Chapter 8

SMCRA Primacy, Mining Permit Transfers, Ownership and Control, and Excess Reclamation Responsibilities: A Primer on Confusing Topics

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§ 8.01. Introduction.

The concepts of state primacy under the Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA); the requirements for approval of mining permit transfers under SMCRA and delegated state programs; so-called ‘ownership and control’ and permit-blocking mechanisms under these mine regulatory schemes; and the potential for liability beyond the amount of a bond posted to secure completion of reclamation at a permitted site are all complicated issues in and of themselves. Bring them together in an unwarranted fashion, and this mix of regulatory concepts can create real havoc (and real liability). This chapter is intended to serve as a primer and update on these confusing topics. In addition, we provide a warning about how one state agency with primacy has attempted to meld together parts of these program elements in a convoluted effort to impose liability for excess reclamation costs on persons that would never have expected to be the target of such an action.

§ 8.02. The Surface Mining Control and Reclamation Act (SMCRA) and Cooperative Federalism.


SMCRA contemplates that the responsibility for regulating surface coal mining in the United States will be shared between the U.S. Secretary of the Interior and state regulatory authorities. This shared responsibility is a form of what is referred to as “cooperative federalism,” a critical aspect of the major federal environmental regulatory statutes that have been enacted by Congress since 1970. With SMCRA, such a principle finds expression in the approval of state programs that include the minimum requirements of

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3 Id.
SMCRA in regulating the environmental effects of coal mining operations, and the delegation of primary regulatory authority (or “primacy”) to a state mine regulatory agency that enforces its own SMCRA-based statutes and rules.4

A different example of cooperative federalism is found within the federal Water Pollution Control Act5 (“Clean Water Act”). Similar to SMCRA, the Clean Water Act allows state agencies to administer their own programs for the issuance and enforcement of National Pollution Discharge Elimination System (NPDES) permits.6 However, even when a state has been delegated NPDES permitting authority, the U.S. Environmental Protection Agency (EPA) retains full authority to take enforcement action against any person who is found to be in violation of the Clean Water Act or an NPDES permit.7 The federal Clean Air Act8 (CAA) offers yet another example, under which “state implementation plans” are developed and submitted for EPA approval, for purposes of determining how the National Ambient Air Quality Standards for various criteria pollutants (NAAQS) will be met.9 Once approved, such implementation plans are primarily enforced by the state, although EPA is responsible for determining whether a particular area is in compliance with the NAAQS, and EPA may enforce state-issued permits and regulations after notice to the state agency.10

As noted, SMCRA differs somewhat from these other federal environmental statutes. In enacting SMCRA, Congress determined that the cooperative effort established by that statute is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.11 From one perspective, Congress recognized that because of the diversity in terrain, biologic and other physical conditions,

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5 Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq.
6 33 U.S.C. § 1342(b).
7 33 U.S.C. § 1342(i).
8 Federal Clean Air Act, 42 U.S.C. § 7401, et seq.
10 42 U.S.C. §§ 7407(d)(1)(B); 7413(a).
primary governmental authority for developing, authorizing, issuing, and enforcing regulations governing mining operations should rest with the states.\textsuperscript{12} However, from another perspective, Congress recognized it may be necessary to exercise the full reach of federal constitutional powers through SMCRA to ensure the protection of the public interest through effective control of such operations. These different requirements have created significant tension and conflict among states, federal regulators, the coal industry, and coalfield citizens.\textsuperscript{13}

Under SMCRA, Congress intended to strike the proper balance when it divided responsibility for the regulation of surface coal mining between the federal government and the states.\textsuperscript{14} However, characterizing the regulatory structure of SMCRA as “cooperative” federalism is not entirely accurate, as the statute does not provide for \textit{shared} regulation of coal mining. Rather, the Act provides for enforcement of either a federal program or a state program, but not both. Thus, in contrast to other “cooperative federalism” statutes, the Act exhibits extraordinary deference to the states.\textsuperscript{15}

In primacy states such as Kentucky and West Virginia, regulation of surface coal mining on nonfederal lands within its borders is “exclusive.”\textsuperscript{16} This federal policy of encouraging “exclusive” state regulation was careful and deliberate. As previously discussed, because of the unique character of each state, the regulation of surface coal mining is generally administered at the state level.\textsuperscript{17} According to the Act, it is the states, not the federal government, that are to “develop and implement a program to achieve the purposes of this chapter.”\textsuperscript{18} To make this point absolutely clear, SMCRA provides explicitly that when states regulate, they do so exclusively,\textsuperscript{19} and when the federal government regulates, it does so exclusively.

\textsuperscript{12} 30 U.S.C. § 1201(f).
\textsuperscript{13}\textit{Green}, 21 S. Ill. U. L. J. at 536.
\textsuperscript{14} See \textit{Bragg}, 248 F.3d at 294-295.
\textsuperscript{17} See 30 U.S.C. § 1201(f).
\textsuperscript{18} \textit{Id.}, 30 U.S.C. § 1202(g).
\textsuperscript{19} \textit{Id.}, 30 U.S.C. § 1203(a).
It is important to note, however, that SMCRA does provide minimum national standards with respect to permitting, environmental protection, and other aspects of the regulatory program. More specifically, the statute mandates that in order to be approved by the Secretary of the Interior, a proposed state mine regulatory program must include (1) state laws that are “in accord with” SMCRA;20 and (2) state regulations that are “no less effective than” regulations issued by the federal Office of Surface Mining Reclamation and Enforcement (OSMRE or OSM).21 After initial approval, to the extent that a state program falls below these standards, OSM may require submission of state program amendments to address the deficiencies.22 It should also be observed that nothing in SMCRA or OSM regulations prohibits a state from enacting statutes or rules that are more stringent than federal requirements.23


The Office of Surface Mining’s Directive REG-8, “Oversight of State Regulatory Programs,” defines “oversight” as the process of evaluating and assisting states in the administration, implementation and maintenance of approved regulatory programs.24 The directive states:

OSM’s oversight role will not involve any duplication of the state’s program implementation responsibilities. Oversight will not be process-driven. Instead, OSM oversight will focus on the on-the-ground/end-result success of the state program in achieving the purposes of the Act. Also, it will focus on identifying the need for and providing financial, technical, and other program assistance to States to strengthen their programs.25

In other words, oversight includes inspections and other evaluations of how well state programs are ensuring environmental protection, reclamation

21 30 C.F.R. § 730.5(b).
22 30 C.F.R. § 732.17(e).
23 30 C.F.R. § 730.11.
24 REG-8 may be found at http://www.osmre.gov/guidance/directives/directive921.pdf.
25 Id. at 1-3.
success, and prevention of off-site impacts. It also includes providing training to state employees to assist them with their job performance and technical assistance, such as information technology and software, to improve both state capability and efficiency in processing permit applications and evaluating reclamation.

