimately, to serving the public interest.

These final rules incorporate the AVS into the Federal regulations and mandate the use of the system by State and Federal surface mining regulatory authorities. At the same time that these rules strengthen the enforcement of Section 510(c), they also establish a detailed set of procedural pathways to assure the protection of due process for the regulated community.

PUBLIC PARTICIPATION

As indicated above, OSM published proposed rules on September 6, 1991. The proposed regulations were available for public comment until November 20, 1991. Comments were received from members of the regulated community,

representatives of environmental advocacy groups, representatives of State regulatory authorities, and various citizens. While a total of 20 commenters submitted written comments, most comments can be grouped into three major categories which are captioned below. After the discussion of these three major issues, this preamble will then provide a section-by-section discussion of the final rules.

II. RULES ADOPTED AND RESPONSES TO PUBLIC COMMENTS

A. SUMMARY OF RULES ADOPTED

These final rules include the following provisions:

PART 701 - PERMANENT REGULATORY PROGRAM

Section 701.5 is amended to delete the definition of "Violation notice."

PART 773 - REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

The Table of Contents is amended to include new section numbers 773.22, verification of ownership or control application information; 773.23, review of ownership or control and violation information; 773.24, procedures for challenging ownership or control links shown in AVS; and 773.25, standards for challenging ownership or control links and the status of violations.

Section 773.5 is amended to include definitions of "Applicant/Violator System" or "AVS." The terms are defined to mean the computer system maintained by OSM to identify ownership or control links involving permit applicants, permittees, and persons cited in violation notices. The regulation is further amended to include definitions of "Federal violation notice," "Ownership or control link," "State violation notice," and "Violation notice."

A "Federal violation notice" is defined to include a violation notice issued by OSM or by another agency or instrumentality of the United States.

An "ownership or control link" is defined as any relationship included in the definition of "owned or controlled" or "owns or controls" in 30 CFR 773.5 or in the violations review provisions of 30 CFR 773.15(b). It includes any relationship presumed to constitute ownership or control under 30 CFR 773.5(b) unless such presumption has been successfully rebutted under sections 773.24 and 773.25 of this rule or under the provisions of 30 CFR part 775 and Section 773.25 of this rule. It also includes an identity between persons, e.g., an applicant and a violator.

A "State violation notice" is defined as a violation notice issued by a State regulatory authority or by another agency or instrumentality of State government.

"Violation notice" is defined as any written notification from any governmental entity advising of violations of the Act or any other laws which would form the basis for a regulatory authority to deny issuance of a permit in accordance with the criteria contained in Section 773.15(b) of the regulations. The type of written notification is broadly defined to include a letter, memorandum, legal or administrative pleading, or other written communication. Consistent with the provisions of Section 773.15(b), the term includes notification of a violation of the Act, any Federal rule or regulation promulgated pursuant thereto, a State program, or any Federal or State law, rule, or regulation pertaining to air or water environmental protection in connection with a surface coal mining operation. It includes, but is not limited to, a notice of violation; an imminent harm cessation order; a failure-to-abate cessation order; a final order, bill, or demand letter pertaining to a delinquent civil penalty; a bill or demand letter pertaining to delinquent abandoned mine reclamation fees; and a notice of bond forfeiture, where one or more violations upon which the forfeiture was based have not been corrected.

Section 773.10 is revised to include the new sections of the AVS-related rules that result in information collection requirements. The revision provides an estimate of the average public reporting burden of four and one-half hours per response for the collection of information under part 773 as such part is revised by these final rules. The section also lists the addresses for OSM and OMB where comments on the information collection requirements may be sent.

Paragraph 773.15(b)(1) is amended to require the regulatory authority to review all reasonably available information concerning violation notices and ownership or control links involving the applicant. Such information would include that obtained pursuant to Section 773.22 (verification of ownership or control application information); Section 773.23 (review of ownership or control and violation information); Section 778.13 (identification of interests); and Section 778.14 (violation information).

The net effect of referencing such provisions in Section 773.15(b)(1) is to assure that the regulatory authority makes a decision with respect to permit issuance or denial based upon complete information relating to ownership, control, and violations. Such complete information includes the mandated use of AVS.

Furthermore, in accordance with Section 773.23, the regulatory authority will follow the procedures and standards set forth in Sections 773.24 and 773.25 in deciding whether to issue the permit under Section 773.15(b).

OSM has also decided to amend 30 CFR 773.15(b)(1) to provide that, in the absence of a failure-to-abate cessation order (FTACO), a regulatory authority may presume that a notice of violation (NOV) is being corrected to the satisfaction of the agency with jurisdiction over the violation where the abatement period for such notice of violation has not yet expired and where the permit applicant has provided certification in his or her permit application that such violation is in the process of being abated to the satisfaction of the agency with jurisdiction over the violation. In addition, OSM has also amended 30 CFR 773.15(b)(2) to provide that any permits issued incident to such presumption and certification will be conditionally issued based upon successful completion of the necessary abatement.

Section 773.20 is amended by the insertion of a new paragraph (b)(2), which makes the provisions of proposed Section 773.25, standards for challenging ownership or control links and the status of violations, applicable when a regulatory authority makes determinations with respect to improvidently issued permits. In this context, Section 773.25 is applicable when a regulatory authority determines whether a violation, penalty, or fee existed at the time that it was cited, remains unabated or delinquent, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, and whether any ownership or control link between the permittee and the person responsible for the violation, penalty, or fee existed, still exists, or has been severed.

The insertion of the language referring to Section 773.25 has the effect of assuring that the standards, responsibilities, and procedures created by proposed Section 773.25 are consistently applied to permit issuance and to determinations regarding improvident permit issuance. Such an approach enhances the fairness of the permitting process and the prospect for the uniform enforcement of nationwide minimum standards. In one respect, however, the improvident permit issuance process will differ from the permit issuance process. In the improvident permit issuance process, prior to permit suspension or rescission, the permittee will be able to challenge the existence of the violation at the time it was cited. In the permit issuance process, prior to permit denial, the applicant will not be able to challenge the existence of the violation at the time it was cited.

OSM has also renumbered certain provisions of the regulation at 30 CFR 773.20(c). Among such provisions, renumbered paragraph (c)(1)(iv), which authorizes the regulatory authority to use rescission as one of the remedial measures for improvident permit issuance, deletes a specific reference contained in the former 30 CFR 773.20(c)(4) to the rescission procedures of 30 CFR 773.21.

The reason for this deletion is that OSM today establishes a prior notice and a common appeal procedure for both permit suspensions and permit rescissions with respect to improvidently issued permits. The former regulation governing permit suspensions at 30 CFR 773.20(c)(3) did not impose any specific requirements for prior notice, opportunity to be heard, or right of appeal for the permittee whose permit is to be suspended. See *54 FR 18450 (1989)*. In contrast to this, regulations governing permit rescissions at 30 CFR 773.21 contained specific requirements for prior notice to a permittee and an explicit right of appeal. OSM has now provided for greater consistency in its procedures governing suspension and rescission of permits.

Accordingly, OSM amends 30 CFR 773.20 to add a new paragraph (c)(2) which requires that a regulatory authority which decides to suspend a permit must provide at least 30 days' prior written notice to the permittee. In the event that the regulatory authority decides to rescind a permit, it must provide notice in accordance with the provisions of 30 CFR 773.21. The amendment further provides that a permittee be given the opportunity to request administrative review of

the notice under Office of Hearings and Appeals, (OHA) rule 43 CFR 4.1370 et seq., where OSM is the regulatory authority, or under the State program equivalent, where the State is the regulatory authority.

The regulation further allows for enhanced due process protection and fairness by providing that temporary relief from the regulatory authority's decision is available in accordance with the provisions of OHA rule 43 CFR 4.1376 or the State program equivalent. In the absence of such temporary relief, the regulatory authority's decision remains in effect during the pendency of appeal.

OSM has retained the language in paragraph 773.20 which addresses the situation which occurs when a permit is issued in reliance upon the presumption that an NOV is being abated in the absence of a cessation order and a cessation order is, in fact, issued with respect to the violation. In such an event, a regulatory authority is required to find that the permit has been improvidently issued.

OSM amends paragraph (a) of 30 CFR 773.21 to make the provisions of Section 773.25, standards for challenging ownership or control links and the status of violations, applicable when a regulatory authority invokes the automatic suspension and rescission procedures of 30 CFR 773.21. The rationale for such amendment is the same as that discussed above with respect to similar language contained in Section 773.20.

Further, OSM deletes former paragraph (c) of 30 CFR 773.21 which provides for appeals of rescission notices. As discussed above, rescission appeal procedures are incorporated in 30 CFR 773.20.

Section 773.22 is a new section and mandates an inquiry whose focus is to assure that the regulatory authority develops complete and accurate information as to the identification of the applicant and all owners or controllers of the applicant prior to making a determination on a permit application and enters such information promptly into the AVS. Accordingly, this section focuses on verification of ownership or control application information. Such accurate and complete information enables the regulatory authority to make an informed decision as to whether the applicant is linked to a surface coal mining and reclamation operation in violation of the Act or other any other environmental law within the terms of 30 CFR 773.15(b)(1).

Paragraph (a) of Section 773.22 imposes a duty upon a regulatory authority to review the information provided in the permit application, pursuant to 30 CFR 778.13(c) and 778.13(d), to determine whether the information provided, including the identification of the operator and all owners and controllers of the operator, is complete and accurate. In making such determination, the regulatory authority is required to compare information provided in the application with information contained in manual and automated data sources. Manual sources for review include the regulatory authority's own enforcement and inspection records and State corporation commission or tax records, to the extent they contain information concerning ownership or control links. Automated data sources include the regulatory authority's own computer systems, if any, and the AVS.

Paragraph (b) of Section 773.22 provides that, if it appears from information provided in the application pursuant to paragraphs (c) and (d) of Section 778.13 that none of the persons identified in the application has had any previous mining experience, the regulatory authority has to inquire of the applicant and investigate whether anyone other than those persons identified in the application will own or control the mining operation as either an operator or as another type of owner or controller.

Paragraph (c) of Section 773.22 provides that if, after conducting the information review described above, the regulatory authority identifies any potential omission, inaccuracy, or inconsistency in the ownership or control information provided in the application, it must contact the applicant prior to making a final determination with respect to the application. The applicant is then required to resolve the potential omission, inaccuracy, or inconsistency through submission of an amendment to the application or a satisfactory explanation which includes credible information sufficient to demonstrate that no actual omission, inaccuracy, or inconsistency exists. The regulation also contains a reference to required action by the regulatory authority in accordance with Section 843.23, sanctions for knowing omissions or inaccuracies in ownership or control and violation information, or the State program equivalent, where appropriate. As will be described more fully below, OSM is deferring action at this time with respect to proposed Section 843.23. Such proposed section will be considered as part of a subsequent rulemaking. OSM has, however, retained the reference to proposed Section 843.23 in final Section 773.22 in the event that proposed Section 843.23 is ultimately adopted.

Nevertheless, OSM has made no decision with respect to the adoption of proposed Section 843.23 and the retention of such reference does not mean that OSM will ultimately adopt proposed Section 843.23 as a final rule.

Paragraph (d) of Section 773.22 requires that, upon completion of the information review mandated by Section 773.22, the regulatory authority promptly enter into or update all ownership or control information on AVS.

Section 773.23 is a new section which delineates the regulatory authority's review obligations with respect to a permit application after the regulatory authority has completed the process of verifying ownership or control application information as described in proposed Section 773.22.

Paragraph (a) of Section 773.23 requires the regulatory authority to review all reasonably available information concerning violation notices and ownership or control links involving the applicant to determine whether the application can be approved under the provisions of 30 CFR 773.15(b). With respect to ownership or control links involving the applicant, such information includes all information obtained under proposed Section 773.22 and 30 CFR 778.13. With respect to violation notices, such information includes all information obtained under Section 778.14, information obtained from OSM, including information shown in the AVS, and information obtained from the regulatory authority's own records concerning violation notices.

In substance, the regulation assures that the regulatory authority considers complete ownership, control, and violation information in making the decision required by 30 CFR 773.15(b)(1) with respect to a permit application.

Paragraph (b) of Section 773.23 provides the course of action which a regulatory authority is required to take if the review conducted pursuant to paragraph (a) of the section discloses any ownership or control link between the applicant and any person cited in a violation notice.

Thus, paragraph (b)(1) of Section 773.23 requires that the regulatory authority notify the applicant of such link and refer the applicant to the agency with jurisdiction over the violation notice.

Paragraph (b)(2) of Section 773.23 requires that the regulatory authority not approve the permit application unless and until it determines that all ownership or control links between the applicant and any person cited in a violation notice are erroneous or have been rebutted, or the regulatory authority determines that the violation to which the applicant has been linked has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1) or the State program equivalent. The determinations to be made by the regulatory authority under paragraph (b)(2) of the regulation are made in accordance with the provisions of Section 773.24, procedures for challenging ownership or control links shown in AVS, and Section 773.25, standards for challenging ownership or control links and the status of violations, or their State program equivalents.

Paragraph (c) of Section 773.23 requires that, following the regulatory authority's decision on the application or following the applicant's withdrawal of the application, the regulatory authority is required to promptly enter all relevant information related to the decision or withdrawal into AVS. The regulatory authority's decision could include unconditional issuance, conditional issuance, or denial of the permit. The requirement that all relevant information be promptly entered into AVS is intended to insure that AVS is continually updated to reflect the most current information available with respect to permit applicants. A critical source of such information is the regulatory authority.

Section 773.24 is a new section that establishes the procedures to be followed if a person wishes to challenge an ownership or control link between a person and any other person shown on AVS. The procedures to be followed by both OSM and the challenger are included. The section provides procedures for direct appeals of such links to OSM by persons who have been so linked. The section also provides for challenges concerning the status of violations to which persons shown on AVS have been linked. The section further provides the opportunity for those persons making a challenge to obtain a temporary relief from any adverse use of the challenged link or violation information during the pendency of such challenge.

Paragraph (a)(1) of Section 773.24 provides that an applicant or anyone else shown in AVS is an ownership or control link to any person could challenge such a link in accordance with the provisions of paragraphs (b) through (d) of Section 773.24 and in accordance with the provisions of Section 773.25. Paragraph (a)(1) of Section 773.24 provides,

however, that such challenge is not available if the challenger is bound by a prior administrative or judicial decision with respect to the link.

Paragraph (a)(1) of Section 773.24 provides that challenges of ownership or control links shown on AVS are made before OSM.

Paragraph (a)(2) of Section 773.24 provides that an applicant or anyone else shown in AVS in an ownership or control link to a person cited in a Federal violation notice seeking to challenge the status of such violation may do so in accordance with the provisions of paragraphs (b) through (d) of Section 773.24 and in accordance with the provisions of Section 773.25, which are discussed in detail below. The procedures applicable are similar to those described in paragraph (a)(1) of Section 773.24.

The "status of the violation" means whether the violation remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good faith, direct administrative or judicial appeal to contest the validity of the violation. See 30 CFR 773.15(b)(1)(i)-(ii). This usage is carried forward into paragraphs (b) and (c) of Section 773.24 and into the provisions of paragraph (b)(1)(iv) of Section 773.25. The process for challenging the status of a Federal violation is a Federal process and such challenges will be made before OSM.

In challenging the current status of a violation under Section 773.24 or 773.25, a person will not be able to challenge the existence of the violation at the time it was cited unless the challenge is made by a permittee within the context of the improvidently issued permit process or by an applicant after permit denial. In general, the existence of the violation will have been established by prior administrative or judicial proceedings involving the person cited in the violation notice, or by such person's failure to exhaust its available remedies in a timely manner.

Paragraph (a)(2) of Section 773.24 provides, in language similar to that contained in paragraph (a)(1) of the regulation, that the opportunity to challenge the status of a violation is not available to any person who "is bound by a prior administrative or judicial determination concerning the status of the violation."

Paragraph (a)(3) of Section 773.24 provides that any applicant or person shown in AVS to be linked by ownership or control to a person cited in a State violation notice may challenge the status of the violation before the State that issued the violation notice. The challenge must be made in accordance with the State's program equivalents to paragraphs (b) through (d) of Section 773.24 and Section 773.25. Again, the challenge may not involve the existence of the violation at the time it was cited, and is not available if the challenger is bound by a prior administrative or judicial determination with respect to status of the violation.

Paragraph (b) of Section 773.24 requires that any applicant or other person seeking to challenge ownership or control links shown in AVS or the status of Federal violations must submit to OSM a written explanation of the basis for his or her challenge and provide relevant evidentiary materials and supporting documents. The information must be submitted to the Chief of OSM's AVS Office in Washington, DC.

Paragraph (c) of Section 773.24 provides that, in response to a challenge made under paragraph (b) of that section, OSM must make a written decision with respect to the ownership or control link and/or with respect to the status of the violation.

Paragraph (d)(1) of Section 773.24 provides that, if OSM has determined that the ownership or control link has been shown to be erroneous or has been rebutted and/or that the violation covered by the violation notice has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, OSM is required to provide notice of its determination to the permit applicant or other person challenging the link or the status of the violation. If an application is pending, OSM must also notify the regulatory authority before whom the application is pending. Further, OSM is required to correct information contained in AVS to reflect the determination which has been made.

Paragraph (d)(2) of Section 773.24 provides that, if OSM has determined that the challenged ownership or control link has not been shown to be erroneous and has not been rebutted, and that the violation remains outstanding, OSM must provide notice of its determination to the permit applicant or other person challenging the link or the status of the violation. If an application is pending, OSM must also notify the regulatory authority before whom the application is

pending. Further, OSM is required to update information contained in AVS, if necessary, to reflect OSM's determinations.

Paragraph (d)(2)(i) of Section 773.24 provides that OSM must serve a copy of its decision with respect to a challenge upon the applicant or other challenger by certified mail, or by any other means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure. The regulation provides that service is complete upon tender of the notice or of the mail and is not deemed incomplete by virtue of a challenger's refusal to accept the notice or mail.

Paragraph (d)(2)(ii) of Section 773.24 provides that the applicant or other challenger can appeal OSM's decision to the Department of the Interior's Office of Hearings and Appeals (OHA) within 30 days of such decision in accordance with OHA regulations at 43 CFR 4.1380 et seq. Paragraph (d)(2)(ii) further provides that OSM's decision remains in effect unless temporary relief was granted in accordance with OHA regulations at 43 CFR 4.1386. The filing of an appeal will not automatically suspend the use of the information in AVS during the pendency of such appeal. The challenger must explicitly seek such relief in appeal proceeding before OHA.

Section 773.25 is a new section which establishes standards for challenges to ownership or control links and for challenges to the status of violations. The section allocates responsibilities between OSM and State regulatory authorities for resolving issues related to ownership and control and provides the standards for evidence to resolve such issues.

Paragraph (a) of Section 773.25 provides that provisions of Section 773.25 are applicable to any challenge concerning an ownership or control link to any person or the status of any violation covered by a violation notice when such challenge is made under the provisions of 30 CFR 773.20 and 30 CFR 773.21 (improvidently issued permits); Sections 773.23 (the regulatory authority's review of ownership or control and violation information), and 773.24 (procedures for challenging ownership or control links shown in AVS); or 30 CFR part 775 (administrative and judicial review of permitting decisions).

Paragraph (b) of Section 773.25 provides the basic allocation of responsibility among regulatory authorities to make decisions with respect to ownership or control and with respect to the status of violations.

Paragraph (b)(1)(i) of Section 773.25 provides that the regulatory authority before which an application is pending has responsibility for making decisions with respect to the ownership or control relationships of the application.

Paragraph (b)(1)(ii) of Section 773.25 provides that the regulatory authority that issued a permit has responsibility for making decisions with respect to the ownership or control relationships of the permit.

Paragraph (b)(1)(iii) of Section 773.25 provides that the State regulatory authority that issued a State violation notice has responsibility for making decisions with respect to the ownership or control relationships of the violation.

Paragraph (b)(1)(iv) of Section 773.25 provides that the regulatory authority that issued a violation notice, whether State or Federal, has responsibility for making decisions concerning the status of the violation covered by the notice.

The "status" of the violation means whether the violation remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1).

Paragraph (b)(2) of Section 773.25 provides that OSM has responsibility for making decisions with respect to the ownership or control relationships of a Federal violation notice.

Paragraph (b)(3)(i) of Section 773.25 provides that with respect to information shown on AVS, the responsibilities of State regulatory authorities to make decisions with respect to ownership or control links are subject to the plenary authority of OSM.

Paragraph (b)(3)(ii) of Section 773.25 provides that with respect to information shown on AVS relating to the status of a violation and with respect to ownership or control information which has not been entered into AVS by a State, the authority of a State regulatory authority is subject to OSM's oversight authority under 30 CFR parts 773, 842, and 843.

Paragraph (c) of Section 773.25 establishes evidentiary standards applicable to the formal and informal review of ownership or control links and the status of violations.

Paragraph (c)(1) of Section 773.25 provides that in any formal or informal review of an ownership or control link or of the status of a violation covered by a violation notice, the agency responsible for making a decision is required to first make a prima facie determination or showing that the link exists, existed during the relevant period, and/or that the violation remains outstanding. A prima facie determination is made when the agency is reviewing the evidence itself, in an informal process; a prima facie showing is made when the agency's determination is the subject of a formal administrative or judicial review process. When the agency makes such a determination or showing, the person seeking to challenge the link or the status of the violation then has the burden of proving the necessary elements of his or her challenge to the link or to the status of the violation by a preponderance of the evidence.

Under paragraph (c) of Section 773.25, a challenger of a link has to prove at least one of three proposed conclusions by a preponderance of the evidence to succeed in his or her challenge.

First, under paragraph (c)(1)(i) of Section 773.25, a challenger could prove that the facts relied upon by the responsible agency to establish ownership or control under the definition of "owned or controlled" or "owns or controls" in 30 CFR 773.5 do not or did not exist or that the facts relied upon to establish a presumption of ownership or control under the definition of "owned or controlled" or "owns or controls" in 30 CFR 773.5 do not or did not exist.

Paragraph (c)(1)(ii) of Section 773.25 provides that a person subject to a presumption of ownership or control under the definition of "owned or controlled" or "owns or controls" in 30 CFR 773.5 could rebut such presumption by demonstrating that he or she does not or did not in fact have the authority directly or indirectly to determine the manner in which surface coal mining operations are or were conducted.

Paragraph (c)(1)(iii) of Section 773.25 provides that a challenger could prove that the violation covered by a violation notice did not exist, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal within the meaning of 30 CFR 773.15(b)(1). Paragraph (c)(1)(iii) further provides, however, that a person challenging the status of a violation would not be able to challenge the existence of the violation at the time it was cited under the provisions of Section 773.24 unless such challenger is a permittee acting within the context of Sections 773.20-773.21 of this part. In any circumstance, a person who had failed to take timely advantage of a prior opportunity to challenge the violation notice or who was bound by a previous administrative or judicial determination concerning the existence of the violation would also be precluded from making a challenge to the existence of the violation at the time it was cited in any proceeding.

Paragraph (c)(2) of Section 773.25 describes the type of evidence that a person challenging an ownership or control link or the status of a violation has to present to meet the burden of proof by a preponderance of the evidence. The regulation provides that the evidence presented be probative, reliable, and substantial. See *5 U.S.C. 556(d)*.

Paragraph (c)(2) of Section 773.25 provides a list of examples of such evidence for proceedings before the "responsible agency" (the agency with responsibility for making a decision with respect to a challenge) and for proceedings before administrative or judicial tribunals reviewing the decisions of the responsible agency. The list of the types of acceptable evidence is intended to be illustrative, not exhaustive. It is expected that regulatory authorities will add to this list as they develop experience in making determinations under the regulation.

Paragraph (c)(2)(i) of Section 773.25 focuses upon proceedings before the responsible agency. The list of examples includes documents which are likely to be truthful and which have certain indicators of reliability which go beyond the mere assertions of the individual presenting the evidence.

Paragraph (c)(2)(i)(A) of the section provides that a challenger may submit affidavits setting forth specific facts concerning the scope of responsibility of the various owners or controllers of an applicant, a permittee, or any person cited in a violation notice; the duties actually performed by such owners or controllers; the beginning and ending dates of such owners' or controllers' affiliation with the applicant, permittee, or person cited in a violation notice; and the nature and details of any transaction creating or serving an ownership or control link; or specific facts concerning the status of the violation.

Paragraphs (c)(2)(i)(B) and (c)(2)(i)(C) of section 773.25 each look to official certification as the basis for the reliability of a submitted document. Paragraph (c)(2)(i)(B) allows for the submission of copies of certain types of documents if they are certified. Such documents include copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence or other relevant company records. Paragraph (c)(2)(i)(C) allows for submission of certified copies of documents filed with or issued by any State, municipal, or Federal governmental agency.

Paragraph (c)(2)(i)(D) of final Section 773.25 provides for a challenger's submission of an opinion of counsel in support of his or her position. Such opinion would be appropriate for submission when it is supported by evidentiary materials; when it is rendered by an attorney who certifies that he or she is qualified to render an opinion of law; and when counsel states that he or she has personally and diligently investigated the facts of the matter or where counsel states that such opinion is based upon information which has been supplied to counsel and which is assumed to be true.

Paragraph (c)(2)(ii) of Section 773.25 provides that, when the decision of the responsible agency is reviewed by an administrative or judicial tribunal, the challenger could present any evidence to such tribunal which is admissible under the rules of the tribunal. Under the regulation, however, the evidence submitted still has to be probative, credible, and substantial.

Paragraph (d) of Section 773.25 provides for the review and revision of information in AVS to reflect determinations made by regulatory authorities in response to challenges of ownership or control links or the status of violations. Paragraph (d) provides that, following any determination by a State regulatory authority or other State agency, or following any decision by an administrative or judicial tribunal reviewing such determination, the State regulatory authority shall review the information in AVS to determine if the information in AVS is consistent with the determination or decision. If it is not consistent, the State regulatory authority is required to promptly inform OSM and request that the AVS information be revised to reflect the determination or decision.

PART 778 - PERMIT APPLICATIONS - MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION

Paragraph (c) of 30 CFR 778.14 is amended to require a permit applicant to disclose "all violation notices" received by the applicant within the preceding three years. In addition, the introductory language of the provision is amended to require the disclosure of all outstanding violation notices for any surface coal mining operation that is deemed or presumed to be owned or controlled by either the applicant or by any person who is deemed or presumed to own or control the applicant under definitions of "owned or controlled" or "owns or controls" under 30 CFR 773.5.

The regulation previously required the applicant to disclose violations of a number of various laws listed in 30 CFR 778.14(c). Use of the amended definition of "violation notice" adopted today as part of 30 CFR 773.5 obviates the need for listing each of these violations in 30 CFR 778.14.

The regulation also previously required that the applicant provide only a list of unabated cessation orders and unabated air and water quality violation notices received prior to the date of the application by any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant. With respect to this list, the previous regulation did not require that an applicant list notices of violation received or unpaid penalties or fees incurred by any surface coal mining operation owned or controlled by the applicant or by any person who owns or controls the applicant.

Paragraph (c) of Section 778.14 is now amended to require an applicant to disclose all outstanding violation notices received by any surface coal mining operation that is deemed or presumed to own or control the applicant.

In addition, OSM has amended paragraph (c) of Section 778.14 to provide that for each notice of violation issued pursuant to 30 CFR 843.12 or under a Federal or State program for which the abatement period has not expired, the applicant must certify that such notice of violation is in the process of being abated to the satisfaction of the agency with jurisdiction over the violation.

PART 840 - STATE REGULATORY AUTHORITY: INSPECTION AND ENFORCEMENT

Paragraph (b) of 30 CFR 840.13 is amended to include a reference to Section 843.23, a proposed rule. As has been explained previously, OSM has deferred action on adopting proposed Section 843.23 at this time. The reference, however, to that section has been placed in Section 840.13 in the event that proposed Section 843.23 is adopted. The use of such reference does not mean, however, that OSM will ultimately adopt proposed Section 843.23.

PART 843 - FEDERAL ENFORCEMENT

OSM amends the Table of Contents of 30 CFR part 843 to add Section 843.24, oversight of State permitting decisions with respect to ownership or control of the status of violations.

Former Section 843.10 is deleted since part 843 did not contain any information collection requirements which require approval by the Office of Management and Budget under *44 U.S.C. 3507*. The references to Sections 843.14(c) and 843.16 formerly in Section 843.10 did not represent information collection requirements. The requirement in Section 843.14(c) for OSM to furnish copies of notices and orders to the State regulatory authority and to any person having an interest did not require OMB approval because the obligation to provide the information is imposed upon OSM and not upon the State or upon a member of the public. Section 843.16 merely informs the public of the right to file an application for review and request a hearing under 43 CFR part 4.

Section 843.24 is a new section which provides standards for OSM's oversight of State permitting decisions with respect to ownership or control or the status of violations.

Paragraph (a) of Section 843.24 establishes the bases which require OSM to take action under the provisions of paragraphs (b) and (c) of proposed Section 843.24. Paragraph (a) provides that OSM is required to take action whenever it determines, through its oversight of the implementation of State programs, that a State has issued a permit without complying with the State program equivalents of proposed Sections 773.22 (verification of ownership or control application information), 773.23 (review of ownership or control and violation information), 773.24 (procedures for challenging ownership or control links shown in AVS), 773.25 (standards for challenging ownership or control links and the status of violations), and Section 843.23. As has been explained previously, OSM has deferred action on adopting proposed Section 843.23 at this time. The reference, however, to that proposed rule has been placed in Section 843.24 in the event that Section 843.23 is adopted. The use of such reference does not mean, however, that OSM will ultimately adopt proposed Section 843.23.

If, as a result of determination made under paragraph (a) of Section 843.24, OSM has reason to believe that the State has issued a permit improvidently within the meaning of 30 CFR 773.20, paragraph (b) of Section 843.24 requires OSM to initiate action under 30 CFR 843.21.

Paragraph (c) of Section 843.24 provides for remedial actions by OSM against a State which knowingly fails to comply with the regulations relating to ownership or control and violation information during the permit application process.

B. GENERAL COMMENTS

Numerous comments were made which addressed various issues with respect to the overall rulemaking. While such comments also invoked particular sections of the proposed rules, these comments asserted several central themes which went beyond particular sections of the rulemaking even through specific sections of the proposed rulemaking were referenced as areas of concern by the commenters. Accordingly, OSM has decided to address these central issues in this portion of the preamble. Within the context of such discussion, particular sections of the proposed and final rules will be referred to as necessary. Nevertheless, in these responses, OSM focuses upon central issues which appear to be of overarching concern to the commenters.

DUE PROCESS

Industry commenters asserted that the proposed rules violated due process and the underlying principles of the Act. These commenters further argued that OSM's proposed rules violated due process principles because they did not allow

for a permit conditioned upon the outcome of an appeal of an ownership or control link, upon the challenge of the status of the violation, or upon the challenge of the existence of the violation at the time it was cited. They also asserted that because OSM did not allow for de novo challenges of the existence of violations by owners or controllers, the proposed rules violated due process principles.

OSM disagrees with these commenters' characterizations. The proposed rules and the rules which have been adopted today provide detailed procedures to assure that those wishing to contest ownership or control links and the status of violations may do so. Further, the proposed and final rules provide that decisions on these matters are made based upon credible evidence and fair processes. Those seeking to challenge the existence of violations have the opportunity to do so, incident to permit denial, in accordance with currently existing rules which predate this rulemaking. See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38885* ("Due Process Provided.") (October 3, 1988). In addition, today's final rules clarify that permittees may make such challenges within the context of the improvidently issued permit process. The procedures provided in today's final rules supplement current rules contained at 30 CFR part 773 to provide more than sufficient due process to protect the limited property interest a permit applicant has in the expectancy of a permit to engage in surface coal mining operations.

OSM does not believe that principles of due process mandate, as a necessary condition precedent to the denial of a permit to an owner or controller of a violator, that the agency provide a full, formal, de novo hearing on the merits of an ownership or control link, the existence of the violation at the time it was cited, and the status of the violation—followed by an exhaustive appeal on each of these matters to the court of last resort. Instead, the final rules adopted today provide due process commensurate with the limited interest of a permit applicant—the expectancy of permit issuance. OSM's position is consistent with the agency's earlier statements relating to the sufficiency of due process and the protection of property rights provided by the ownership and control rules and the AVS. See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38885* (October 3, 1988).

Moreover, in the cases of *Pittston Co. v. Lujan*, No. 92-1606 (4th Cir.) and No. 91-0006-A (W.D. Va.), *National Wildlife Federation v. Lujan*, No. 88-3117 (D.D.C.), and *Save Our Cumberland Mountains, Inc. v. Lujan*, No. 81-2134 (D.D.C.), coal industry interests advanced similar due process arguments attacking the agency's ownership and control rules published at *53 FR 38868 et seq.* on October 3, 1988, and the agency's implementation of AVS and those rules. In the briefs submitted by the Department of the Interior in those cases, the Department analyzed relevant case law and carefully explained why the due process criticisms were not well taken. Copies of these briefs are being placed in the Administrative Record of this rulemaking. To the extent relevant, OSM incorporates the arguments advanced by the Department in those briefs herein by reference.

