

FEDERAL REGISTER: 46 FR 59934 (December 7, 1981)

DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 801 and 806

Surface Coal Mining and Reclamation Operations Permanent Regulatory Program;
Suspension of Effect of Self-bonding and Surface Protection Bonding Rules

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement is issuing a final rule suspending the effect of the self-bonding and surface protection bonding rules at 30 CFR 801 and 806. OSM is involved in litigation concerning the self-bonding, surface protection bonding rules and other rules published on August 6, 1980. National Coal Association, American Mining Congress v. Andrus, civ. No. 80-2530 and Pennsylvania Coal Mining Association et al. v. Department of the Interior, civ. No. 80-2544. Evaluation of that litigation coupled with comments received during the August 6 rulemaking led OSM to the preliminary conclusion that the existing September 9, 1981 proposed rulemaking mentioned in the supplementary information below.

EFFECTIVE DATE: December 7, 1981.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

On September 9, 1981, *46 FR 45082*, the Office of Surface Mining Reclamation and Enforcement (OSM) issued proposed rules which would revise the entire bonding program, including self-bonding and bonding of surface protection measures contained in 30 CFR 801 and 806. OSM will address the entire self-bonding concept in review of comments received pursuant to that rulemaking. Self-bonding and surface protection bonding rules revising the original rules of March 13, 1979 (*44 FR 15485*) were previously published on August 6, 1980, at *45 FR 52306*. At that time OSM acknowledged that difficulties existed with respect to the criteria used in accepting self-bonds. OSM is involved in litigation concerning the self-bonding, surface protection bonding rules and other rules published on August 6, 1980. National Coal Association, American Mining Congress v. Andrus, civ. No. 80-2530 and Pennsylvania Coal Mining Association et al. v. Department of the Interior, civ. No. 80-2544. Evaluation of that litigation coupled with comments received during the August 6 rulemaking led OSM to the preliminary conclusion that the existing self-bonding rules should be suspended pending the outcome of the above-mentioned September 9, 1981 proposed rulemaking.

OSM expects to receive resubmissions of several State programs next month. Suspension of the existing bonding rules which have been proposed for revision will allow States to forego the useless exercise of submitting programs which comply with a set of rules which OSM proposes to replace before the resubmission approval process is complete. Since the self-bonding program is discretionary with the regulatory authorities under the Surface Mining Control and Reclamation Act of 1977 (*30 USC 1201 et seq.* SMCRA), States may still include a self-bonding program in their resubmission. Such a program must meet the minimum standards set by section 509(c) of SMCRA.

OSM recently proposed at *46 FR 52287* (October 26, 1981) to suspend that part of 30 CFR 801.16(a) which requires operators to bond subsidence control and surface protection measures. OSM believes that there is a need to require completion of surface measures to be taken to prevent subsidence, but no need to bond for these actions or those measures not disturbing the surface. Bonding is unnecessary because the work would not be required if operations were ceased under forfeiture. Furthermore, the surface measures are not part of the reclamation plan on which the bond amount is based and the work to be accomplished is contracted. Under the current rules, § 801.16(a), no underground shafts or tunnels can be extended until all surface measures described under 30 CFR 784.20(b) to prevent subsidence are completed or bonded in accordance with 30 CFR 800.11(b). The remaining provisions of § 801.16 do not impact on underground mining which does not disturb surface acreage as part of the mining operation.

The subsidence control provisions continue to be effective as part of the operations plan [subsidence control plan] subject to the regulatory program.

OSM is involved in litigation over the rules specified in this notice. The court has granted OSM numerous extensions of time from the necessity of filing its brief while OSM proceeded with the rulemaking which was published on September 9, 1981. The most recent extension was granted on October 16, 1981, to extend until the date of publication of the notice of proposed suspension of the rules in litigation or until October 26, 1981, whichever was first. The parties to the litigation agreed to mutually seek a further 30 day extension from the date of publication of that notice to allow time for OSM to consider comments received and to make a final decision on whether to suspend these rules. A further extension of seven days was received on November 25, 1981.