Under Directive REG-8, the “performance agreement” is a framework by which OSM and the state agree on a plan for oversight activities. Joint efforts to prepare workable performance agreements also maintain and improve the relationship between OSM and the state, and foster shared responsibilities and a more open discussion of difficult issues.26

With regard to inspections, OSM’s joint inspections with the approved state regulatory authority (SRA) provide an opportunity for the OSM Field Office staff to work cooperatively with states and industry to resolve problems. OSM must conduct joint inspections with the state regulatory authority where practical and where the state so requests.27 OSM currently conducts both joint and independent inspections.

OSM has regular and special inspections of mine sites in primacy states, and reviews files of state regulatory authorities. For complaints, if facts as alleged would constitute a violation, OSM is required to find that it has “reason to believe that a violation, condition, or practice exists” that warrants an inspection.28 A state regulatory authority must take appropriate action as to any perceived violations, or show good cause for failure to do so, within 10 days after notice is provided by OSM.29 “Appropriate action” is defined to include enforcement “or other action authorized under the state program to cause the violation to be corrected.”30 “Good cause” exists when OSM finds that no violation exists under the state program, the state regulatory

26 Id. at App. 1, 1-14.
27 30 C.F.R. § 842.11(a)(1).
28 30 C.F.R. § 842.11(b)(iii)(C)(2). Cessation orders may be issued when there is imminent danger to the health or safety of the public or where there are conditions presenting significant, imminent environmental harm. Id.
authority lacks jurisdiction, or the state regulatory authority is constrained by administrative or judicial order from taking action.\(^{31}\)

If OSM finds that a state regulatory authority has *not* taken appropriate action or shown good cause, it may issue a federal notice of violation or take other enforcement action directly against the permittee or operator. The state regulatory authority may request informal review of such a determination by the OSM Deputy Director, and any person who may be adversely affected may also seek review of an OSM determination regarding a state regulatory authority’s response to an OSM “Ten Day Notice.”\(^{32}\)


[a] — Amendments to State Programs Under SMCRA.

The Office of Surface Mining must promptly notify state regulatory authorities of changes in SMCRA or OSM rules “which will require an amendment to the state program.”\(^{33}\) State program amendments may be required when “as a result of changes to OSM regulations, the approved state program no longer meets the requirements of SMCRA or OSM regulations.”\(^{34}\) In considering the significant changes to OSM definitions of “transfer, assignment or sale of permit rights,” the OSM definition of “ownership and control,” and the OSM permit-blocking rules (all discussed, *infra*), it is important to note that OSM has not required that any approved state program be amended to conform to those changes. This means that in OSM’s view, all such state programs that retain the former provisions addressing these topics are “more stringent than” SMCRA — a circumstance that is expressly permitted.\(^{35}\)


Historically, the extent of OSM’s oversight activities with respect to the review of mining permits issued by state regulatory authorities have

\(^{31}\) Id.

\(^{32}\) 30 C.F.R. § 842.11.

\(^{33}\) 30 C.F.R. § 732.17(d).

\(^{34}\) 30 C.F.R. § 732.17(e)(1).

\(^{35}\) 30 C.F.R. § 730.11.
been limited, based on the language of the federal oversight regulations and the fact that OSM (as with anyone else) is able to participate during the permitting process through the notice and comment procedures required to be included in all state permitting programs. In most cases, mine permittees and state regulatory authorities have successfully opposed efforts by those who may be frustrated with the outcome of a state permitting decision to seek a ‘second bite at the apple’ through the OSM complaint process. In addition, because OSM conducts regular, systematic reviews of all aspects of an approved state program under SMCRA (including the mine permitting procedures), the need for improvements or corrections to state mine permitting has been something that is traditionally addressed in the annual State Oversight Evaluation reports prepared by the appropriate OSM regional office.

On June 11, 2009, EPA, the Secretary of the Interior, the US Army Corps of Engineers, and the White House’s Council on Environmental Quality released a new Memorandum of Understanding (MOU) regarding the permitting and regulation of coal mining operations in Appalachia.36 The MOU is intended to formalize those agencies’ “Inter-Agency Action Plan” for the coordinated regulation of Appalachian coal mining that is “designed to significantly reduce the harmful environmental consequences” of such mining operations.37 Among the longer-term actions that were identified in the MOU, OSM plans to “re-evaluate and determine how it will more effectively conduct oversight of state permitting, state enforcement, and regulatory activities under SMCRA.” In particular, the MOU states that OSM will “remove impediments to its ability to require correction of permit defects in SMCRA primacy states.”

Notably, neither the MOU nor any of the other documents that were released in conjunction with it describe how or why those federal agencies concluded that OSM has not been effectively conducting oversight under SMCRA. Likewise, there was no identification of the “impediments” to the correction of state permit defects that the agencies believe need to be removed. One can reasonably surmise, however, that these action items will

36 The MOU is available at: www.epa.gov/owow/wetlands.
37 Id.
be accomplished through some combination of further policy development and amendments to OSM regulations.

[c] — Challenges to State Actions and Inactions.