Further, OSM disagrees with the commenters' view that due process requires that conditional permits be made available during the pendency of the appeal of an ownership or control link as a condition precedent to permit block. The final rules published today provide ample protection for an owner or controller by providing the opportunity for an owner or controller to challenge an ownership or control link. Further, the final rules provide for the Department's Office of Hearings and Appeals (OHA) to grant temporary relief from a permit block, where, inter alia, the challenger has a substantial likelihood of prevailing on the merits of the appeal. OHA is contemporaneously publishing final rules establishing procedures for the granting of temporary relief. Under OSM's final rules published today and the OHA rules, the likelihood of the erroneous deprivation of a permit due to an erroneous link is minimal. An appellant with a meritorious claim can get relief. Conditional permits for all appellants, without regard to the merits of their claims, are unnecessary and unwarranted.

Moreover, the final rules published today provide a measure of protection commensurate with the very limited interest that a permit applicant has in his or her application for a permit. An applicant does not have a right to a permit to mine coal in the same way that he or she has title to real property or a leasehold interest in a mineral lease. A permit to mine coal is a privilege granted by the regulatory authority to those who have complied with the requirements of the Act and the applicable regulatory program, including the provisions of Section 510(c) of the Act and the provisions of 30 CFR part 773. Until an applicant has been found in compliance with the applicable provisions of the program; until the other provisions governing permit issuance have been satisfied; and until a permit has been issued, the applicant has, at most, an expectation which may or may not be reasonable, depending upon the circumstances, that he or she will qualify for permit issuance. Such an expectancy is highly speculative, contingent, and limited. Investments based on an expectancy do

not transform the expectancy into a presently vested property right. See generally *Jacobsen v. Hannifin*, 627 F.2d 177, 179-80 (9th Cir. 1980). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legislation claim of entitlement to it." See also *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

In contrast to this, the agency's interest in and responsibility for implementing Section 510(c) of the Act is substantial and must be balanced against the limited property interest of the permit applicant. OSM's ability to implement the provisions of Section 510(c) of the Act is critical to the agency's enforcement of the Act. Those provisions of the Act prevent violators from receiving new permits and, thus, from injuring the environment at new surface coal mining operations. Those provisions of the Act encourage abatement of violations and deter operators and their owners or controllers from committing violations. Potential applicants fear permit denial in the future. Therefore, such applicants are motivated to prevent or abate violations in the present. Thus, OSM has a substantial interest in the successful, credible implementation of Section 510(c) of the Act.

If conditional permits were allowed during the pendency of a prolonged appellate process challenging an ownership or control link, the agency's ability to enforce the provisions of section 510(c) of the Act and the ownership and control rules would be severely compromised. Rather than abate the violations of their owned or controlled operations, it is possible that some applicants would routinely appeal ownership or control links without regard to the strength of the link as demonstrated by a full proceeding on the merits. Such applicants would appeal merely for the purpose of gaining conditional permits. Depending upon how long the appeals process ran, an operator with a conditional permit could extract a significant portion of the coal in a permitted mine and would have no incentive to abate the violations of the surface coal mining operation to which he had been linked. The Act does not contemplate such a result; nor does the Constitution require it.

Further, such a result would provide an unfair competitive advantage to an unscrupulous operator to the detriment of the interests of the other members of the coal industry, the majority of whom take responsibility for environmental reclamation and are responsible corporate citizens.

Nevertheless, industry commenters have asserted that there is little likelihood of operators making frivolous or bad faith ownership or control appeals because they have significant investments in their surface coal mining operations. While OSM recognizes that this is probably true for the majority of operators, including those who have provided comments on the proposed rules, experience has shown that a small minority of irresponsible operators can create harm disproportionate to their numbers. In the process, such irresponsible operators do harm not just to OSM's effective implementation of the Act, but also to the reputation of the industry as well.

For instance, a marginal operator's significant investment in coal extraction equipment may mask his/her plan to avoid spending resources on reclamation. Indeed, there could be a serious economic temptation for such an operator to protect a significant investment by appealing, if such appeal would support the continuation of operations. Accordingly, OSM considers the extent of an applicant's investment in a surface coal mining operation to be an unreliable indicator of an applicant's motive in initiating an appeal. Thus, OSM declines to develop a process requiring the evaluation of operators' good faith based upon their comparative investments in surface coal mining operations.

OSM does recognize, however, that a permittee has an interest in his permit deserving of a higher level of protection than that of an applicant with respect to an application. A valid permit represents more than the mere expectancy represented by an application. A current, valid permit represents legal authorization to conduct surface coal mining operations in accordance with the terms of such permit. See section 506 of the Act. Further, a permit carries with it the right of successive renewal. See section 506(d)(1) of the Act; 30 CFR 774.15. Thus, a detailed process governing improvidently issued permits has been established which recognizes this interest. See 30 CFR 773.20; 773.21. In response to concerns asserted by industry with respect to due process, OSM has amended the regulations governing improvident permit issuance to provide that a permittee can challenge the existence of the violation at the time it was cited as part of the improvidently issued permit process. See 773.20(b)(2). OSM has done this in recognition of the more substantial interest that a permit represents in contrast to the limited interest represented by a permit application.

Industry commenters have further asserted that an owner or controller must be afforded the opportunity to challenge the validity of the existence of the violation at the time that it was cited as a condition precedent to the recommendation of a denial of a permit application for an owner or controller of the violation. These commenters argued that owners or

controllers may not have had the opportunity to challenge the validity of the violation which forms the basis of the permit denial at the time it was cited. They argued that only the actual violators were cited at that time and that the owners or controllers would not have received notice in a timely manner to enable them to challenge the violation then. They further asserted that a right to contest the merits of a violation after permit denial is not sufficient to redress the harm caused by permit denial. Rather than face permit denial, they asserted that coal operators will be forced to pay the disputed fees or to reclaim land. Accordingly, they asserted that they should be allowed to challenge the violation prior to any permit denial.

OSM disagrees with those views. The rights of an owner or controller are well protected by the ability to challenge the link to the violation. If the ownership or control link is not well taken, then the violation is irrelevant as a basis for permit block. If the link is meritorious, the owner or controller would have been well-positioned to have had knowledge in fact of the citations, if he or she desired such knowledge, see, e.g., 30 CFR 843.15(d), and to have compelled the controlled surface coal mining operation to abate the violation or to challenge the violation in a timely manner. See, e.g., 30 CFR 843.16(a). Accordingly, if an ownership or control link is well taken, the owner or controller has already had an opportunity to challenge the violation or to abate the violation through the controlled entity. Under these circumstances, OSM does not believe that an owner or controller is entitled to an additional opportunity to challenge the existence of a violation before the regulatory authority can deny issuance of a permit.

Even so, the final rules promulgated today would not prohibit the challenge of the existence of the violation. Such a challenge, however, must be made at the time of permit denial, rather than before, by persons who are not bound by prior administrative or judicial proceedings with respect to the existence of the violation or who have not had a prior opportunity to challenge the existence of the violation. This is entirely consistent with OSM's position as expressed in the preamble to the ownership and control rules published in 1988. See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38885* (October 3, 1988).

Additionally, within the context of today's final provisions amending the regulations governing improvident permit issuance, OSM has made explicit that a permittee may challenge the existence of the violation at the time it was cited. A permittee may make such challenge if the challenge is not otherwise precluded by a permittee's previous failure to take advantage of a prior opportunity to challenge or by a prior administrative or judicial determination concerning the existence of the violation. See Sections 773.20 and 773.25.

Nevertheless, the industry commenters questioned whether the ability to challenge a violation after permit denial is illusory because OSM may attempt to argue that the owner or controller failed to take advantage of a prior opportunity to challenge the violation at the time that it was issued or that the challenger was bound by a prior administrative or judicial determination. This is not OSM's intent. Each specific case must be evaluated on its merits. In general, a challenge would be precluded only when the facts indicate that a potential challenger has already had the opportunity to challenge and has squandered it, or when the potential challenger is bound by a prior determination. The purpose of this portion of the proposed rules and the final rules as adopted is to eliminate multiple repetitive opportunities for challenge for those who have already had a substantive opportunity to challenge, either directly or through a controlled entity. It is not OSM's intention to assert these defenses to a challenge unless such defenses are supported by the facts of a particular case.

Industry commenters argued that a State's decision to deny a permit based upon violation information contained in AVS is also not subject to challenge. OSM disagrees. The existence of the violation at the time it was cited, along with any other bases for permit denial, may be challenged in a proceeding under 30 CFR part 775, or the equivalent State programs, subject to the defenses discussed above. To the extent that a regulatory authority has based its permit denial decision upon violation information contained in AVS, that information would be an integral part of the challenge proceeding. When administrative and judicial tribunals consider appeals of permit denials, it is probable that evidence related to violations which form the basis of a permit denial will be relevant to the tribunal. OSM will work with State regulatory authorities to provide supporting documentation if required for appeals of State permitting decisions. OSM anticipates that State regulatory authorities will similarly cooperate with OSM and with each other in making such evidence related to violation information available to administrative and judicial tribunals.

Industry commenters also asserted that the proposed rules, along with the ownership and control rules promulgated in 1988, deny due process in that they retroactively impose responsibilities for violations upon owners and controllers. Again, OSM must reject this characterization of the effect of the proposed rules and 1988 ownership and control rules.

OSM must further reject this characterization with respect to the final regulations adopted today. The ownership and control rules published in 1988, the AVS-related proposed rules published in September, 1991, and the final rules published today subject the owners or controllers of violations to permit denial for currently outstanding violations, rather than past, abated violations. This obligation follows the clear mandate of section 510(c) of the Act which requires the denial of permits when "any surface coal mining operation owned or controlled by the applicant is currently in violation" of the Act or other laws cited.

Moreover, the presumptions of ownership and control provided by 30 CFR 773.5 and the final rules merely reflect the reality that owners or controllers have the authority, by reason of their control at the time that the violations are committed or during any period when the violations remained outstanding, to be aware of violations, to compel their controlled entities to undertake timely challenges of violations, and to compel their controlled entities to abate violations of the Act. Under these circumstances, there is no retroactive application of responsibility.

Moreover, the clear provisions of section 507(b)(4) of the Act require, in substance, that permit applicants identify most of those people who are considered owners or controllers for purposes of section 510(c) of the Act and 30 CFR 773.15 and 773.5. As OSM observed in the preamble to the ownership and control rules published in 1988:

The legislative history of section 507(b)(4) includes the statement that "[t]he information required by [section 507(b)(4)] is a key element of the operator's affirmative demonstration that the environmental protection provisions of the Act can be met as stipulated in Section 510 and includes: (1) Identification of all parties, corporations, and officials involved to allow identification of parties ultimately responsible * * *." H.R. Rep. No. 94-896, 94th Cong., 2nd Sess. 111 (1976). (Emphasis added.) See also S. Rep. No. 94-28, 94th Cong., 1st Sess. 206 (1975).

See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, 53 *FR* 38868 at page 38875 (October 3, 1988).

With the ownership and control rules published in October of 1988 and with these final rules published today, OSM is simply implementing sections 510(c) and 507(b)(4) of the Act. None of these provisions impose retroactive responsibilities.

Finally, related to their due process concerns, industry commenters argued that the proposed rules also violate the Act by not providing conditional permits during the appeal of ownership or control links, the current status of the violation, or the existence of the violation at the time it was cited. They pointed to the provisions of current 30 CFR 773.15(b)(2) which allow for a permit to be conditioned upon a good faith, direct administrative or judicial appeal to contest the validity of the current violation as indicative of the agency's longstanding recognition that such an appeal is consistent with the Act.

OSM disagrees with the commenters' analysis and rejects the view that OSM's historic interpretation of the Act requires that owners or controllers be entitled to permits conditioned upon the appeals of ownership or control links, the status of the violation, or the existence of the violation at the time that it was cited.

OSM's regulation at 30 CFR 773.15(b)(2) does not constitute the agency's recognition that all appeals form the basis for conditional permits. Such a blanket interpretation would negate the clear mandate of the provisions of section 510(c) of the Act and of 30 CFR 773.15(b)(1) which require the denial of permits to applicants who own or control surface coal mining operations in current violation of the Act. As has been discussed previously in this preamble, the issuance of permits conditioned upon the appeal of ownership or control links thwarts the effective implementation of section 510(c) of the Act. OSM has never interpreted its regulations to allow for such a result.

Contrary to commenters' assertions, the regulation at 30 CFR 773.15(b)(2) only allows a limited exception for good faith, direct administrative or judicial appeals contesting the validity of the violation as the basis for conditional issuance. An appeal of an ownership or control link which tests a person's relationship to a violator or to a violation does not test the validity of the underlying violation. To the extent that the provisions of a State program allow for conditional issuance based upon the appeal of an ownership or control link, those provisions must be considered less effective than comparable Federal provisions. See 30 CFR parts 730 and 732.

Moreover, in many instances, the existence of ownership or control links in AVS may be readily discovered by the presumed controllers, and the accuracy of those links administratively challenged prior to the actual denial of a permit by a regulatory authority. An appeal challenging the current status of a violation does not constitute a direct challenge to the validity of the violation at the time that it was cited. Instead, it would test whether the violation is currently abated or not.

An appeal as to the existence of the violation at the time it was cited could constitute a challenge as to the validity of the violation. Nevertheless, there is nothing in the Act or OSM's regulations which requires that such an appeal, undertaken by an owner or controller of a violator after standard appeal times have run, be the basis for conditional issuance. Conditional issuance is particularly inappropriate when the controller's ability to compel the controlled entity to act is taken into account. A controller has the capacity to force the controlled entity to abate or to appeal and would have had such rights at the time that the violation was cited. Thus, a timely appeal of the violation, directly made through administrative or judicial tribunals, could have been made at that time.

One commenter argued that due process protection in the proposed rules should be enhanced. In substance, this commenter asserted that it is unfair to deny permits to applicants or to subject active permits to treatment as improvidently issued permits where the applicants or permittees are subjectively unaware of their ownership or control links to violators or of the import of such relationships. Accordingly, this commenter proposed that such persons should have extended opportunities for "corrections and questions" without the risk of permit denial or revocation.

OSM appreciates the commenter's suggestion, but does not believe that further proposed rules are needed or that amendments to the final rules should be made to reflect the commenter's proposal. The AVS Office will work with anyone at any time, including when there is no pending permitting action, to answer questions and make appropriate corrections to ownership and control information in the database. Data in the system is available on-line to any interested party, and the AVS Office will provide print-outs of AVS data on request. The AVS Office will also provide training to interested parties on the use of the system. The AVS Office routinely works with major companies to insure that their ownership and control information in the system is kept current. Given all these factors, there is no "risk of permit denial" necessarily involved in the resolution of an ownership and control link.

Furthermore, applicants and permittees are deemed to be aware of the law. The ownership and control rules were published in October, 1988. Since that time, applicants and permittees could reasonably be expected to be aware of the regulations and could have acted to cure any outstanding violations or to resolve any erroneous links in the AVS which would form the basis for a permit denial or revocation. Thus, any "unfair surprise" to applicants or permittees posited by the commenter is not an actual problem. Accordingly, it is entirely legitimate to deny permits to such applicants or permittees when they are linked to violations.

Further, permit applicants are required to provide full ownership and control information at the time of permit application. See 30 CFR 778.13; 778.14. Permittees are required to update relevant ownership and control information in a timely manner. See 30 CFR 774.17. Thus, the proposed remedy offered by the commenter is already a requirement of the rules. Finally, in the unlikely event that a person has been unfairly subjected to permit denial by the process, that person could still seek temporary relief from OHA in accordance with procedures governing such relief provided by OHA's and OSM's regulations.

PRIMACY

Industry and State commenters asserted a number of concerns relating to the impact of the proposed rules upon the primacy of States.

In general, industry commenters argued that the proposed rules and the AVS itself impermissibly substitute Federal authority for State authority in the permitting process. They argued that, under the principle of State primacy, once a State's program has been approved by OSM, the State should have sole authority for making decisions with respect to permit issuance, including the determination of ownership and control matters. They asserted that requiring a State to query the AVS before making a permitting decision takes the decision out of the hands of the State and transfers substantive control of the decision to OSM which controls the content of the AVS. As evidence of this Federal control, industry commenters cited, with disapproval, provisions of the proposed rules which provide that challenges of ownership and control information on the AVS must be made to OSM.

OSM disagrees. First, in the cases of *National Wildlife Federation v. Lujan*, No. 88-3117 (D.D.C.), and *Save Our Cumberland Mountains, Inc. v. Lujan*, No. 81-2134 (D.D.C.), coal industry interests advanced similar primacy arguments attacking the agency's ownership and control rules published in 1988. OSM responded to those arguments in detail demonstrating that the ownership and control rules support State programs, rather than undermine them. Copies of these briefs are being placed in the Administrative Record of this rulemaking. OSM incorporates the arguments advanced by the Department in those briefs herein by reference.

Similarly, the purpose of AVS is to assist, rather than to undermine, the States in the exercise of their primary authority for the implementation of their approved programs. The provisions of section 510(c) of the Act require that the regulatory authority deny a permit to an applicant where "information available" to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation" of the Act or certain other governmental laws. See section 510(c) of the Act. In a State which has an approved program to regulate surface coal mining operations pursuant to section 503 of the Act, neither OSM nor AVS decides whether or not to issue a permit to an applicant in that State. The State regulatory authority is the decision maker.

Contrary to the commenter's assertions, however, the Federal government has an ongoing role in this system of State primacy. The Act and Federal regulations require that OSM assist the States in the implementation of their programs under the Act and that OSM provide oversight of the State regulatory authorities' activities. See sections 102(g), 201(c), 503, 504, 505, and 521 of the Act; 30 CFR parts 732, 733, and 842.

Consistent with the State's role as primary decision maker, the AVS is a tool, developed by the Federal government in concert with the States, which provides information in a convenient mode, readily accessible to State regulatory authorities. It is a source of relevant "information available" of the type which the State regulatory authority is required by the Act to consider when the State regulatory authority decides whether to issue a permit to conduct surface coal mining operations. Absent AVS, a State regulatory authority would have to laboriously contact other State regulatory authorities for violation and ownership and control information or would have to simply reply upon the voluntary disclosure of information supplied by applicants or by public-spirited citizens. That OSM has taken the lead in developing the AVS and in proposing to require to use of AVS through rulemaking is consistent with the Federal government's role to assist and to oversee the State regulatory authorities. Even then, the content of AVS is the product of the efforts of both State regulatory authorities and OSM working together to incorporate into AVS ownership and control and violation information developed through their regulatory programs.

Accordingly, a State's authority to make a decision with respect to a permit application is primary and is unimpaired by anything in the proposed rules and by the State's use of AVS. To the extent that the rules support OSM's oversight of the State's decisions, such oversight is mandated by and consistent with the provisions of the Act and the regulations cited above.

To the extent that the proposed rules provide that challenges of information already on AVS be made to OSM, such provisions do not impair primacy. Instead, the rules recognize that the Federal government is uniquely situated to maintain the accuracy and integrity of a nationwide database that will be used by many States. To be sure, each of the State regulatory authorities has a valuable contribution to make to the quality of AVS information. Yet, the individual States may have differing perspectives on ownership and control issues. The potential for inconsistency is significant-particularly with respect to ownership and control decisions relating to multistate companies with complex organizational structures. Also, potential challengers of such information need, if possible, a single point at which they can challenge ownership or control information which will be used in many States and which, absent such a locus, could subject them to inconsistent outcomes. Such a role for OSM is consistent with the role for the agency envisioned by SMCRA. See sections 201(c)(9) and 201(c)(12) of SMCRA.

Further, it must be recognized that the decision to deny a permit because an operator is linked to a violation through ownership or control can be an unpopular one, subjecting a local economy to stress. An operator may claim that he "has been put out of business" by the State regulatory authority. This is one area where the Federal government can assist the States by accepting the responsibility of maintaining ownership and control information which may ultimately lead to permit denials in the various States. Federal acceptance of such a role helps to assure the integrity, consistency, and accuracy of ownership and control information on the AVS. It is also consistent with one of the purposes of the Act which is "to insure that competition in interstate commerce among sellers of coal produced in different States will not be

used to undermine the ability of the several States to improve and maintain adequate standards of coal mining operations within their borders." See section 101(g) of the Act.

Finally, even with the State using information on AVS as part of its information gathering incident to making a determination with respect to a permit application, the State retains the authority, subject to Federal oversight, to decide whether to issue the permit or not. Appeals of such a decision are made to the appropriate State reviewing tribunal, in accordance with the provisions of the State program. Also, the final rules published today make clear that the State regulatory authority which issues a permit has responsibility, subject to OSM's oversight, for determining the ownership or control relationships of the permit. See Section 773.25(b)(1)(ii). Contrary to commenters' assertions, the State's use of AVS does not transmute the process into a Federal proceeding.

To the extent that a State denies a permit based upon information in AVS indicating that the applicant is linked through ownership or control to an outstanding violation of the Act, such denial is made based upon the mandate of section 510(c) as implemented by the applicable State program, rather than some extraordinary Federal intervention in the State's process. A State regulatory authority denying a permit based upon ownership or control information shown in AVS would be obligated under the Act to take the same action based upon a phone call, letter, or other communication from another regulatory authority advising of an applicant's ownership or control of a surface coal mining operation in current violation of the Act.

Further, it must be emphasized that the cooperation of all regulatory authorities, including the States and OSM, is necessary to facilitate the implementation of section 510(c) of the Act. Information on violations wherever they have occurred is needed by each regulatory authority considering a permit application to ensure true compliance with the provisions of section 510(c) of the Act. It is unreasonable, ineffective, and inefficient for each regulatory authority to attempt to develop such information by itself. It is both reasonable and prudent for OSM to fulfill this role. See sections 201(c)(9) and 201(c)(12) of SMCRA.

Industry commenters further asserted that the proposed rules will have the effect of "Balkanizing" (i.e., dispersing) regulatory authorities' permitting decisions. They were especially concerned about the provisions of Section 773.26 of the proposed rules which allocated responsibility to particular regulatory authorities to make decisions with respect to ownership or control relationships.

Proposed Section 773.26 allocated responsibility among the respective regulatory authorities such that the regulatory authority before which an application is pending would have had authority for making decisions with respect to the ownership or control relationships of the applicant; the regulatory authority that issued a permit would have had authority for making decisions with respect to the ownership or control relationships of the permittee; the State regulatory authority that issued a State violation notice would have had authority for making decisions with respect to the ownership or control relationships of persons cited in the violation; and the regulatory authority that issued a violation notice, whether State or Federal, would have had authority for making decisions concerning the status of the violation covered by the notice. The proposed rule provided that these allocations of authority were subject to OSM's oversight.

In substance, the industry commenters asserted that the provisions of this proposed section would impermissibly weaken the authority of the State regulatory authority before whom a permit application is pending. They asserted that the allocations of authority contained in the proposed rule would create confusion and delay in the permitting process.

OSM disagrees with these comments. The interaction between the Federal government and the States described above does not constitute a "balkanization" of the permit application process. Nor will such interaction lead to confusion in the permit application process. Such interaction is consistent with the mandate of SMCRA to implement section 510(c) within a context of State primacy supported by Federal oversight. The proposed rules and the final rules adopted today attempt to establish a road map which is consistent with SMCRA for the making of decisions with respect to ownership or control and for the development of information to be used in AVS.

First, the allocations of responsibility are consistent with the requirements of the Act. The provisions of section 510(c) of the Act mandate a separation of decision making in the permit application process which commenters might characterize as "balkanization." The provisions of section 510(c) of the Act are very explicit in stating that permits shall be denied to applicants who own or control surface coal mining operations with outstanding violations of the Act "until

the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation."

Thus, the Act contemplates that the State regulatory authority before which an application is pending could require information from another State regulatory authority with respect to violations issued by the other State regulatory authority before issuing a permit.

Further, the Act is equally specific in establishing a mandated role for the Federal government to oversee the States in the implementation of their State regulatory programs. See sections 201(c)(1); 503; 504; 505; and 521 of the Act. Thus, to the extent that the proposed rules and the final rules adopted today envision the exercise of Federal oversight, such a role is responsive to the provisions of SMCRA.

Moreover, while the proposed rule and the final rule, modified and renumbered as Section 773.25, will be compared and discussed in more detail below in this preamble, it is appropriate to offer some responses at this point since these critical comments refer to the issue of relationships between governments. These comments invoke issues of State primacy. Contrary to commenters' assertions, the rules in question allocate responsibility in a manner which is supportive of, and consistent with, State primacy.

For instance, the final rule provides that a State regulatory authority which issues a violation has responsibility, subject to OSM oversight, for identifying the ownership and control relationships of the violation. See 30 CFR 773.25(b)(1)(iii). The State regulatory authority which issues a violation has the greatest interest, among those regulatory authorities with an interest in the ownership and control relationships of that violation, in seeing that the persons responsible for the violation abate the violation. Such abatement directly improves the environmental quality of the State which issues the violation. Accordingly, the State which issued a violation should have the first opportunity, subject to Federal oversight, to identify the owners or controllers of the violation. Well before OSM made its proposals in September, 1991, which form the basis for today's final rules, both SMCRA and Federal regulations recognized that a violation had to be corrected to the satisfaction of the agency that has jurisdiction over the violation, before a permit could be issued by a regulatory authority. See section 510(c) of SMCRA; 30 CFR 773.15(b)(1)(i).

Moreover, today's final provisions further recognize the relative access to ownership and control information that the interested regulatory authorities have at each stage of the process. The regulatory authority which issued the violation is in the best position to investigate and to develop all of the relevant facts about the violation, including the identification of those responsible for the violation. The violation was committed within the jurisdiction of the regulatory authority which issued the violation. That regulatory authority has access to the actors on the ground at the surface coal mining operation and would be able to question them to identify ownership and control information.

A similar analysis can be offered in support of affording the agency before which an application is pending responsibility for identifying the ownership and control of the application. This regulatory authority has the applicant before it and can inquire of the applicant directly with respect to any ownership and control information contained in the application. Thus, the regulatory authority before which an application is pending has responsibility, subject to Federal oversight, to decide the ownership and control relationships of the application. See 30 CFR 773.25(b)(1)(i).

A regulatory authority which has issued a permit has ongoing authority for the permittee's surface coal mining operations on the permitted site. Thus, this regulatory authority has responsibility, subject to Federal oversight, to decide the ownership and control relationships of the permit. See 30 CFR 773.25(b)(1)(ii).

Moreover, OSM recognizes that the industry commenters are deeply troubled by any use of the AVS in the permit application process and any application of OSM's ownership or control rules as contained at 30 CFR 773.5 and 773.15(b)(1). Nevertheless, OSM has accepted the mandate of Congress to develop and implement the AVS because "the AVS is essential to effective enforcement of the Surface Mining Control and Reclamation Act of 1977 [SMCRA]." See Report of the Senate Appropriations Committee, Senate Report No. 103-114, at page 47 (July 28, 1993). Thus, the allocation of responsibilities for the various regulatory authorities contained in the proposed rules and the final rules adopted today also attempt to reflect the pragmatic realities of implementing a national computer system.

Once a decision has been made to go forward with a national computer system to aid the enforcement of section 510(c) of SMCRA, certain pragmatic realities must be recognized. First, information will be coming to the computer

system from many sources. As each State regulatory authority analyzes ownership and control information contained in permit applications and reports such information to AVS, such information is incorporated into AVS. A national computer system requires centralized management and maintenance to assure the accuracy and consistency of information. Centralized management provides a focus of responsibility when inaccuracies or technical problems are identified. Accordingly, the Federal government, acting through OSM, has responsibility for such system management. At the same time, the States are primary actors in the permit application process and critically important actors in the development and the support of AVS. With respect to AVS, the States play a critical role in using the computer system as an information resource in the permit application process and in supplying information to AVS gleaned from the permit application process and other research.

Consistent with the need for centralized management of the database, OSM has such a role with respect to the AVS and the information contained therein. As will be discussed below in the discussion of specific sections of the final rules, one of the changes made from the September, 1991, proposal was to place language in the final rule clarifying OSM's plenary role with respect to the content of ownership or control information in the AVS. See 30 CFR 773.25(b)(3)(i). OSM will also have sole responsibility over the ownership and control relationships incident to Federal violations. See 30 CFR 773.25(b)(2). Further, OSM will exercise oversight over State regulatory authorities' activities. See 30 CFR 773.25(b)(3)(ii). This role provided for OSM under the final rule, consistent with that proposed under the proposed rule, recognizes that, under the Act, while the States are subject to Federal oversight, OSM is not subject to the oversight of State regulatory authorities.

The industry commenters asserted that the proposed rules will create confusion and conflict among the States with the potential for conflicting decisions on ownership and control by multiple State regulatory authorities and OSM. Again, OSM disagrees with the commenters' characterization of the effect of the rules. As indicated above, the proposed rules and the final rules clearly allocate responsibility among the various regulatory agencies. The regulatory authority before which an application is pending decides whether or not to issue a permit.

OSM retains the authority to oversee the decision of the State. Indeed, OSM's role as controller of information already on AVS and as overseer of State ownership or control decisions will reduce, not create, confusion and conflict by establishing one final authority to make decisions in cases where disagreements among States might occur about information already on AVS.

Accordingly, the rules do not inappropriately disperse decision making among State and Federal regulatory authorities with respect to ownership and control. Further, prior to the publication of these final rules, OSM's AVS Office and the States have worked well together to implement AVS and the ownership and control regulations promulgated in 1988. To the extent that there have been disagreements between OSM's AVS Office and the State regulatory counterparts, such disagreements have been addressed expeditiously and resolved in a collegial and cooperative manner.

Some commenters expressed concern that the proposed rules did not sufficiently address the issues of conflicts between the States and OSM and between the States themselves on matters of ownership and control. OSM believes that these issues will be addressed adequately by the provisions of 30 CFR 773.25. That section is based upon proposed Section 773.26 and establishes the relative responsibilities of agencies responsible for making ownership and control decisions. As noted previously, this regulation is discussed in detail below. Within the framework of State primacy, OSM will exercise its oversight role to review State ownership or control decisions, in response to citizen complaints or as otherwise appropriate, to assure the integrity of the AVS. See 30 CFR 773.12; 842.11; and 843.21.

One commenter asserted, in substance, that the proposed rules did not go far enough in imposing Federal responsibility. This commenter proposed that all matters relating to ownership and control under section 510(c) of the Act should be OSM's responsibility. While OSM appreciates the commenter's suggestion, OSM must reject this proposal. As OSM indicated above, the Act establishes a system of State primacy with Federal oversight and assistance to the States. While it is understandable that some persons would prefer that the entire responsibility for permit decision making be shouldered by the Federal government, such a system would require a significant restructuring of the statutory framework established by the Act. In contrast to this, today's final rules address the responsibilities established by section 510(c) of the Act in a manner more consistent with the statutory framework.

One commenter questioned whether OSM had given adequate consideration to the implications of the rules upon Federal and State relations. As the above discussion indicates, OSM has considered, in detail, the effect of AVS and

these rules upon the relationship between OSM and the State regulatory authorities and believes that the rules are consistent with the framework for Federal and State relations established by the Act. Further, as indicated above, the working relationship between OSM's AVS Office and its State colleagues has been heretofore very productive and cooperative. OSM believes that State and Federal cooperation on AVS matters has been, overall, a significant success. Accordingly, OSM intends to continue to work closely and cooperatively with State regulatory authorities to resolve issues related to the implementation of AVS and section 510(c) of the Act.

CITIZEN PARTICIPATION

Commenters representing environmental groups criticized the proposed rules as not containing sufficient provision for citizen participation. They asserted that citizens should be afforded the opportunity to add ownership and control links to AVS. They further argued that citizens should have appeal rights when the regulatory authority denies their requests to add ownership or control links and that citizens should have rights of intervention when decisions are made to sever links. They also urged that citizens should have explicit rights to request enforcement action with respect to improvidently issued permits, with respect to other provisions of the rules relating to ownership and control, and with respect to the imposition of sanctions.

OSM strongly supports citizen participation and agrees that opportunities for citizen participation need to be addressed in the rules governing ownership and control. OSM further agrees that the proposed rules did not sufficiently address these issues in the September, 1991, proposal. Under the Administrative Procedure Act, however, the agency has a responsibility to propose regulations for public comment, prior to finalizing such regulations. The changes proposed by commenters would represent significant modifications of the September, 1991, proposals.

Thus, OSM does not consider it appropriate to incorporate commenters' proposals into today's final rules without first providing opportunity for comment to the regulated community, the States, and the public generally. While OSM could delay finalization of today's rules to allow for such proposal and for opportunity for comment, OSM does not believe that the public interest would be served by such delay.

Nevertheless, suggestions made by the commenters are worthy of further consideration. Accordingly, at some future date, OSM may present proposals to respond to the concerns expressed by the commenters. Until such proposals are made, however, the interests of concerned citizens should be asserted pursuant to the provisions of 30 CFR 773.13, 842.11, 842.12, 843.21 and other regulations providing for citizen participation, as appropriate. In this respect, if citizens disagree with a decision of OSM finding that an ownership or control link does not exist, citizens can challenge such decision by demanding a Federal inspection of relevant permits affected by such decision in accordance with the current provisions of 30 CFR 842.12. If OSM rejects their demand to conduct an inspection, citizens can seek review of such rejection and the issues related thereto pursuant to 30 CFR 842.15 to the Director or his designee and, if necessary, to OHA in accordance with 43 CFR part 4.