DISCUSSION OF COMMENTS RECEIVED

801.16(a) A comment received with respect to suspension of Section 801.16(a) cited the action as illegal. The commenter believed that bonds should be required for subsidence control work in conjunction with underground mining. OSM does not believe that temporary suspension of the limited portion of this rule involved in this action is contrary to section 509 or 516(d) of the Act. This provision will be addressed further in the rulemaking (*46 FR 52306*, September 9, 1981) to clarify the bonding requirements regarding underground mining operations.

Two commenters objected to the 15 day public comment period. They felt that a 30-day comment period and a public hearing were required by Section 501(b) of the Act and 43 CFR Part 14. The commenters also stated that the 15-day comment period was unrealistic and an attempt to avoid public comment on the proposed suspension. The Office acknowledges that the 15-day comment period provided on the proposed suspension notice is shorter than the period OSM normally provides and affirms its general policy of providing at least a 30-day comment period for all rulemakings. As stated in the notice of proposed suspension, OSM provided a shorter comment period in this instance because the Department of Justice was unable to obtain the consent of the plaintiffs in the litigation over these rules, to a further extension of time beyond 30 days. Without plaintiffs' agreement OSM is unlikely to be granted further extensions of the date on which it must file its brief due to the numerous prior extensions granted while the Office was developing the revised bonding rules published on September 9, 1981. In order to be able to make its decision on the proposed suspension within 30 days and to develop its position in the litigation, OSM felt 15 days was the maximum comment period possible. In addition, the decision on suspension must be made before the State program resubmissions are received so that States can know which bonding provisions must be included in their programs. The majority of resubmissions are expected in December and a longer decision process might have vitiated the effect of the suspension for those States.

OSM does not believe the 15-day comment period was unrealistic nor was it attempting to avoid public comment. To the contrary, the comments from citizen and industry groups indicate that there was sufficient time for the public to evaluate the proposal and submit thoughtful comments.

Contrary to the commenter's assertion, this proposal was not governed by 43 CFR Part 14 as that rule was repealed on September 30, 1981, *46 FR 47748*. Comments on that action are not properly directed to OSM. Nor does the Office believe that this suspension of rules is governed by the procedures of section 501(b) of SMCRA. That section provides that the Secretary shall promulgate regulations covering the permanent regulatory program within one year after enactment of the Act but not before holding at least one public hearing on the regulations and providing at least 30 days after publication of proposed regulations for public comment. The Office does not believe that this suspension of rules is covered by section 501(b) because it is not an action to promulgate regulations covering a permanent regulatory procedure under Title V of the Act. Rather it is a temporary suspension of such permanent program rules which will be in effect only until the rulemaking on bonding is completed. Because this action has no permanent effect on the permanent program regulations the Office is of the view that the public hearing and 30-day comment period provisions of section 501(b) are not applicable.

The public was given ample opportunity to comment on the substantive issues of bonding at the public hearing held on September 24, 1981, and during the 30-day comment period for the bonding rules proposed on September 9, 1981. Those comments are currently being considered.

One commenter asserted that this suspension is a major Federal action significantly affecting the quality of the human environment for which an environmental impact statement must be prepared. In addition, the commenter stated that OSM had not prepared an environmental assessment in violation of Departmental Manual requirements. To the contrary, OSM prepared an environmental assessment on October 9, 1981, which concluded that this suspension would not have a significant effect on the quality of the human environment.

The commenter further objected to suspension of detail criteria in the self-bonding rules because State programs would be approved without the details found in the paragraphs to be suspended as guidance by which to evaluate a State's self-bonding submission. OSM, in the rules proposed on September 9, 1981 (*46 FR 45082*) would require that State self-bonding submissions provide criteria which provide equivalent guarantees to other bonding methods, and set forth procedures for evaluating self-bonding candidates. Such a provision would allow State implementation of the Act, which sketches out the basic parameters of self-bonding. Comments suggesting changes in the proposed rules are being considered.

