

MINING: OSM says former mine owners not liable for new SMCRA violations

By Daniel Cusick, *Land Letter* reporter

The Office of Surface Mining this week proposed to shorten the liability chain for coal mining firms who had previous ownership or operational control over mines that are later tagged with environmental violations.

According to a *Federal Register* [notice](#) published Tuesday, the agency plans to "revise and clarify" existing regulations under the Surface Mining Control and Reclamation Act (SMCRA) to more accurately assess responsibility for SMCRA violations.

Under existing rules, any former owner or operator of a SMCRA-violating mine can be prohibited from seeking new mining permits until the existing violation is resolved. Industry has long argued that such an approach is unfair, because former owners should not be held accountable for violations that did not occur on their watch.

OSM agreed to revise its approach under settlement terms reached with the coal industry stemming from a 2000 lawsuit. In December 2003, the agency proposed the "Ownership and Control Settlement Rule" ([Land Letter](#), Jan. 8, 2004), followed by the "Transfer, Assignment or Sale of Permit Rights" rule in January 2005.

The new measure, which will undergo a 60-day comment period, is an attempt to combine the two earlier proposals into one cohesive rule, OSM officials said.

"Our overarching objective is to promote regulatory stability for the regulatory authorities, the coal industry and the public, while continuing effective enforcement of SMCRA," said OSM acting Director Brent Wahlquist in a statement.

Luke Popovich, a spokesman for the National Mining Association, said the new rule would allow mining companies that have no direct connection to SMCRA violations to avoid getting caught in a regulatory net.

"It uses a more discriminating, and we think more reasonable approach, to determining who really has ownership and control, and therefore who is really responsible for problems that may have been caused by another entity," Popovich said.

Neither Popovich nor OSM officials could estimate how many mining permits had been held up by regulators' concerns over ownership and control of SMCRA-violating mines. But Popovich said "it was a serious problem that had the potential to become a very serious problem."

Ben Owens, an OSM spokesman in Washington, said all violations are recorded in the agency's computer-based Applicant Violator System, where regulators across the nation can access information to see if a mining firm has outstanding SMCRA problems. So far in fiscal 2006, the system has handled more than 4,000 queries, he said.

But critics say such a rule change could erode OSM's ability to track down violators and hold them accountable for problems that may have originated before an ownership transfer.

Glenn Sugameli, an attorney for Earthjustice who has litigated coal mining cases in the past, said OSM's regulatory record on mine ownership and control is rife with problems. In some cases, he said, mining companies who violate SMCRA avoid responsibility by dismantling an existing corporation and forming a new one under a different name. In other cases, he said, mining companies will try to disassociate themselves with a problem mine by pinning blame for violations on independent contractors.

"There are real problems here, and they have recurred over and over again," Sugameli said.

"If those regulations are weakened or loopholes are created that allow companies to avoid responsibility by creating another company, then it eliminates a very vital tool" for enforcing SMCRA, Sugameli added.

Owens, the OSM spokesman, said the definition of "control," as it pertains to SMCRA, will be interpreted "so that it reaches wherever control is," including past mine operations. But he said, "We were running into cases where a company had clearly done a good job and left it behind, and then was being held accountable" for later violations.

"What we're trying to do is give a clearer road map for somebody who wants to sell or transfer a portion of a mine and move on," Owens added.

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