Further, OSM's AVS Office will receive and consider ownership or control information from concerned citizens as part of OSM's ongoing research activities to incorporate ownership or control and violation information into the AVS database. Such information is relevant and will be used by the agency in the making of ownership or control determinations and for inclusion, upon verification by the agency, into AVS. OSM strongly encourages concerned citizens, environmental advocates, and members of the industry to come forward with information relevant to ownership or control matters. It is in everyone's interest for the AVS to contain the most complete, comprehensive, and accurate information possible.

C. DISCUSSION OF FINAL RULES

The following text, which describes the final rules and responds to the specific public comments that OSM received on the proposed rules, is organized by the part and section number of the affected provisions. Grammatical or stylistic changes that do not affect the substance of the final rules are generally not discussed.

1. PART 701 - PERMANENT REGULATORY PROGRAM

SECTION 701.5 - DEFINITIONS.

In the proposed rule, OSM deleted the definition of "violation notice" previously contained in the regulations and transferred such definition in expanded form to Section 773.5. The final rule is identical to the proposed rule. As described below, the definition of "violation notice" refers to the types of violations of the Act or other laws which will form the basis for a regulatory authority to deny a permit application under the provisions of Section 773.15(b).

2. PART 773 - REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

PART 773 - THE TABLE OF CONTENTS.

In the proposed rule, OSM had included an amendment to the Table of Contents to provide for a proposed rule governing procedures for the challenge of ownership or control links prior to entry in AVS. Since OSM has determined not to go forward with that portion of the proposal, that reference is not included in the final Table of Contents adopted today. Also, since OSM has deferred action with respect to the adoption of proposed Section 773.27 to a subsequent rulemaking, that reference has also been deleted. The final Table of Contents is adopted as described in Summary of Rules Adopted.

SECTION 773.5 - DEFINITIONS.

The proposed rule added certain definitions to Section 773.5. Such definitions included the terms "Applicant/Violator System or AVS," "Federal violation notice," "Ownership or control link," "State violation notice," and "Violation notice." Such definitions were necessary to an understanding of the proposed comprehensive regulations relating to the implementation of AVS.

Industry commenters objected that the proposed definition of "violation notice" contained in the regulation was too broad. They argued that the proposed definition, insofar as it applies to a "Federal violation notice" should be explicitly limited to violations of environmental laws. Further, they asserted that the definition inappropriately included written communications and demand letters as "violations."

OSM disagrees with the commenters' concern over the need for an explicit limitation for violations of environmental laws in the definition of a "Federal violation notice." Commenters conceded that such a limitation is already contained in the proposed definition of "violation notice." The definition of a Federal violation notice is modified by any limitations contained in the definition of a violation notice. Accordingly, there is no need for an explicit additional limitation to address commenters' concerns. It is already clear that it is limited to violations of environmental laws. Thus, OSM has adopted the proposed definition of "Federal violation notice" as a final definition without modification.

Further, commenters asserted that the proposed rule inappropriately expanded the definition of violation notice to include various written communications and demand letters. They asserted that a demand letter could somehow preclude a permit applicant from pursuing a good faith appeal and that a person's ability to challenge the debt would depend on whether the agency attempted to collect the debt. In substance, commenters took exception to the prospect of a demand letter being the basis for a permit denial when the demand letter contains notice of a delinquent civil penalty and the applicable statute of limitations has expired precluding further action to collect the debt. They asserted that the proposed rule impermissibly expands the types of violations for which a person could be subject to permit block without affording the person a right of timely challenge.

Again, OSM disagrees with commenters' analysis. First, it must be emphasized that the type of document is less significant than the violation of which it provides notice. The document is merely a vehicle for communicating notice of the substantive violation. The documents listed in the proposed definition merely recount the possible types of documents providing notice and do not substantively expand the universe of violations which would be the basis for permit denial under section 510(c) of the Act and the provisions of 30 CFR 773.15(b). The substantive violation, rather than the type of document, forms the basis for a permit denial under the provisions of section 510(c) of the Act and 30 CFR 773.15(b)(1). Pursuant to those provisions, a regulatory authority is required to refuse permit issuance where available information indicates that any surface coal mining operation owned or controlled by an applicant is currently in violation

of the Act or other indicated laws. Delinquent fees or penalties which have ripened to the level for which a demand letter is indicated constitute available information for which an applicant will be held accountable and which a regulatory authority must take into account in any permit decision. Contrary to commenters' assertions, the filing of a suit to collect delinquent reclamation fees or civil penalties is not a condition precedent to such debts being valid violations or a condition precedent to such debts being considered the bases for permit denial.

With respect to the commenters' concerns about rights of challenge incident to demand letters, OSM believes that current quality control procedures will prevent the entry of unripe violations into the system. Furthermore, with this final rule and with OHA's rule which is being contemporaneously published, OSM and OHA have acted to provide a means for applicants to obtain temporary relief from permit blocks where they are likely to prevail on the merits. Thus, if a violation has not actually ripened into the basis for a permit block, temporary relief could be sought. The discussion of these provisions of the final rule are contained at the discussion of 30 CFR 773.25 below in this preamble.

Industry commenters also objected to the prospect that a demand letter or other notice could contain notice of a delinquent civil penalty the collection of which is barred by the applicable statute of limitations. In substance, they argued that such a notice should not be the basis for a permit denial. OSM disagrees. In 1988, OSM addressed similar concerns expressed by commenters with respect to the ownership and control rules. OSM stated, in relevant part, as follows:

EFFECT OF STATUTE OF LIMITATIONS ON COLLECTION ACTIONS

A commenter asserted that permit blocking cannot occur for any civil penalty which has not been reduced to judgment within the applicable statute of limitations in 28 U.S.C. 2462 (barring an action, suit or proceeding for enforcement of any civil fine, penalty unless commenced within five years).

OSMRE disagree[s] with the commenter's position. Although the statute of limitations may provide a defense to suit for collection of money filed five years following the entry of a final order, it does not invalidate the final order or cancel the underlying debt, which will continue to be listed in the Applicant Violator System and will result in blocking the issuance of a permit.

See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, 53 FR 38868 at page 38884 (October 3, 1988). The agency considers this position to be sound and has no intention of changing course. Accordingly, this criticism of the proposed definition is rejected.

A number of commenters representing industry interests asserted that the definition of violation contained in the rule was overbroad in that it potentially included violations of laws other than SMCRA as the basis for permit denial. These commenters proposed that the rule incorporate explicit limitations to the effect that only violations relevant to SMCRA or consistent with the environmental protection standards of SMCRA be the basis for permit denial.

OSM rejects the commenters' proposals as unnecessary. To the extent that the final definition of "violation notice" describes the type of violation for which the listed types of notice will be provided, the final rule is intended to track the language of section 510(c) of the Act. That provision of the Act states that the basis for permit denial includes violations of the Act "and any law, rule or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation * * *" (Emphasis added.)

Commenters' concerns are already addressed by the Act and the proposed and final definitions of "violation notice" which incorporate the above-emphasized language of the Act. This language requires that violations which support permit denial must be those pertaining to air or water environmental protection incurred in connection with any surface coal mining operation. Any air or water environmental protection violations incurred in connection with a surface coal mining operation would be of a type "relevant to SMCRA." If the violations are committed not in connection with a surface coal mining operation, they would not be a basis for the denial of a permit under section 510(c) of the Act. Thus, OSM does not believe that a change in the proposed rule language to reflect commenters' concern is needed.

A commenter representing certain State regulatory authorities also criticized the proposed definition of "violation notice" as being too broad and was concerned that such definition, when read with the provisions of 30 CFR 778.14(c), would lead to "nationwide gridlock" or undue delay in State regulatory authorities' processing of permit applications.

The proposed definition of "violation notice" is designed to incorporate the full range of violations which would form the basis for permit denial under section 510(c) of SMCRA. The definition is intended to implement the statutory definition, not expand such definition. A more limited definition would be an impermissible constraint upon the broad language of the Act. Accordingly, OSM rejects the view that the proposed definition is overbroad.

OSM further disagrees with commenter's view that applicants' reporting of such violation notices in accordance with the provisions of 30 CFR 778.14(c) will lead to undue delay in the processing of permit applications. Applicants must supply complete information with respect to outstanding violations to enable regulatory authorities to make informed decisions as to permit issuance as mandated by section 510(c) of the Act and 30 CFR 773.15(b)(1). The reporting of such information by an applicant may, indeed, lead to permit denial. That, however, constitutes with the mandates of the Act, not inappropriate delay or stalemate. OSM is confident that OSM and State regulatory authorities can evaluate and use the information provided by applicants with respect to outstanding violations in accordance with the definitions of "violation" and "violation notice" along with information contained in AVS to meet the requirements of the Act in a timely fashion.

The same commenter additionally urged that OSM retain the limited definition of "violation notice" previously contained in 30 CFR 701.5 because such definition is more "realistic" in its scope and because there is a need for such a definition across OSM's regulations, not just those contained in 30 CFR part 773.

Again, OSM disagrees with commenter's views. The definition of "violation notice" previously contained in the regulations did not identify the types of violations of the Act or other laws which would form the basis for a regulatory authority to deny a permit under 30 CFR 773.15(b)(1). A fuller definition of the term which would encompass these types of violations as mandated by section 510(c) of the Act was necessary for incorporation by reference into a proposed amended version of 30 CFR 773.15(b)(1). While commenter has asserted that there is a need for a general definition of the term "violation notice" across OSM's regulations, commenter has identified no urgent need for a universal definition of the term that would outweigh the need to clarify the provisions of 30 CFR part 773. Further, in the event that it becomes apparent that the implementation of other regulations have been somehow significantly compromised by the deletion of the general definition of "violation notice" contained in 30 CFR 701.5, OSM can address these issues as necessary. Accordingly, OSM must reject the commenter's position.

Further, a commenter urged that any violations be in a final, unappealable posture before they can be the basis for permit denial. OSM disagrees with the commenter's characterization of the current state of the law and with what the commenter believes ought to prevail.

First, Federal regulations which predate the proposed rules and today's final rules already provide that permits may be conditionally issued based upon a good faith, direct administrative or judicial appeal testing the validity of the underlying violation. See 30 CFR 773.15(b)(1)(ii)-(b)(2). Thus, contrary to commenter's implication, permits are not necessarily denied while violations are under appeal. The burden, however, is on a violator to assert appeal rights in good faith and in a timely manner. There is no legitimate reason to afford additional appeal rights to people who have squandered their opportunity to appeal. In the absence of a timely appeal, a violation should be the basis for denial of a permit, in accordance with the provisions of section 510(c). In this preamble under the topic captioned "Due Process," OSM has responded in detail to commenters who have asserted that permits should be conditioned upon the appeals of ownership or control links or upon the appeals of the existence of the violation asserted by owners or controllers of violations after standard appeal times for the violations have run. As stated in this preamble, OSM rejects these assertions.

To the extent that the commenter implied that permits should be issued unconditionally during the pendency of an appeal of a violation, OSM also rejects this proposal. Under this proposal, a violator could commit a violation at his or her surface coal mining operation; take a timely appeal; and then be approved unconditionally for permit issuance at another site. Following the failure of his or her appeal, he or she could continue to mine on the new site with no interruption or termination of his or her rights on the new site. This course of events violates the provisions of section 510(c) of the Act which mandate that regulatory authorities deny permits when applicants have current violations of the Act or other laws. Also, the commenter's proposal is inconsistent with the provisions of 30 CFR 773.15(b)(1)(ii)-(b)(2) cited above which allow only conditional issuance, rather than unconditional issuance, for permits issued to applicants who have appealed outstanding violations.

In that final rule, OSM has adopted the definitions of "Federal violation notice" and "violation notice" as proposed and without any of the changes requested by commenters.

In the proposed rule, the definition of "ownership or control link" included references to ownership or control "under paragraph (b)" of 30 CFR 773.5. Since the publication date of that proposal, OSM has proposed changes in the definitions of "owned or controlled" or "owns or controls" contained at 30 CFR 773.5. See Proposed Rule, Definitions and Procedures for Transfer, Assignment and Sale of Permit Rights; Definition of Ownership and Control, *58 FR 34652* et seq. (June 28, 1993). If some of those proposed changes are ultimately adopted, the reference to ownership or control as defined by "paragraph (b)" contained in the proposed definition of "ownership or control link" would be inappropriate.

Accordingly, to assure flexibility, OSM has deleted the reference to "paragraph (b)" of 30 CFR 773.5 from the final definition of "ownership or control link."

Also, the proposed definition of "ownership or control link" indicated that a link included presumptive ownership or control relationships which had not "been successfully rebutted under the provisions of Sections 773.24 and 773.26 or Sections 773.25 and 773.26 or under the provisions of part 775 of this chapter and Section 773.26 of this part." As is discussed below in this preamble, OSM has deleted proposed section 773.25, procedures for challenging ownership or control links prior to entry in AVS and has renumbered proposed Section 773.26 as final Section 773.25, standards for challenging ownership or control links and the status of violations. The final definition of "ownership or control link" has been amended to reflect these changes.

The final rules are adopted containing the provisions described in this preamble above at Summary of Rules Adopted.

SECTION 773.10 - INFORMATION COLLECTION.

The proposed rule would have revised Section 773.10 which contained a list of the existing information collection requirements in part 773 and also the OMB clearance number indicating OMB approval of the information collection requirements. The proposed rule revision would have updated Section 773.10 by including the proposed AVS-related rules containing information collection requirements. The proposed revision provided an estimate of the average public reporting burden per response of three hours, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The proposed section also listed the addresses for OSM and the Office of Management and Budget (OMB) where comments on the information collection requirements may be sent.

Industry commenters asserted that the estimate of three hours to prepare an average response for the collection of information required was unrealistically low.

OSM disagrees with commenters' assertion. The three hours estimated burden was an estimated average, rather than a predicted figure for the burden of a single, typical response. The calculation of an "average" response means that there are some responses which may require larger amounts of time to prepare and that there are also some responses which may require significantly lesser amounts of time. It is entirely reasonable to expect that the reporting and information collection burden of these regulations may vary among entities depending upon the entities' size and structural complexity.

Further, once companies have researched and compiled their particular ownership or control information, they have done the basic research which can be used for future compliance. This basic ownership or control research will then be readily available to the company and the company only needs to update such research to reflect changes in ownership or control for future applications. Once entities and regulatory authorities develop experience in complying with the regulations, they will also develop experience in collecting, storing, retrieving, and reporting the necessary compliance information. A number of large companies have told OSM that they have already collected and stored their ownership or control information in a computerized database or are in the process of doing so. Once such information has been so stored, it would be readily accessible and easily retrieved for compliance purposes. Thus, the amount of time required to prepare a typical response under these regulations should diminish over time.

Nevertheless, in the final rule adopted today, OSM has recalculated the estimated time for compliance in accordance with standard procedures required by the OMB. OSM has concluded that the public reporting burden for the collection

of information required by part 773 as amended by these final regulations is four and one half hours per response, rather than three hours. The final rule also has been modified to delete specific references to the particular sections of part 773 which are relevant for information collection purposes. Instead, OSM has provided a reference to the collection of information required by 30 CFR part 773, since this part encompasses all sections of part 773, including the final rules adopted today, which generate an information collection obligation.

SECTION 773.15 - REVIEW OF PERMIT APPLICATIONS.

In the proposed rule, OSM proposed to amend 30 CFR 773.15(b)(1) to refer to relevant amended definitions and AVS-related rules as the basis for a regulatory authority's analysis when reviewing a permit application.

The proposed regulation required the regulatory authority to review all reasonably available information concerning violation notices and ownership or control links involving the applicant.

Such information would include that obtained pursuant to Section 773.22 (verification of ownership or control application information); Section 773.23 (review of ownership or control and violation information); amended Section 778.13 (identification of interests); and amended Section 778.14 (violation information).

While those regulations will be discussed in detail later in this preamble, the net effect of referencing such provisions in Section 773.15(b)(1) was to assure that the regulatory authority makes a decision with respect to permit issuance or denial based upon complete information relating to ownership, control, and violations. Such complete information includes the mandated use of AVS.

The proposed rule would have further added a paragraph (b)(4) to 30 CFR 773.15. This provision would have provided that delinquent civil penalties for violations cited prior to October 3, 1988, not form the basis for a permit block against persons linked through ownership or control to such violations, where reclamation had been completed in accordance with the provisions of the applicable regulatory program and where, with respect to each cessation order for which a delinquent civil penalty exists, such persons had paid \$750 of the amount of such penalty to the regulatory authority which issued such cessation order. In substance, this regulation proposed a "safe harbor" with respect to owners or controllers of delinquent civil penalties cited prior to October 3, 1988.

In addition, the proposed amendments to 30 CFR 773.15(b)(1) would also have deleted the presumption contained in the then current version of that rule that allows a regulatory authority, in evaluating whether a surface coal mining operation owned or controlled by a permit applicant is currently in violation of the law, to presume, in the absence of a failure to abate cessation order (FTACO), that a notice of violation (NOV) has been or is being corrected, except where evidence to the contrary is set forth in the permit application, or where the notice of violation is issued for non-payment of abandoned mine reclamation fees or civil penalties.

Further, the proposed amendment to 30 CFR 773.15(b)(1) would have incorporated by reference the amended definition of "violation notice" and the proposed definition of "ownership or control link" contained in proposed Section 773.5 by requiring a regulatory authority to review "all reasonably available information concerning violation notices and ownership or control links involving the applicant." This proposed change would have eliminated the need for the detailed list contained in 30 CFR 773.15(b)(1) of the types of violation information which a regulatory authority must review as part of the application review process provided by 30 CFR 773.15(b)(1).

The two issues which generated the most significant comments were the proposed deletion of the presumption of NOV abatement and the proposed safe harbor for owners or controllers of surface coal mining operations with delinquent civil penalties for violations issued prior to October 3, 1988.

The first of these issues to be addressed is the proposed deletion of the presumption of NOV abatement. Commenters representing a number of State regulatory authorities strongly objected to the deletion of the presumption. They asserted that the elimination of the presumption would lead to "nationwide gridlock." They asserted that such a rule provision would lead to automatic appeals of all NOV's; that State regulatory authorities would have to expend significant resources tracking the course of NOV's and NOV appeals; that companies operating before multiple State regulatory authorities would never be able to definitively prove that NOV's were being abated such that they could be issued

permits; and that such efforts would be a significant waste of State and Federal resources. They asserted that 80%-85% of all NOV's are resolved and never ripen into CO's in any event.

Also, commenters representing industry interests strongly criticized the proposed deletion of the NOV presumption as both impractical and counterproductive. They asserted that the proposed deletion of the presumption would be especially burdensome on large multi-state corporations. They questioned whether such entities would be able to keep track of the abatement status of the NOV's of their many operating subsidiaries and contract miners. They further asserted that most NOV's are routinely and timely abated. They argued that eliminating the NOV presumption would lead to information overload in the permit application process; to increased costs and delays in permit processing; and to increased errors in data collection. They argued that the deletion of the presumption would require the reallocation of personnel from enforcement to document processing.

In contrast to the positions of State regulatory authorities and the industry, one commenter representing environmental advocacy groups supported the deletion of the NOV presumption, asserting that the deletion of the presumption would lead to better tracking of the status of violations and to faster remediation of violations. Another commenter did concede, however, that it would be difficult for the OSM to keep AVS accurate and current with respect to violation information if the presumption of NOV abatement in the absence of an FTACO was eliminated.

OSM considers the arguments raised by the State regulatory authorities and by the industry to be persuasive. OSM must give particular consideration to the concerns expressed by the State regulatory authorities on this issue. These agencies have the responsibility of implementing the ownership and control process. If the State regulatory authorities believe that the complete elimination of the presumption of NOV abatement will impose a significantly increased burden upon them for limited environmental return, this position cannot be discounted. OSM recognizes that there may be a potential benefit in having multiple jurisdictions tracking the course of NOV's for purposes of permit issuance. Such multiple supervision could theoretically encourage prompt abatement. Nevertheless, the mechanics of implementing such a process through AVS and other means would be sufficiently complex so as to create significant uncertainty among permit applicants and regulatory authorities. Such uncertainty outweighs the benefits of the complete elimination of the presumption of NOV abatement.

In response to the environmentalists' arguments, OSM recognizes that there is a theoretical, potential benefit in multiple regulatory authorities tracking the course of an NOV for purposes of permit issuance. Under this scenario, a State would deny a permit to an applicant based upon his or her being linked through ownership or control to an NOV in another State even though the abatement period for the NOV had not expired. The threat of permit denial could enhance the prospect for prompt abatement of that NOV.

Nevertheless, the mechanics of implementing this process with respect to AVS would be complex and would create such uncertainty as to outweigh the benefits. Assuming that NOV's whose abatement period had not yet expired and which had not yet generated FTACO's were loaded onto AVS, OSM would have to check the status of such NOV's and continually update such information on AVS. It is unclear whether OSM would be able to keep up with the changing status of NOV's and incorporate such information in a timely manner into AVS. This would add an additional element of uncertainty with respect to the currency of violation information in AVS. OSM believes it is more desirable to have information in AVS which is both current and reliable, so that State regulatory authorities may depend on the system during the permit application review process.

Further, OSM believes that the decision to retain at least a limited presumption of NOV abatement is consistent with positions taken by the Department of the Interior in previous litigation. In litigation relating to Section 773.15(b)(1) and related matters before the U.S. District Court of the District of Columbia, the Secretary advised the court that he had decided to reconsider the issue of whether, in the absence of an FTACO, the regulatory authority may presume that an NOV has been or is being corrected. The Secretary further advised the court that he would, if appropriate, engage in further rulemaking on the subject as expeditiously as possible. See *National Wildlife Fed'n v. Lujan*, No. 88-3117-AER (D.D.C.), Memorandum of Points and Authorities in Support of the Federal Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment, at pages 89-90.

As indicated in the preamble to the proposed rule, the proposed amendment to delete the presumption of NOV abatement represented the "further rulemaking" of which the court was advised. However, the Secretary committed only to reconsider the presumption of NOV abatement. The Secretary never committed to finalize any proposed rule. After

receiving the States' and industry's comments cited above, OSM has determined that the complete deletion of the presumption would impose a significant burden upon the States and provide little enforcement benefit.

As indicated in the preamble to the September, 1991 proposed rule, it was, in fact, never OSM's intention to load NOV's (other than delinquent NOV civil penalties) into the AVS database, given the large volume of data entry that would be required to keep such violation information up to date. Id. Thus, even if OSM had completely deleted the presumption of NOV abatement by adopting the proposed modification to 30 CFR 773.15(b)(1), there would have been no immediate, direct impact upon the AVS database. If OSM had eliminated the presumption, there would have been, however, a significant indirect impact upon AVS. The States would have been required to spend scarce resources tracking other States' NOV's, including those whose abatement periods had not yet expired, for permit application purposes. The States would have had fewer resources available to focus upon the other information that AVS believes is more critical to the effective implementation of section 510(c) of the Act, including the development of complete information with respect to entities' ownership and control. Further, OSM is committed to making its best effort to provide, through the AVS, a complete list of violations which are required to be used as the basis for a permit block.

Accordingly, OSM has determined to retain a presumption of NOV abatement in 30 CFR 773.15(b)(1). The focus of State regulatory authorities' concern appears to be the uncertainty incident to NOV's with abatement periods which have not yet expired. In substance, where an NOV has been issued and the abatement period has not yet expired, it is uncertain whether the violation will be ultimately abated or will ripen into the basis for the issuance of a failure to abate cessation order. The State regulatory authorities and the coal industry argue that such uncertainty justifies unconditional permit issuance. The environmentalists argue that such uncertainty demands permit denial. While OSM recognizes the needs of the State regulatory authorities, OSM believes that environmental advocates have also asserted legitimate concerns about the consequences of a blanket presumption of abatement for all NOV's. OSM has therefore chosen a middle ground which will serve to reduce the uncertainty while balancing the concerns of the various interests.

In response to the comments made to its proposal, OSM has amended 30 CFR 773.15(b)(1) to provide that, in the absence of a failure-to-abate cessation order, a regulatory authority may presume that a notice of violation is being corrected to the satisfaction of the agency with jurisdiction over the violation where the abatement period for such notice of violation has not yet expired and where the permit applicant has provided certification in his or her permit application that such violation is in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation. Where OSM is regulatory authority, OSM will incorporate such certification into the statement of verification currently required in OSM's permit applications. Any permits issued incident to such certification will be conditionally issued based upon successful completion of the necessary abatement.

The above approach balances the concerns of the commenters. A blanket presumption of abatement for all NOV's-including those whose abatement period has expired-is inappropriate. It is entirely possible that there are NOV's with expired abatement periods for which cessation orders have not yet been written. To presume that such NOV's are abated is unjustified. At the same time, today's final rule recognizes that, until the abatement period has expired, diligent operators should have the opportunity to correct their NOV's in a timely manner without being subjected to permit denial during the period of abatement if they certify that such violations are in the process of abatement. State regulatory authorities can conserve limited resources by having the benefit of a reasonable presumption of NOV abatement which applies to those NOV's which are in a true state of uncertainty with respect to abatement. In considering whether a particular NOV should be the basis for permit denial, State regulatory authorities will also have the comfort of certification by the applicant and the protection of conditional issuance to assure that any representations made with respect to NOV abatement are actually fulfilled.

OSM recognizes that some large companies may not be aware of all NOV's whose abatement periods have not expired where such NOV's are cited against one or more of their many subsidiaries. Nevertheless, OSM expects that companies will make a good faith effort to track their NOV's and report such NOV's as part of permit applications. Where a company has developed a good faith NOV tracking procedure and, in the diligent exercise of such procedure, has inadvertently failed to report an NOV whose abatement period has not yet expired, such failure would not constitute willful nondisclosure by the company. On the other hand, where a company fails to set up a tracking procedure or where a company sets up a tracking procedure or corporate structure designed or intended to shield it from knowledge of NOV's or the ability to track NOV's this will not excuse a company's failure to accurately report NOV's in permit applications. Further, OSM expects that any certifications of ongoing correction provided with respect to NOV's be based upon truthful information and be submitted in good faith. To the extent that a company asserts that it cannot certify

because it is not certain whether all violations have been identified, the presumption of NOV abatement would not apply. OSM recognizes that companies may assert this argument, but OSM considers the certification necessary to assure that violations are in the process of being corrected.

As indicated above, the second issue in the proposed rule which generated significant comments was the proposed safe harbor for the owners or controllers of delinquent civil penalties for violations issued prior to October 3, 1988.

Commenters from the coal industry and the States criticized the safe harbor proposal because it required, as a condition precedent for safe harbor treatment, that reclamation be completed within 120 days after the effective date of the rule. These commenters asserted that this proposed condition limiting the availability of safe harbor protection was inadequate and insufficiently flexible. They argued that the proposal did not take into account the time required to perform reclamation and the potential for reclamation to be effected by changing events and environmental conditions.

Moreover, commenters representing the environmental community also criticized the safe harbor provision. These commenters criticized the proposed \$750 settlement amount as arbitrarily and artificially low. Commenters representing the State regulatory authorities asserted that the proposed penalty amount provided insufficient flexibility and that a State regulatory authority should be able to demand a greater penalty if the circumstances warrant.

While the industry and the States focused upon the limited window of time available to perform abatement and the environmentalists and the States questioned the limited penalty amount, all of these commenters seemed to share the view, subject to their particular and differing perspectives, that the proposed safe harbor provision was artificial and unnecessarily rigid.

Upon consideration of the comments, OSM agrees that the proposal was unnecessarily rigid and has, therefore, not finalized the safe harbor proposal. Accordingly, regulatory authorities will have the discretion to review the totality of the facts on a case by case basis to determine whether a person who is linked, through ownership or control, to delinquent civil penalties may avoid permit block through payment of a portion of such penalties. OSM will review the adequacy of such settlements within the context of OSM's routine oversight of the State regulatory authorities under 30 CFR parts 732 and 733 and of case specific complaints and investigations under 30 CFR part 842.

Whether a settlement is adequate will be a function of the entire context of a particular case. Factors to be considered include, but are not limited to, whether the settling owner or controller has performed required reclamation to abate the violations other than the delinquent civil penalties in a timely manner. The regulatory authority should also consider the degree to which the facts indicate that the owner or controller had the authority to exercise control of the violator. If the owner or controller had such authority, whether it chose to exercise such authority or not, it is less credible for the owner or controller to argue that it was unaware of the activities and violations such that a significant discount in civil penalty amount is warranted for the owner or controller. In substance, with such authority, the owner or controller would have had the ability to be informed of violations in a timely manner if he or she had wanted to be so informed. The regulatory authority should also consider the size and solvency of the owner or controller and the impact that the payment of a reduced amount of the civil penalty will have upon the activities of that company and other companies similarly situated. Further, the regulatory authority should consider the impact of the settlement upon the integrity of the regulatory authority's enforcement program. In other words, will the proposed settlement encourage companies to conclude that there is an economic benefit in ignoring the civil penalties and violations of their owned or controlled entities until such companies are required to settle by regulatory authorities?

In accordance with the above discussion, OSM has not adopted the provisions of the proposed rule which would have deleted the presumption that NOV abatement currently contained in 30 CFR 773.15(b)(1) and which would have created a safe harbor for owners or controllers with respect to delinquent civil penalties for violations cited prior to October 3, 1988. In paragraph (b)(1) of the final rule, OSM has inserted language providing for a presumption of NOV abatement for NOV's whose abatement periods have not yet expired where the permit applicants have certified that such NOV's are in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation. In the final rule, OSM has also deleted the language contained in the proposed rule which would have provided the safe harbor for certain owners or controllers. OSM has otherwise adopted the provisions of the proposed rule as the final rule.

SECTION 773.20 - IMPROVIDENTLY ISSUED PERMITS: GENERAL PROCEDURES.

In the proposed rule, OSM proposed to amend paragraph (b)(1)(ii) of 30 CFR 773.20 to delete the reference to the presumption of NOV abatement contained in 30 CFR 773.15(b)(1). See Proposed Rule, Use of the Applicant/Violator Computer System in Surface Coal Mining and Reclamation Permit Approval, *56 FR 45780, 45784-45785* (September 6, 1991). The basis for such deletion was to assure consistency with the provisions of 30 CFR 773.15(b)(1) which were to be similarly amended.

In the final rule, OSM has reinserted language which addresses the situation which occurs when a permit is issued in reliance upon the presumption that an NOV is being abated in the absence of a cessation order and a cessation order is, in fact, issued with respect to the violation. In such an event, a regulatory authority is required to find that the permit has been improvidently issued. The September, 1991, proposed rule deleted this language to assure consistency with OSM's proposal to delete the presumption of NOV abatement from the permit review process of 30 CFR 773.15(b). As described in this preamble in the discussion relating to 30 CFR 773.15(b), OSM has decided to include a presumption of NOV abatement for that regulation. To assure consistency between the treatment of improvidently issued permits and permit applications, OSM has reinserted language which addresses the presumption of NOV abatement into 30 CFR 773.20(b)(1)(i)(B). The agency's reasons for retaining a presumption of NOV abatement are described fully in the preamble discussion with respect to 30 CFR 773.15(b)(1).

In the proposed rule, OSM also proposed to renumber certain provisions of the then current 30 CFR 773.20 such that paragraph (b)(2) would become (b)(1)(ii), paragraph (b)(2)(i) would become (b)(1)(ii)(A), paragraph (b)(2)(ii) would become (b)(1)(ii)(B), and paragraph (b)(3) would become (b)(1)(iii). In the final rule, such renumbering is also adopted.

OSM also proposed to amend the then current 30 CFR 773.20 by inserting a new paragraph (b)(2), which would have made the provisions of proposed Section 773.26, standards for challenging ownership or control links and the status of violations, applicable when a regulatory authority makes determinations with respect to improvidently issued permits. Proposed Section 773.26 would have been applicable when a regulatory authority determines whether a violation, penalty, or fee remains unabated or delinquent, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, and whether any ownership or control link between the permittee and the person responsible for the violation, penalty, or fee existed, still exists, or has been severed.

The proposed insertion of the language referring to Section 773.26 would have had the effect of assuring that the standards, responsibilities, and procedures created by proposed Section 773.26 were consistently applied to permit issuance and to determinations regarding improvident permit issuance. OSM took such an approach in the belief that this would enhance the fairness of the permitting process and the prospect for the uniform enforcement of nationwide minimum standards.

In the final rule, this approach is adopted. The reference to Section 773.26 is changed, however, to Section 773.25 to reflect the renumbering of that section. Also, as has been indicated previously, OSM has inserted language in paragraph (b)(2) of final Section 773.20 to clarify that a challenge as to the existence of a violation at the time it was cited may be made within the context of the improvident permit issuance process.