On commenter supported OSM's action and argued that the suspension should be made effective immediately to avoid subjecting the industry to rules challenged as inconsistent with the Act and to allow States to develop resubmissions that do not include provisions that will be changed immediately. OSM accepts the latter part of this comment but rejects the concept that it must suspend any rule which has been challenged in court. In this instance OSM has decided to suspend the rules because it does not believe they adequately implement the bonding provisions of the Act.

Each State submission will be judged, until a final rule is issued, based on the procedures set forth by a State in evaluating financial histories, continuous operation, in qualifying self-bond applicants, and analyzing the financial responsibility and capability of the operator to complete the reclamation required under the mandates of the Act.

It should be noted that each State program is subject to public comment and participation, and it is considered appropriate to evaluate a State's self-bonding options and details at that time.

The Office has determined that these rules should be suspended because they do not allow for effective implementation of a self-bonding program in accordance with section 509(c) of the Act. In addition, the rules are subject to separate rulemaking and an adequate opportunity for public comments has been afforded to resolve problem issues.

Determinations under Executive Order 12291, the Regulatory Flexibility Act and the National Environmental Policy Act

The Department of the Interior has determined that this document is not a major rule and does not require a regulatory impact analysis under Executive Order 12291. The economic impact of the rules is expected to be indirectly beneficial to coal operations and consumers, because of increased availability of bonds and flexibility to regulatory authorities in implementing the rules.

The Department of the Interior has determined that this action does not constitute a major Federal action having a significant effect on the quality of the human environment and an environmental impact statement will not be prepared.

The Department of the Interior has determined that this document will not have a significant economic effect on a substantial number of small entities and therefore does not require a regulatory flexibility analysis under The Regulatory Flexibility Act, Public Law 96-354. The proposed rules under separate rulemaking are expected to reduce the regulatory burden on small coal operators by alleviating previous constraints on the surety market.

Under the authority of *30, U.S.C. 1201*, et seq., and Executive Order 12291 (*46 FR 13192*), Title 30 Subchapter J of the Code of Federal Regulations is amended as set forth below.

The Department of the Interior finds in accordance with *5 U.S.C. 553(d)(3)* that good cause exists to make this final rule effective upon publication because some State programs will be submitted within the next few weeks and a delay in the effective date would vitiate the purpose of the suspension. If these rules were allowed to remain in effect for 30 days longer, few, if any, States would be able to benefit from the opportunity of avoiding the useless submission of bonding rules that will be revised before their programs are approved. Illinois, Kentucky, Ohio, and Tennessee are all expected to resubmit their programs before the end of December which is when the 30-day period following publication of this rule would end. This would mean only Pennsylvania could take advantage of the suspension.

Dated: December 2, 1981.

Daniel N. Miller, Jr., Assistant Secretary, Energy and Minerals.

30 CFR Parts 801 and 806 are amended as follows:

PART 801 – BONDING REQUIREMENTS FOR UNDERGROUND COAL MINES, COAL-PROCESSING PLANTS, ASSOCIATED STRUCTURES, AND OTHER COAL-RELATED LONG-TERM FACILITIES AND STRUCTURES

SECTION 801.16 [SUSPENDED IN PART]

1. 30 CFR 801.16(a) is suspended.

PART 806 -- FORM, CONDITIONS, AND TERMS OF PERFORMANCE BONDS AND LIABILITY INSURANCE

SECTION 806.14 [SUSPENDED IN PART]

2. 30 CFR 806.14 (a)(2) through (a)(4) are suspended.
3. In 30 CFR 806.14(a)(5), the words "for 10 years" and the remainder of paragraph (a)(5) beginning with the second sentence are suspended.
4. 30 CFR 806.14(a)(6) is suspended.

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