[i] — Bragg v. West Virginia Coal Association.38

In Bragg, plaintiffs filed a federal lawsuit under SMCRA against the West Virginia Department of Environmental Protection (WVDEP), seeking to restrain the WVDEP from issuing mining permits that included the construction of valley fills in and over existing streams. In particular, plaintiffs claimed (and the district court held) that such activities violated the WVDEP's “buffer zone” rule, which was based on an OSM regulation.39 The plaintiff sought to overcome the State of West Virginia’s Eleventh Amendment sovereign immunity defense on the basis of Ex parte Young,40 which provides an exception to sovereign immunity when a lawsuit is brought against a state officer to enjoin violations of federal law.

In rejecting that argument, the U.S. Court of Appeals for the Fourth Circuit found that, under SMCRA, primacy states are granted “exclusive jurisdiction” to enforce the minimum national standards set forth in SMCRA, “thereby conditionally divesting the federal government of direct regulatory authority.”41 Accordingly, even though the relevant language in the WVDEP regulation was essentially identical to that of the OSM regulation, the court found that the plaintiff in Bragg was actually seeking to enforce state law, not federal law, and could not bring the State of West Virginia into federal court for that purpose.42 In addition, the court found nothing in the language of SMCRA that supported the assertion that by submitting a mining program for approval by the Secretary of Interior under SMCRA, a state implicitly waived its right to sovereign immunity against being sued in federal court.43

38 Id.
40 Ex parte Young, 209 U.S. 123, 52 L. Ed. 714 (1908).
41 Bragg, 240 F.3d at 294.
42 Id. at 296.
43 Id. at 298.

In *Hess*, sporting and environmental groups sought to assert claims under SMCRA against the Pennsylvania Department of Environmental Protection. In upholding the dismissal of several counts against the state agency, the U.S. Court of Appeals for the Third Circuit rejected the notion that, for purposes of applying *Ex parte Young*, the identification of state laws and regulations as constituting an approved “state program” (for purposes of a listing in the Code of Federal Regulations) transforms those identified state regulations into “federal law.”

Accordingly, all counts in the complaint that alleged a failure on the part of the Pennsylvania agency to properly administer and enforce the approved state program were dismissed on the basis of sovereign immunity, recognizing that the plaintiff groups could avail themselves of the procedures set forth in OSM regulations for seeking federal enforcement of such a program, or withdrawal of approval of same.

[iii] — *Canestraro v. Faerber.*

The Surface Mining Control and Reclamation Act provides that any state mining law or regulation that is “inconsistent with” SMCRA shall be superseded. In *Canestraro*, the West Virginia Supreme Court invoked this federal statutory provision in striking down a West Virginia statute that required the filing of mining permit applications at the nearest WVDEP office. Since SMCRA requires that such applications be filed at the local county courthouse or another appropriate public office *near where the proposed mining is to occur*, and the West Virginia statute was required to be read in a way consistent with SMCRA, the state statutory provision was held invalid unless it was applied in such a way as to require filing of such applications at a public place near where the proposed mining would

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45 *Id.* at 326.
46 *Id.* at 316-318.
occur. The court issued its ruling despite the fact that OSM had approved of the same statutory provision as a part of West Virginia’s program under SMCRA.

[iv] — *DK Excavating, Inc. v. Miano*.\(^{49}\)

In *Miano*, the West Virginia Supreme Court addressed the OSM requirement that whenever changes to laws or regulations that make up an approved state program are proposed by a state, no such change may take effect until it has been specifically approved by OSM.\(^{50}\) In this case, the WVDEP had submitted a proposed amendment to OSM that exempted coal extraction activities that were to be undertaken “as an incidental part of the development of land for commercial, residential, industrial, or civic use” from the mine permitting requirement.\(^{51}\) The Office of Surface Mining had specifically disapproved that proposed WVDEP regulation as being inconsistent with SMCRA, and because of that, the WVDEP denied the appellant’s request for removal of coal without a permit. Affirming the supremacy of SMCRA and the OSM regulations governing state program amendments, the West Virginia Supreme Court upheld the WVDEP’s action.

§ 8.03. **The Basic Regulatory Mechanism: the SMCRA Permit.**

[1] — **Covered Activities.**

Under SMCRA, no person may engage in “surface mining operations” without first obtaining a permit from either OSM or the designated state regulatory authority.\(^{52}\) The term “surface mining operations” is defined broadly to include both activities conducted on the surface of lands for the removal of coal and the surface impacts associated with underground coal mines. The term also includes any adjacent land, the use of which is “incidental” to any such mining activities. By way of example, the improvement or use of existing roads to gain access to the mine and for

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50 30 C.F.R. § 732.17(g).
51 *Miano*, 549 S.E.2d at 282.
coal haulage; surface features of underground mines, such as entryways and ventilation shafts; coal refuse disposal areas and slurry impoundments resulting from the preparation of coal; and “other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to” mining are all considered to be “surface mining operations.” Pursuant to OSM regulations and caselaw, this definition also includes off-site preparation plants and coal processing facilities that are undertaken “in connection with” a coal mine that operated after July 6, 1984.

Generally, the only exemptions from the broad scope of coverage of SMCRA’s permitting requirement are for the extraction of coal by a landowner for the landowner’s own noncommercial use, and coal extraction undertaken as an incidental part of a government-financed construction project. However, persons wishing to engage in prospecting or “coal exploration” operations that will not involve extraction of more than 250 tons of coal may do so without a permit, after providing notice to the appropriate regulatory authority containing certain basic information.


Enforcement actions taken against a mining permit are the primary means of assuring the proper and timely implementation of site-specific, pre-mining operational and reclamation plans that have been approved during the permitting process. For example, in addition to corporate ownership and control information, engineering plans and studies, and information on property ownership and mineral rights, a typical SMCRA mining permit application includes literally volumes of information regarding the potential environmental consequences of the proposed operations.