OSM further proposed to renumber provisions of the regulation at 30 CFR 773.20(c), which relate to remedial measures for improvidently issued permits, so that then current paragraph (c) would become (c)(1), then current paragraph (c)(1) would become (c)(1)(i), then current paragraph (c)(2) would become (c)(1)(ii), then current paragraph (c)(3) would become (c)(1)(iii), and then current paragraph (c)(4) would become (c)(1)(iv). In the final rule, such renumbering is adopted.

Further, proposed renumbered paragraph (c)(1)(iv), which would authorize the regulatory authority to use rescission as one of the remedial measures for improvident permit issuance, would have deleted a specific reference contained in the former 30 CFR 773.20(c)(4) to the rescission procedures of 30 CFR 773.21.

The reason for such proposed deletion was that OSM sought to establish a prior notice and common appeal procedure for both permit suspensions and permit rescissions with respect to improvidently issued permits. The then current regulation governing permit suspensions at 30 CFR 773.20(c)(3) did not impose any specific requirements for prior notice, opportunity to be heard, or right of appeal for the permittee whose permit is to be suspended. See *54 FR 18450*

(1989). In contrast to this, then current regulations governing permit rescissions at 30 CFR 773.21 contained specific requirements for prior notice to a permittee and an explicit right of appeal. Accordingly, through its proposed rule, OSM sought to provide for greater consistency in its procedures governing suspension and rescission of permits. In the final rule, the proposed change has been adopted.

OSM further proposed to amend 30 CFR 773.20 to add a new paragraph (c)(2) which would have required that a regulatory authority which decides to suspend a permit must provide at least 30 days' prior written notice to the permittee. The proposed rule would have provided that, in the event that the regulatory authority decides to rescind a permit, it would provide notice in accordance with the provisions of 30 CFR 773.21. The proposed amendment further provided that a permittee would be given the opportunity to request administrative review of the notice under proposed OHA rules 43 CFR 4.1370 et seq., where OSM is the regulatory authority, or under the State program equivalent, where the State is the regulatory authority. In the absence of such temporary relief, the regulatory authority's decision would have remained in effect during the pendency of appeal.

OSM's proposed rule amendments made no change in the requirement contained at 30 CFR 773.20(b) that a regulatory authority analyze a potentially improvidently issued permit "[U]nder the violations review criteria of the regulatory program at the time that the permit was issued."

A commenter representing one of the State regulatory authorities criticized the provisions of the proposed rule which would have required that the regulatory authority provide thirty days' written notice to the permittee, if the regulatory authority decides to suspend the permit. This commenter asserted that there may be circumstances which require the immediate suspension and, possibly, outright rescission of a permit. This commenter asserted that delay, in the interests of due process rights, may not serve the public interest.

OSM appreciates the commenter's concerns. It is entirely conceivable that a permittee could have been issued a permit even though the permittee was linked, through ownership or control, to a string of unabated violations at the time of permit issuance. The permittee could have willfully and fraudulently concealed such links through some clever scheme or artifice at the time of permit application. While AVS has reduced the potential for such a scenario to occur, it remains possible. Such a permit ought to be subject to immediate suspension.

Nevertheless, OSM must weigh the public interest in preventing violators from keeping permits against the public interest in assuring that permittees' due process rights are protected. The remedies of permit suspension and rescission are serious. Unlike an applicant who merely has an expectancy in his application to receive a permit to mine, a permittee has, in fact and as a matter of law, assumed the rights and responsibilities incident to the permit to engage in surface coal mining operations. Indeed, OSM's regulations provide that a valid permit carries with it the right of successive renewal. See 30 CFR 774.15(a). Thus, a permittee has an interest which is deserving of a higher level of protection than the interest of an applicant.

Further, the provisions of 30 CFR 773.21 previously provided for notice to the permittee only prior to a proposed permit suspension and rescission. Thus, a permittee got prior notice of a suspension only if the suspension was the precursor to a subsequent rescission. If the regulatory authority did not intend the suspension of a permit to be followed by the permit's rescission, there was no requirement for prior notice. Also, the provisions of 30 CFR 773.21 provided appeal rights for a notice of suspension and rescission. There were no similar appeal rights in 30 CFR 773.20 with respect to suspension. In substance, permit suspension had the potential of being a harsher punishment than permit rescission by reason of these procedural differences. These were anomalies that OSM wanted to correct.

Accordingly, the final version of 30 CFR 773.20(c)(2) provides for notice prior to permit suspension; for administrative review of the notice of suspension under 43 CFR 4.1370 et seq. or under the State program equivalent; for a common appeal procedure for both permit suspensions and permit rescissions with respect to improvidently issued permits and for the regulatory authority's decision to remain in effect during the pendency of an appeal, unless temporary relief has been granted in accordance with 43 CFR 4.1376 or the State program equivalent. States can be more stringent with respect to providing less prior notice, but they are responsible for the legal consequences of such actions.

Industry commenters objected to OSM's assertion of any role in revoking or setting aside improvidently issued permits based upon the totality of their objections to the AVS, the ownership and control rules, and the proposed rules. These

reasons included the proposed rules' alleged deficiencies with respect to due process, State primacy, dispersion of authority for permit decision making, and all other objections asserted by industry commenters.

OSM disagrees with the commenters' views, including their view that OSM has no legitimate role in the improvidently issued permit process. OSM has an essential role to play, both as a regulatory authority and as an agency of the Federal government overseeing the States' programs. OSM incorporates by reference its previous responses to industry commenters in this preamble which address the commenters' concerns. Further, in the preamble to the rules governing improvidently issued permits, OSM has explained the legal basis for the improvidently issued permit rules and the rationale for OSM's role with respect to the implementation of such rules in relation to the States. See Preamble to 30 CFR 773.20, 773.21, and 843.21; Final Rule, *54 FR 18438* et seq., especially see pages 18458-18461 (April 28, 1989). OSM also incorporates these explanations by reference.

Environmental commenters criticized the portions of 30 CFR 773.20 which provide that the test for evaluating whether a permit was improvidently issued is "the violations review criteria of the regulatory program at the time the permit was issued." See 30 CFR 773.20(b). These commenters asserted that OSM should clearly spell out the violations review criteria, rather than rely upon the individual regulatory programs' criteria at the time of permit issuance as the applicable standards. These commenters criticized the provisions of OSM's regulations as being contrary to the Act and cited in support portions of their brief filed in the case of *National Wildlife Federation v. Lujan*, No. 88-3117 (D.D.C.).

OSM disagrees with the commenters' position. As indicated above, OSM's proposed rule did not propose substantive changes to this provision of the regulation. In the preamble to the improvidently issued permit rules cited above, OSM explained its rationale for using the violations review criteria of the regulatory program at the time the permit was issued as the standard for improvident issuance. See Preamble to 30 CFR 773.20, 773.21, and 843.21; Final Rule, *54 FR 18438, 18440-18441* (April 28, 1989).

Further, in the case of *National Wildlife Federation v. Lujan*, No. 88-3117 (D.D.C.), and *Save Our Cumberland Mountains, Inc. v. Lujan*, No. 81-2134 (D.D.C.), environmental advocates advanced similar arguments with respect to the agency's improvidently issued permit rules and the provisions of the rules applying the violations review criteria of the regulatory program at the time of permit issuance. In the briefs submitted by the Department of the Interior in those cases, the Department analyzed relevant statutory language and legislative history and carefully explained why the environmental advocates' criticisms were not well taken. Copies of these briefs are being placed in the Administrative Record of this rulemaking. OSM incorporates the arguments advanced by the Department in those briefs herein by reference.

Environmental commenters also criticized other portions of 30 CFR 773.20 for which OSM did not propose any substantive amendments as part of the September, 1991, proposed rules. The commenters asserted that OSM should clarify that the remedial measures available to a regulatory authority to cure an improvidently issued permit require that the regulatory authority impose both an abatement plan and a permit condition incorporating such plan before an improvidently issued permit is considered resolved. They asserted that the provisions of 30 CFR 773.20(c) inappropriately allow the regulatory authority to choose whether to require a permit condition or an abatement plan.

OSM disagrees with the commenters that a rule amendment is needed. The provisions of the regulation require that the regulatory authority "use one or more" of the listed remedial measures including requiring the implementation of an abatement agreement; conditioning the permit upon abatement of outstanding violations within a reasonable period of time; suspension of the permit; or rescission of the permit. This provision affords the regulatory authority the opportunity to exercise discretion, in light of the circumstances, to make a reasoned choice as to the appropriate remedy. In the preamble to the improvidently issued permit rule, OSM stated, in relevant part, as follows:

This section * * * includes four alternative remedial measures because of the diversity of circumstances under which a regulatory authority might find that a permit was improvidently issued, and the resulting need to apply a remedy that not only is administratively appropriate, but also is fair and equitable to the permittee * * *.

OSMRE believes that the term ["improvidently issued"] reflects the severity of the problem involved when a regulatory authority should not have issued a permit, while at the same time not foreclosing reasonable flexibility in the adoption of appropriate remedial measures * * *.

[T]he rule affords the regulatory authority reasonable discretion to consider the circumstances involving a particular improvidently issued permit and to fashion an appropriate remedy * * *.

Although the rule does not require a regulatory authority to use any particular one of the four remedial measures, OSMRE intends that the measure or measures used will be commensurate with the circumstances under which a permit was improvidently issued.

(Emphasis added.) See *54 FR 18438, 18447-18448* (April 28, 1989). Certainly, it could be reasonable, depending upon particular circumstances, for a regulatory authority to require both a plan of abatement and a permit condition implementing such plan. The agency has previously rejected the view, however, that there is only one correct option or options from the alternative remedies provided in the improvidently issued permit rule which is or are appropriate for all circumstances. *Id.* The provisions of the regulation afford the regulatory authority the opportunity to tailor a remedy "package" appropriate for the particular circumstances under which a permit was improvidently issued. The goals of any such remedy are "to correct the defect in the permit and achieve a state of compliance." *Id., at 18447*. If either a permit condition or an abatement agreement could reasonably be expected to accomplish these goals under the circumstances, then either would be sufficient to resolve the improvidently issued permit. In the event that it becomes apparent that selected remedial measures are not effective, each of the remedies affords leverage to the regulatory authority to compel compliance. Such choices are appropriately made by the regulatory authority, subject to OSM's oversight under 30 CFR 843.21. At this time, OSM sees no reason to amend the regulation to routinely require the use of both remedies in all circumstances where abatement of a violation is to be undertaken as a necessary part of the resolution of an improvidently issued permit.

SECTION 773.21 - IMPROVIDENTLY ISSUED PERMITS: RESCISSION PROCEDURES.

In the proposed rule, OSM proposed to amend the then current regulation at 30 CFR 773.21(a) to make the provisions of proposed Section 773.26, standards for challenging ownership or control links and the status of violations, applicable when a regulatory authority invokes the automatic suspension and rescission procedures of 30 CFR 773.21. The rationale for such amendment is the same as that discussed above with respect to similar language contained in Section 773.20. In substance, that was to assure that the standards, responsibilities, and procedures created by proposed Section 773.26 were consistently applied to permit issuance and to determinations regarding improvident permit issuance. OSM proposed such an approach in the belief that this would enhance the fairness of the permitting process and the prospect for the uniform enforcement of nationwide minimum standards.

Further, OSM proposed to delete paragraph (c) of then current 30 CFR 773.21 which provided for appeals of rescission notices. Under the proposal, rescission appeal procedures were to be incorporated in 30 CFR 773.20.

One commenter representing a State regulatory authority asserted that the States typically have provisions for the administrative review of a regulatory authority's decision to suspend or rescind a permit. Accordingly, this commenter questioned why OSM's proposed rules needed to include provisions for the appeals of permit rescissions due to improvidently issued permits.

The rationale for providing appeal procedures for permit rescissions incident to improvidently issued permits is essentially the same as the rationale for providing appeal procedures for permit suspensions. In substance, a permittee has, in fact and as a matter of law, assumed the rights and responsibilities incident to the permit to engage in surface coal mining operations. Indeed, OSM's regulation provides that a valid permit carries with it the right of successive renewal. See 30 CFR 774.15(a). Thus, a permittee has an interest which is deserving of protection. Thus, a permittee whose permit has been rescinded is entitled to a review of the decision to rescind.

Prior to the proposed amendment of September, 1991, then current 30 CFR 773.21 provided notice and appeal rights with respect to permit rescission incident to improvidently issued permits. By proposing to amend this rule to achieve a common set of procedural protections for permit suspensions and permit rescissions incident to improvidently issued permits, it was not OSM's intention to reduce the appellate rights previously provided by 30 CFR 773.21 or comparable State provisions. Instead, OSM wanted to assure that procedures of review were available for both permit suspensions and permit rescissions. The absence of such procedures for suspensions was a matter which OSM sought to address.

To the extent that State programs already have adequate appeals and notice procedures with respect to permit rescissions incident to improvidently issued permits, OSM believes that the proposed rules should impose little, if any, additional burden upon such States. Under the Act, OSM's responsibility is to establish minimum national standards which approved State programs are required to meet. Accordingly, individual State programs may exceed OSM's standards. A State which has such provisions may respond to any 732 letters OSM sends as a result of this rule by affirming that the State already interprets its program consistent with this Federal provision.

For the above reasons, the commenter's position is rejected.

OSM has decided to adopt the proposed changes as part of the final rules. In adopting the proposal, OSM has modified the provisions at paragraph (a) of 30 CFR 773.21 to make the provisions of Section 773.25, standards for challenging ownership or control links and the status of violation, applicable when a regulatory authority invokes the automatic suspension and rescission procedures of 30 CFR 773.21. The proposed rule contained a reference to Section 773.26. This change reflects that proposed Section 773.26 has been renumbered as final Section 773.25. OSM has made an additional non-substantive change to the introductory paragraph of Section 773.21 to reflect that Section 773.20(c)(4) has been renumbered to be Section 773.20(c)(1)(iv). Further, OSM deletes former paragraph (c) of 30 CFR 773.21 which provides for appeals of rescission notices. As discussed above, rescission appeal procedures are incorporated in 30 CFR 773.20.

SECTION 773.22 - VERIFICATION OF OWNERSHIP OR CONTROL APPLICATION INFORMATION.

OSM proposed Section 773.22 to mandate an inquiry whose focus was to assure that the regulatory authority develops complete and accurate information as to the identification of the applicant and all owners or controllers of the applicant prior to making a determination on a permit application. Accordingly, the proposed section focused on verification of ownership or control application information. Such accurate and complete information would enable the regulatory authority to make an informed decision as to whether the applicant was linked to a surface coal mining and reclamation operation in violation of the Act or of any other environmental laws within the terms of 30 CFR 773.15(b)(1).

Paragraph (a) of proposed Section 773.22 would have imposed a duty upon a regulatory authority to review the information provided in the permit application, pursuant to 30 CFR 778.13(c) and 778.13(d), to determine whether the information provided, including the identification of the operator and all owners and controllers of the operator, was complete and accurate. In making such determination, the regulatory authority would have been required to compare information provided in the application with information contained in manual and automated data sources. Manual sources for review would have included the regulatory authority's own enforcement and inspection records and State corporation commission or tax records, to the extent they contain information concerning ownership or control links. Automated data sources would have included the regulatory authority's own computer systems, if any, and the AVS.

Paragraph (b) of proposed Section 773.22 would have provided that, if it appeared from information provided in the application pursuant to paragraphs (c) and (d) of Section 778.13 that none of the persons identified in the application has had any previous mining experience, the regulatory authority would have been required to inquire of the applicant whether anyone other than those persons identified in the application would own or control the mining operation as either an operator or as another type of owner or controller.

The proposed rule assumed that, given the complexity of modern coal mining operations, it was likely that most applicants would have at least someone in an ownership or control capacity who has had previous mining experience. If it appeared from the face of an application that that was not the case, the regulatory authority would have been required to contact the applicant to verify that the applicant had not omitted from the application an operator or other owner or controller who had such experience. The intent of this proposal was to ensure that the regulatory authority obtains information on other, experienced persons who may actually be running the operation and should therefore have been disclosed as part of the ownership and control data in a permit application, but were not.

Paragraph (c) of proposed Section 773.22 provided that if, after conducting the information review described above, the regulatory authority identified any potential omission, inaccuracy, or inconsistency in the ownership or control information provided in the application, it would be required to contact the applicant prior to making a final determination with respect to the application. The applicant would then be required to resolve the potential omission,

inaccuracy, or inconsistency through submission of an amendment to the application or a satisfactory explanation which includes credible information sufficient to demonstrate that no actual omission, inaccuracy, or inconsistency existed. The regulatory authority was also required to take action in accordance with the provisions of proposed Section 843.23, sanctions for knowing omissions or inaccuracies in ownership or control and violation information, or the State program equivalent, where appropriate.

Paragraph (d) of proposed Section 773.22 would have required that, upon completion of the information review mandated by Section 773.22, the regulatory authority promptly enter all ownership or control information into AVS.

Industry commenters objected to the provision of the proposed rule requiring that the regulatory authority compare information provided in the permit application with sources such as State corporation commission or tax records. They asserted that such records are typically updated only on an annual basis and may be obviously inaccurate. They further asserted that requiring the applicant to explain discrepancies between information contained in the application and the State corporation commission or tax records will lead to inappropriate delays in the permit process.

OSM disagrees with the commenters' criticisms of the proposed requirement. The proposed requirement was designed to assure that the regulatory authority reviewing an application has complete ownership and control information. Such information is necessary to enable the regulatory authority to determine whether the application should be issued in accordance with the provisions of section 510(c) of the Act and 30 CFR 773.15(b)(1).

Unfortunately, a regulatory authority cannot simply rely upon all applicants to supply complete ownership or control information. Some applicants may err in good faith, others may conceal information knowingly. Accordingly, the regulatory authority must look to other sources of information. The information contained in the records of State corporation commissions or taxing authorities is a good potential source of ownership or control information. Depending upon particular State requirements, such information may have been submitted under oath. Further, such information is submitted subject to the review of State corporation commissions and State taxing authorities. Thus, a State regulatory authority reviewing such information has the benefit of any efforts made by these other agencies to assure that information submitted to them is accurate and complete.

Moreover, such information is important because it provides a basis for inquiry and for comparison with information submitted in the permit application. If there are discrepancies between the ownership or control information in such records and that submitted in the permit application, the applicant should be able to readily explain such discrepancies. Thus, if any information previously submitted to State taxing authorities or corporation commission has become subsequently outdated, this can be explained with minimal inconvenience to an applicant and minimal delay in the permit application process. On the other hand, if important ownership or control information has been omitted from a permit application, the State taxing and corporation commission records may be the key to identifying such omissions. In any event, the benefits of such information to the regulatory authority outweigh the risks identified by the industry commenters.

A commenter representing State regulatory authorities also asserted that these records rarely provide information not contained in previous permit applications or in AVS. This commenter also indicated that these records are difficult to obtain because tax records are not typically available for review by State agencies other than the taxing authorities.

OSM disagrees with the view that these types of records merely contain information which is duplicative of information already available to the State regulatory authorities through permit applications or AVS. While OSM makes every effort to assure that AVS contains complete and accurate information with respect to ownership or control links, OSM has never asserted that AVS is perfect. Even if AVS were a perfectly complete source of such information, new corporations are being formed and new applications to conduct surface coal mining operations are submitted. AVS must be regularly updated. It is likely that there is relevant ownership or control information contained in corporation commission and tax records of the various States which is not yet reflected on AVS. Thus, there is a need for State regulatory authorities to review such information and compare such information with permit applications to identify accurate and complete ownership or control information. Such information can then be added to the AVS database.

With respect to commenter's concern about the availability of State tax and corporation commission records, OSM recognizes that particular State laws may limit a State regulatory authority's access to such records. The requirement of the proposed regulation was for the regulatory authority to review "reasonably available sources." Thus, if a State law

explicitly forbids the regulatory authority's access to State tax information, the information would not be "reasonably available" for review. In the absence of such explicit prohibition, however, State regulatory authorities should review such information. OSM encourages State regulatory authorities to work with their sister tax and corporation commission agencies to develop information access arrangements to the extent permissible under applicable laws. Nevertheless, OSM rejects the view that the difficulty of obtaining the information justifies withdrawing or amending the proposing regulation.

The commenter representing State regulatory authorities further questioned the requirement contained in paragraph (c)(2) of proposed Section 773.22 that "credible information," rather than "credible evidence," support an applicant's satisfactory explanation of omissions, inaccuracies, or inconsistencies with respect to ownership or control information in an application. OSM used the term "credible information," rather than "credible evidence" because this is a broader concept than credible evidence. This term would include credible evidence which would be admissible at trial. Nevertheless, an applicant might be able to provide a satisfactory explanation based upon information which would not necessarily be admissible at trial, but which is a reliable and believable basis to conclude that no actual omission, inaccuracy, or inconsistency exists. Accordingly, the language of the proposed regulation was intended to provide flexibility to the regulatory authority to consider such information, including credible evidence.

OSM has determined to adopt the proposed rule at Section 773.22 as a final rule with minor modifications which are now described.

As indicated above, paragraph (b) of the proposed rule would have required that, if it appeared from information provided in the application pursuant to paragraphs (c) and (d) of Section 778.13, that none of the persons identified in the application had any previous mining experience, the regulatory authority had to inquire of the applicant whether anyone other than those persons identified in the application would own or control the mining operation as either an operator or as another type of owner or controller. The final rule imposes the duty upon the regulatory authority to both inquire of the applicant and to investigate.

In the proposed rule, there may have been an implication that the regulatory authority could simply conclude its inquiry in reliance upon the applicant's explanation. Such an implication was not intended. Accordingly, OSM has added explicit language to paragraph (b) of final Section 773.22 to insure that, if none of the persons identified in the permit application has had any previous mining experience, the regulatory authority will not simply rely upon the applicant's explanations. Instead, the regulatory authority will go forward to investigate whether any persons other than those identified in the application will conduct the mining.

In the final version of Section 773.22, OSM has retained language from paragraph (c) of the proposed Section 773.22 requiring the regulatory authority to take action in accordance with the provisions of Section 843.23 or the State program equivalent. However, OSM has deferred action on the adoption of proposed Section 843.23 for a later rulemaking. See *58 FR 34652* et seq. (June 28, 1993). The reference to that rule has been left in final Section 773.22 in the event that a final version of Section 843.23 is adopted. The inclusion of such reference, however, does not prejudice whether OSM will ultimately adopt such a rule.

As indicated above, paragraph (d) of the proposed rule would have required that, upon completion of the information review mandated by Section 773.22, the regulatory authority promptly enter all ownership or control information into AVS. OSM has adopted the final version of this paragraph to require that, upon completion of its review, the regulatory authority enter ownership or control information "into" AVS. If such information is already on the system, the regulatory authority is required to "update" such information. Such changes have been made to provide better clarity to the rule language.

SECTION 773.23 - REVIEW OF OWNERSHIP OR CONTROL AND VIOLATION INFORMATION.

OSM proposed Section 773.23 as a new section which would delineate the regulatory authority's review obligations with respect to a permit application after the regulatory authority had completed the process of verifying ownership or control application information as described in Section 773.22.

The provisions of paragraph (a) of proposed Section 773.23 would have required the regulatory authority to review all reasonably available information concerning violation notices and ownership or control links involving the applicant to

determine whether the application could be approved under the provisions of 30 CFR 773.15(b). With respect to ownership or control links involving the applicant, such information would have included all information obtained under 30 CFR 773.22 and 778.13. With respect to violation notices, such information would have included all information obtained under Section 778.14, information obtained from OSM, including information shown in the AVS, and information obtained from the regulatory authority's own records concerning violation notices.

In substance, the proposed regulation was designed to assure that the regulatory authority considers complete ownership, control, and violation information in making the decision required by 30 CFR 773.15(b)(1) with respect to a permit application.

The provisions of paragraph (b) of proposed Section 773.23 were proposed to provide the course of action which a regulatory authority would be required to take if the review conducted pursuant to paragraph (a) of the section disclosed any ownership or control link between the applicant and any person cited in a violation notice.

Thus, paragraph (b)(1) of proposed Section 773.23 would have required that the regulatory authority notify the applicant of such link and refer the applicant to the agency with jurisdiction over the violation notice.

Paragraph (b)(2) of proposed Section 773.23 would have required that the regulatory authority not approve the permit application unless and until it determined that all ownership or control links between the applicant and any person cited in a violation notice were erroneous or had been rebutted, or the regulatory authority determined that the violation to which the applicant had been linked had been corrected, was in the process of being corrected, or was the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1) or the State program equivalent. The determinations to be made by the regulatory authority under paragraph (b)(2) of the proposed regulation were to have been made in accordance with the provisions of proposed Section 773.24, procedures for challenging ownership or control links shown in AVS, and proposed Section 773.26, standards for challenging ownership or control links and the status of violations, or their State program equivalents.

Paragraph (c) of proposed Section 773.23 would have required that, following the regulatory authority's decision on the application or following the applicant's withdrawal of the application, the regulatory authority be required to promptly enter all relevant information related to the decision or withdrawal into AVS. The regulatory authority's decision could have included unconditional issuance, conditional issuance, or denial of the permit. The requirement that all relevant information be promptly entered into AVS was intended to insure that AVS was continually updated to reflect the most current information available with respect to permit applicants. A critical source of such information would be the regulatory authority.

Commenters representing members of the coal industry criticized the provisions of the proposed regulation as being unnecessarily duplicative of the provisions of proposed Section 773.22 and of 30 CFR 773.15(b). In support of this position, they pointed to the provisions of the proposed regulation which require the review of violation information and ownership or control links to determine whether an application could be approved. They questioned why the requirements of proposed Sections 773.22 and 773.23 would be imposed as two separate stages, rather than as a single stage of the permit application process under 30 CFR 773.15(b)(1).

OSM disagrees with the view that the provisions of proposed Sections 773.22 and 773.23 are duplicative or redundant to each other or with respect to the provisions of 30 CFR 773.15(b)(1). Further, OSM does not believe that these provisions should be consolidated with the provisions of 30 CFR 773.15(b)(1).

While each of the regulatory sections at issue are part of the permit application and review process, the two proposed Sections 773.22 and 773.23 represent separate tasks for the regulatory authority. In implementing the provisions of proposed Section 773.22, the regulatory authority would be focusing upon information contained in the permit application and attempting to verify such information by comparing it with other readily available sources of information. The purpose of such activity is to identify complete and accurate information with respect to the application, including identification of the person or persons who will own or control the surface coal mining operation. In implementing the provisions of proposed Section 773.23, the regulatory authority takes the information gleaned from its research on the application and then evaluates whether there are any ownership or control links between the applicant and any person cited in a violation notice. In this stage, the focus of inquiry is to determine whether the permit can be approved in accordance with the provisions of 30 CFR 773.15(b).

While both of these stages involve the use of AVS, this does not mean that such stages are redundant or duplicative. The AVS should be consulted throughout the permit application process to assure that the regulatory authority has the most current ownership or control and violation information available from OSM and other State regulatory authorities. The AVS is an evolving information system which is routinely supplemented with new information. The use of AVS in the earlier stage, proposed Section 773.22, provides an information resource for comparison with application ownership or control information and a basis for inquiry with the applicant. During the later stage, proposed Section 773.23, the regulatory authority takes previously developed ownership or control information and compares such information with outstanding violation information in deciding whether or not to issue the permit. The use of AVS in this stage enables the regulatory authority to have the benefit of any information which may have been subsequently added to AVS by OSM or other State regulatory authorities.

Further, neither of the provisions of proposed sections are redundant with 30 CFR 773.15(b)(1). The provisions of 30 CFR 773.15(b)(1) do not delineate the means by which a regulatory authority may comply with the mandates of section 510(c) of the Act or 30 CFR 773.15(b)(1). Proposed Sections 773.22 and 773.23 fill this need. These proposed sections provide the specific steps to be taken by a regulatory authority to achieve compliance with the provisions of 30 CFR 773.15(b)(1).

One industry commenter suggested that all of these provisions should be consolidated into a single violations review provision. While this is a reasonable alternative, OSM is convinced that the approach contained in the proposed rules is a better alternative. The placement of the required tasks in separate sections of the regulations, with appropriate cross references, better highlights the particular duties necessary at each stage of the permit application review process in a way which is more likely to support compliance. Also, as the above discussion demonstrates, the tasks are sufficiently separable that they lend themselves to separate regulatory sections. Such separation, however, does not mean that there must be unnecessary delays. A regulatory authority can move forward methodically through each required task in a timely manner.

A commenter representing State regulatory authorities criticized the provisions of paragraph (b)(2)(ii) of proposed Section 773.23 because such provision would prohibit the issuance of a permit if there are outstanding violations. He asserted that these provisions would significantly increase the burden on applicants, because the provisions did not incorporate the presumption that an NOV is considered abated unless an FTACO has been issued.

In this preamble, OSM has already addressed the matter of the presumption of NOV abatement within the discussion of the amendments to 30 CFR 773.15(b)(1) which have been adopted today. As indicated, OSM has determined to retain a presumption of NOV abatement where the abatement period for the NOV has not expired and the applicant has provided certification that the violation is in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation. Since the provisions of proposed Section 773.23 incorporate the provisions of 30 CFR 773.15(b)(1), such presumption would be similarly applied as part of proposed Section 773.23. Thus, the substance of commenter's concern has been addressed.

Commenters representing environmental advocacy groups urged that paragraph (a) of proposed Section 773.23 be clarified with respect to the regulatory authority's duty to review the accuracy of ownership or control information. They pointed out that there are many additional sources of ownership or control information beyond those listed in the regulation which a regulatory authority could review. They asserted that the regulatory authority should be required to review the sources listed in the regulation, the AVS and the regulatory authority's own records, at a minimum.

OSM agrees that there are many potential sources of ownership or control information and that the sources for review listed in the proposed regulation are those which the regulatory authority should be required to review, at a minimum. OSM disagrees, however, that the proposed regulation needs to be further clarified or modified. There is already language in the proposed regulation which meets the substance of commenters' concerns. In paragraph (a) of proposed Section 773.23, the regulatory authority is required to "review all reasonably available information concerning violation notices and ownership or control links involving the applicant * * *." (Emphasis added.) In addition, the language makes clear that "[s]uch information shall include" the listed items which follow in paragraphs (a)(1-2) of the proposed regulation. The clear meaning of this proposed language is that the listed examples are those sources which the regulatory authority must review. In addition, the regulatory authority can choose to review other sources.

Commenters representing environmental advocacy groups also urged OSM to incorporate standards to demonstrate whether an outstanding violation has been corrected or is in the process of being corrected to the satisfaction of the agency with jurisdiction over such violation. OSM believes that the regulatory authority which issued the violation can effectively define the status of such violation with additional standards. This regulatory authority is well positioned to determine whether the violation which it has issued has been abated or is in the process of being abated to its satisfaction. A regulatory authority before which a permit application is pending should consult the regulatory authority which issued the violation to ascertain the status of any violation to which an applicant has been linked through ownership or control.

OSM has determined to adopt the proposed rule as a final rule with a small modification which is now described. In adopting the proposal, OSM has modified the provisions of paragraph (b)(2) of section 773.23 to make the provisions of Sections 773.25, standards for challenging ownership or control links and the status of violations, along with those contained in Section 773.24, applicable when a regulatory authority makes a determination whether to approve a permit. The proposed rule contained a reference to proposed section 773.26. This change reflects that proposed section 773.26 has been renumbered as final Section 773.25. The rule is otherwise adopted as proposed.

SECTION 773.24 - PROCEDURES FOR CHALLENGING OWNERSHIP OR CONTROL LINKS SHOWN IN AVS.

OSM proposed Section 773.24 to establish the procedures to be followed in the event that the AVS showed an ownership or control link between a person and any person cited in a violation notice. The proposed section would have provided procedures for direct appeals of such links to OSM by persons who had been so linked. The proposed section would also have provided for challenges concerning the status of violations to which persons shown on AVS had been linked. The proposed section would have further provided the opportunity for those persons making a challenge to have

obtained temporary relief from any adverse use of the challenged link or violation information during the pendency of such challenge.

Paragraph (a)(1) of proposed Section 773.24 would have provided that an applicant or anyone else shown in AVS in an ownership or control link to any person cited in a Federal or State violation could have challenged such a link in accordance with the provisions of paragraphs (b) through (d) of proposed Section 773.24 and in accordance with the provisions of proposed Section 773.26, standards for challenging ownership or control links and the status of violations. Paragraph (a)(1) of proposed Section 773.24 would have provided, however, that such challenge would not be available if the challenger was bound by a prior administrative or judicial decision with respect to the link.

In substance, paragraph (a)(1) of proposed Section 773.24 would have provided that challenges of ownership or control links shown on AVS be made before OSM. The theory of the proposed regulation was that, once information with respect to particular ownership or control links has become part of the AVS and accessible to regulatory authorities across the country, the responsibility for the maintenance of such information would be a Federal responsibility. Accordingly, the process for challenging such information would be a Federal process.

Paragraph (a)(2) of proposed Section 773.24 would have provided that an applicant or anyone else shown in AVS in an ownership or control link to a person cited in a Federal violation notice would have challenged the status of such violation in accordance with the provisions of paragraphs (b) through (d) of proposed Section 773.24 and in accordance with the provisions of proposed Section 773.26, standards for challenging ownership or control links and the status of violations. The procedures applicable would have been similar to those described in paragraph (a)(1) of proposed Section 773.24.

