

<b>DIVISION OF MINED LAND RECLAMATION</b>		<b>PROCEDURE NO.</b>	2.2.05
<b>PROCEDURES MANUAL</b>		<b>ISSUE DATE</b>	04/10/15
<b>SUBJECT</b>	Applicant Violator System (AVS) & Ownership/Control	<b>Section</b>	Permitting
		<b>Last Revised</b>	2-21-07

**OBJECTIVE AND INTENT:**

To ensure the DMLR’s permit and revision application review and onsite investigations adequately identify permit applicants and operators who are eligible to conduct coal surface mining and reclamation operations in Virginia.

**Operator** - means any person engaged in coal mining that removes or intends to remove more than 250 tons of coal from the earth or from coal refuse piles by mining within 12 consecutive calendar months in any one location.

**Permittee** - means a person holding a permit issued by the Director for coal surface mining pursuant to §45.1-234, for coal exploration pursuant to § 45.1-233, or for an NPDES permit pursuant to §45.1-254.

**Ownership and Control of Coal Mining Operations - Owned and/or Controlled or Owns and/or Controls** - includes, but is not limited to:

- the permittee of the mining operation.
- the person owning a controlling interest (greater than 50 percent) of the particular operation through voting shares or based on instrument of ownership.
- any other business relationship which allows the person to directly or indirectly determine the manner in which an entity conducts coal surface mining operations.

In examining the business relationship, DMLR will consider informal agreements, personal relationships, and the mining history of the parties involved. A determination that the relationship results in control of the mining operation, should show that the person has:

- actually financed the operation;
- owns the mining equipment;
- owns the right to the coal;
- directs onsite operations;
- has a family relationship with one or more principals of the venture;
- has a contract or other business relationship with the employee(s) of the operation, or
- is otherwise the alter ego<sup>1</sup> of the permittee/violator.

**Presumed Business Relationship** - Unless rebutted by a preponderance of evidence, the following may provide a presumption of ownership or control of the mining operation when the person is:

- the operator of the mining operation (exercises control of the operation).

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<sup>1</sup> Under the doctrine of “alter ego”, court merely disregards corporate entity and holds individual responsible for acts knowingly and intentionally done in the name of corporation. It does not create assets for or in corporation, but simply fastens liability on the individual who uses the corporation merely as an instrumentality in conducting his own personal business and that liability springs from fraud perpetrated not on the corporation, but on third persons dealing with corporation. (Black’s Law Dictionary, 5<sup>th</sup> Edition)

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- able to commit the financial or real property assets of the business entity.
- a general partner (compliance review should focus on whether the person controls the operation).
- owning or controlling coal to be mined by another person under a lease, sublease or other control and having the right to receive such coal after mining or having the authority to determine the manner in which that person or another person conducts a surface coal mining operation.

**PROCEDURES:**

Initial E-form Permit Application - Identification of Interest(s):

The permit application must provide the detailed information required by 4 VAC 25-130-778.13 and 4 VAC 25-130-778.14. This information must be provided for:

- the applicant,
- the person(s) who owns or controls the applicant, and
- any entity that is or has been owned or controlled by the applicant.

During the initial application review process (prior to submission of the complete application to the DMLR office), the Field Inspector shall examine the application to determine if the person listed as the applicant will in fact be the entity that will determine how the mining will be conducted.

If the Field Inspector discovers ownership or control inconsistencies in the application, the applicant shall be instructed to resolve such before submitting the complete application to the DMLR’s Big Stone Gap office.

Upon acceptance of a complete application, the Review Inspector will complete the “AVS Applicant Data” form.

- Relevant data will be abstracted from the application material and entered into the federal AVS by the Review Inspector. Prior to entering the data into the AVS, the Review Inspector shall review the application materials to verify that the ownership and control information is accurate and complete by comparison with existing DMLR and AVS data files (manual and automated).

Should the information be deemed incomplete, the Review Inspector shall identify the application deficiencies, and shall notify the applicant that necessary correction(s) must be made.

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Interaction between DMLR and federal AVS:

During the initial permit application review and any subsequent changes regarding ownership and control of the permit or the operator, the Division will interact with the federal AVS to determine operator eligibility. Information regarding the permittee and operator will be gleaned from the application by the Review Inspector, who will enter the required application data into the federal AVS data system. The Review Inspector will receive and print out an initial report identifying any potential links<sup>2</sup> to violators from the federal AVS.

The federal AVS office will search the AVS for links to violators (usually within 72 hours). Upon completion of its research, the federal AVS office will update the AVS and send the Review Inspector the final federal AVS report. The O/C investigator will review and analyze the report and determine the applicant’s eligibility.