An application must address, among other items, the following:

a. description of the type and method of mining that is proposed, the engineering techniques, and the equipment to be used;

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56 30 C.F.R. § 772.11.
b. the anticipated starting and termination dates of each phase of mining and the number of acres affected in each phase;

c. maps, plans and cross-sections showing the areas to be affected, containing all features normally found on United States Geological Survey maps; all surface areas abutting the permit area; pertinent elevation and location of test borings or core samples depicting the nature and depth of various strata of overburden, the location of subsurface water, the nature and thickness of coal seams and rider seams, and all mineral crop lines and strike and dip of the seam to be mined; the location and extent of any known underground workings and openings; the location of all aquifers, and estimated elevation of the water table; the proposed location of spoil or refuse disposal areas and topsoil preservation areas; the location of any proposed or existing impoundments; constructed and natural drainways, the location of all discharges to any surface waterbody on the permit and adjacent areas, and all sediment control and/or water treatment facilities; and profiles of the anticipated final surface configuration that will be achieved pursuant to the approved reclamation plan;

d. a determination of the probable hydrologic consequences of the mining and reclamation operation, both on and off the mine site, specifically addressing the quantity and quality of surface water and groundwater, before and after mining (this submission is commonly referred to as the “PHC Study”);

e. a statement of the result of test borings or core samples from the permit area, including chemical analyses of the coal seam to be mined and potentially toxic or acid-forming sections of the overburden; and

f. a Reclamation Plan, addressing (among other items) pre-mining conditions and productivity of the permit area; the proposed postmining land use, comments of any surface owners as to that proposed use, and how the proposed postmining use relates to existing land use policies and plans; and a hydrologic reclamation plan addressing the measures to be taken during the mining
and reclamation process to assure the protection of surface and groundwater systems.57

Any or all of these specifications and commitments may be the subject of an enforcement action by a state regulatory authority or OSM. In addition, in West Virginia, violations of a mining permit may be viewed as *prima facie* negligence for purposes of common law tort actions.58


In order to assure continuity of the regulatory functions of an approved state regulatory authority or OSM following the sale of a coal mining operation, there must be a formal transfer of the mining permit into the name of the new mine operator, following established procedures. In conjunction with other regulations, such a process serves to clarify the responsible parties for a mining operation under SMCRA, and facilitates the review of the eligibility of proposed new mine operators under the ownership and control and permit-blocking rules (discussed below). Though a regulatory authority may obtain information as to other persons who become newly associated with a mining operation without any permit transfer,59 when there has been a complete change in the identity of the company engaged in such operations, the permit transfer process is the appropriate method of requiring disclosure of such information for purposes of future compliance and enforcement actions.

§ 8.04. Permit Transfer, Assignment or Sale.

[1] — SMCRA and OSM.

SMCRA provides that “no transfer, assignment, or sale [herein, “TAS”] of permit rights granted under any permit issued pursuant to this Act shall be

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59 For example, permittees must update their ownership and control information on file with the state regulatory authority within 30 days after receipt of a cessation order, and within 60 days of a change in a principal shareholder, director, officer or partner. 30 C.F.R. § 774.12. The state regulatory authority or OSM may also require updated ownership and control information based on a routine mid-term review of a permitted operation. 30 C.F.R. § 774.15.
made without the written approval of the regulatory authority.”60 Office of Surface Mining regulations reiterate this point by also requiring no transfer, assignment, or sale of rights granted by a permit shall be made without the prior written approval of the regulatory authority.61 Under current OSM regulations, “transfer, assignment or sale of permit rights” means simply “a change of a permittee.”62

Under OSM’s previous definition, transfer, assignment, or sale of permit rights meant “a change in ownership or other effective control over the right to conduct surface coal mining operations under a permit issued by the regulatory authority.” Effective January 2, 2008, OSM revised the definition of transfer, assignment, or sale of permit rights to mean a change of a permittee. The rule change was informed by a decision of the Department of the Interior’s Office of Hearing and Appeals (OHA) in Peabody Western Coal Co. v. OSM,63 comments received on a previously proposed rule, and extensive discussions with state regulators.64

In Peabody Western, the Office of Hearing and Appeals examined the impact of National Mining Ass’n v. Dep’t of the Interior65 on transfer, assignment, or sale issues. The Office of Surface Mining had determined that Peabody Western’s change of all of its corporate officers and directors constituted a transfer, assignment, or sale of permit rights.66 The administrative law judge disagreed, explaining that after NMA v. DOI II, OSM cannot presume that an officer or director is a controller and, therefore, a change of an officer or director (or even a change of all officers and directors) cannot, standing alone, automatically constitute a change

60 30 U.S.C. § 1261(b).
61 30 C.F.R. § 774.17 (a).
62 30 C.F.R. § 701.5.
63 Peabody Western Coal Co. v. OSM, No. DV 2000-1-PR (June 15, 2000) [hereinafter Peabody Western].
64 “Ownership and Control; Permit and Application Information; Transfer, Assignment, or Sale of Permit Rights, Final Rule,” 72 Fed. Reg. 68000 (December 3, 2007).
65 Nat’l Mining Ass’n v. Dep’t of the Interior, 177 F.3d 1 (D.C. Cir. 1999) [hereinafter NMA v. DOI II].
66 30 C.F.R. § 701.5. Id.
of “effective control” triggering a transfer, assignment, or sale of permit rights. The administrative law judge also made other observations that OSM assigned particular weight to in developing the rule change, including the finding that the former rule was so “vague and imprecise” that it offered “no meaningful standard and provides no advance notice to a regulated corporate entity” as to which changes will constitute a transfer, assignment, or sale.67 Because OSM ultimately agreed with many of the judge’s observations about the previous transfer, assignment, or sale rules, further review of the Office of Hearings and Appeal’s decision was not sought, and OSM decided instead to greatly simplify the regulation.68

When a permit transfer, assignment, or sale has been initiated, at its discretion the regulatory authority may allow a prospective successor in interest to engage in surface coal mining and reclamation operations under the existing permit during the pendency of an application for approval of the transfer, assignment, or sale.69 An applicant for approval of the transfer, assignment, or sale of permit rights shall:

- Provide the regulatory authority with an application for approval of the proposed transfer, assignment, or sale;
- Advertise the filing of the application in a newspaper of general circulation in the locality of the operations involved; and
- Obtain appropriate performance bond coverage in an amount sufficient to cover the proposed operations.70

Any person having an interest which is or may be adversely affected by a decision on the transfer, assignment, or sale of permit rights, including an official of any federal, state, or local government agency, may submit written comments on the application to the state regulatory authority within a time specified by that agency.71

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67 As discussed below, this previous OSM definition of transfer, assignment or sale still applies in many primacy states.
68 72 Fed. Reg. at 68008.
69 30 C.F.R. § 774.17 (a)
70 30 C.F.R. § 774.17 (b).
71 30 C.F.R. § 774.17 (c).
The regulatory authority may allow a permittee to transfer its permit rights to a successor, if it finds in writing that the successor:

- Is eligible to receive a permit;
- Has submitted a performance bond or other guarantee, or obtained the bond coverage of the original permittee; and
- Meets any other requirements specified by the regulatory authority.72

The successor in interest assumes the liability and reclamation responsibilities of the existing permit and must conduct mining and reclamation operations in full compliance with applicable laws, regulations and the existing permit.73


In order to consider how the transfer, assignment, or sale provisions in a primacy state program may differ from the current OSM rules, set forth below are pertinent excerpts or summaries of the statutes and regulations administered by the Kentucky Energy and Environment Cabinet [“Cabinet”] pursuant to its approved SMCRA mine regulatory program:

[a] — Ky. Rev. Stat. § 350.135(1): prohibits the transfer by “sale, assignment, lease, or otherwise” of a mining permit without the written approval of the Cabinet based on joint application of current permittee and proposed transferee.

[b] — 405 Ky. Admin. Reg. 8:010. General provisions for permits; Section 22. Transfer, Assignment, or Sale of Permit Rights. (1) General. No transfer, assignment, or sale of the rights granted under any permit issued pursuant to 405 Ky. Admin. Reg. shall be made without the prior written approval of the cabinet, in accordance with this section.

[c] — 405 Ky. Admin. Reg. 8:001. Definitions for 405 Ky. Admin. Reg. Chapter 8 (132): “Transfer, assignment, or sale of permit rights” means a change in ownership or other effective control over the right to conduct surface coal mining operations under a permit issued by the cabinet.

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72 30 C.F.R. § 774.17 (d).
73 30 C.F.R. § 774.17 (f).
[d] — Criteria for approval: The Cabinet may grant permit transfer to a successor if it finds, in writing, that the successor: (a) is eligible to receive a permit in accordance with the ownership and control / permit-blocking rules; (b) has submitted a performance bond, in accordance with 405 Ky. Admin. Reg. Chapter 10, which will ensure reclamation of all lands affected by the permit, including areas previously disturbed by the existing permittee on the areas covered by the permit being transferred, and which is at least equivalent to the bond of the existing permittee; (c) has submitted proof that required liability insurance has been obtained; and (d) meets any other requirements specified by the Cabinet in its discretion.74

[e] — Requirements for new permits for persons succeeding to rights granted under a permit. A successor in interest who is able to obtain appropriate bond coverage may continue mining operations according to the approved mining and reclamation plan and permit of the original permittee. However, any successor in interest seeking to change the conditions of mining or reclamation operations, or any of the terms or conditions of the original permit shall make application for a new permit, revision, or amendment, as appropriate.75

Although the basic requirements for advance approval of a TAS are similar, it should be noted that the definition of “TAS” is far different than that found in OSM regulations. In addition, the authority of a successor in interest to continue mining operations under a permit is expressly conditioned upon compliance with the existing plans, etc., found in the current permit. Should a successor wish to change the permit terms and conditions, appropriate revisions must be made in accordance with other procedures.

§ 8.05. “Permit-Blocking” and Ownership and Control.


Pursuant to SMCRA section 510(c), when “any surface coal mining operation owned or controlled by the applicant is currently in violation of

74 405 Ky. Admin. Reg. 8:010, Section 22 (4).
75 405 Ky. Admin. Reg. 8:010, Section 22 (8).
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dis Act or such other laws referred to in this subsection, the permit shall not be issued . . . .” The provision is commonly referred to as SMCRA’s “permit block” provision.

Under the permit block provision, permit applicants who own or control surface coal mining operations with delinquent civil penalties or fees, certain outstanding unabated violations of SMCRA, and/or unabated violations of certain other laws, are not eligible for new permits (or permit renewals, transfers, etc.). SMCRA does not define the terms “owned” or “controlled,” or any variations thereof. Hence, these terms are defined in OSM’s regulations, discussed further below.

[2]— OSM Ownership and Control Regulations and the Applicant Violator System.

Under SMCRA and applicable regulations, OSM and state regulatory authorities determine whether a permit applicant is linked by ownership or control to a violator by (1) consulting the federally-maintained “Applicant Violator System” (AVS), which is a database that links mining permit applicants with violators at mining operations across the country; and (2) by consulting state counterpart systems and other databases specified in state regulations. In primacy states, the state counterpart to the Applicant Violator System is commonly referred to as the Surface Mine Information System (SMIS).

The criteria to determine whether a person or organization should be considered “linked” to a violator for permit-block purposes has been the subject of litigation for nearly all of the more than 20 years since OSM regulations implementing the Applicant Violator System and associated permit-blocking mechanisms were first promulgated in 1988. The most recent challenge was filed in February 2008, by the Citizens Coal Council, seeking to overturn OSM’s December 3, 2007 revisions to its ownership and control regulations.

76 See 30 U.S.C. 1260 (c).
77 30 C.F.R. § 773.12.
78 30 C.F.R. § 773.9.
control regulations that, in turn, were based upon a settlement of an earlier lawsuit brought by the National Mining Association.\(^7\) On the federal level, the mining industry generally has been successful in challenging OSM rules implementing very broad definitions of “ownership” and “control,” with the result that OSM has revised its regulations to limit the circumstances when permit-blocking linkages may be made between a permit applicant and a violator. As a result, under the current federal approach there are separate definitions of “owns” and “controls,” while most primacy states retain the original (OSM) unitary definition of “owns or controls” and “owned or controlled.”