Paragraph (a)(2) of proposed Section 773.24 would have provided, in language similar to that contained in paragraph (a)(1) of the proposed regulation, that the opportunity to challenge the status of a violation would not be available to any person who was bound by a prior administrative or judicial determination concerning the status of the violation.

The "status of the violation" would have meant whether the violation remained outstanding, had been corrected, was in the process of being corrected, or was the subject of a good faith, direct administrative or judicial appeal to contest the validity of the violation. See 30 CFR 773.15(b)(1)(i)-(ii). This usage was to have been carried forward into the provisions of proposed Section 773.26, standards for challenging ownership or control links and the status of violations. Further, the provisions of proposed Section 773.26 would have limited challenges made to the status of violations under proposed

Section 773.24 to prevent challenges of the existence of the violation at the time that it was cited. Again, the process for challenging the status of a Federal violation was to have been a Federal process. Challenges would have been made before OSM.

Paragraph (a)(3) of proposed Section 773.24 would have provided that any applicant or person shown in AVS to have been linked by ownership or control to a person cited in a State violation notice could challenge the status of such violation before the State that issued the violation notice. Such challenge would have to have been made in accordance with that State's program equivalents to paragraphs (b) through (d) of proposed Section 773.24 and proposed Section 773.26. Again, the provisions of proposed section 773.26 would have been incorporated under proposed Section 773.24 to prevent challenges as to the existence of the violation at the time that it was cited.

Paragraph (a)(3) of proposed Section 773.24 would have provided, in language similar to that contained in paragraph (a)(2) of the proposed regulation, that the opportunity to challenge the status of a violation before a State program would not be available to any person who was bound by a prior administrative or judicial determination concerning the status of the violation.

Paragraph (b) of proposed Section 773.24 would have required that a person seeking to challenge ownership or control links shown in AVS or the status of Federal violations submit to OSM a written explanation of the basis for his or her challenge and provide relevant evidentiary materials and supporting documents. The proposed regulation would have required that such information be submitted to the Chief of OSM's AVS Office in Washington, DC.

Paragraph (c) of proposed Section 773.24 would have required that OSM make a written determination with respect to the ownership or control link and/or with respect to the status of the violation. The proposal required that, if an ownership or control link had been challenged, OSM would then determine whether the link had been shown to be erroneous or had been rebutted.

Paragraph (d)(1) of proposed Section 773.24 would have provided that, if OSM had determined that the ownership or control link had been shown to be erroneous or had been rebutted and/or that the violation covered by the violation notice had been corrected, appropriately appealed, or otherwise resolved within the terms of 30 CFR 773.15(b)(1) (i)-(ii), OSM would be required to have provided notice of its determination to the permit applicant or other person challenging the link or the status of the violation. Under the proposed regulation, if an application was pending, OSM would also have to notify the regulatory authority before which the application was pending. Further, OSM would have been required to correct information contained in AVS to reflect the determination which had been made.

Paragraph (d)(2) of proposed Section 773.24 would have provided that, if OSM had determined that the challenged ownership or control link had not been shown to be erroneous and had not been rebutted, and that the violation remained outstanding, OSM would have been required to provide notice of its determination to the permit applicant or other person challenging the link or the status of the violation. Under the proposed regulation, if an application was pending, OSM would have also been required to notify the regulatory authority before whom the application was pending. Further, OSM would have been required to update information contained in AVS, if necessary, to reflect OSM's determinations.

Paragraph (d)(2)(i) of proposed Section 773.24 would have provided that OSM be required to serve a copy of its decision with respect to a challenge upon the applicant or other challenger by U.S. certified mail or by any other means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure.

Paragraph (d)(2)(ii) of proposed Section 773.24 would have provided that the applicant or other challenger could have appealed OSM's decision to the Department of the Interior's Office of Hearings and Appeals (OHA) within 30 days of such decision in accordance with proposed OHA regulations at 43 CFR 4.1380 et seq. Paragraph (d)(2)(ii) would have further provided that OSM's decision remained in effect unless temporary relief was granted in accordance with OHA regulations at 43 CFR 4.1386.

Paragraph (d)(2)(ii) of proposed Section 773.24 would have further provided for temporary relief from OSM's decision, if OHA granted such relief in accordance with proposed OHA regulations at 43 CFR 4.1386. Under the

proposed regulation, OSM's decision would have remained in effect during the pendency of appeal, unless temporary relief was granted.

Commenters representing the coal industry took exception to the provisions of paragraph (a)(2) of the proposed section which would preclude an applicant or other person from challenging the status of a violation if he or she was "bound by a prior administrative or judicial determination concerning" the status of the violation. The commenters asserted that determining whether a person was "bound" by a prior determination was vague and susceptible to conflicting interpretations. They further asserted that if, by this proposed language, OSM intended to apply the doctrines of res judicata or collateral estoppel, there was no need to include such language in the proposed regulation, since these doctrines would be available as legal defenses to OSM in any event. The commenters indicated that their objection to this language also applied to the other portions of the proposed regulations where similar language imposing such a limit on challenges was incorporated.

OSM disagrees with the commenters' characterization of the rule language. The proposed rule language is clear in standing for the principle that a person is entitled to his or her challenge opportunity before an administrative or judicial tribunal. Nevertheless, a person is not entitled to the multiple relitigation of issues which he or she has already litigated to conclusion. Accordingly, the proposed rule is explicit in requiring that a person who is bound by a prior administrative or judicial determination with respect to the status of a violation may not relitigate such issue. In determining whether a person is bound by a prior determination, traditional principles of res judicata and collateral estoppel will apply. Contrary to commenters' view, however, it is insufficient to assume that such principles will apply as a matter of law and that there is no need to provide an explicit limitation in the regulation. Such a limitation is necessary to eliminate any ambiguity in the regulation with respect to this issue and to assure that judicial and administrative tribunals are not clogged with duplicative, repetitive claims by persons who have already litigated such claims. The limiting language provides a clear statement of OSM's intent and will be adopted as part of the final rule.

Commenters representing environmental advocacy groups indicated approval of the provisions of the proposed regulation which would have limited challenges of the existence of the violation at the time it was cited. Such commenters did indicate concern, however, that the proposed regulation did not provide an explicit time limit for OSM to make its decision with respect to a challenge. They urged that the regulation incorporate an explicit time limit of 30 days for OSM to make a decision to avoid undue delay with respect to the permit application process.

OSM disagrees with the view that the regulation needs to contain an explicit time limit for the agency to make a decision with respect to challenges of ownership or control links or the status of violations. While OSM makes every effort to decide these issues in an expeditious manner, the review and determination of an ownership or control link can be a complex endeavor, requiring the review of significant amounts of complex documentary material. Such a process typically involves a dialogue involving the exchange of numerous documents and testimony between the agency and the challenger. Such issues may require extensive research and investigation by trained specialists. The imposition of artificial time limits on the process could create a risk that decisions will be inaccurate and that investigations will be incomplete.

Further, there is no risk to the environment during the period of challenge. During the period of challenge, the permit is not issued. Once a presumption of ownership or control has been established pursuant to 30 CFR 773.5 and such presumption is shown on AVS, the burden is upon an applicant to rebut the presumption. The regulatory authority should not issue the permit until the presumption has been rebutted. While an expeditious process is encouraged, the regulatory authority should not be rushed in making such a decision. It should conduct a thorough investigation and review all of the relevant evidence presented. Some challenges can be resolved within 30 days. Other challenges may require six months. Imposing an absolute time limit disregards the differences that particular cases have with respect to factual and legal complexity. Accordingly, OSM must reject the commenters' suggestion that a time limit should be incorporated into the proposed regulation.

A commenter representing State regulatory authorities criticized the provisions of proposed Section 773.24 which would require that challenges of ownership or control links shown on AVS be heard before OSM. In substance, the commenter was concerned that, for such challenges to be meaningfully addressed, OSM would need copies of supporting documentation from the States and challengers would be referred to the States to review various documents with respect to ownership or control relationships and with respect to violations. The commenter asserted that the States would have an "unnecessary burden" to provide duplicate copies of documents to OSM and other participants.

While OSM appreciates commenter's concern, OSM disagrees that the process provided in the proposed rule will impose an unnecessary burden upon the States. Under the proposed regulation, OSM is assuming the responsibility to entertain challenges to ownership or control information shown on AVS. In the absence of OSM's assumption of such responsibility, the States would have to hear such challenges. Further, regardless of which party assumes responsibility for addressing such challenges, that party would have to obtain complete documentation from all other parties which might have relevant records. Thus, each State would have to provide copies of essential documentation to the participants and to whichever regulatory authority was reviewing the case, be it OSM or a specific State, to enable the challenges to be fairly considered and resolved. It is in the interests of all concerned with the process—including OSM, the States, the challengers, and the public—that determinations of such challenges are based upon a complete administrative record. OSM is confident that the cooperative relationship between OSM and the States which has characterized the development and implementation of AVS would be carried forward with respect to challenges of ownership or control information on AVS made before OSM.

Commenters representing State regulatory authorities also questioned whether proposed Section 773.24 was inconsistent with other provisions of the proposed rules which would allocate responsibility to State regulatory authorities to make ownership or control decisions. In support of these positions, the commenters cited the provisions of proposed Section 773.26(b) which they considered to be inconsistent with proposed Section 773.24. As is noted elsewhere in this preamble, proposed Section 773.26 is being modified, renumbered, and adopted today as final Section 773.25. The commenters were concerned that there would be confusion in the permit application process if OSM would be the deciding agency with respect to ownership or control information on AVS.

OSM disagrees with the commenters' analysis. The provisions of proposed Section 773.24 were designed to avoid confusion. In substance, the proposed rule would provide challengers with a single forum, OSM, before which they could contest ownership or control information shown on AVS. The alternative to the proposed rule's approach would be for challengers to challenge ownership or control links shown on AVS before the various States. There is a greater likelihood of inconsistent results with multiple jurisdictions making such decisions as opposed to a single agency making such decisions. Further, the content of AVS would be subject to such inconsistency, since the resolution of challenges would have to be reflected in the AVS database. Given that AVS is a national database which is used across State lines, there is a need for consistency in the decision making which forms the content of AVS. Moreover, the approach provided in proposed Section 773.24 is consistent with that provided in proposed Section 773.26(b).

Paragraph (b)(1)(i) of proposed Section 773.26 would provide that the regulatory authority before which an application is pending has authority for making decisions with respect to the ownership or control of the applicant. Paragraph (b)(1)(ii) of proposed Section 773.26 would provide that the regulatory authority that issued a permit would have authority for making decisions with respect to the ownership or control of the permittee. As will be discussed below in detail, OSM's final regulation adopted as final Section 773.25 modifies this language to refer to ownership or control of applications, permits, and violations, rather than ownership or control of applicants, permittees, and violators.

Under paragraph (b) of proposed Section 773.26, the authority of the regulatory authority is initial authority, subject to OSM's oversight. Under that paragraph of proposed Section 773.26, a regulatory authority would analyze the facts and make an initial decision with respect to the ownership or control links of an applicant or a permittee. Such decision would be subject to OSM's oversight. Then, the regulatory authority would enter such information into AVS, to the extent necessary to update the system. The entry of such information into AVS would also be subject to OSM's oversight. Since OSM has ultimate authority, through the exercise of oversight, as to the content of the ownership or control information on AVS, it is consistent for OSM to be the single forum for the challenge of ownership or control information shown on AVS as provided by proposed Section 773.24. If OSM later amends the AVS to reflect a different conclusion with respect to a particular ownership or control link than that reached by a State regulatory authority, that reflects OSM's exercise of its oversight authority and its responsibility for the ownership or control information contained in AVS. If a regulatory authority would then consider a subsequent application, it would be required to review AVS and to factor the information shown in AVS, as amended by OSM, into the regulatory authority's decision with respect to the later permit application. Thus, proposed Sections 773.24 and 773.26 are consistent with each other and will not lead to confusion in the permit application process.

A commenter representing State regulatory authorities also proposed a revision of proposed Section 773.24 such that OSM's decisions made under the proposed regulation would be considered preliminary decisions which would become final within 30 days thereafter if the person challenging the link could show no valid reason why the decision should not

become final. The commenter asserted that such a provision would enable the challenger to provide supplemental information which could lead to a corrected final decision and, thus, obviate the need for an appeal to OHA.

OSM appreciates the commenter's suggestion. OSM believes, however, that persons should have the opportunity to seek review of the agency's decision by OHA as soon as possible upon the agency's determination that they are linked, through ownership or control, to violations. In the absence of a final agency decision, such review by OHA would not be routinely available. Accordingly, the proposed regulation provides for a final agency decision which may then be appealed to OHA by a challenger. If a challenger has new information which would lead OHA to conclude that the challenger is likely to win a reversal of OSM's decision, then such information would support temporary relief with respect to the decision. On the other hand, where OSM has reviewed information submitted and concluded that an ownership or control link has been severed, OSM may choose to reserve the right to reopen such decision in the event that new information or evidence comes to light subsequently. Such reservation of the right to reopen by the agency would be necessary to assure that the agency can correct its mistakes and assure the accuracy of the AVS. Thus, OSM can supplement the record with information discovered subsequent to any decision. Accordingly, OSM has determined not to adopt the commenter's proposal.

In accordance with the above discussion, OSM has decided to adopt a final version of Section 773.24 which is substantively similar to the proposed version. OSM has, however, made some minor modifications to the proposed rule which are now described.

In paragraph (a)(1) of the proposed rule, the rule provided for the challenge of links by persons linked to any person cited in a Federal or State violation notice. At the time that this proposal was published in September, 1991, OSM expected that most challenges would be by persons seeking to challenge links to violators to avoid permit blocks. In actuality, members of the regulated community have also routinely come before OSM seeking to challenge ownership or control links to persons who are not violators. The language of the proposal did not reflect this reality and was, therefore, too narrow. Further, the language was potentially inconsistent with language contained in the 1988 preamble to OSM's ownership and control rules. In that preamble, OSM stated, in relevant part, as follows:

PROCEDURES TO AMEND APPLICANT VIOLATOR SYSTEM INFORMATION.

In addition to the procedures described above, both individuals and organizations may seek to amend the information in the Applicant Violator System, independent of the existence of a permit application if they believe that the records are not accurate, relevant, timely or complete.

See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, 53 *FR* 38868 at page 38879 (October 3, 1988). Accordingly, the final rule broadens the proposed language to provide that "[a]ny applicant or other person shown in AVS in an ownership or control link to any person may challenge such link" even if the link is to persons who are not violators. OSM intends to protect due process rights and provide an efficient avenue to challenge information shown on AVS. The substance of paragraph (a)(1) of the rule proposed in September, 1991 is otherwise retained.

Proposed Section 773.24 has been further modified to delete references in paragraphs (a)(2) and (a)(3) to proposed Section 773.26 and substitute references to final Section 773.25 in the place of the deleted section references. This reflects OSM's renumbering of the sections of the proposed rule. No substantive change in the rule has been made by such modification.

Paragraph (b) of proposed Section 773.24 would have required that a person seeking to challenge ownership or control links or the status of Federal violations submit to OSM a written explanation of the basis for his or her challenge and provide relevant evidentiary materials and supporting documents. Proposed paragraph (b) did not explicitly state that the process of challenge described in this paragraph applied to links shown in AVS. That was OSM's intent, however, as stated in the preamble to the proposed rule. Accordingly, OSM has corrected the oversight in the rule language by explicitly incorporating this language into this final rule.

Paragraph (c) of proposed Section 773.24 has been adopted as proposed. This provision requires OSM to make a written determination with respect to the ownership or control link and/or with respect to the status of the violation. The provision of the rule requires that, if an ownership or control link is challenged, OSM then determines whether the link

has been shown to be erroneous or has been rebutted. While no change has been made to the proposed rule, OSM believes that the following explanation will be helpful in clarifying the operation of the rule.

Under the rule, a determination that a link is "erroneous" means that the facts in the case show that no ownership or control relationship set forth in 30 CFR 773.5 ever existed. Thus, if an individual is shown on AVS as being linked to a corporation by virtue of his or her position as an officer of such corporation, see 30 CFR 773.5(b)(1), evidence demonstrating that such individual is not and has never been an officer of the corporation would support a determination that an ownership or control link based upon such a relationship is erroneous.

A determination that a link has been "rebutted" means that, while the facts in the case show that a presumed ownership or control relationship as set forth in 30 CFR 773.5(b) exists or existed, sufficient evidence has been presented to demonstrate that the "person subject to the presumption [did] * * * not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation [was] conducted * * *." See 30 CFR 773.5(b).

Accordingly, if the individual in the preceding example was, in fact, an officer of the corporation, but did not have authority or demonstrated control over the conduct of the surface coal mining operation, the presumption of ownership or control would be rebutted.

The provisions of paragraph (d) of the proposed rule have been adopted as proposed. Paragraph (d)(2)(i) of Section 773.24 provides that OSM is required to serve a copy of its decision with respect to a challenge upon the applicant or other challenger by U.S. certified mail or by any other means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure.

The date of service of the decision will set a date certain from which the time for appeals will begin to run. The regulation provides that service is complete upon tender of the notice or of the mail and is not deemed incomplete by virtue of a challenger's refusal to accept the notice or mail. The theory of this provision is to assure that a challenger is not able to delay the running of the time for appeal by avoiding or refusing service of OSM's decision and then claiming that he or she was never served.

Paragraph (d)(2)(ii) of Section 773.24 has been adopted as proposed. As provided in the proposed rule, the final version of this paragraph provides that the applicant or other challenger can appeal OSM's decision to OHA within 30 days of such decision in accordance with OHA regulations at 43 CFR 4.1380 et seq.

As provided in the proposed rule, paragraph (d)(2)(ii) of the final regulation provides all challengers to an OSM decision in these matters with the opportunity to appeal the decision to OHA.

The preamble to the ownership or control rules published in 1988 provided that appeals by individuals from OSM decisions with respect to information contained in AVS were made to the Department's Assistant Secretary-Policy, Management, and Budget under procedures developed under the Privacy Act of 1974. Appeals by entities other than individuals were made to OHA. See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38879* ("Procedures to Amend Applicant Violator System Information") (October 3, 1988).

In 1993, pursuant to a delegation from the Department's Assistant Secretary-Policy, Management and Budget, the authority to decide appeals with respect to information contained in AVS was delegated to OHA. Consistent with such delegation, OSM believes that a single process of appeal for both individuals and entities will promote consistency for both the public and the regulated community and that such appeal process should be explicitly contained in the final rule. As provided in the proposed rule, paragraph (d)(2)(ii) of the final rule provides that OSM's decision would remain in effect unless temporary relief were granted in accordance with OHA regulations at 43 CFR 4.1386.

Paragraph (d)(2)(ii) of Section 773.24 provides for temporary relief from OSM's decision, if OHA grants such relief in accordance with OHA regulations at 43 CFR part 4. Under the final regulation, the period during which a person may file a notice of appeal or the actual filing of an appeal will not automatically suspend the use of the information in AVS during the pendency of such appeal. The challenger will have to explicitly seek such relief in appeal proceedings before OHA and be granted such relief. See also 43 CFR 4.21(a).

In considering a request for temporary relief, OHA will apply the criteria of Section 525(c) of the Act, *30 U.S.C. 1275(c)*, to determine whether such relief is warranted. See OHA regulations at 43 CFR 4.1386. To grant temporary relief under such criteria, OHA will have to find that the challenger has a substantial likelihood of prevailing in his appeal of the OSM decision and that temporary relief, if granted, will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

In determining whether the granting of temporary relief would cause significant, imminent environmental harm, OHA will not attempt to decide whether a denial of temporary relief will compel the applicant or other challenger to abate a violation posing such harm. It is not the intent of these rules to force a person to abate a violation even if he or she is able to show a substantial likelihood that he or she had no ownership or control over the operation that is in violation.

Instead, OHA will focus its attention upon the compliance history of those persons who do appear to have had ownership or control over operations in violation, to determine whether the granting of temporary relief would pose a risk of significant, imminent environmental harm at sites for which new permits could be issued during the pendency of the appeal process.

In accordance with the above discussion, the provisions of the proposed rule are adopted with the modifications noted.

Withdrawal of former proposed Section 773.25 which would have provided procedures for challenging ownership or control links prior to entry in AVS. In the September, 1991 proposal, OSM proposed a rule to provide procedures for challenging ownership or control links prior to entry in AVS. That proposal which was numbered as proposed Section 773.25 represented OSM's attempt to go beyond the Constitutional requirements of due process. The proposal would have prospectively required OSM or a State regulatory authority to provide notice to those persons who were actively involved in surface coal mining operations and who were linked to a violation through ownership or control before such link information would be used to subject them to permit denial through AVS. Such persons would then have had an opportunity to challenge such information. Upon further consideration, OSM has decided to withdraw the proposed regulation.

OSM believes that adequate due process rights to notice and an opportunity to be heard are afforded by current practices which permit a challenge to ownership or control and violation information after it is incorporated into AVS. Such challenges can be made currently both within the context of a permit application and independent of such an application. OSM believes that these opportunities suffice to pass constitutional muster. See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38885* ("Due Process Provided") and at page 38879 ("Procedures to Amend Applicant Violator System Information") (October 3, 1988).

Further, the Department's OHA is contemporaneously adopting a rule providing for temporary relief from an ownership or control link, under specified conditions. Such a rule significantly enhances the already available due process protections available to the members of the regulated community. The risk that someone will be inappropriately subjected to a permit block due to an erroneous link is substantially mitigated by the temporary relief procedures available before OHA.

Moreover, the proposed rule would have subjected OSM and State regulatory authorities to a substantial paperwork morass as a condition precedent to implementing the provisions of Section 510(c) of the Act. OSM, which has been utilizing procedures similar to those proposed in the September, 1991, rule, discovered that the process was taking substantial amounts of time and resources to implement. The dialogue and paper exchange between the agency and persons debating the proposed ownership or control link was a prolonged exercise lasting, in some cases, for many months. Also, OSM was finding that most of these debates made no difference in the ultimate outcome, except where entities refuted the facts which would invoke a link. Typically, the ownership or control link was found to be well taken. The prolonged debate was preventing accurate information from being incorporated into AVS. During the period of the dialogue, the individual or entity subject to the ownership or control link was not relieved of the cloud of the potential link and the agency was not able to directly implement the link. Neither OSM nor the person challenging the link benefitted by this course of events.

Further, industry, environmental advocates, and representatives of State regulatory authorities were dissatisfied with the proposed rule. Industry commenters condemned the proposed rule as providing insufficient due process for challengers of ownership or control links. Environmental advocates criticized the proposal as deficient in not providing a set time frame for OSM to bring ownership or control decisions to closure and to incorporate such decisions into AVS. A commenter representing State regulatory authorities asserted that the proposed rules should either provide for no challenge of an ownership or control link prior to permit denial or for conditional issuance of a permit pending full challenge of an ownership or control link. As is stated above in the portion of this preamble captioned "Due Process," OSM is unwilling, for a number of significant reasons, to accept that permits may be conditioned upon the appeal of ownership or control links. Nevertheless, the criticisms of the commenter representing the State regulatory authorities, the industry commenters, and the environmental advocacy groups also caused OSM to reconsider the proposed rules.

Given that the incorporation of accurate and complete information into AVS in a timely manner is critical to the development and implementation of AVS, OSM believes that the needs of these constituent groups are addressed more effectively by the provisions of the OHA rule. OSM remains committed to developing complete and accurate information for entry into AVS, and as part of this process will of course consider information submitted by any party which would establish or refute facts relevant to an ownership or control link. To the extent that a person is injured by an erroneous ownership or control link, the OHA temporary relief procedure quickly and effectively neutralizes such injury in a timely manner. The availability of such a process enables OSM to go forward in an expeditious manner to utilize its resources to develop information, rather than engage in prolonged paper exchanges; to avoid delay in incorporating information into AVS, thus responding to the concerns of environmental advocates; and to address effectively the concerns of the industry which can invoke an administrative process outside of OSM for quick relief if the claims of injury are meritorious. Additionally, by enabling challengers to go to OHA more quickly, the focus of the challenge procedures shifts to OHA, a forum created to address such challenges of agency decisions. Finally, OSM can meet the terms of its continuing mandate from Congress to develop and implement the AVS. See Report of the Senate Appropriations Committee, Senate Report No. 103-114, at page 47 (July 28, 1993).

In appropriate cases, OSM may engage in a dialogue and exchange of documents with persons subject to a proposed ownership or control link prior to incorporating an ownership or control link into AVS. OSM will do this, however, only when OSM believes it needs additional information concerning the proposed ownership or control link. In that case, such a dialogue would enhance OSM's investigative process and assist in the development of relevant information.

In accordance with the above, OSM has withdrawn this portion of the September, 1991, proposal and is renumbering the remaining provisions of the final rules presented today to reflect the deletion of former proposed Section 773.25.

SECTION 773.25 - STANDARDS FOR CHALLENGING OWNERSHIP OR CONTROL LINKS AND THE STATUS OF VIOLATIONS.

Proposed section 773.26 would have established standards for challenges to ownership or control links and for challenges to the status of violations. The proposed section would have allocated responsibilities between OSM and State regulatory authorities for resolving issues related to ownership and control and would have provided the substantive criteria for resolving such issues. In recognition of OSM's withdrawal of former proposed Section 773.25, proposed Section 773.26 has been renumbered as final rule Section 773.25. For the reasons discussed below, the final rule also has been modified to delete the substantive criteria to resolve ownership or control issues previously contained in the proposed rule.

Paragraph (a) of proposed Section 773.26 provided that its provisions would have been applicable to any challenge concerning an ownership or control link or the status of a violation when such challenge was made under the provisions of 30 CFR 773.20 and 30 CFR 773.21 (improvidently issued permits); proposed Section 773.23 (the regulatory authority's review of ownership or control and violation information), proposed Section 773.24 (procedures for challenging ownership or control links shown in AVS), and proposed Section 773.25 (procedures for challenging ownership or control links prior to entry in AVS); or 30 CFR part 775 (administrative and judicial review of permitting decisions).

Paragraph (b) of proposed Section 773.26 would have provided the basic allocation of authority among regulatory authorities to make decisions with respect to ownership or control and with respect to the status of violations.

Paragraph (b)(1)(i) of proposed Section 773.26 would have provided that the regulatory authority before which an application was pending would have had authority for making decisions with respect to the ownership or control of the applicant. Such regulatory authority would have had responsibility for reviewing information submitted by the applicant and other available information to ensure the complete identification of the applicant's ownership or control links.

Paragraph (b)(1)(ii) of proposed Section 773.26 would have provided that the regulatory authority that issued a permit would have had authority for making decisions with respect to the ownership or control of the permittee. Such decisions would be necessary in determining whether the permit was improvidently issued, pursuant to 30 CFR 773.20. The regulatory authority which issued a permit would have done so based upon a complete review of ownership or control information.

Paragraph (b)(1)(iii) of proposed Section 773.26 would have provided that the State regulatory authority that issued a State violation notice would have had authority for making decisions with respect to the ownership or control of any person cited in the notice.

Paragraph (b)(1)(iv) of proposed Section 773.26 would have provided that the regulatory authority that issued a violation notice, whether State or Federal, would have had authority for making decisions concerning the status of the violation covered by the notice. The "status" of the violation meant whether the violation remained outstanding, had been corrected, was in the process of being corrected, or was the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1).

Paragraph (b)(2) of proposed Section 773.26 would have provided that OSM would have authority for making decisions with respect to the ownership or control of any person cited in a Federal violation notice.

Under the allocation principles set forth in paragraphs (b)(1) and (b)(2) of the proposed rule, a regulatory authority that was deciding whether a permit application should be granted or whether a permit had been improvidently issued would have determined for itself the ownership or control of the applicant or permittee, but it would have deferred to the regulatory authority that issued a violation notice for a determination of the ownership or control of the violator. The application would be blocked or the permit would be found improvidently issued if any owner or controller of the applicant or permittee were also an owner or controller of a violator, as determined by the respective regulatory authorities.

Paragraph (b)(3) of proposed Section 773.26 would have provided that the authority of State regulatory authorities to make decisions with respect to ownership or control links or the status of violations would have been subject to OSM's oversight authority under 30 CFR parts 733, 842, and 843. Under paragraph (b)(3) of proposed Section 773.26, when OSM disagreed with a decision of a State regulatory authority, it would have taken action, as appropriate, under proposed Section 843.24, oversight of State permitting decisions with respect to ownership or control of the status of violations.

Paragraph (c) of proposed Section 773.26 would have established evidentiary standards applicable to the formal and informal review of ownership or control links and the status of violations.

Paragraph (c)(1) of proposed Section 773.26 would have provided that in any formal or informal review of an ownership or control link or of the status of a violation, the agency responsible for making a decision would be required to make first a prima facie determination or showing that the link exists or that the violation remains outstanding.

Under paragraph (c) of proposed Section 773.26, a challenger of a link to a violation would have had to prove at least one of three proposed conclusions by a preponderance of the evidence to succeed in his or her challenge.

First, under paragraph (c)(1)(i) of proposed Section 773.26, a challenger could have proven that the facts relied upon by the responsible agency to establish ownership or control within the terms of 30 CFR 773.5(a) or to establish a presumption of ownership or control under 30 CFR 773.5(b) do not or did not exist.

Paragraph (c)(1)(ii) of proposed Section 773.26 provided that a person subject to a presumption of ownership or control under 30 CFR 773.5(b) could have rebutted such presumption by demonstrating that he or she does not or did not in fact have the authority directly or indirectly to determine the manner in which surface coal mining operations are or

were conducted. Such demonstration would have been made in accordance with the provisions of paragraph (d) of proposed Section 773.26.

Paragraph (c)(1)(iii) of proposed Section 773.26 provided that a challenger could have proven that the violation covered by a violation notice did not exist, had been corrected, was in the process of being corrected, or was the subject of a good faith appeal within the meaning of 30 CFR 773.15(b)(1).

Paragraph (c)(2) of proposed section 773.26 described the type of evidence that a person challenging an ownership or control link or the status of a violation would have had to present to meet the burden of proof by a preponderance of the evidence. The proposed regulation provided that the evidence presented would have had to have been probative, reliable, and substantial. See *5 U.S.C. 556(d)*.

Paragraph (c)(2)(i)(A) of proposed Section 773.26 provided that a challenger could have submitted affidavits setting forth specific facts concerning the scope of responsibility of the various owners or controllers of an applicant, a permittee, or any person cited in a violation notice; the duties actually performed by such owners or controllers; the beginning and ending dates of such owners' or controllers' affiliation with the applicant, permittee, or person cited in a violation notice; and the nature and details of any transaction creating or severing an ownership or control link; or specific facts concerning the status of the violation.

Paragraphs (c)(2)(i)(B) and (c)(2)(i)(C) of proposed Section 773.26 looked to official certification as the basis for the reliability of a submitted document. Paragraph (c)(2)(i)(B) would have allowed for the submission of certified copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records. Paragraph (c)(2)(i)(C) would have allowed for the submission of certified copies of documents filed with or issued by any State, municipal, or Federal governmental agency.

Paragraph (c)(2)(i)(D) of proposed Section 773.26 provided for a challenger's submission of an opinion of counsel in support of his or her position. Under the proposed rule, such opinion would have been appropriate for submission when it was supported by evidentiary materials and when it was rendered by an attorney who certified that he or she had personally and diligently investigated the facts of the matter and that he or she was qualified to render the opinion.

Paragraph (c)(2)(ii) of proposed Section 773.26 provided that, when the decision of the responsible agency was reviewed by an administrative or judicial tribunal, the challenger could have presented any evidence to such tribunal which was admissible under the rules of the tribunal. Under the proposed regulation, however, the evidence submitted would still have to have been probative, credible, and substantial.

Paragraph (d) of proposed Section 773.26 represented OSM's attempt to offer substantive standards which would have established what must be proved by those seeking to rebut the presumptions of ownership or control contained in current Section 773.5(b) of this title. Proof of the facts set forth in the proposed regulation would have established that the presumed owner or controller did not, in fact, have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation was conducted, under the provisions of 30 CFR 773.5(b).

In general, the proposed standards contained in paragraph (d) of proposed Section 773.26 would have allowed a presumed owner or controller to demonstrate that he or she lacked control over a surface coal mining operation by presenting evidence that he or she actually lacked authority directly or indirectly to determine the manner in which the relevant surface coal mining operation would be conducted. In the alternative, with respect to a presumed owner or controller of a violator, the proposed standards would have allowed a person to present evidence that he or she took all reasonable steps within his or her authority to cause the violation to be abated and that such abatement was prevented by those in actual control of the mining operation.

Paragraph (e) of proposed Section 773.26 would have provided for the review and revision of information in AVS to reflect determinations made by regulatory authorities in response to challenges of ownership or control links or the status of violations. The proposed provision would have provided that, following any determination by a State regulatory authority or other State agency, or following any decision by an administrative or judicial tribunal reviewing such determination, the State regulatory authority would have been required to review the information in AVS to determine if such information was consistent with the determination or decision. If it were not consistent, the State regulatory

authority would have been required to promptly inform OSM and to request that the AVS information be revised to reflect the determination or decision.