If the O/C investigator recommends to “**DENY**”, the Reclamation Program Manager - Permitting or Review Inspector shall immediately notify the applicant (via e-mail) of the determination. The application will not be approved without first obtaining an “**ISSUE**” or “**ISSUE - CONDITIONED**” recommendation.

Within 30 days following DMLR’s application action (issuance, conditional issuance, denial, or withdrawal), the Review Inspector shall enter all relevant information concerning the decision into AVS.

Operator Changes – Subsequent to Permit Issuance

The Inspector may be faced with three situations where an operator change occurs after a permit is issued:

1. The permittee notifies the Inspector that a change in the operator at the permit will occur.
2. The Inspector notes during an onsite inspection that the operator has changed. (In this situation, the Inspector shall follow the procedure set out in the Enforcement Action section to ensure the permittee and operator comply with the applicable regulatory requirements.)
3. An approved contractor assumes (purchases) primary control of the permitted operation. If the Reclamation Inspector has reason to believe the contractor has assumed primary control of the permit, he/she should interview the contractor’s company officials and document the findings in the inspection report. The Inspector should also note in the inspection report any observation of operational control by the contractor, any MSHA legal identity changes, sales agreements, or

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<sup>2</sup> Any links to operations with outstanding reclamation obligations, civil penalty debt, failure to pay reclamation taxes, etc.

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other pertinent documents. The Reclamation Inspector and Area Supervisor must evaluate this to determine what enforcement action, if any, would be appropriate. In most instances, a revision order notice may be issued rather than a notice of violation. (i.e., to reflect the transfer, assignment, and/or sale of the permittee's former property rights.) This would be appropriate when the contractor is an approved operator on the permit.

The Inspector must ascertain whether the operator will or does exercise ownership or control of the mining operation.

- **If the operator exercises ownership and control**, an application to transfer, assign, or sell the permit rights from the permittee to the new operator must be submitted pursuant to 4 VAC 25-130-774.17. The permittee would have to submit a relinquishment of the permit and the new operator would submit a transfer application by forms: DMLR-PT-034e, DMLR-PT-034p, and DMLR-PT-034o. This will also require the publication of a public notice for the transfer, assignment, or sale of the permit for 2 consecutive weeks.
- **If the operator serves at the pleasure of the permittee**, a change would be documented by submittal of the operator information form (DMLR-PT-034o) and certification (DMLR-PT-034D). Publication of a public notice would not be required.

During review of a revision to add a new operator to the permit, prior to the submittal to the Division, a preliminary check of the AVS/OC information and outstanding state penalty information should be conducted. The Field Inspector should contact the Review Inspector by phone and provide the name of the proposed operator and any other O/C information concerning the operator for an immediate preliminary determination.

The Review Inspector will perform a preliminary search of the AVS and check for outstanding civil penalties of the proposed operator. This information will be provided to the Field Inspector by phone.

If the check indicates there is a link to a violator, the Field Inspector will notify the permittee of the problem and inform the permittee that the problem must be resolved before the onsite operator may commence mining operations. If the check indicates there is no link to a violator on the operator, the Field Inspector shall click the inspector approved button on the e-form application inspector checklist

Note: The inspector comments shall state that the contractor information is consistent with the field findings and the preliminary AVS check has been conducted with no problems identified.

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Update of Information:

Whenever the Review or Field Inspector notices changes in the company or corporate structure (i.e.: new officials, contractors, resident agents, mine names, MSHA numbers, etc.), the Inspector will instruct the permittee to submit the appropriate forms (DMLR-PT-034p and/or DMLR-PT-034o) and notify the Reclamation Program Manager - Permitting of the change(s). The Review Inspector will document these changes immediately on the AVS applicant data forms.

The Review Inspector will enter the updated information into the federal AVS, obtain a new evaluation, and initiate an AVS research.

Each DMLR approved change in the corporate or company structure of an existing permit or pending application shall be entered into the federal AVS within 10 calendar days by the Review Inspector (to ensure the system has accurate and current permit information).

Onsite Confirmation of Information:

During complete inspections on minesites with coal removal activity taking place, the Inspector must document the ownership control findings in the inspection report (DMLR-ENF-044S: in the “Type of Inspection” field enter “AQ”). During the onsite review, the Inspector should pay particular attention to such items as the mine identification signs, on-site equipment with identification numbers, and identification of persons who appear to exercise “control” on the site (compared to the information contained in the approved permit package).

If any discrepancies in the approved ownership and control information are observed, the inspector shall contact the Reclamation Program Manager with the information and begin an ownership and control investigation. If the Field Inspector discovers information suggesting an ownership or control change, but is unable to make a clear determination that coal is being removed by a person other than the permittee (or approved operator), such will be documented in the inspection report.