In OSM’s regulations, “Owns or Owner” refers to or means being a sole proprietor or owning of record in excess of 50 percent of the voting securities or other instruments of ownership of an entity.\(^8\) In addition, the reach of permit denials based on ownership is “one level down” from the applicant.\(^9\) When an applicant directly owns an entity with an unabated or uncorrected violation of SMCRA or other applicable laws — meaning there are no intermediary entities between the applicant and the entity with a violation — then it is not eligible for a permit. In other words, the rule reaches one level down from the applicant to the entity the applicant owns. On the other hand, an applicant’s indirect ownership of an entity with a violation, standing alone, would not make the applicant ineligible for a permit. However, the same applicant would not be eligible for a permit if it controls such a violator.

OSM rules specify that “controls or controller” means the following:

- A permittee of a surface coal mining operation;
- An operator of a surface coal mining operation; or
- Any person who has the ability to determine the manner in which a surface coal mining operation is conducted.\(^9\)

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\(^8\) 30 C.F.R. § 701.5.

\(^9\) 30 C.F.R. § 773.12(a).

\(^9\) 30 C.F.R. § 701.5.
Determining who is a permittee or operator of a surface coal mining operation is generally a straightforward matter. However, determining who has the “ability to determine the manner in which a surface coal mining operation is conducted” can be much more complicated. The “ability to determine” standard in the definition is useful from a regulatory standpoint because it gives regulatory authorities the flexibility to consider all of the relevant facts on a case-by-case basis, in determining whether control is present, and they have the leeway to follow control wherever it may exist in a series of business relationships. The “ability to determine” standard was included in the definition because it might be easier for the regulated community to evade a definition with specific categories of controllers, by reorganizing their business structures and relationships so as not to fall within the defined categories. In short, a flexible definition of control or controller is intended to allow regulatory authorities to identify controllers in real-world situations.83

Challenging Ownership and Control Determinations and Listings

One may challenge a listing or finding of ownership or control if you are:

- Listed in a permit application or Applicant/ Violator System (AVS) as an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof
- Found to be an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof; or
- An applicant or permittee affected by an ownership or control listing or finding.84

To challenge an ownership or control listing or finding, an individual must submit a written explanation outlining the basis for the challenge, along with any evidence or explanatory materials one wishes to provide to the regulatory authority, as identified in the following table.85

83 “Ownership and Control; Permit and Application Information; Transfer, Assignment, or Sale of Permit Rights, Final Rule,” 72 Fed. Reg. at 68003.
84 30 C.F.R. § 773.25.
85 30 C.F.R. 773.26 (a).
Note that these provisions may not be used to challenge liability or responsibility under any other provision of the Act or its implementing regulations. A regulatory authority responsible for deciding a challenge may request an investigation by the Applicant Violator System Office.

When one challenges a listing of ownership or control, or a finding of ownership or control they must prove by a preponderance of the evidence that they either:

- Do not own or control the entire surface coal mining operation or relevant portion or aspect thereof; or
- Did not own or control the entire surface coal mining operation or relevant portion or aspect thereof during the relevant time period.

This means that an ownership or control link is time-specific; one may have been an owner of an entity or controller of a mining operation at a time before or after permit-blocking violations existed, and if so, a link to that entity during that time period when there were no disqualifying violations should not present a permit-block to that individual.

In meeting the burden of proof, one must present reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority. Within 60 days of receipt of a challenge, the agency must

<table>
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<tr>
<th>If the challenge concerns . . .</th>
<th>Then you must submit a written explanation to . . .</th>
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<tr>
<td>(1) a pending or federal permit application</td>
<td>the regulatory authority with jurisdiction over the application</td>
</tr>
<tr>
<td>(2) your ownership or control or a surface coal mining operation and you are not currently seeking a permit</td>
<td>the regulatory authority with jurisdiction over the surface mining operation</td>
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86 30 C.F.R. § 773.26 (b).
87 30 C.F.R. § 773.26 (d).
88 30 C.F.R. §§ 773.27 (a) (1) & (2)(emphasis added).
89 30 C.F.R. § 773.27.
investigate the evidence and explanatory materials submitted and any other reasonably available information bearing on the challenge and issue a written decision.\textsuperscript{90}

The agency decision must state whether petitioner owns or controls the relevant surface coal mining operation, or owned or controlled the operation, during the relevant time period.\textsuperscript{91} The regulatory authority will promptly provide the petitioner with a copy of their decision.\textsuperscript{92} The regulatory authority will post all decisions made under this section on the AVS.\textsuperscript{93}

\textbf{[3] — State Regulations (Kentucky example).}

As with the transfer, assignment, or sale provisions, the definition of ownership and control, and the manner in which a permit-block may be applied, are generally much different in primacy states than under the current OSM rules. Again, for purposes of discussion, set forth below are pertinent excerpts or summaries of the current provisions administered by the Kentucky Energy and Environment Cabinet pursuant to its approved SMCRA mine regulatory program:

[a] — “Owned and controlled” and “owns or controls” means:

Any one (1) or a combination of the relationships specified in paragraphs (a) and (b) of this subsection (a): (1) Being a permittee of a surface coal mining operation; (2) Based on instruments of ownership or voting securities, owning of record in excess of fifty (50) percent of an entity; or (3) Having any other relationship that gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations.