Industry commenters criticized the provisions of paragraphs (a) and (b) of proposed Section 773.26 as violating due process by not providing an owner or controller with the opportunity to challenge the existence of the violation at the time it was cited. They further criticized the provisions of the proposed rule as violating State primacy. In substance, they asserted that the proposed rule "balkanized" the permit application process by allowing the regulatory authority that issued a violation to identify the ownership or control links to the violation. They asserted that this provision impermissibly allowed such regulatory authority to play a role in the permit application process. They further argued that the regulatory authority before which an application was pending should be the sole decision maker.

OSM disagrees with these views. OSM has already addressed these issues in detail in previous sections of this preamble captioned "Due Process" and "Primacy." Further, OSM has clarified that a permittee may, within the context of the improvident permit issuance process, challenge the existence of the violation at the time it was cited. See discussion above in this preamble, "Section 773.20-Improvidently Issued Permits: General Procedures."

A commenter representing State regulatory authorities took exception to the provisions of paragraph (b)(3) of proposed Section 773.26 which would have provided that State determinations of ownership or control challenges be subject to OSM's oversight authority. The commenter asserted that those provisions were duplicative of other provisions of current regulations which provide for OSM's oversight of the States such as 30 CFR parts 733, 842, and 843. He further asserted that the Act established OSM's oversight power over the States and that such power required no reiteration by the proposed regulation.

In addition, commenters representing State regulatory authorities argued that, under a system of State primacy, OSM has no authority to act, on a case by case basis, with respect to a particular permit decision by a State regulatory program, other than revoking the State's approved regulatory program. Thus, they questioned OSM's authority to review a State's decision with respect to ownership or control. They also argued that, if OSM review of State ownership or control decisions was done, this would lead to duplication and disruption in the permit application process.

While these commenters asserted that the provisions of the proposed regulation should be deleted, they proposed that, if OSM insisted on going forward with the proposed provision or a similar rule providing for OSM oversight of State decisions, the final rule should make explicit that the initial decision of a State regulatory authority with respect to an ownership or control issue would be considered presumptively correct. They also proposed that a standard such as "gross inadequacy" should be the standard for OSM to apply to the review of the State decision.

OSM disagrees with the commenters' analysis. First, OSM rejects the commenters' view that the proposed regulation is unnecessary since the Act and regulations already provide for OSM's oversight of the States. The provisions of SMCRA such as sections 201, 503, 504, 505, and 521, and the provisions of the Federal regulations at 30 CFR parts 733, 842, and 843 do establish a system of State primacy subject to Federal oversight. Nevertheless, such provisions do not explicitly address every question which could arise in the implementation of the relationship between OSM and the States with respect to Section 510(c) of the Act which, as has been previously discussed in this preamble, invokes significant issues of State primacy and Federal oversight. Further, the implementation of the AVS also invokes issues of State primacy and Federal oversight. Multiple State regulatory authorities and OSM will be making ownership or control decisions at various stages which are relevant to issues arising under section 510(c) of the Act. While the proposed regulation is consistent with the Act and with OSM's existing regulations, the proposed regulation's allocation of responsibilities among the regulatory authorities who will be making ownership or control decisions relevant to section 510(c) of the Act has not been previously part of the Federal regulations. The allocation of responsibilities provides necessary clarification to the regulated community, to regulatory authorities, and to the public. Accordingly, OSM must reject the view that the proposed regulation is duplicative of current regulations.

OSM further rejects the view that, under a system of State primacy, OSM has no authority to act, on a case by case basis, with respect to a particular permit decision by a State regulatory program, other than revoking the State's approved regulatory program. A number of provisions of the Federal regulations, including 30 CFR 842.11 and 843.21, are very explicit in providing that OSM can exercise necessary oversight authority with respect to a particular permit without revoking a State's entire regulatory program. These other provisions are consistent with the system of State primacy established by SMCRA. The proposed regulation is similarly consistent.

Moreover, OSM has a particularly strong interest in working to assure that ownership or control decisions are made correctly because the fruits of such decision making will be incorporated into AVS. As has been previously discussed, AVS is used across State lines by the various State regulatory authorities and by OSM itself. Accordingly, a decision made with respect to an ownership or control link by one State regulatory authority has the potential to effect the outcomes of permit decisions by many regulatory authorities. Without consistency, there would be chaos. Federal oversight in these matters supports consistency among the various States in the application of the ownership or control rules and the outcomes of the decisions on ownership or control issues. Since these State decisions are ultimately incorporated into AVS, OSM's oversight supports the quality of the AVS.

Also, there is no reason to conclude that the exercise of Federal oversight, pursuant to the provisions of the proposed regulation, will lead to disruption in the permit application process. Paragraph (b)(1) of proposed Section 773.26 and the provisions of the final regulation discussed below are designed to avoid such disruption by allocating responsibilities among the various regulatory authorities who each have a legitimate interest in the outcome of an ownership or control issue. The oversight provisions of paragraph (b)(3) of proposed Section 773.26 are designed to support such allocation of responsibilities in a way that is consistent with SMCRA and OSM's implementing regulations.

OSM further believes that the commenter's proposal that a final rule should make explicit that the initial decision of a State regulatory authority with respect to an ownership or control issue will be considered presumptively correct is adequately addressed. In substance, the provisions of paragraph (b)(3) of final Section 773.25 discussed below already provide that State regulatory authorities who are issuing violations, considering permit applications, and issuing permits with the first opportunity to decide the owners or controllers of, respectively, violations, applications, and permits. While the first opportunity to make a particular decision is not equivalent to a legal presumption in favor of the decision, such an opportunity does give a State regulatory authority the chance to define the status quo which would be subject to oversight review. OSM declines, however, to convert such initial decision making opportunity into a presumption. The need for consistency with respect to ownership or control decisions and with respect to AVS require that OSM conduct oversight reviews of such State decisions as are necessary without the application of a presumption favoring the affirmance of such decisions.

OSM also declines to incorporate a standard such as "gross inadequacy" or some other criterion as the basis for Federal oversight of State ownership or control decisions under paragraph (b)(3) of proposed Section 773.26. The application of such a standard would limit OSM's ability to review State decisions for purposes of protecting the consistency and accuracy of information in the AVS. As will be discussed with respect to the final rule Section 773.25 below, OSM has made modifications to proposed Section 773.26 to reflect OSM's responsibility for the ownership or control information shown on AVS and to enable OSM to act to maintain the integrity of the AVS database. With respect to oversight incident to particular applications, permits, and violations, paragraph (b)(3) of proposed Section 773.26 already contains references to 30 CFR parts 733, 842, and 843. Final rule Section 773.25 contains identical references. Each of these parts of Title 30 of the Code of Federal Regulations contains provisions which have explicit criteria and triggering standards for OSM's review and action with respect to State decisions. Such criteria and standards are incorporated by reference in paragraph (b)(3) of proposed Section 773.26 and would be applied, as appropriate, by OSM. Accordingly, there is no need for additional review criteria in OSM's oversight under the proposed regulation. As discussed below, final rule Section 773.25 adopts the same approach.

A commenter representing environmental advocacy groups questioned whether the provisions of paragraph (b) of proposed Section 773.26 sufficiently explained the allocation of responsibilities between OSM and State regulatory authorities. The commenter questioned the provision of the proposal contained at paragraph (b)(3) which provided that State regulatory authorities' authority to make ownership or control decisions would be subject to OSM's review as an element of State program oversight. The commenter asserted that this provision required further clarification as to the respective roles of OSM and the State regulatory authorities in the making of ownership or control decisions.

OSM agrees with the commenter's observation that further clarification is in order with respect to the allocation of responsibilities and authority contained in paragraph (b)(3) of proposed Section 773.26. Accordingly, OSM has made a change to the final rule to clarify that, with respect to information shown on AVS, State responsibilities to make decisions with respect to ownership or control are subject to OSM's plenary authority.

Thus, under the final rule, once ownership or control information is entered into AVS, OSM will assume control of such data. If OSM reviews such information and concludes that it is incorrect, OSM will act to correct such ownership or control information and will incorporate such corrected information into AVS. The rationale for OSM's plenary authority is that AVS is used across State lines by all of the State regulatory authorities and the Federal government must act to protect the accuracy and integrity of AVS. With respect to the State regulatory authority's decision underlying such ownership or control information, OSM will further act pursuant to the provisions of final Section 843.24, which is described in detail below.

Nevertheless, OSM must reject the view that, because ownership or control issues are invoked, OSM must be initially involved in every permit application decision made by a State regulatory authority. The primary responsibility and authority for making a decision whether to issue or deny a permit is with the regulatory authority before which an application is pending. The primary responsibility and authority under a State regulatory program for issuing a violation is with that State's regulatory authority. The primary responsibility for the ongoing supervision of a permit is with the State regulatory authority which issued the permit. Accordingly, while OSM has changed some of the terminology in the final rule for reasons which are discussed below, OSM has not changed the basic conceptual framework contained in paragraph (b)(3) of proposed section 773.26. That framework is that the regulatory authority which is considering an application, which has issued a permit, or which has issued a violation has initial authority for making decisions with respect to the ownership or control relationships respectively invoked by the application, the permit, and the violation. OSM has program oversight authority of such decisions under 30 CFR parts 733, 842, and 843.

This commenter further indicated that the provisions of paragraph (b)(3) of the proposed section allocated the authority to review State decisions with respect to permit applications to OSM, but that OSM could exercise such authority only after a permit had been issued, in accordance with proposed Section 843.24, and that this would cause friction between OSM and the States. The commenter proposed that, if OSM believed that an ownership or control link had not been made or had been severed improperly by a State regulatory authority considering a permit application, the permit should not be issued until OSM and the State regulatory authority resolved their dispute.

OSM appreciates the commenter's concern. In any system involving Federal oversight of the States, there is the potential for disagreements between the States and the Federal government. SMCRA is no exception. For instance, the invocation of the improvidently issued permit process by OSM, pursuant to 30 CFR 843.21, subjects the State's permit application review process to close scrutiny with respect to the permit in question. This is one of the remedies provided in proposed Section 843.24 which paragraph (b)(3) of proposed Section 773.26 would make applicable. There is potential for stress in this process. To help avoid to improvident issuance of permits, however, OSM, through its AVS Office, has attempted to be accessible to the States and to work with the States have the benefit of OSM's most current opinions with respect to particular ownership or control situations. Whether a State regulatory authority chooses to avail itself of this service is a matter within the discretion of the State regulatory authority which has the primary authority to decide whether to issue a permit. Principles of State primacy make it inappropriate, however, to mandate such consultations with respect to every permit application. Accordingly, OSM declines to modify the rule to mandate that OSM intervene in the State permit application process to require that the State not issue a permit if OSM disagrees with the State's resolution of an ownership or control issue.

Industry commenters criticized the provisions of paragraph (c)(1) of proposed Section 773.26. They questioned the requirement contained in the proposed regulation that a regulatory authority make a prima facie determination whether an ownership or control link exists to a violation and that such violation remains "outstanding." They asserted that the provisions of section 510(c) of the Act require the denial of permits for "unabated" violations only, not "outstanding" violations.

OSM disagrees with the commenters' analysis. The provisions of section 510(c) of the Act require that a regulatory authority not issue a permit if information available to it indicates that "any surface coal mining operation owned or controlled by the applicant is currently in violation of the Act" or other laws specified. (Emphasis added.) Paragraph (c)(1) of proposed Section 773.26 requires a prima facie determination whether the violation covered by a violation notice "remains outstanding." A violation which "remains outstanding" is one which is "current." The plain meaning of these phrases is the same. Further, by the use of the words "remains outstanding" in the proposed regulation, OSM did not intend to change the standard established by section 510(c) of the Act. Instead, OSM merely sought, as the Federal agency charged with implementing SMCRA, to provide a workable phrase defining a current violation.

Industry commenters further objected to paragraph (c)(1) of proposed Section 773.26 insofar as such proposal required an applicant to demonstrate, by a preponderance of the evidence, that the applicant did not own or control the violator within the meaning of the regulations. The commenters asserted that the imposition of such a burden of proof upon the applicant was inconsistent with section 510(c) of the Act and that the use of such an evidentiary burden was only appropriate for formal proceedings before tribunals, rather than informal proceedings before State regulatory authorities.

OSM disagrees with commenters' objections. The imposition of such a burden of proof is entirely consistent with the provisions of section 510(c) of the Act which require that, when available information indicates that a surface coal mining operation "owned or controlled by the applicant" is in current violation of the Act or other laws listed, the permit not be issued "until the applicant submits proof that such violation has been corrected or is in the process of being corrected."

Moreover, the statute is silent as to how an applicant may demonstrate that he or she does not own or control a surface coal mining operation. Under the Act, it is the duty of OSM, the administrative agency charged with implementing the Act, to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of * * * [the] Act." See section 201(c)(2) of the Act.

Thus, OSM proposed, and today is finalizing, a regulation which carries out the purposes of section 510(c) of the Act and places the burden of evidence production and persuasion upon the person challenging an ownership or control link to a current violation. This is consistent with the provisions of that section of the Act which clearly place the burden of going forward with proof that a violation has been corrected or is in the process of correction upon the applicant who owns or controls a surface coal mining operation which is in violation of the Act.

Moreover, in the absence of some means of showing that he or she does not own or control a particular surface coal mining operation which is in violation of the Act, an applicant who owned or controlled such an operation would only be able to receive a permit if he or she could produce proof that the current violation was corrected or was in the process of correction. As indicated above, consistent with its statutory role to propose regulations, OSM has provided the "means" for an applicant to show that he or she does not control a surface coal mining operation by establishing the burden of proof and evidentiary standards contained in paragraph (c) of proposed Section 773.26.

Finally, OSM must reject the notion that the burden of proof contained in the proposed regulation is inappropriate for use by State regulatory authorities. Burdens of proof are used in formal litigation before tribunals because they are helpful to the resolution of such litigation. Such burdens establish the parameters of what parties to litigation must do to prevail in their claims. Similarly, challengers of ownership or control links need to know what parameters they need to meet in proceedings before regulatory authorities to challenge such links. Also, in making decisions with respect to ownership or control or with respect to the status of violations, regulatory authorities need guidance in assisting their decision making process. In the absence of guidance establishing burdens of proof and evidentiary standards, the resulting decisions made may be inconsistent and based upon uncertain standards. For instance, one regulatory authority may believe the any quantity of evidence, including a mere scintilla, is sufficient to successfully challenge an ownership or control link to a violation. Another regulatory authority may believe that a successful challenge requires a challenger to demonstrate that an ownership or control link is rebutted beyond any reasonable doubt.

Thus, OSM's proposed rule has provided a single standard of persuasion and production, a preponderance of the evidence, to be required for the successful challenge of an ownership or control link. OSM believes that such a standard represents a prudent middle ground between the possible extremes of burdens of proof requiring a mere scintilla of evidence and those requiring proof beyond a reasonable doubt. OSM is confident that State regulatory authorities will be able to implement such a standard and that it will prove helpful. Accordingly, OSM rejects the commenters' assertion that the use of the evidentiary burden of production contained in the proposed rule is inappropriate for State regulatory authorities.

Industry commenters further criticized paragraph (c)(1) of proposed Section 773.26 for requiring, as one of the bases to rebut a presumption of ownership or control, proof that the facts relied upon to establish such presumption do not or did not exist. The commenters asserted that such a test may foreclose a demonstration that the regulatory authority which established such presumption reached the wrong legal conclusion, notwithstanding the truth of the facts. Further, the commenters asserted, in substance, that the provisions of the proposed section imply that the challenger would have to

disprove all of the facts which were considered by the agency which established the presumption of ownership or control, not just the relevant facts which support the presumption.

OSM does not agree with commenters' assertions. Paragraph (c)(1) of proposed Section 773.26 was intended to provide the parameters as to what factual demonstration must be made by a challenger of an ownership or control link. Accordingly, paragraph (c)(1)(i) of proposed Section 773.26 provides for the challenge of a link by proof that the facts necessary to invoke the presumption of ownership or control did not or do not exist. Nothing in such proof of facts precludes legal arguments which could be made, including those questioning the application of the presumption under the operative facts. Further, facts relevant to that legal issue could be presented under the provisions of paragraph (c)(1)(ii) of proposed Section 773.26 which provides that a person could demonstrate that he or she does not or did not have authority directly or indirectly to determine the manner in which surface coal mining operations are or were conducted.

Moreover, under the provisions of the proposed regulation, challengers would only have to present proof with respect to factual issues which are relevant to the invocation of the presumption of ownership or control. If the presumption turns upon certain key factual issues, these are the issues upon which the challenge will focus. Challengers will not be required to disprove irrelevant facts which may have been included in the administrative record of the agency which initially established the presumption of ownership or control.

The industry commenters further objected to paragraph (c)(1)(ii) of proposed Section 773.26 which provides that a person seeking to challenge a presumption could demonstrate that he or she did not have authority directly or indirectly to determine the manner in which surface coal mining operations were conducted. The commenters questioned whether the requirement that a person prove that he or she did not have such indirect authority was an attempt by OSM to impermissibly extend the reach of the ownership or control regulations to cover persons remote from surface coal mining operations.

OSM denies that the proposed provision represents an attempt to impermissibly extend the reach of the ownership or control regulations. In fact, the proposed standard was taken from currently operative ownership and control regulations. The provisions of paragraph (b) of 30 CFR 773.5, which have been effective since November 2, 1988, state that a person subject to one or more of the presumptions contained in paragraph (b) of that regulation is presumed to be an owner or controller unless there is a demonstration that "the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted." (Emphasis added.) This is the same standard which is also contained in paragraph (a)(3) of 30 CFR 773.5. The purpose of this standard is to enable:

“the regulatory authority * * * [to] examine any relationships and the facts surrounding them, such as informal agreements, personal relationships, and the mining history of the parties in question to determine if the relationship results in control over a surface coal mining operation. The regulatory authority may also consider any of the circumstances surrounding a surface coal mining operation to determine control. Such circumstances might include, for example, the fact that a person has financed the operation, or owns the equipment or the rights to the coal, or directs on-site operations.”

See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, 53 *FR* 38868 at page 38870 (October 3, 1988). Further, whether a person is "remote" in a corporate chain of command is not the issue under the standard. The issue is whether the totality of the circumstances indicate that the person had the authority to exercise control over the relevant surface coal mining operation. Such "authority" includes control or the power to control. *Id.*, at pages 38870-38871. The resolution of such issues is necessary for the regulatory authority's analysis of an ownership or control challenge. Accordingly, requiring a person challenging a presumption of ownership or control to make such demonstration is appropriate.

Industry commenters proposed that paragraph (c) of proposed Section 773.26 be modified to provide that a person challenging the presumption be able to prove that the agency relied upon incorrect facts to support its determination of ownership or control; that the person subject to the presumption did not have knowledge of the violation, did not authorize the activity that led to the violation, or did not have direct authority to determine the manner in which surface coal mining operations were conducted; or that the ownership or control link has been severed.

OSM appreciates the commenters' proposal. Nevertheless, OSM will not adopt the commenters' proposed modifications for the following reasons.

The provisions of paragraph (c)(1)(i) of proposed Section 773.26 already contain language providing for a challenger's proof that the facts relied upon by regulatory authority to make a determination of ownership or control did not or do not exist. Such language is inclusive of the commenters' proposal that a challenger be allowed to submit proof that the agency relied upon incorrect facts to support its determination of ownership or control.

Further, the language contained in OSM's proposed regulation would also encompass the commenters' proposal that a challenger be able to provide proof that an ownership or control link has been severed. Under paragraph (c)(1)(i) of the proposed regulation, such proof would be included as evidence that the facts relied upon by the regulatory authority to establish ownership or control or a presumption of ownership or control did not or do not exist. Whether such proof is sufficient to support a successful challenge to an ownership or control link will depend upon the facts of each case. OSM must reject the implication of commenters' proposal that the severance of a current ownership or control link to a violator would relieve a person from permit block in all cases. For instance, if a person was an owner or controller of a violator during the period in which the violation was committed, severance of his or her current ownership or control relationship with the company would not relieve him or her of responsibility created through the prior ownership or control link.

OSM must further reject commenters' proposal to the extent that it would establish a standard which would enable a challenger of an ownership or control link to a violation to challenge the link by proof that he lacked knowledge of the violation; that he did not authorize the activity which led to the violation; or that he did not have direct authority to determine the manner in which surface coal mining operations were conducted. Commenters' proposal must be rejected because it ignores the control which stems from indirect authority.

OSM agrees that all of commenters' proposed standards invoke factual matters which may be relevant when a regulatory authority considers an ownership or control link to a violation. As such, proof of each of these matters could be presented within the context of the presentation of facts made under paragraph (c) of proposed Section 773.26. For instance, proof presented that a person had no knowledge of a violation; that he or she did not actually authorize a violation; or that he or she did not have direct authority for the surface coal mining operation may well reflect on the contours of the person's responsibilities with a presumptively owned or controlled entity. Nevertheless, such facts may also constitute a false shield which has been created to conceal the substantive, indirect control that the person has over a surface coal mining operation. Commenters' proposal is flawed, therefore, because it would enable a challenger to successfully challenge an ownership or control link by simply proving lack of actual knowledge, actual authority, or direct control, without requiring proof that a presumed owner or controller also lacked indirect authority over the surface coal mining operation.

Industry commenters further proposed a modification to paragraph (c)(1)(iii) of proposed Section 773.26. In OSM's proposal, that paragraph prohibited a challenge as to the existence of the violation within the context of a challenge to an ownership or control link or a challenge to the status of the violation. Commenters proposed changes to allow a challenge as to the existence of the violation at the time it was cited. For the reasons discussed with respect to this issue in the section of this preamble captioned "Due Process" and in the previous discussion of changes made to final Section 773.20, OSM has generally rejected commenters' proposal but has accepted such proposal with respect to the improvident permit issuance process. Also, at the time of permit denial, a permit applicant can appeal any reason for such denial including the existence of a violation assuming that the applicant is not bound by a prior administrative or judicial determination or has not had a prior opportunity to challenge the existence of the violation. Accordingly, OSM has amended paragraph (c)(1)(iii) of final rule Section 773.25 to clarify that a challenge may be made by a permittee acting within the context of the improvident permit issuance process under Sections 773.20-773.21. This is in recognition of the more significant interest that a permittee has in a permit compared to the limited interest that an applicant has in a permit application. A permittee's ability to assert such a challenge will be limited, however, if he or she had a prior opportunity to challenge the violation notice and failed to do so in a timely manner or if he or she is bound by a prior administrative or judicial determination concerning the existence of the violation.

A commenter representing State regulatory authorities indicated concern that paragraph (c) of proposed Section 773.26 contained legal terms such as "prima facie determination," proof "by a preponderance of the evidence," and "probative, reliable, and substantial evidence" without providing definitions of such terms. The commenter indicated that

all of these terms have "particular legal meanings." He urged that the proposed regulation be amended to incorporate definitions of such terms, "consistent with their common legal meanings."

OSM appreciates the commenter's proposal. OSM disagrees, however, with commenter's view that the cited terms need formal definition in the proposed regulation. As commenter has correctly noted, each of the cited terms has a traditional, common legal meaning. In a proceeding to challenge an ownership or control link or the status of a violation, such terms would have their traditional legal meanings. It is anticipated that such meanings will further evolve on a case by case basis over time. Finally, with respect to the terms "probative, reliable, and substantial" as such terms describe evidence, paragraph (c)(2) of proposed Section 773.26 provides some examples of this type of evidence.

A commenter representing a State regulatory authority criticized the provisions of paragraph (c)(2)(ii) of the proposed regulation because such provisions would potentially allow a challenger of an ownership or control link to present evidence to a tribunal reviewing a decision of a regulatory authority which had not previously been presented to the regulatory authority. The commenter proposed a modification to the regulation such that any evidence presented on appeal by a challenger be limited to that which was presented to the regulatory authority at the time when the decision being reviewed was made. The commenter proposed that evidence which was not reasonably available to the challenger at the time of the regulatory authority's decision could, however, be presented for the consideration of the reviewing tribunal.

OSM appreciates the commenter's proposal. One legitimate approach to the process of such challenges might be to limit the presentation of evidence on review to that which had been previously presented to the regulatory authority which made the decision which has been subjected to review. OSM believes, however, that the better approach is to allow the presentation of any evidence admissible under the rules of the reviewing tribunal, including evidence which was not previously presented to the regulatory authority. This will assure that the review of the decision with respect to the ownership or control link or the status of a violation is based upon the most complete evidence available to all parties participating in the review process. Such a review will help assure that all parties have the opportunity to present their complete proof with respect to their respective positions in what is, substantively, a de novo proceeding. Such complete evidence presentation and review may aid the legitimacy and acceptance of any final decision made incident to such review.

Further, OSM disagrees with the view that such a process might encourage a challenger to withhold relevant evidence for surprise presentation at a subsequent review proceeding. A challenger will have sufficient incentive to overcome a presumed ownership or control link at the earliest possible time because he or she will want to avoid permit blocks or further litigation. Accordingly, he or she can be expected to present the best evidence available to make the case in favor of overcoming the presumed ownership or control link. Thus, OSM must reject the commenter's suggested modification to the proposed regulation.

A number of commenters criticized paragraph (c)(2) of the proposed regulation for allowing the use of affidavits in support of a challenge to an ownership or control link or to the status of a violation. The commenters asserted that such materials contain self-serving statements and are unreliable. The commenters further asserted that affidavits should not be the basis to overcome a presumption, in the absence of additional evidence supporting such affidavits. The commenters proposed various modifications to the proposed rule which would require the submission of additional information when affidavits are presented in support of a challenge to an ownership or control link. In this respect, one commenter proposed a "best evidence" rule which would not allow the presentation of affidavits when there was "better" documentary evidence available, such as official copies of corporate records previously filed with State corporation commissions.

OSM appreciates the commenters' concern with respect to affidavits. Nevertheless, affidavits do have certain indicators of reliability. They are made under oath before a government official licensed to witness such oaths, a notary public. Further, affidavits are recognized as evidence sufficient to support a motion for summary judgment in civil litigation. See Rule 56 of the Federal Rules of Civil Procedure. Accordingly, OSM continues to consider affidavits as appropriate evidence for a regulatory authority's review in the evaluation of a challenge to an ownership or control link.

Nevertheless, OSM agrees that, in most cases, an affidavit unsupported by other evidence may be insufficient to overcome a presumption of ownership or control. There could be rare circumstances, however, where an affidavit by itself could be the basis for rebuttal, given the totality of the circumstances involved. Such matters are appropriately

addressed on a case by case basis, rather than through a rule. Under the proposed rule, challengers are encouraged to submit additional evidence along with affidavits.

Accordingly, OSM will not modify the proposed regulation to delete the use of affidavits or to require that affidavits only be allowed as proof if accompanied by other supporting evidence in every case. Also, while OSM agrees that State corporation commissions may be a good source of relevant ownership or control information, OSM declines to adopt a "best evidence" test which would prevent the submission of affidavits when documents have been filed with State corporation commissions.

One commenter representing environmental advocacy groups criticized paragraph (c)(2)(i)(D) of proposed Section 773.26 insofar as the provisions allowed for the submission of an opinion of counsel in support of a challenge with respect to an ownership or control link or with respect to the status of a violation. In substance, the commenter asserted that such opinions present no factual evidence for the regulatory authority. Such opinions of counsel represent legal opinions with respect to ownership or control and invade the province of the decision maker, the regulatory authority.

OSM agrees that an opinion of counsel should not, in itself, be considered "evidence." Indeed, opinions of counsel constitute legal analysis based upon factual information. Both proposed and final regulations require that such opinions "be supported by evidentiary materials."

Nevertheless, OSM must disagree that such opinions should be excluded. By providing an opportunity for the submission of such opinions, OSM is seeking to encourage counsel to conduct a diligent investigation of the facts and to assist regulatory authorities by presenting the fruits of such investigation-the factual materials-along with counsel's legal opinions as to the import of such evidence. The decision as to the weight to be given to the evidentiary materials and the persuasiveness of the counsel's opinions remain with the regulatory authority considering the challenge to the ownership or control link. Lawyers routinely argue their clients' positions to triers of fact and law. Such argument does not invade the province of the decision maker which retains the authority to make the decision.

OSM has decided to allow for a challenger's submission of an opinion of counsel in support of his or her position as part of final Section 773.25. Such opinion would be appropriate for submission when it is supported by evidentiary materials; when it is rendered by an attorney who certifies that he or she is qualified to render an opinion of law; and when counsel states that he or she has personally and diligently investigated the facts of the matter or where counsel states that such opinion is based upon information which has been supplied to counsel and which is assumed to be true.

Whereas the proposed rule only provided for such opinion when counsel made a personal investigation of the facts, the final rule incorporates language to provide for opinions where such investigation has not been made. The basis for this change is to reflect that, under certain circumstances, attorneys might not choose to conduct a complete personal investigation of the factual representations made within the opinion. See Formal Opinion 346 (Revised), Tax Law Opinions in Tax Shelter Investment Offerings, Standing Committee on Ethics and Professional Responsibility, American Bar Association (January 29, 1982).

Such opinion is similar in type to that provided by counsel to an adversary party as to title, tax issues, or environmental compliance in real estate transactions. The indicator of reliability in this document is that the attorney is offering his or her opinion subject to professional standards provided by national and local bar associations and possible sanctions for the violations of such standards which may be imposed by applicable rules of conduct governing attorneys. In addition, under the final regulation, the attorney's opinion by itself is not enough to challenge an ownership or control link. Evidentiary materials need to be submitted along with such opinion.

In addition to the substantive change noted above, OSM has made non-substantive changes to the provision which clarify the requirements of the final rule provision. Accordingly, OSM has adopted the proposed rule with the changes noted as paragraph (c)(2)(i)(D) of final Section 773.25.

As described above, paragraph (d) of proposed Section 773.26, required proof for the rebuttal of ownership or control presumptions, represented OSM's attempt to offer substantive standards which would have established what must be proved by those seeking to rebut the presumptions of ownership or control contained in current Section 773.5(b) of this title. Proof of the type of facts set forth in the proposed regulations would have established that the presumed owner

or controller did not, in fact, have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation was conducted, under the provisions of 30 CFR 773.5(b).

OSM has determined not to go forward with paragraph (d) of proposed Section 773.26 and has, therefore, withdrawn that portion of the proposed rule. In substance, OSM believes that ownership and control determinations are inherently a case specific process. Each ownership or control matter turns on the totality of circumstances in a given case and whether the evidence presented demonstrates that the presumed owner or controller does not or did not, in fact, have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation was conducted. See 30 CFR 773.5(b)(1). The pragmatic focus of such an inquiry will continue to be whether a presumed controller actually exercised control over an entity or had the substantive power to exercise control over an entity, even if he or she chose not to actually exercise such power. As OSM has stated previously in the preamble to 30 CFR Section 773.5(b), "To the extent that a coal company controls or can exercise control over a contract operator, it should be held responsible for any outstanding violations of the Act which it should have prevented or corrected." (Emphasis added.) See Preamble to Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control; Final Rule, *53 FR 38868 at page 38877* (October 3, 1988). In effect, a person challenging a presumption of control must demonstrate, by a preponderance of the evidence, that neither of these two circumstances is applicable.

While it might be initially attractive for the agency to create a standard containing three or four elements, the proof of which automatically rebuts a presumption, OSM is unwilling to impose such potentially rigid substantive tests upon the process of analyzing ownership or control cases. OSM believes that such rigid standards do not serve the interests of the States, industry, or OSM, because they might be taken to preclude consideration of other rebuttal evidence not listed or, conversely, might force a State regulatory authority to accept a rebuttal which conforms substantially to OSM's model but which, in the opinion of the regulatory authority, does not in fact rebut the presumption. OSM's experience has taught that each ownership or control rebuttal requires an analysis of the presumed relationship within the complete factual context.

Accordingly, in analyzing the ownership or control profile of an entity, OSM will look to the totality of circumstances-with the view to understanding how a particular entity operates and operated-to determine the true owners or controllers of a surface coal mining operation.

Commenters representing environmental advocacy groups asserted that the rules should provide that any documents submitted by persons challenging presumptions of ownership or control be considered part of the public record and part of the permit file. On the other hand, industry commenters argued that the rules are deficient because they do not contain a provision by which documentation submitted could be held confidential. They further asserted that there was no means for a challenger to obtain a protective order with respect to confidential materials submitted in support of a challenge.

OSM agrees that documents submitted in support of a challenge to an ownership or control link or in support of a challenge to the status or the existence of a violation should normally be considered part of the public record. The public has a legitimate interest in knowing and understanding the basis for a regulatory authority's decisions in these matters. In a democracy, it is unreasonable for a governmental agency to make such decisions based upon secret information. Further, the credibility of the regulatory authority and the integrity of its decision making process require that its decisions be supported by an adequate record.