Enforcement Action

When the Field Inspector determines that coal is being removed by a person not approved in the permit as the permittee or operator, a notice of violation (NOV) shall be issued to the permittee requiring the immediate cessation of mining<sup>3</sup> on the site by anyone other than the person approved in the permit as either the permittee or operator. This NOV will be issued under the performance standard code “AO” (mining contrary to the approved plans - 4 VAC 25-130-773.17(c) of the regulations).

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<sup>3</sup> However, if the preliminary AVS check reveals that the operator in question is eligible to conduct mining, the permittee will be instructed to submit the appropriate (operator change) e-form application materials within 5 days. The eligible operator may be allowed to continue operations when the permittee has not relinquished ownership or control over the permit.

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The Inspector shall inform the permittee that

- an operator change (DMLR-PT-034o & DMLR-PT-034D) must be submitted for an operator under the control of the permittee; or
- an application for transfer, assignment, or sale of permit rights (DMLR-PT-034e, DMLR-PT-027; DMLR-PT-034p, and publication of public notice) for any person to whom ownership and control of the permit is transferred, assigned or sold.

The Inspector shall conduct a follow-up inspection within 5 days to verify that mining has ceased by the unapproved individual.

The NOV may be terminated when the unapproved operator ceases mining operations, or for eligible operators the permittee submits:

- for an operator under the permittees' control – an operator change
- for an operator who will assume the permit – an application for transfer, assignment, or sale of permit rights. In addition, the person involved must clear an AVS check and the permittee's bond coverage and liability insurance coverage must be adequate and remain in place until the permit is transferred to the new operator. (The new operator may conduct mining pending final approval of the application when there are no blocks under AVS or failure to pay civil penalties against the new operator.)

Notification Process - Issuance of Failure to Abate Cessation Orders (CO):

Whenever the Field Inspector or Supervisor issues a failure to abate CO to a permittee, the Permitting Office Services Specialist will be immediately notified of the action (or change in status of the CO). The Inspector shall instruct the permittee (4 VAC 25-130-843.11(g)), via the inspection report, to provide (written) current ownership and control information within 30 days from service of the CO. The inspection report<sup>4</sup> shall:

- inform the permittee that the updated information must comply with 4 VAC 25-130-778.13(c).
- instruct the permittee to state in writing if no changes have occurred in the ownership and control information.

The Inspector shall monitor the 30-day deadline established by 4 VAC 25-130-773.17(h). The inspector will contact the Permitting Office Services Specialist to determine if this information has been submitted. The permittee is required to confirm that there are no changes to the ownership and control information or to submit the appropriate changes. If there are any

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<sup>4</sup> The Inspector or Supervisor will send a copy of this report by certified mail to the surety, if applicable.

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changes<sup>5</sup>, the updated ownership and control information, should be submitted by letter to the Reclamation Program Manager – Permitting. If there are changes from the approved ownership and control file, the permittee will be required to also submit the appropriate updated information in an e-form application (DMLR-PT-034p and/or DMLR-PT-034o).

Upon receipt of the CO, the Permitting Office Services Specialist will immediately notify the Reclamation Program Manager - Permitting or staff of the violation(s) cited under the CO.

The Review Inspector shall enter the updated information into AVS.

In the event that the CO is not terminated within 30 days, the Permitting Office Services Specialist (within 60 days after the issuance of the CO) will e-mail and/or mail a copy of the CO to the operator (if different than the permittee) and president/director of the company owning or controlling the particular operation. The Permitting Office Services Specialist shall monitor the 60 day deadline. A cover letter will be included with the CO that informs the persons that the CO was issued, remains unabated, and that alternative enforcement action may occur (e.g., the individuals may be held personally responsible if the violation is not abated).

Routine Requests:

Industry, citizens, or DMLR personnel may make requests for violation checks on companies or individuals. A request for a violation check must be submitted in writing to the attention of the Reclamation Program Manager.

Files:

The AVS data files for each application and permit shall be retained in alphanumeric order in the AVS Office.

Each approved permit must have a computer printout of the latest AVS evaluation attached along with DMLR’s violation history and penalty checks. There will be instances where the O/C investigator recommends that the permit be “**ISSUED - CONDITIONED**” upon compliance with a particular situation. Should this occur, the Review Inspector must prepare and dispatch a “Terms of Issuance” memorandum to the applicant that sets out the condition(s) placed upon the issuance of the permit.

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<sup>5</sup> If there are, the Inspector may issue appropriate enforcement action (see page 5).