(b): The following relationships are presumed to constitute ownership or control unless a person can demonstrate 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: (1) Being an officer or director of an entity; (2) Being the

\textsuperscript{90} 30 C.F.R. § 773.28 (a).
\textsuperscript{91} 30 C.F.R. § 773.27 (a).
\textsuperscript{92} 30 C.F.R. § 773.27 (b).
\textsuperscript{93} 30 C.F.R. § 773.27 (d).
operator of a surface coal mining operation; (3) Having the ability to commit the financial or real property assets or working resources of an entity; (4) Being a general partner in a partnership; (5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record ten (10) through fifty (50) percent of the entity; or (6) Owning or controlling coal to be mined by another person under a lease, sublease, or other contract and having the right to receive the coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.94

[b] — “Review of violations” (i.e. Permit-Block): requires that permitting actions (new permits, permit transfers, renewals of permits, and revisions) not be approved when any mining operation owned or controlled by the permittee or proposed transferree (“applicant”), or “by any person who owns or controls the applicant,” has:

- outstanding, unabated “failure-to-abate” cessation orders issued by OSM, the Cabinet, or any other state;
- unabated imminent harm cessation orders issued by OSM, the Cabinet, or any other state;
- delinquent civil penalties assessed pursuant to SMCRA, federal regulations enacted pursuant to SMCRA, Ky. Rev. Stat. Chapter 350 and administrative regulations adopted pursuant thereto, or any other state’s laws or administrative regulations under SMCRA;
- bond forfeitures by OSM, the Cabinet, or any other state where violations upon which the forfeitures were based have not been corrected;
- delinquent abandoned mine reclamation fees; and/or
- unabated violations of federal, Kentucky, and any other state’s laws, rules and administrative regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation.95

94  405 Ky. Admin. Regs. 8:001, Section 1, (76).
95  405 Ky. Admin. Regs. 8:010, Section 13 (4).
There are at least two critical aspects of these Kentucky regulations that differ significantly from OSM rules. First, the definition of “owns or controls” is based upon (and virtually identical to) the original OSM definition issued in 1988 (that, as discussed infra, has since been replaced on the federal level). Most notably, that definition includes a number of “presumptive” categories of control that may be invoked by the Cabinet, to shift the burden of proof to the person who has been linked by ownership or control to a particular mining operation. Second, the scope of the review for purposes of applying the state permit-block in Kentucky encompasses mining operations that are (or were) owned or controlled by the permit applicant’s “owners or controllers.” In other words, (as OSM’s regulations formerly provided) in Kentucky the ownership and control inquiry for permit-blocking purposes extends to up-stream owners and controllers, and out to sister subsidiaries and affiliates with a common corporate parent. This is obviously a far larger “web” of connections that will result in permit-blocking in more circumstances than under the OSM definition.

§ 8.06. Liability for Excess Reclamation Costs.


Under SMCRA, approval of a permit application is not sufficient to cause the issuance of a mining permit. Even after a permit application has been approved, no permit may be issued until the applicant has posted a performance bond to secure the “faithful performance of all the requirements of [SMCRA] and the permit.”96 The amount of the bond must reflect the reclamation requirements of the permit, and “shall reflect the probable difficulty of reclamation giving consideration to such factors as topography, geology of the site, hydrology, and revegetation potential.”97

Liability under a mine permit bond extends for the duration of the permitted mining and reclamation operations, including the mandatory revegetation success periods set forth in SMCRA (generally, five full years after the last augmented seeding).98 In the event a permittee fails to fulfill its

97 Id.
regulatory obligations during that time and the permit is ultimately revoked due to noncompliance, the state regulatory authority is required to invoke the designated procedures for forfeiting the associated bond, and must take steps to reclaim such bond forfeiture sites in accord with the approved state program.99

If the estimated amount of bond forfeiture proceeds is insufficient to pay for the full costs of reclamation of a permit site, under OSM regulations, the “operator” is liable for all remaining costs. Specifically, OSM rules provide that “the regulatory authority may complete, or authorize completion of, reclamation of the bonded area and may recover from the operator all costs of reclamation in excess of the amount forfeited.”100 “Operator” is defined to mean any person who is engaged in mining and who removes or intends to remove more than 250 tons in 12 months.101 Since any such person must also have permit coverage in order to mine, the term encompasses both mine permittees and any separate “operators” who have been granted approval to conduct operations under a permit held by another (using a procedure commonly referred to as “operator reassignment”).102

[2] — Cat Run Coal Co. v. Babbitt.103

In Cat Run, a lessor of coal properties challenged OSM’s approval of a revision to the WVDEP mining regulations dealing with the recovery of excess reclamation costs. Specifically, the WVDEP rules had previously specified that in the event proceeds of a bond forfeiture were inadequate to fund reclamation of a permitted site, the WVDEP “shall collect from the permittee all costs in excess of the amount forfeited.”104 Under the new regulation enacted by WVDEP and submitted for OSM approval, the WVDEP was authorized to collect excess reclamation costs from

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99 30 C.F.R. § 800.50.
100 30 C.F.R. § 800.50(d)(1).
101 30 C.F.R. § 701.5.
102 See, i.e., 405 Ky. Admin. Regs. § 8:010, Section 18 (6)(procedures for changing assigned operators without transferring permit).
“the operator, permittee, or other responsible party. . . .” The district court invalidated OSM’s approval of this proposed regulation on several grounds.

First, the court noted that OSM’s Federal Register notice with regard to the proposed amended rule did not provide an adequate description of which entities would fall within the scope of the phase “other responsible party.” As a result, OSM’s action was invalid under the federal Administrative Procedure Act.106

Second, and of far greater significance, the court ruled that the proposed regulation should not have been approved by OSM because it was inconsistent with SMCRA’s scheme for holding mine permittees responsible for performing reclamation at mined sites — and not others. In particular, the court ruled:

The SMCRA consistently holds operators and permittees, not landowners, responsible for the reclamation of mine lands. The SMCRA requires operators to follow both permit and performance standards that require operators to reclaim post-SMCRA mine sites....

By approving the challenged regulation, OSM has attempted to externalize the costs of reclamation in direct contravention of the clear statutory language and legislative history of the SMCRA.107

In other words, in seeking to impose liability for excess reclamation costs, at least one district court has found that the entity that holds a mining permit is the primary — if not exclusive — party to which a state regulatory authority must turn.