At the same time, OSM also recognizes that there may be valid competitive reasons why industry operators believe that certain information needs to be kept confidential. For instance, a person may not wish to reveal the price which he or she has paid for the coal extracted by a mine contractor for fear that other contractors or competitors will learn of this information and change their prices or bids to the disadvantage of the person revealing the information. A person concerned about such disclosure may be reluctant to submit a copy of the relevant contract because it contains the agreed price. OSM disagrees, however, that these industry concerns require special provisions in the rules to seal documents or to otherwise protect confidentiality.

In balancing the concerns of the public and the coal industry with respect to public access to the submitted documents, OSM will be guided by the principles of the Freedom of Information Act, *5 U.S.C. 552* (FOIA), and the Departmental regulations implementing FOIA. See 43 CFR 2.11-2.22. Upon request by a member of the public, OSM will ordinarily make available to the requestor documents provided by challengers of ownership or control links, the status of violations,

and the existence of violations. To the extent that a person submitting information to OSM asserts that the materials should be kept confidential, OSM will evaluate that request in accordance with the applicable provisions of FOIA.

In accordance with the above analysis, OSM has determined that the interests of the commenters can be addressed under current law and that the rule does not need to be modified.

In accordance with the above discussion, OSM has determined to adopt a final version of the proposed rule. The final rule has been renumbered as Section 773.25 to reflect the withdrawal of proposed Section 773.25, procedures for challenging ownership or control links prior to entry in AVS. As indicated above, OSM has modified the provisions of the proposal to allow for the submission of an opinion of counsel based upon evidence developed through counsel's personal investigation or based upon facts which have been supplied to counsel in support of a challenge of an ownership or control presumption. As further discussed above, OSM has inserted language in paragraph (c)(1)(iii) to clarify that a permittee may challenge the existence of the violation at the time it was cited within the context of improvident permit issuance as provided by Sections 773.20 and 773.21. OSM has also withdrawn paragraph (d) of the proposed rule, required proof for the rebuttal of ownership or control presumptions, described above. The final rule contains no other substantive changes from proposed rule Section 773.26. The final rule contains certain other non-substantive modifications as described below.

Paragraph (a) of final Section 773.25 provides that provisions of Section 773.25 are applicable to any challenge concerning an ownership or control link or the status of a violation when such challenge is made under the provisions of 30 CFR 773.20 and 30 CFR 773.21 (improvidently issued permits); Sections 773.23 (the regulatory authority's review of ownership or control and violation information), and 773.24 (procedures for challenging ownership or control links shown in AVS); or under 30 CFR part 775 (administrative and judicial review of permitting decisions).

Paragraph (a) of the final rule differs from the proposed rule in that references to proposed Section 773.25, procedures for challenging ownership or control links prior to entry in AVS, have been deleted. A further change in this paragraph from the proposed rule provides that the provisions of final Section 773.25 apply to challenges of an ownership or control "link to any person" rather than only to a "link to any person in a violation notice." The purpose of this change is to clarify that the provisions of the section apply to challenges of ownership or control links including those which do not generate a current link to an outstanding violation. OSM's experience has demonstrated that members of the regulated community have, in many cases, sought proactively to challenge ownership or control links to other persons, without regard to whether there were outstanding violations. Such challenges have been asserted, among other reasons, to avoid the risk of being linked to future violations through such ownership or control relationships. OSM recognizes that this is a legitimate concern. Accordingly, the change in the final rule allows the challenge of ownership or control links without regard to whether there are outstanding violations.

Paragraph (a)(2) of final Section 773.25 contains a further change from the proposed rule in that the regulation provides that the provisions of the rule apply to challenges of "the status of any violation covered by a notice." (Emphasis added.) The comparable section of the proposed regulation provided that the regulation applied to the status of "the violation covered by such notice." The purpose of the change is to recognize that there may be multiple violations, rather than a single violation, to which a person is linked through ownership or control. A person may wish to challenge the status of each of these violations, rather than only the violation contained in a single notice. If so, the provisions of final Section 773.25 apply to such challenges. Consistent with this change, "such notice" is changed to "a notice."

Paragraph (b) of final Section 773.25 provides the basic allocation of responsibility among regulatory authorities to make decisions with respect to ownership or control and with respect to the status of violations. State regulatory authorities are expected to have procedures in place to address challenges made in accordance with these rules, including in situations where there are ongoing State proceedings in other jurisdictions on permit applications.

Paragraph (b)(1)(i) of final Section 773.25 provides that the regulatory authority before which an application is pending has "responsibility" for making decisions with respect to the "ownership or control relationships of the application." This represents a change of terminology from the comparable provision of the proposed rule which provided that the regulatory authority would have "authority for making decisions with respect to the ownership or control of the applicant."

First, the use of the word "responsibility," rather than "authority," more accurately describes the regulatory authority's mandate under this regulation. "Responsibility" encompasses both authority, the power to act, and the obligation to act.

Further, paragraph (b)(1)(i) of final Section 773.25 speaks of "ownership or control relationships of the application," rather than of the "ownership or control of the applicant," as provided in the proposed rule. This change clarifies that the regulatory authority before which an application is pending will evaluate and make decisions with respect to the ownership and control issues with respect to an entire application, rather than just the particular applicant, consistent with this regulatory authority's primary responsibility for the application. This regulatory authority has responsibility for revising ownership or control information submitted as part of the permit application and other available information to ensure the complete identification of ownership or control relationships relevant to the decision to be made with respect to the application. The word "relationships" has been added to the regulation because it better explains the focus of this process.

Paragraph (b)(1)(ii) of final Section 773.25 provides that the regulatory authority that issued a permit has responsibility for making decisions with respect to the ownership or control relationships of the permit. The regulatory authority which issued a permit would have done so based upon a complete review of ownership or control information as required by the regulations. In the event that the improvidently issued permit regulations of 30 CFR 773.20 and 773.21 are invoked, this regulatory authority will have to decide whether such permit has been improvidently issued and whether, if the basis for such improvident issuance was an ownership or control link to a violator, whether such improvident issuance has been remedied. Accordingly, that regulatory authority must make decisions with respect to ownership or control relationships incident to the permit.

In paragraph (b)(1)(ii) of final Section 773.25, "responsibility" has replaced the word "authority" contained in the proposed rule. The reasoning provided with respect to the changes made to paragraph (b)(1)(i) of the final rule is applicable here. Again, the regulatory authority will be making decisions "with respect to the ownership or control relationships of the permit," rather than with respect to the ownership or control of the permittee," as provided in the proposed rule. This reflects that regulatory authority's primary responsibility for the permit which it has issued.

Paragraph (b)(1)(iii) of final Section 773.25 provides that the State regulatory authority that issued a State violation notice has responsibility for making decisions with respect to the ownership or control relationships of the violation. The State regulatory authority issuing the violation is in the best position to be aware, in the first instance, of operative facts which identify those owners or controllers who have the "authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted" and who can thus cause the abatement of the violation. See 30 CFR 773.5(b).

As in paragraph (b)(1)(i) of final Section 773.25, "responsibility" has replaced the word "authority" contained in the proposed rule. The reasoning provided with respect to these changes in paragraph (b)(1)(i) of the final rule is applicable here. Again, the regulatory authority will be making decisions "with respect to the ownership or control relationships of the violation," rather than "with respect to the ownership or control of any person cited in such notice [of violation]," as provided in the proposed rule.

Paragraph (b)(1)(iv) of the final Section 773.25 provides that the regulatory authority that issued a violation notice, whether State or Federal, would have responsibility for making decisions concerning the status of the violation covered by the notice. As in paragraph (b)(1)(i) of the final rule, "responsibility" has replaced the word "authority" previously contained in the proposed rule. The reasoning provided with respect to the similar change in paragraph (b)(1)(i) of this final rule is applicable here.

As in the proposed rule, the "status" of the violation means whether the violation remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1). This approach is consistent with the provisions of section 510(c) of SMCRA which require that a regulatory authority considering a permit application look to the "agency that has jurisdiction over such violation" to determine whether a violation "has been or is in the process of being corrected."

Paragraph (b)(2) of final Section 773.25 provides that OSM has responsibility for making decisions with respect to the ownership or control relationships of a Federal violation notice.

As in paragraph (b)(1)(i) of final Section 773.25, "responsibility" has replaced the word "authority" contained in the proposed rule. The reasoning provided with respect to this change in paragraph (b)(1)(i) is applicable here.

Paragraph (b)(2) of final Section 773.25 is essentially a Federal counterpart to paragraph (b)(1)(iii) and the same basic rationale applies here, as well. This provision differs from (b)(1)(iii), however, in that OSM's authority to decide the ownership and control relationships of a Federal violation notice is not initial responsibility as the State's responsibility is in (b)(1)(iii). Instead, OSM's responsibility is final. This difference recognizes that State regulatory authorities are subject to oversight by OSM. OSM is not subject to similar oversight by the States.

Under the allocation principles set forth in paragraphs (b)(1) and (b)(2) of final Section 773.25, a regulatory authority deciding whether a permit application should be granted or whether a permit has been improvidently issued determines for itself the ownership or control relationships of the application or permit, but it defers to the regulatory authority that issued a violation notice for a determination of the ownership or control relationships of the violation. The application is then denied or the permit subject to treatment under the regulations governing improvident issuance if any owner or controller of the applicant or permittee is also an owner or controller of a violator, as determined by the respective regulatory authorities.

Paragraph (b)(3)(i) of final Section 773.25 provides that with respect to information shown on AVS, the responsibility of State regulatory authorities to make decisions concerning ownership or control links will be subject to the plenary authority of OSM. This represents a change from the comparable provision of the proposed rule which provided that the authority of regulatory authorities to make ownership or control decisions with respect to applicants, permittees, and persons cited in violation notices and decisions with respect to the status of violations would be subject to OSM's review as an element of State program oversight under parts 733, 842, and 843.

The rationale for this change is simply that OSM is ultimately responsible for the maintenance and content of the AVS with respect to ownership or control information. OSM believes that the quality of ownership or control information is the core of AVS. OSM must closely monitor such information to maintain the accuracy of such information and the integrity of AVS. The need to protect the integrity of the AVS dictates that OSM have the ability to review the underlying basis supporting any ownership or control link shown on the system and to change information with respect to any ownership or control link or all such links, if necessary. Accordingly, the final rule provides that OSM's authority will be plenary with respect to ownership or control information shown on AVS.

Thus, once ownership or control information is entered into AVS, OSM will assume control of such data. If OSM reviews such information and concludes that it is incorrect, OSM will act to correct such ownership or control information and incorporate such corrected information into AVS. OSM intends to coordinate any such changes with the regulatory authority responsible for initial entry of the data in question.

Under paragraph (b)(3)(ii) of final Section 773.25, with respect to information shown on AVS relating to the status of a violation and with respect to ownership or control information which has not been entered into AVS by a State, the authority of a State regulatory authority will be subject to OSM's program oversight authority under 30 CFR parts 733, 842, and 843. OSM relies primarily upon the States to determine whether State violations have been abated or not. SMCRA section 510(c) explicitly states that an applicant must demonstrate that any current violation "has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation * * *" See also 30 CFR 773.15(b)(1).

Further, where State ownership or control information has not yet become part of AVS, the information has not yet entered the Federal information stream and has not yet become OSM's immediate responsibility. Such information is, in effect, still the primary responsibility of the State regulatory authority and potentially subject to correction through procedures of the State regulatory program. If correct information fails to enter the AVS, that may represent a weakness of the regulatory authority's decision making process. Accordingly, that process may require review. With respect to the State's decision making process, principles of primacy require that OSM review State actions in these matters in accordance with OSM's program oversight under parts 733, 842, and 843. In the exercise of program oversight however, it is also probable that OSM would review particular decisions with a view to determining whether the State regulatory authority complied with the provisions of its approved program. Accordingly, in the event that a State determines not to enter an ownership or control link into AVS, OSM will review such decision when it has reason to believe, through

information provided in a citizen's complaint or otherwise, that the State's ownership or control decision is arbitrary, capricious, or an abuse of discretion under the State program.

In final Section 773.25, OSM has deleted language contained in the proposed rule which would have provided that when OSM disagreed with the decisions of State regulatory authorities, OSM would take action, as appropriate, under Section 843.24, oversight of State permitting decisions with respect to ownership or control or the status of violations. This language has been deleted for two reasons. First, the proposed language was redundant. Paragraph (b)(3)(ii) of final Section 773.25 already provides that State regulatory authorities' decisions are subject to OSM's oversight under parts 733, 842, and 843 of 30 CFR. As a section of part 843, the provisions of final Section 843.24 would thus be applicable under appropriate circumstances. Further, the agency was concerned that additional language specifically requiring OSM to take action under final Section 843.24 could somehow be construed as a limiting factor on OSM's authority to take action under parts 733 or 842 or under other sections of part 843 as provided by previous paragraph (b)(3)(ii) or 773.25.

Paragraph (c) of final Section 773.25 establishes evidentiary standards applicable to the formal and informal review of ownership or control links and the status of violations. The provisions of the final section are substantively similar to the provisions of the comparable provisions of the proposed rule. Certain minor changes described below have been made to the proposal.

Paragraph (c)(1) of final Section 773.25 provides that in any formal or informal review of an ownership or control link or of the status of a violation covered by a violation notice, the agency responsible for making a decision is required to first make a prima facie determination or showing that the link exists, existed during the relevant period, and/or that the violation remains outstanding. The language "existed during the relevant period" has been added to the final rule to clarify that, even when a person is not a current owner or controller of a surface coal mining operation, a previous ownership or control link to that operation may be the basis for permit denial where the surface coal mining operation has an outstanding violation and that violation had its inception during the previous period of ownership or control. The requirement of a prima facie determination or prima facie showing is satisfied by evidence presented establishing a presumption of ownership or control. A prima facie determination is made when the agency is reviewing the evidence itself, in an informal process; a prima facie showing is made when the agency's determination is the subject of a formal administrative or judicial review process. When the agency makes such a determination or showing, the person seeking to challenge the link or the status of the violation than has the burden of proving the necessary elements of his or her challenge to the link or to the status of the violation by a preponderance of the evidence.

Also, in the comparable provision of the proposed rule, the rule language referred to the evidentiary standards applicable to the review of ownership or control links "to a person cited in a violation notice." The final rule has been changed to reflect that these standards will be applicable to the review of an ownership or control link, without regard to whether such relationship involves a link to an outstanding violation. The rationale for such a change has been explained previously in this preamble in the discussion of a similar change made in paragraph (a)(1) of this final rule section. As in the proposed rule, where there is a link to a violation, these evidentiary standards will apply to the review of the status of a violation.

Paragraph (c)(1) of final Section 773.25, requires a challenger of an ownership or control link to prove at least one of three proposed conclusions by a preponderance of the evidence to succeed in his or her challenge.

Under paragraph (c)(1)(i) of final Section 773.25, a challenger can demonstrate that the facts relied upon by the responsible agency to prove ownership or control under the definitions of "owned or controlled" or "owns or controls" contained in 30 CFR 773.5 do not or did not exist. The final regulation differs from the comparable provision of the proposed regulation in that while the final regulation refers to 30 CFR 773.5, it does not specifically cite particular paragraphs of 30 CFR 773.5 defining presumed and deemed relationships of ownership or control. On June 28, 1993, OSM proposed rules which, if adopted, would modify the organization of regulatory language in 30 CFR 773.5. See Proposed Rule, 58 *Fed. Reg.* 34652 (June 28, 1993). By changing the language in paragraph (c)(1)(i) of final Section 773.25 to delete references to the current paragraph organization of 30 CFR 773.5, OSM retains the flexibility to adopt or reject its rule proposal of June 28, 1993, without having to further modify final Section 773.25.

Paragraph (c)(1)(ii) of final Section 773.25 provides that a person challenging a presumption of ownership or control can prove that the person subject to the presumption does not and did not have authority directly or indirectly to determine the manner in which surface coal mining operations were conducted. The final rule deletes a reference

contained in the proposed rule to the paragraph (d) of the proposed rule which provided the required proof for the rebuttal of ownership or control presumptions. As indicated above, that portion of the proposed rule has been withdrawn.

Paragraph (c)(1)(iii) of final Section 773.25 provides that a challenger can prove that the violation covered by a violation notice did not exist, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal within the meaning of 30 CFR 773.15(b)(1). The final rule provides that a person challenging the status of a violation under Section 773.24 will not be able to challenge the existence of the violation at the time it was cited unless such challenge is made by a permittee within the context of Sections 773.20-773.21 of this part. As indicated previously, the proposed rule did not explicitly allow challenge of the existence of the violation by a permittee within the context of improvident permit issuance. The proposed rule also did not include the words "at the time it was cited" with respect to the concept "existence of the violation." The final rule has provided such clarification. Also, references to proposed Section 773.25, procedures for challenging ownership or control links prior to entry in AVS, have been deleted. In addition, while no further substantive change has been made to the text of paragraph (c)(1)(iii) of final Section 773.25, some editing has been done to clarify the parallel construction of the regulatory text.

Under the provisions of final Section 773.25, the existence of the violation at the time it was cited could also be challenged in a proceeding under 30 CFR part 775 (involving administrative or judicial appeals of permitting decisions), unless the challenger has failed to take timely advantage of a prior opportunity to litigate the violation or is bound by a previous administrative or judicial determination concerning the existence of the violation.

In addition, certain minimal changes have been made to the proposed rule with respect to the submission of documents in the proof of challenges. Paragraphs (c)(2)(i)(B) and (c)(2)(i)(C) of proposed Section 773.26 provided that certified copies of corporate documents and certified copies of documents filed with or issued by State, Municipal, or Federal government agencies could be submitted. Paragraphs (c)(2)(i)(B) and (c)(2)(i)(C) of final Section 773.25 clarify that copies of such documents can be submitted only "if certified."

Paragraph (c)(2)(i)(D) of final Section 773.25 provides for a challenger's submission of an opinion of counsel in support of his or her position. Such opinion would be appropriate for submission when it is supported by evidentiary materials; when it is rendered by an attorney who certifies that he or she is qualified to render an opinion of law; and when counsel states that he or she has personally and diligently investigated the facts of the matter or where counsel states that such opinion is based upon information which has been supplied to counsel and which is assumed to be true.

In accordance with the discussion above, the proposed rule has been renumbered as final rule Section 773.25 and adopted as modified.

Deferral of action on proposed Section 773.27-Periodic Check of Ownership or Control Information. In the September, 1991 proposed rule package, OSM proposed this section which would have required that the regulatory authority engage in periodic review of a permitted site to assure that basic ownership and control information contained in the current official record of the permit was and remains complete and accurate. Subsequent to the publication of that proposal, OSM published a modified version of such proposal as part of a comprehensive rule proposal designed to address permit information requirements; ownership or control; and the transfer, assignment and sale of permit rights. See *58 FR 34652, 34666* (June 28, 1993). OSM intends to address the proposed rule within the context of the subsequent rulemaking. Accordingly, OSM defers any decision with respect to this proposed rule.

3. PART 778 - PERMIT APPLICATIONS-MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION

Deferral of action on proposed Section 778.13-Identification of Interests. In the September, 1991 proposal, OSM proposed to revise the provisions of paragraphs (c) and (d) of then current 30 CFR 778.13 to clarify that permit applicants would be required to disclose relevant information with respect to both "deemed" and "presumed" owners or controllers within the meaning of the definitions of "owned or controlled" and "owns or controls" under 30 CFR 773.5 (a) and (b), respectively.

Subsequent to the publication of that proposal, OSM published a new proposed amendment to 30 CFR 778.13 as part of the comprehensive rule proposal cited above which was designed to address permit information requirements; ownership or control; and the transfer, assignment and sale of permit rights. See *58 FR 34652, 34668* (June 28, 1993).

Accordingly, OSM hereby defers any decision with respect to the amendments proposed to 30 CFR 778.13 in today's rulemaking. Instead, OSM will address proposed amendments to 30 CFR 778.13 within the context of that subsequent proposal.

SECTION 778.14 - VIOLATION INFORMATION.

The proposed amendment would have provided that the introductory language in paragraph (c) of 30 CFR 778.14 be amended to require a permit applicant to disclose all violation notices received by the applicant within the preceding three years. In addition, such introductory language would have been amended to require the disclosure of all outstanding violation notices for any surface coal mining operation that is deemed or presumed to be owned or controlled by either the applicant or by any person who is deemed or presumed to own or control the applicant under definitions of "owned or controlled" or "owns or controls" under 30 CFR 773.5.

The regulation to be amended required the applicant to disclose violations of various laws listed in 30 CFR 778.14(c). Use of the proposed amended definition of "violation notice" from 30 CFR 773.5 would have obviated the need for such a list.

The regulation to be amended further required that the applicant provide only a list of unabated cessation orders and unabated air and water quality violation notices received prior to the date of the application by any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant. With respect to this second list, that regulation did not require that an applicant list notices of violation received or unpaid penalties or fees incurred by any surface coal mining operation owned or controlled by the applicant or by any person who owns or controls the applicant.

Moreover, in litigation relating to Sections 778.14, 773.15(b)(1), and related matters before the U.S. District Court of the District of Columbia, the Secretary advised the court that he had decided to reconsider Section 778.14(c). The Secretary stated that he intended to propose a regulation "which considers the extent to which violation information should be reported concerning owners and controllers of applicants as well as entities owned or controlled by the applicant." See *National Wildlife Fed'n v. Lujan*, No. 88-3117-AER (D.D.C.), Memorandum of Points and Authorities in Support of the Federal Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment, footnote 33, at page 90.

Consistent with the representation made to the court, the proposed amendment to paragraph (c) of Section 778.14 would have required an applicant to disclose all outstanding violation notices received by any surface coal mining operation that was deemed or presumed to be owned or controlled by either the applicant or any person who was deemed or presumed to own or control the applicant.

Commenters representing members of the coal industry expressed concern over the proposed amendment to 30 CFR 778.14(c) for essentially three reasons. They asserted that the proposed amendment impermissibly expanded the types of violations which must be reported by an applicant by incorporating the newly amended definition of "violation notice" as the basis for reporting; that the proposal inappropriately expanded the definition of "owners or controllers" which must be reported; and that the proposal inappropriately expanded the type of information required for operations linked through ownership or control.

OSM disagrees with the commenters' assertions. First, the proposed regulation does incorporate the new definition of the term "violation notice" which had been proposed, and has now been adopted, in Section 773.5. The new definition of violation notice, however, is not overly broad. In this preamble, OSM has already responded to similar comments made with respect to this definition in the section of this preamble captioned "Section 773.5-Definitions."

By incorporating the amended definition of "violation notice," the proposed amendment to paragraph (c) of Section 778.14 would have incorporated the list and types of violations which are relevant to a regulatory authority's decision whether to issue a permit under section 510(c) of the Act and under the provisions of 30 CFR 773.15(b)(1). In contrast to this, the unamended version of the regulation did not require that an applicant list unpaid penalties or fees incurred by any surface coal mining operation owned or controlled by the applicant or by any person who owns or controls the applicant. Accordingly, the proposed amendment would expand what has to be reported to enable the regulatory

authority to have necessary information to make its decision. It is entirely appropriate to require that a permit applicant report such information to the regulatory authority so that the regulatory authority can make an informed decision.

As indicated above, commenters further asserted that the proposal inappropriately expanded the definition of "owners or controllers" by requiring the reporting of all outstanding violations received prior to the date of permit applications by surface coal mining operations deemed or presumed to be owned or controlled by the applicant or by any person who owns or controls the applicant. The commenters asserted that this placed the applicant in an untenable position. OSM disagrees with this assertion.

Even if 30 CFR 778.14(c) would not be amended by the proposal, the regulation already required the reporting of violations of surface coal mining operations which the applicant is deemed or presumed to own or control under the provisions of 30 CFR 773.5. Such reporting is required even if the applicant believes that he or she can rebut the presumption of ownership or control. The permit application is not forced to admit ownership or control. On the contrary, such reporting can be done by an applicant who, at the same time, reserves his or her rights to deny ownership or control. Even under current law, the applicant must disclose violations incident to the presumed ownership or control relationship so that the regulatory authority can evaluate this information. Thus, the amendment would just clarify what the regulation already does. Therefore, the amendment has not inappropriately expanded the definition of what constitutes surface coal mining operations owned or controlled by the applicant.

Commenters further asserted that the proposal inappropriately expanded the type of information required for operations linked through ownership or control. In substance, the commenters argued that the proposed regulation is overbroad and vague in requiring the reporting of "all outstanding violation notices" received prior to the date of application which are linked, through ownership or control, to the applicant. Again, OSM disagrees with the commenters.

As discussed previously in this preamble with respect to Section 773.25 of the final rule, an "outstanding violation" is one which is currently in violation of the Act or of other laws specified in Section 510(c) of the Act. Under the proposed amendment to 30 CFR 778.14(d), an "outstanding violation notice" is a written notification from a governmental entity advising of a violation which remains uncorrected. Such violations are the basis for permit denial unless an applicant can demonstrate that the violation is in the process of being corrected or is the subject of a good faith appeal, within the meaning of 30 CFR 773.15(b)(1). It is reasonable to require, prior to the date of application, that a permit applicant disclose such violations to the regulatory authority with respect to surface coal mining operations to which it is linked through ownership or control.

One commenter suggested that the proposed amendment should be modified to require only the reporting of violations which would subject an applicant to permit block. OSM considers this proposal to be too restrictive. For instance, under commenter's proposal, an applicant correcting a violation to the satisfaction of the agency which has jurisdiction over such violation would not report such violation at the time of application. Nevertheless, any permit to be issued should be conditioned upon the performance of the corrective work being accomplished. Absent the reporting of such violation by the applicant, a regulatory authority might overlook the violation and issue the permit unconditioned upon such performance. The same rationale would apply with respect to the reporting of violations which are the subject of good faith appeal, within the meaning of 30 CFR 773.15(b)(1). Accordingly, OSM must reject the proposed change.

In addition, commenters asserted that requiring such disclosure by large companies with multiple affiliates and multiple surface coal mining operations is overly burdensome. OSM believes that companies which own or control surface coal mining operations should be aware of the compliance status of such operations. If companies choose to engage in surface coal mining operations, they should also have the capability of monitoring such operations. It is reasonable to require the disclosure of outstanding violations. Thus, OSM disagrees with the commenters' assertion.

Nevertheless, OSM intends to further address the issues of compliance under 30 CFR 778.13 and 778.14. In a recently proposed rule package of June 28, 1993, OSM proposed the streamlining of companies' reporting under 30 CFR 778.13 and 778.14 through the use of information already incorporated into AVS. See *58 FR 34652* et seq. (June 28, 1993). Further, OSM's AVS Office stands ready to work with companies in the development of methods to report such companies' ownership or control relationships and to track the compliance of surface coal mining operations.

As indicated previously in the preamble discussion of final section 773.15, OSM has decided to retain a limited presumption that notices of violation are in the process of being abated for purposes of a regulatory authority's review of a permit application. OSM made this decision as result of comments received in response to its proposed rules. Accordingly, OSM has amended paragraph (b)(1) of final Section 773.15 to provide that a regulatory authority may presume, in the absence of a cessation order, that a notice of violation is in the process of abatement if certain conditions are present. These conditions include that the abatement period for the notice of violation has not yet expired and that the applicant has provided certification that such violation is in the process of being corrected to the agency with jurisdiction over the violation as part of the violation information provided pursuant to Section 778.14. In accordance with that change made to final Section 773.15, OSM has added language to paragraph (c) of final Section 778.14 requiring that an applicant provide such certification along with his or her disclosure of violations.

In accordance with the above discussion, OSM has determined to adopt, with the modification noted, the proposed amendment to 30 CFR 778.14(c) as a final rule.

4. PART 840 - STATE REGULATORY AUTHORITY: INSPECTION AND ENFORCEMENT

SECTION 840.13-ENFORCEMENT AUTHORITY. The proposed rule provided that paragraph (b) of 30 CFR 840.13 be amended to include a reference to proposed Section 843.23 as an enforcement provision whose stringency must be matched by State programs. As has been stated previously in this preamble, OSM has deferred action on the adoption of proposed Section 843.23 for a later rulemaking. See Proposed Rule, *58 FR 34652* et seq. (June 28, 1993). While OSM has adopted the reference to 843.23 for inclusion in paragraph (b) of 30 CFR 840.13, the adoption of such reference does not prejudice whether OSM will ultimately adopt proposed Section 843.23 as a final rule.

5. PART 843 - FEDERAL ENFORCEMENT

PART 843 - TABLE OF CONTENTS.

In the September, 1991, proposal, OSM proposed to amend the Table of Contents of 30 CFR part 843 to add, in numerical order, the proposed regulations for the Federal enforcement of the proposed AVS-related regulations. The proposed additions would have included Section 843.23, sanctions for knowing omissions or inaccuracies in ownership or control and violation information, and Section 843.24, oversight of State permitting decisions with respect to ownership or control of the status of violations.

Subsequent to the publication of the proposed additions to the Table of Contents, OSM proposed a modified version of 843.23 as part of a separate rulemaking. See Proposed Rule, *58 FR 34652* et seq. (June 28, 1993). OSM has deferred action on the adoption of proposed Section 843.23 for that later rulemaking. Since action on proposed Section 843.23 has been deferred, OSM will not adopt a reference to Section 843.23 for inclusion in the Table of Contents at this time. If a final version of 843.23 is adopted, a reference to the section will be added to the Table of Contents.

OSM has adopted the proposed reference to 843.24, oversight of State permitting decisions with respect to ownership or control or the status of violations, for inclusion in the Table of Contents.

SECTION 843.10 - INFORMATION COLLECTION.

The September, 1991, proposal would have removed existing section 843.10 since part 843 did not contain any information collection requirements which required the approval by the Office of Management and Budget under *44 U.S.C. 3507*. The references to Section 843.14(c) and 843.16 in existing 843.10 did not represent information collection requirements. The requirements in Section 843.14(c) for OSM to furnish copies of notices and orders to the State regulatory authority and to any person having an interest did not require OMB approval because the obligation to provide the information was imposed upon OSM and not upon the State or upon a member of the public. Section 843.16 merely informed the public of the right to file an application for review and request a hearing under 43 CFR part 4.

In accordance with the proposal, OSM has deleted section 843.10.

Deferral of decision with respect to proposed Section 843.23-Sanctions for knowing omissions or inaccuracies in ownership or control and violation information. Proposed Section 843.23 was designed to respond to those

circumstances in which there had been a knowing failure to provide the regulatory authority with complete and accurate ownership and control or violation information in an application or other document submitted pursuant to parts 773 and 778 of Title 30.

Proposed Section 843.23 was designed "to carry out the purposes" of sections 507(b)(4), 510(b), 510(c), and 518(g) of SMCRA. The proposed section was designed to deter and punish the intentional failure to provide the complete and accurate ownership and control information required by sections 507(b)(4) and 510 (b)-(c) of the Act. It would have further implemented the criminal provisions of section 518(g) where appropriate.

Subsequently, OSM again proposed this rule with certain modifications. See *58 FR 34652* et seq. (June 28, 1993).

At this time, OSM has determined to defer further action on the proposed rule. OSM will address the proposed rule within the context of the subsequent rulemaking initiated on June 28, 1993.

As has been discussed previously in this preamble, OSM has allowed references to Section 843.23 to remain in various sections of some of the other final rules adopted today in the event that a final Section 843.23 is adopted. That such references have been allowed to remain, however, does not constitute a prejudgment by OSM to ultimately adopt proposed Section 843.23 or some version of that rule. Any decision of this type will be made within the context of the subsequent rulemaking.

SECTION 843.24 - OVERSIGHT OF STATE PERMITTING DECISIONS WITH RESPECT TO OWNERSHIP OR CONTROL OR THE STATUS OF VIOLATIONS.

Proposed Section 843.24 would have provided standards for OSM's oversight of State permitting decisions with respect to ownership or control or the status of violations.

Paragraph (a) of proposed Section 843.24 would have established the bases which would have required OSM to have taken action under the provisions of paragraphs (b) and (c) of proposed Section 843.24.

Paragraph (a)(1) of proposed Section 843.24 would have provided that OSM would have been required to take action whenever it determined, through its oversight of the implementation of State programs, that a State had issued a permit without complying with the State program equivalents of proposed Sections 773.22 (verification of ownership or control application information), 773.23 (review of ownership or control and violation information), 773.24 (procedures for challenging ownership or control links in AVS), 773.26 (standards for challenging ownership or control links and the status of violations), and 843.23 (sanctions for knowing omissions or inaccuracies in ownership or control and violation information).

Paragraph (a)(2) of proposed Section 843.24 would have provided that OSM would have been required to take action whenever it had determined, through its oversight of the implementation of State programs, that a State had failed in a systemic manner to comply with the State program equivalent of proposed Section 773.27 (periodic check of ownership or control information).

Paragraph (a)(2) of proposed Section 843.24 would have defined "failure to comply in a systemic manner" to include a continuing pattern of noncompliance by a State, or one of more instances of noncompliance that result from or evidence a legal or policy decision which the State intended to apply to similar cases.

Under paragraph (a) of proposed Section 843.24, a State's isolated failure to comply with proposed Section 773.27 (periodic check of ownership and control information) would have been treated differently from isolated failures to comply with the proposed regulations listed in paragraph (a)(1) of proposed Section 843.24.