Unlike the ownership and control, permit-block and permit transfer areas, the applicable regulations on bond forfeiture and excess reclamation liability in a primacy state such as Kentucky are not much different than

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105 Id. (as proposed)(italics added).
106 Cat Run, 932 F. Supp. at 778.
107 Id. at 780-1.
the counterpart OSM rules. Specifically, the Kentucky program includes the following provisions:

[a] — In the event the amount forfeited [from the performance bond required by Ky. Rev. Stat. Ann. § 350.064 to be posted upon approval of surface coal mining and reclamation permit] is insufficient to pay for the full cost of reclamation, the permittee or operator shall be liable for remaining costs. The Cabinet may complete, or authorize completion of, reclamation of the bonded area and may recover from the permittee or operator all costs of reclamation in excess of the amount forfeited.108

[b] — Permit Transfers – Release (transfer) of bond liability: The Cabinet may release the prior permittee from bond liability on the permit area if the successor in interest has filed a performance bond satisfactory to the Cabinet, has received written approval of the Cabinet for the transfer of the permit, has submitted proof of execution of the transfer (purchase) agreement, and has assumed all liability under applicable regulations for reclamation of the areas affected by all prior permittees.109

These provisions are quite similar to the OSM regulations addressing these topics. Of particular note, however, is that part of the Kentucky rule that expressly requires that a permit transferee assume “all liability . . . for reclamation of the areas affected by all prior permittees.”110 Though there is no other statute or regulation that addresses this question, it could be that this assumption of liability by a permit transferee is different than the scope of liability assumed by a mine operator who has not accepted transfer of a permit. On this and other grounds, an entity that has conducted limited operations under a mining permit held by another (that is, an “operator”) might well argue that the “costs of reclamation” referenced in 405 Ky. Admin. Reg. 10:050 are those reclamation costs occasioned by its operations under the permit — not costs that are unrelated to its presence on the permit site.

109 405 Ky. Admin. Reg. 8:010, Section 22 (9).
110 Id.

Though it cannot be discussed in detail because it involves a case that remains in litigation as of the date of this writing, it is worth mentioning that at least one state regulatory authority has taken the position that the typical primacy state “ownership and control” rules and permit transfer requirements discussed above may be applied in a manner that results in the imposition of excess reclamation costs on a non-permittee operator. In that case, the parties to a proposed mine sale entered into an asset purchase agreement under which the selling entities (mine permittees) agreed to execute appropriate mining permit transfer forms to cause the subject permits to be transferred to the purchaser. After closing, however, the proposed transaction fell apart; the selling entities never signed the requisite permit transfer applications, and eventually the mining permits were revoked. The proceeds of the subsequent bond forfeitures were estimated to be millions of dollars less than what would be required to fully reclaim the sites, and the selling entities later became essentially defunct.

Based on the fact that the purchaser in this scenario had conducted some limited (underground) coal production, the state regulatory authority issued determinations finding that the subject mining permits had been improperly “transferred,” without completing the required regulatory procedures. As a part of its case, the state regulatory authority claimed that the purchaser’s acquisition of the assets of the mining operations constituted a transfer of the “effective control” over the right to conduct mining operations under the mining permits. At the same time, the state regulatory authority linked the purchaser (under the ownership and control rules) to each of the mining permits in question, based on the theory that one can be an “owner” or “controller” of a mining permit — as distinguished from a mining operation. In essence, the state regulatory authority took the position that a mining permit is an “entity” for purposes of the unitary definition of ownership and control, and since the permits had been effectively “transferred” to the purchaser, it had also become linked to those permits through the ownership and control rules.

Unstated in the formal orders but implicit in the state regulatory authority’s filings was the point that as a “permittee,” the purchaser of the
subject mines may be open to much greater liability for excess reclamation costs than would an entity that was an operator at those mines for only limited periods. Accordingly, rather than cite the purchaser for having extracted coal without obtaining the necessary “operator reassignment” approvals, the state regulatory authority asserted a violation of the permit transfer regulation and sought to force the purchaser to complete the permit transfer process — even though it was no longer economically feasible to conduct operations at the mines.

Whether the state regulatory authority involved in this unusual case will succeed is yet to be determined. However, this effort by a primacy state does raise the question of whether or not such state programs should amend their ownership and control and permit transfer regulations to conform to OSM’s current rules, thereby removing a great deal of uncertainty and confusion regarding who is responsible for permit compliance and when permit transfer procedures must be employed.

§ 8.07. Conclusion.

As most coal companies operate in more than one state, it is worth considering the differences amongst states in terms of regulatory approaches to the areas of ownership and control, permit-blocking, permit transfer requirements, and reclamation liability. It may also be worthwhile to consider how the regulations in the primacy states in which a company operates differ from the OSM regulations in these same areas, and whether that is a situation which should persist.

As has been the case for quite some time, the application of the older “ownership or control” definition in most of the primacy states warrants a periodic review of a company’s ownership and control “tree.” Likewise, proposed transactions should be evaluated with respect to who is being proposed to be added to a company’s “ownership and control” family and whether they are associated with any problem sites. Once imposed, it can be very difficult to break a link to a site with permit-blocking violations, particularly when faced with an administrative appeal system that does not promote the timely and inexpensive disposition of such challenges.

Finally, with respect to any proposed transaction that involves the acquisition of coal companies or the assets of mining operations, it is
important to seek pre-closing clarity with the relevant state regulatory authorities as to ongoing operations, including the need for advance approval for continuing operations; outstanding enforcement issues; responsibility for permit sites prior to permit transfer (and, in the event the transaction is not ultimately consummated); and the timing and procedures for obtaining agency approval for mining permit and other associated permit transfers. In addition, for those entities that undertake mining operations pursuant to a mining permit that is held by a third-party, it is critical to be prepared to defend against efforts to impose liability on such an operator for costs associated with reclaiming areas that were not disturbed during its tenure.

Though these rules were not developed with a view toward seeking to hold persons responsible for disturbances beyond their control, in some cases regulatory agencies have sought to do just that. Careful attention to the details, both as to proposed transactions and the rules that apply under a particular SMCRA program, will yield great benefits in helping to avoid such efforts.