Paragraph (b) of proposed Section 843.24 would have required OSM to initiate action under 30 CFR 843.21 if, as a result of the determination made under paragraph (a) of the proposed section, OSM had reason to believe that the State had issued a permit improvidently within the meaning of 30 CFR 773.20.

Paragraph (c) of proposed Section 843.24 would have provided for remedial actions by OSM against a State which did not comply with the proposed regulations relating to ownership or control and violation information during the

permit application process. Such actions would have been applied where the State had knowingly failed to comply with the State program equivalents of sections 773.22 (verification of ownership or control application information), 773.23 (review of ownership or control and violation information), 773.24 (procedures for challenging ownership or control links in AVS), 773.26 (standards for challenging ownership or control links and the status of violations), or 843.23 (sanctions for knowing omissions or inaccuracies in ownership or control and violation information), or where the State had failed in a systemic manner to comply with Section 773.27 (periodic check of ownership and control information).

Under the proposed regulation, the remedial actions against a non-complying State could have included grant reduction or termination under 30 CFR 735.21 or 30 CFR 886.18 and the substitution of Federal enforcement or other action pursuant to 30 CFR 733.12(b). Such remedial actions would not have been used where the State's actions were mandated by court order or where the State had not knowingly failed to comply.

A commenter representing environmental advocacy groups expressed concern that proposed Section 843.24 did not expressly provide that citizens could petition OSM to take enforcement action where they had reason to believe that violations of the sections subject to Section 843.24 exist. OSM recognizes commenter's concern about citizen participation and has addressed that issue in some detail above in this preamble in the section captioned "Citizen Participation." The analysis in that section of the preamble is generally applicable to proposed Section 843.24. For reasons similar to those expressed in that section of the preamble, OSM must reject commenter's proposal to explicitly modify the proposed rule at this time.

Until these matters are addressed directly by further proposal of the agency, citizens could, however, assert their rights in a number of ways in accordance with the provisions of proposed Section 843.24. With respect to specific permits under paragraph (b) of proposed Section 843.24, concerned citizens could assert their complaints within the context of 30 CFR 842.11, 842.12, 842.15, and 843.21. With respect to more global remedies such as the reduction of State grants or the termination or the substitution of Federal enforcement provided by paragraph (c) of proposed Section 843.24, OSM could accept and review information submitted by citizens with a view to determining whether such remedies were appropriate under the circumstances.

The commenter also took issue with the provision of paragraph (b) of proposed Section 843.24 in that such provision would have provided that OSM take action under the provisions of 30 CFR 843.21 if OSM had reason to believe that a State had issued a permit improvidently within the meaning of 30 CFR 773.20. The commenter questioned the legality of 30 CFR 773.20 and 843.21 and asserted that these improvidently issued permit rules violated SMCRA. OSM disagrees with commenter's criticisms. OSM considers these rules to be legal. OSM incorporates by reference the arguments that the Department has made defending such rules in briefs filed in the case of *National Wildlife Federation v. Lujan*, No. 88-3117 (D.D.C.), and *Save Our Cumberland Mountains, Inc., v. Lujan*, No. 81-2134 (D.D.C.). As indicated previously, copies of these briefs are being placed in the Administrative Record of this rulemaking.

A commenter representing State regulatory authorities questioned the provision of paragraph (c) of proposed Section 843.24 which stated that a State regulatory authority would be excused from a failure to comply with the State program equivalents of the AVS-related regulations if such non-compliance was the result of a "mandatory injunction." The commenter asked for clarification of this term.

Under the proposed regulation, a mandatory injunction would be an order to a regulatory authority by a court with jurisdiction over which the regulatory authority has no control. Such an order would have the effect of ordering or otherwise preventing the regulatory authority from complying with the provisions of the regulations cited in paragraph (c) of proposed Section 843.24.

A commenter representing a State regulatory authority indicated approval of the requirement contained in paragraph (c) of proposed Section 843.24 that a State's failure to comply with proposed Sections 773.22, 773.23, 773.24, 773.26, and 843.23 be a "knowing" failure, before sanctions could be imposed.

OSM agrees with commenter and has retained the "knowing" standard in paragraph (c) of the final rule adopted as described below. The determination of what constitutes a State's "knowing" behavior would be made based upon a full consideration of the facts. In substance, the issue would be whether the State knew or had reason to know that its actions constituted a failure to comply with the regulations.

OSM has determined to adopt the proposed rule, with certain modifications, as final rule Section 843.24. The final rule and the rationale behind such modifications are now described.

First, in paragraph (a) of the proposed rule, a reference to proposed Section 773.26 has been deleted from among the list of regulations with which a State must comply to avoid action by OSM. As discussed previously, proposed Section 773.26 has been renumbered and adopted as final Section 773.25. Accordingly, a reference to Section 773.25 has been substituted in paragraph (a) of final Section 843.24. A similar substitution has also been made in paragraph (c) of the final rule.

Second, OSM has deleted subparagraph (a)(2) of proposed Section 843.24. The proposed section would have required action by OSM when OSM determined that a State had systemically failed to comply with proposed Section 773.27, periodic check of ownership or control information. As has been discussed previously, OSM is deferring action on proposed Section 773.27 as part of a subsequent rulemaking. See *58 FR 34652* et seq.

In dealing with a similar deferral with respect to proposed Section 843.23 described above in this preamble, OSM was able to allow references to proposed Section 843.23 to remain in other final rules in the event of the ultimate adoption of 843.23. If Section 843.23 is ultimately not adopted, the references in the final rules to it will be mere surplusage.

Unlike those other references to proposed Section 843.23, the references to proposed Section 773.27 contained in final Section 843.24 are presented within a context of defining and applying a special standard, systemic noncompliance, applicable only to a State's failure to comply with Section 773.27. The rationale for adopting the particular standard of systemic noncompliance is inextricably linked to the issue of whether the adoption of proposed Section 773.27 is appropriate. Accordingly, both issues will be appropriately addressed together in the separate rulemaking. Thus, OSM has deleted all of subparagraph (a)(2) of proposed Section 843.24.

Further, the provisions of paragraph (c) of proposed Section 843.24 would have required OSM to initiate action under Sections 735.21 or 886.18 and/or Section 733.12 if OSM determined that a State had failed to comply in a systemic manner with the State program equivalent to Section 773.27. In the final Section 843.24, OSM has deleted such language for the reasons justifying a similar deletion of subparagraph (a)(2) of the proposed rule.

OSM emphasizes that the deletion of this language does not indicate that OSM has made a prejudgment with respect to the ultimate adoption of proposed Section 773.27 or with respect to the issue of systemic noncompliance with respect to such proposed section. These matters will be addressed in the subsequent rulemaking.

In accordance with the above discussion, Section 843.24 is adopted as modified.

III. PROCEDURAL MATTERS

Effect of the Rule in Federal Program States and on Indian Lands

This rule will apply, through cross-referencing, in those States with Federal programs: California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The rule will also apply through cross-referencing to Indian lands as provided in 30 CFR part 750. No comments were received concerning unique conditions in any of these Federal program states or on Indian lands which would require changes to the national rules or as specific amendments to any or all of the Federal programs or the Indian lands program.

Effect of the Rule on State Programs

The provisions of section 503(a)(1) of the Act require that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of the Act. Further, section 503(a)(7) of the Act requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to the Act.

These terms are defined at Section 730.5 of title 30 of the Code of Federal Regulations to require that State programs contain procedures which are, with respect to the Act, no less stringent than the Act; and with respect to the Secretary's regulations, no less effective than the Secretary's regulations in meeting the requirements of the Act.

Following promulgation of this final rule, OSM will evaluate State programs to determine whether any changes in these programs will be necessary. If the Director determines that any State program provisions should be amended to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

Federal Paperwork Reduction Act

The collection of information contained in this rule has been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance numbers 1029-0034, 1029-0041, and 1029-0051.

Executive Order 12778; Civil Justice Reform Certification

This rule has been reviewed under the applicable standards of Section 2(b)(2) of Executive Order 12778, Civil Justice Reform (56 FR 55195). In general, the requirements of Section 2(b)(2) of Executive Order 12778 are covered by the preamble discussion of this rule. Additional remarks follow concerning individual elements of the Executive Order:

A. What is the Preemptive Effect, if any, to be Given to the Regulation?

The rule would have the same preemptive effect as other standards adopted pursuant to SMCRA. To retain primacy, States have to adopt and apply standards for their regulatory programs that are no less effective than those set forth in OSM's rules. Any State law that is inconsistent with, or that would preclude implementation of this proposed rule would be subject to preemption under SMCRA section 505 and implementing regulations at 30 CFR 730.11. To the extent that the rules would result in preemption of State law, the provisions of SMCRA are intended to preclude inconsistent State laws and regulations. This approach is established in SMCRA, and has been judicially affirmed. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).

B. What is the Effect on Existing Federal Law or Regulation, if any, Including all Provisions Repealed or Modified?

This rule modifies the implementation of SMCRA as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the Federal regulatory provisions that are affected by this rule.

C. Does the Rule Provide a Clear and Certain Legal Standard for Affected Conduct Rather than a General Standard, While Promoting Simplification and Burden Reduction?

The standard established by this rule are as clear and certain as practicable, given the complexity of topics covered and the mandates of SMCRA.

D. What is the Retroactive Effect, if any, to be Given to the Regulation?

This rule is not intended to have retroactive effect.

E. Are Administrative Proceedings Required Before Parties may File Suit in Court? Which Proceedings Apply? Is the Exhaustion of Administrative Remedies Required?

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, 30 U.S.C. 1276(a)

Prior to any judicial challenge to the application of the rule, however, administrative procedures must be exhausted. In situations involving OSM application of the rule, applicable administrative procedures may be found at 43 CFR part 4. In situations involving State regulatory authority application of provisions equivalent to those contained in this rule, applicable administrative procedures are set forth in the particular State program.

F. Does the Rule Define Key Terms, Either Explicitly or by Reference to Other Regulations or Statutes That Explicitly Define Those Items?

Terms which are important to the understanding of this rule are set forth in 30 CFR 700.5 and 701.5.

G. Does the Rule Address Other Important Issues Affecting Clarity and General Draftsmanship of Regulations set Forth by the Attorney General, With the Concurrence of the Director of the Office of Management and Budget, That are Determined to be in Accordance With the Purposes of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

Regulatory Flexibility Act

The Department of the Interior has determined that this final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. et seq. The final rule will not change costs to industry or to the Federal, State, or local governments. Furthermore, the rules produce no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

Executive Order 12866

The final rule has been reviewed under Executive Order 12866.

National Environmental Policy Act (NEPA)

OSM has prepared a final environmental assessment (EA) of this rule and has made a finding that the rules adopted in this rulemaking will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). A finding of no significant impact (FONSI) has been approved for the final rule in accordance with OSM procedures under NEPA. The EA is on file in the OSM Administrative Record, room 660, 800 North Capitol St., NW., Washington, DC.

Author: The principal author of this final rule is Harvey P. Blank, Attorney-Adviser, Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior, 1849 C Street, NW, Washington, DC 20240. Inquiries, however, with respect to the rule should be directed to Russell Frum at the address and telephone number specified in FOR FURTHER INFORMATION CONTACT.

LIST OF SUBJECTS

30 CFR Part 701

Law enforcement, Surface mining, Underground mining.

30 CFR Part 773

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 778

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 840

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 843

Administrative practice and procedure, Law enforcement, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: July 18, 1994.

Bob Armstrong, Assistant Secretary, Land and Minerals Management.

Accordingly, 30 CFR Parts 701, 773, 778, 840, and 843 are amended as set forth below:

PART 701 - PERMANENT REGULATORY PROGRAM

1. The authority citation for part 701 continues to read as follows:

Authority: Pub. L. 95-87 (*30 U.S.C. 1201 et seq.*), and Pub. L. 100-34.

SECTION 701.5 -- [Amended]

2. Section 701.5 is amended by deleting the definition of "Violation notice."

PART 773 - REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

3. and 4. The authority citation for part 773 continues to read as follows:

Authority: *30 U.S.C. 1201 et seq.*, *16 U.S.C. 470 et seq.*, *16 U.S.C. 1531 et seq.*, *16 U.S.C. 661 et seq.*, *16 U.S.C. 703 et seq.*, *16 U.S.C. 668a et seq.*, *16 U.S.C. 469 et seq.*, *16 U.S.C. 470aa et seq.*, and Pub. L. 100-34.

5. Section 773.5 is amended by adding the definitions of "Applicant/Violator System or AVS," "Federal violation notice," "Ownership or control link," "State violation notice," and "Violation notice," in alphabetical order as follows:

SECTION 773.5 -- DEFINITIONS.

* * * * *

APPLICANT/VIOLATOR SYSTEM OR AVS means the computer system maintained by OSM to identify ownership or control links involving permit applicants, permittees, and persons cited in violation notices.

FEDERAL VIOLATION NOTICE means a violation notice issued by OSM or by another agency or instrumentality of the United States.

* * * * *

OWNERSHIP OR CONTROL LINK means any relationship included in the definition of "owned or controlled" or "owns or controls" in this section or in the violations review provisions of Section 773.15(b) of this part. It includes any relationship presumed to constitute ownership or control under the definition of "owned or controlled" or "owns or controls" in this section, unless such presumption has been successfully rebutted under the provisions of Sections 773.24 and 773.25 of this part or under the provisions of part 775 of this chapter and Section 773.25.

STATE VIOLATION NOTICE means a violation notice issued by a State regulatory authority or by another agency or instrumentality of State government.

VIOLATION NOTICE means any written notification from a governmental entity, whether by letter, memorandum, judicial or administrative pleading, or other written communication, of a violation of the Act; any Federal rule or regulation promulgated pursuant thereto; a State program; or any Federal or State law, rule, or regulation pertaining to air or water environmental protection in connection with a surface coal mining operation. It includes, but is not limited to, a notice of violation; an imminent harm cessation order; a failure-to-abate cessation order; a final order, bill, or demand letter pertaining to a delinquent civil penalty; a bill or demand letter pertaining to delinquent abandoned mine reclamation fees; and a notice of bond forfeiture, where one or more violations upon which the forfeiture was based have not been corrected.

6. Section 773.10 is revised to read as follows:

SECTION 773.10 -- INFORMATION COLLECTION.

(a) The collections of information contained in 30 CFR part 773 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1029-0041. The information will be used by the regulatory authorities in processing applications. Response is required to obtain a benefit in accordance with 30 U.S.C. 1201 et seq.

(b) Public reporting burden for this collection of information is estimated to average four and one-half hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to *OSM Information Collection Clearance Officer, Room 640 NC, 1951 Constitution Ave., Washington, DC 20240*; and the Office of Management and Budget, Paperwork Reduction Project (1029-0041), Washington, DC 20503.

7. Section 773.15 is amended by revising paragraphs (b)(1) introductory text and (b)(2) as follows:

SECTION 773.15 -- REVIEW OF PERMIT APPLICATIONS.

* * * * *

(b) Review of violations.

(1) Based on a review of all reasonably available information concerning violation notices and ownership or control links involving the applicant, including information obtained pursuant to Sections 773.22, 773.23, 778.13, and 778.14 of this chapter, the regulatory authority shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act, any Federal rule or regulation promulgated pursuant thereto, a State program, or any Federal or State law, rule, or regulation pertaining to air or water environmental protection. In the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation issued pursuant to Section 843.12 of this chapter or under a Federal or State program is being corrected to the satisfaction of the agency with jurisdiction over the violation where the abatement period for such notice of violation has not yet expired and where, as part of the violation information provided pursuant to Section 778.14 of this chapter, the applicant has provided certification that such violation is in the process of being so corrected. Such presumption shall not apply where evidence to the contrary is set forth in the permit application, or where the notice of violation is issued for nonpayment of abandoned mine land reclamation fees or civil penalties. If a current violation exists, the regulatory authority shall require the applicant or person who owns or controls the applicant, before the issuance of the permit, to either-

* * * * *

(2) Any permit that is issued on the basis of a presumption supported by certification under Section 778.14 of this chapter that a violation is in the process of being corrected, on the basis of proof submitted under paragraph (b)(1)(i) of this section that a violation is in the process of being corrected, or pending the outcome of an appeal described in paragraph (b)(1)(ii) of this section, shall be conditionally issued.

* * * * *

8. Section 773.20 is amended by revising paragraphs (b) and (c) to read as follows:

SECTION 773.20 -- IMPROVIDENTLY ISSUED PERMITS: GENERAL PROCEDURES.

* * * * *

(b) Review criteria.

(1) A regulatory authority shall find that a surface coal mining and reclamation permit was improvidently issued if-

(i) Under the violations review criteria of the regulatory program at the time the permit was issued:

(A) The regulatory authority should not have issued the permit because of an unabated violation or a delinquent penalty or fee; or

(B) The permit was issued on the presumption that a notice of violation was in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation, but a cessation order subsequently was issued; and

(ii) The violation, penalty, or fee:

(A) Remains unabated or delinquent; and

(B) Is not the subject of a good faith appeal, or of an abatement plan or payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency; and

(iii) Where the permittee was linked to the violation, penalty, or fee through ownership or control under the violations review criteria of the regulatory program at the time the permit was issued, an ownership or control link between the permittee and the person responsible for the violation, penalty, or fee still exists, or where the link has been severed, the permittee continues to be responsible for the violation, penalty, or fee.

(2) The provisions of Section 773.25 of this part shall be applicable when a regulatory authority determines:

(i) Whether a violation, penalty, or fee existed at the time that it was cited, remains unabated or delinquent, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, and

(ii) Whether any ownership or control link between the permittee and the person responsible for the violation, penalty, or fee existed, still exists, or has been severed.

(c) Remedial measures.

(1) A regulatory authority which, under paragraph (b) of this section, finds that because of an unabated violation or a delinquent penalty or fee a permit was improvidently issued shall use one or more of the following remedial measures:

(i) Implement, with the cooperation of the permittee or other person responsible, and of the responsible agency, a plan for abatement of the violation or a schedule for payment of the penalty or fee;

(ii) Impose on the permit a condition requiring that in a reasonable time the permittee or other person responsible abate the violation or pay the penalty or fee;

(iii) Suspend the permit until the violation is abated or the penalty or fee is paid; or

(iv) Rescind the permit.

(2) If the regulatory authority decides to suspend the permit, it shall afford at least 30 days' written notice to the permittee. If the regulatory authority decides to rescind the permit, it shall issue a notice in accordance with Section 773.21 of this part. In either case, the permittee shall be given the opportunity to request administrative review of the notice under 43 CFR 4.1370 through 4.1377, where OSM is the regulatory authority, or under the State program equivalent, where a State is the regulatory authority. The regulatory authority's decision shall remain in effect during the pendency of the appeal, unless temporary relief is granted in accordance with 43 CFR 4.1376 or the State program equivalent.

9. Section 773.21 is amended by replacing the reference to "Section 773.20(c)(4)" in the introductory paragraph with "Section 773.20(c)(1)(iv)" and by revising the introductory language contained in paragraph (a) to read as follows:

SECTION 773.21 -- IMPROVIDENTLY ISSUED PERMITS: RESCISSION PROCEDURES.

* * * * *

(a) Automatic suspension and rescission. After a specified period of time not to exceed 90 days the permit automatically will become suspended, and not to exceed 90 days thereafter rescinded, unless within those periods the permittee submits proof, and the regulatory authority finds, consistent with the provisions of Section 773.25 of this part, that-

* * * * *

10. Section 773.21 is further amended by deleting paragraph (c).

11. Section 773.22 is added as follows:

SECTION 773.22 -- VERIFICATION OF OWNERSHIP OR CONTROL APPLICATION INFORMATION.

(a) In accordance with Section 773.15(c)(1) of this part, prior to the issuance of a permit, the regulatory authority shall review the information in the application provided pursuant to Section 778.13 of this chapter to determine that such information, including the identification of the operator and all owners and controllers of the operator, is complete and accurate. In making such determination, the regulatory authority shall compare the information provided in the application with information from other reasonably available sources, including-

(1) Manual data sources within the State in which the regulatory authority exercises jurisdiction, including:
(i) The regulatory authority's inspection and enforcement records and (ii) State corporation commission or tax records, to the extent they contain information concerning ownership or control links; and

(2) Automated data sources, including:

(i) The regulatory authority's own computer systems and
(ii) the Applicant/Violator System.

(b) If it appears from the information provided in the application pursuant to Section 778.13(c) through (d) of this chapter that none of the persons identified in the application has had any previous mining experience, the regulatory authority shall inquire of the applicant and investigate whether any person other than those identified in the application will own or control the operation (as either an operator or other owner or controller).

(c) If, as a result of the review conducted under paragraphs (a) and (b) of this section, the regulatory authority identifies any potential omission, inaccuracy, or inconsistency in the ownership or control information provided in the application, it shall, prior to making a final determination with regard to the application, contact the applicant and require that the matter be resolved through submission of (1) An amendment to the application or (2) a satisfactory explanation which includes credible information sufficient to demonstrate that no actual omission, inaccuracy, or inconsistency exists. The regulatory authority shall also take action in accordance with the provisions of Section 843.23 of this chapter (or the State program equivalent), where appropriate.

(d) Upon completion of the review conducted under this section, the regulatory authority shall promptly enter into or update all ownership or control information on AVS.

12. Section 773.23 is added as follows:

SECTION 773.23 -- REVIEW OF OWNERSHIP OR CONTROL AND VIOLATION INFORMATION.

(a) Following the verification of ownership or control information pursuant to Section 773.22(b) of this part, the regulatory authority shall review all reasonably available information concerning violation notices and ownership or control links involving the applicant to determine whether the application can be approved under Section 773.15(b) of this part. Such information shall include-

(1) With respect to ownership or control links involving the applicant, all information obtained under Sections 773.22 and 778.13 of this chapter; and

(2) With respect to violation notices, all information obtained under Section 778.14 of this chapter, information obtained from OSM, including information shown in the AVS, and information from the regulatory authority's own records concerning violation notices.

(b) If the review conducted under paragraph (a) of this section discloses any ownership or control link between the applicant and any person cited in a violation notice-

(1) The regulatory authority shall so notify the applicant and shall refer the applicant to the agency with jurisdiction over such violation notice; and

(2) The regulatory authority shall not approve the application unless and until it determines, in accordance with the provisions of Sections 773.24 and 773.25 of this part (or the State program equivalent), (i) That all ownership or control links between the applicant and any person cited in a violation notice are erroneous or have been rebutted, or

(ii) that the violation has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, within the meaning of Section 773.15(b)(1) of this part (or the State program equivalent).

(c) Following the regulatory authority's decision on the application (including unconditional issuance, conditional issuance, or denial of the permit) or following the applicant's withdrawal of the application, the regulatory authority shall promptly enter all relevant information related to such decision or withdrawal into AVS.

13. Section 773.24 is added as follows:

SECTION 773.24 -- PROCEDURES FOR CHALLENGING OWNERSHIP OR CONTROL LINKS SHOWN IN AVS.

(a)(1) Any applicant or other person shown in AVS in an ownership or control link to any person may challenge such link in accordance with the provisions of paragraphs (b) through (d) of this section and Section 773.25 of this part, unless such applicant or other person is bound by a prior administrative or judicial determination concerning the link.

(2) Any applicant or other person shown in AVS in an ownership or control link to any person cited in a Federal violation notice may challenge the status of the violation covered by such notice in accordance with the provisions of paragraphs (b) through (d) of this section and Section 773.25 of this part, unless such applicant or other person is bound by a prior administrative or judicial determination concerning the status of the violation.

(3) Any applicant or other person shown in AVS in an ownership or control link to any person cited in a State violation notice may challenge the status of the violation covered by such notice in accordance with the State program equivalents to paragraphs (b) through (d) of this section and Section 773.25 of this part for the State that issued the violation notice, unless such applicant or other person is bound by a prior administrative or judicial determination concerning the status of the violation.

(b) Any applicant or other person who wishes to challenge an ownership or control link shown in AVS or the status of a Federal violation, and who is eligible to do so under the provisions of paragraphs (a)(1) or (a)(2) of this section, shall submit a written explanation of the basis for the challenge, along with any relevant evidentiary materials and supporting documents, to OSM, addressed to the Chief of the AVS Office, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, Washington, D.C. 20240.

(c) OSM shall review any information submitted under paragraph (b) of this section and shall make a written decision whether or not the ownership or control link has been shown to be erroneous or has been rebutted and/or whether the violation covered by the notice remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal within the meaning of Section 773.15(b)(1) of this part.

(d)(1) If, as a result of the decision reached under paragraph (c) of this section, OSM determines that the ownership or control link has been shown to be erroneous or has been rebutted and/or that the violation covered by the notice has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, OSM shall so notify the applicant or other person and, if an application is pending, the regulatory authority, and shall correct the information in AVS.

(2) If, as a result of the decision reached under paragraph (c) of this section, OSM determines that the ownership or control link has not been shown to be erroneous and has not been rebutted and that the violation covered by the notice remains outstanding, OSM shall so notify the applicant or other person and, if an application is pending, the regulatory authority, and shall update the information in AVS, if necessary.

(i) OSM shall serve a copy of the decision on the applicant or other person by certified mail, or by any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure. Service shall be complete upon tender of the notice or of the mail and shall not be deemed incomplete because of a refusal to accept.

(ii) The applicant or other person may appeal OSM's decision to the Department of the Interior's Office of Hearings and Appeals within 30 days of service of the decision in accordance with 43 CFR 4.1380 through 4.1387. OSM's decision shall remain in effect during the pendency of the appeal, unless temporary relief is granted in accordance with 43 CFR 4.1386.

14. Section 773.25 is added as follows:

SECTION 773.25 -- STANDARDS FOR CHALLENGING OWNERSHIP OR CONTROL LINKS AND THE STATUS OF VIOLATIONS.

(a) The provisions of this section shall apply whenever a person has and exercises a right, under the provisions of Sections 773.20, 773.21, 773.23, or 773.24 of this part or under the provisions of part 775 of this chapter, to challenge (1) an ownership or control link to any person and/or (2) the status of any violation covered by a notice.

(b) Agencies responsible.

(1) Except as provided in paragraph (b)(3) of this section-

(i) The regulatory authority before which an application is pending shall have responsibility for making decisions with respect to ownership or control relationships of the application.

(ii) The regulatory authority that issued a permit shall have responsibility for making decisions with respect to the ownership or control relationships of the permit.

(iii) The State regulatory authority for the State that issued a State violation notice shall have responsibility for making decisions with respect to the ownership or control relationships of the violation.

(iv) The regulatory agency that issued a violation notice, whether State or Federal, shall have responsibility for making decisions concerning the status of the violation covered by such notice, i.e., whether the violation remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, within the meaning of Section 773.15(b)(1) of this part.

(2) OSM shall have responsibility for making decisions with respect to the ownership or control relationships of a Federal violation notice.

(3)(i) With respect to information shown on AVS, the responsibilities referred to in paragraph (b)(1) of this section shall be subject to the plenary authority of OSM to review any State regulatory authority decision regarding an ownership or control link.

(ii) With respect to ownership or control information which has not been entered into AVS by a State and with respect to information shown on AVS relating to the status of a violation, State regulatory authorities' determinations are subject to OSM's program authority oversight under parts 733, 842, and 843 of this chapter.

(c) Evidentiary standards.

(1) In any formal or informal review of an ownership or control link or of the status of a violation covered by a violation notice, the responsible agency shall make a prima facie determination or showing that such link exists, existed during the relevant period, and/or that the violation covered by such notice remains outstanding. Once such a prima facie determination or showing has been made, the person challenging such link or the status of the violation shall have the burden of proving by a preponderance of the evidence, with respect to any relevant time period-

(i) That the facts relied upon by the responsible agency to establish: (A) Ownership or control under the definition of "owned or controlled" or "owns or controls" in Section 773.5 of this part or (B) a presumption of ownership or control under the definition of "owned or controlled" or "owns or controls" in Section 773.5 of this part, do not or did not exist;

(ii) That a person subject to a presumption of ownership or control under the definition of "owned or controlled" or "owns or controls" in Section 773.5 of this part, does not or did not in fact have the authority directly or indirectly to determine the manner in which surface coal mining operations are or were conducted, or

(iii) That the violation covered by the violation notice did not exist, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal within the meaning of Section 773.15(b)(1) of this part; provided that the existence of the violation at the time it was cited may not be challenged under the provisions Section 773.24 of this part: (A) By a permittee, unless such challenge is made by the permittee within the context of Sections 773.20 through 773.21 of this part; (B) by any person who had a prior opportunity to challenge the violation notice and who failed to do so in a timely manner; or (C) by any person who is bound by a prior administrative or judicial determination concerning the existence of the violation.

(2) In meeting the burden of proof set forth in paragraph (c)(1) of this section, the person challenging the ownership or control link or the status of the violation shall present probative, reliable, and substantial evidence and any supporting explanatory materials, which may include-

(i) Before the responsible agency-

(A) Affidavits setting forth specific facts concerning the scope of responsibility of the various owners or controllers of an applicant, permittee, or any person cited in a violation notice; the duties actually performed by such owners or controllers; the beginning and ending dates of such owners' or controllers' affiliation with the applicant, permittee, or person cited in a violation notice; and the nature and details of any transaction creating or severing an ownership or control link; or specific facts concerning the status of the violation;

(B) If certified, copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records;

(C) If certified, copies of documents filed with or issued by any State, Municipal, or Federal governmental agency.

(D) An opinion of counsel, when supported by (1) Evidentiary materials; (2) a statement by counsel that he or she is qualified to render the opinion; and (3) a statement that counsel has personally and diligently investigated the facts of the matter or, where counsel has not so investigated the facts, a statement that such opinion is based upon information which has been supplied to counsel and which is assumed to be true.

(ii) Before any administrative or judicial tribunal reviewing the decision of the responsible agency, any evidence admissible under the rules of such tribunal.

(d) Following any determination by a State regulatory authority or other State agency, or any decision by an administrative or judicial tribunal reviewing such determination, the State regulatory authority shall review the information in AVS to determine if it is consistent with the determination or decision. If it is not, the State regulatory authority shall promptly inform OSM and request that the AVS information be revised to reflect the determination or decision.

PART 778 - PERMIT APPLICATIONS-MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION

15. The authority citation for part 778 continues to read as follows:

Authority: Public Law 95-87, *30 U.S.C. 1201* et seq., and Public Law 100-34.

16. Section 778.14 is amended by revising the introductory language in paragraph (c) to read as follows:

SECTION 778.14 -- VIOLATION INFORMATION.

* * * * *

(c) A list of all violation notices received by the applicant during the three-year period preceding the application date, and a list of all outstanding violation notices received prior to the date of the application by any surface coal mining operation that is deemed or presumed to be owned or controlled by either the applicant or any person who is deemed or presumed to own or control the applicant under the definition of "owned or controlled" and "owns or controls" in Section 773.5 of this chapter. For each notice of violation issued pursuant to Section 843.12 of this chapter or under a Federal or State program for which the abatement period has not expired, the applicant shall certify that such notice of violation is in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation. For each violation notice reported, the list shall include the following information, as applicable:

* * * * *

PART 840 - STATE REGULATORY AUTHORITY: INSPECTION AND ENFORCEMENT

17. The authority citation for Part 840 continues to read as follows:

Authority: Public Law 95-87, *30 U.S.C. 1201* et seq., and Public Law 100-34, unless otherwise noted.

18. Section 840.13 is amended by revising paragraph (b) to read as follows:

SECTION 840.13 -- ENFORCEMENT AUTHORITY.

* * * * *

(b) The enforcement provisions of each State program shall contain sanctions which are no less stringent than those set forth in section 521 of the Act and shall be consistent with Sections 843.11, 843.12, 843.13, and 843.23 and subchapters G and J of this chapter.

PART 843 - FEDERAL ENFORCEMENT

19. and 20. The authority citation for part 843 continues to read as follows:

Authority: *30 U.S.C. 1201* et seq., as amended; and Pub. L. 100-34.

SECTION 843.10 -- [Removed]

21. Section 843.10 is removed.

22. Section 843.24 is added as follows:

SECTION 843.24 -- OVERSIGHT OF STATE PERMITTING DECISIONS WITH RESPECT TO OWNERSHIP OR CONTROL OR THE STATUS OF VIOLATIONS.

(a) The Office shall take action pursuant to paragraphs (b) and (c) of this section whenever it determines, through its oversight of the implementation of State programs, that a State has issued a permit without complying with the State program equivalents of Sections 773.22, 773.23, 773.24, 773.25, and 843.23 of this chapter.

(b) If, as a result of its determination that a State has failed to comply with the provisions set forth in paragraph (a) of this section, the Office has reason to believe that the State has issued a permit improvidently within the meaning of Section 773.20 of this chapter, the Office shall initiate action under the provisions of Section 843.21 of this part.

(c) If the Office determines that a State's failure to comply with the State program equivalents of Sections 773.22, 773.23, 773.24, 773.25, and 843.23 of this chapter was knowing, it shall initiate action under Sections 735.21 or 886.18 (as allowed by law) and/or Section 733.12(b) of this chapter, unless the State's action was the result of a mandatory injunction of a court of competent jurisdiction.

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