

FEDERAL REGISTER: 44 FR 28005 (May 14, 1979)

DEPARTMENT OF THE INTERIOR

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

30 CFR Chapter VII
Petition to Amend Bond

ACTION: Consideration of Petition to amend 30 CFR Subchapter J concerning Bonding.

SUMMARY: OSM seeks public comment on whether to grant a petition for certain amendments to regulations found in 30 CFR Subchapter J concerning bonding of surface coal mining and reclamation operations. If OSM grants the petition, a rulemaking will subsequently be commenced to consider appropriate amendments to OSM's regulations.

DATES: Comments must be received by June 15, 1979, at the address below by no later than 5 p.m. A public hearing will be held on June 5, 1979. Representatives of the Office will be available to meet with interested persons upon request between June 4, 1979 and June 15, 1979.

ADDRESSES: Written comments must be mailed or hand delivered to: Office of Surface Mining, U.S. Department of the Interior, Room 120, South Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240. The public hearing will be held in the Department of the Interior Auditorium, 18th and C. Streets, N.W., Washington, D.C. 20240. Persons wishing to testify at the hearing should contact the person listed below under "For Further Information Contact". Summaries of meetings will be prepared and made available for public review in Room 120 of the Interior South Building.

FOR FURTHER INFORMATION CONTACT: Ron Drake, Special Assistant to the Director, Office of Surface Mining, U.S. Department of the Interior, Washington, D.C. 20240 (202) 343-5371.

SUPPLEMENTARY INFORMATION:

On March 13, 1979, OSM permanent program regulations which include bonding requirements in Subchapter J (44 FR 15385-15393). A petition to amend Subchapter J has been submitted to OSM by the Mining and Reclamation Council of America (MARC), Green Mountain Company and the Travelers Indemnity Company (a copy of this petition is appended to this notice as Appendix A). The petition seeks to amend certain requirements for bonding set forth in 30 CFR, Subchapter J, and contends that such amendments are necessary to insure the regulations comply with the requirements of the Act and the intent of Congress. It further contends that (1) these amendments are necessary to enable surety companies to continue to provide reclamation bonds to coal operators so that they can obtain permits under the OSM regulations; (2) that shall operators, in particular, are having difficulty obtaining bonds; (3) these amendments will contribute to a solution to the small operators' problems; and (4) rapid clarification of this matter is needed to avoid companies being forced out of business because they fail to qualify for a bond due to unfair requirements.

OSM seeks public comment as to whether this petition should be granted in whole or part. If the petition is granted, a rulemaking proceeding will subsequently be undertaken to consider appropriate amendments to Subchapter J, in accordance with 30 CFR 700.12(d), 44 FR 15315, March 13, 1979. Publication of this petition for public consideration and comment should in no way be construed to affect the effectiveness or enforceability of the existing regulations in Subchapter J.

Public Hearing

Individual testimony at the hearing will be limited to 15 minutes. The hearing will be transcribed. Filing of a written statement at the time of giving oral testimony would be helpful and facilitate the job of the court reporter. Submission of written statements to the person identified below under "For Further Information Contact," in advance of the hearing date, whenever possible, would greatly assist OSM officials who will attend the hearing. Advance submissions will give these officials an opportunity to consider appropriate questions which could be asked to clarify or elicit more specific information from the person testifying. The record will remain open for receipt of additional written comments until June 15, 1979.

Persons in the audience who have not been scheduled to speak and wish to do so will be heard at the end of scheduled speakers. Persons not scheduled to testify, but wishing to do so, assume the risk of having the public hearing adjourned if they are not present when all scheduled speakers conclude.

Public Meetings: Representatives of the Office will be available to meet between June 4, 1979 to June 15, 1979 at the request of members of the public, State representatives, industry officials, labor representatives, and environmental

organizations to receive their advice and recommendations concerning the content of the proposed regulations.

Persons wishing to meet the representatives of OSM during this time period may request to meet with Office officials at the Washington office. OSM will be available for such meetings between 9 a.m. and noon and 1 p.m. and 4 p.m., local time, Monday through Friday, excluding holidays, at this location. Summaries of meetings will be prepared and made available for public review in Room 120 of the Interior South Building at the address given above.

Public Comment Period: The comment period on the petition will extend until June 15, 1979. All written comments must be received at the OSM Headquarters, Department of the Interior, South Building, Room 120, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, by 5 p.m., June 15, 1979. Comments received after that hour will not be considered or included in the administrative record on this petition. The Office cannot insure that written comments received or delivered during the comment period to any locations other than specified above will be considered and included in the administrative record on this petition.

Availability of Copies: In addition to its publication here as Appendix A, copies of the petition and copies of 30 CFR Subchapter J are available for inspection and may be obtained at the following offices:

OSM Headquarters, Department of the Interior, South Building, Room 120, 1951 Constitution Avenue, N.W., Washington, D.C. 20240 (202) 343-4728.

OSM Region I, First Floor, Thomas Hill Building, 950 Kanawha Boulevard, East Charleston, W. Va. 25301; (304) 342-8125.

OSM Region II, 530 Gay Street, S.W., Suite 500, Knoxville, Tenn. 37902; (615) 637-8060.

OSM Region III, Federal Building and U.S. Courthouse, 46 East Ohio Street, Indianapolis, IN 46204; (317) 269-2609.

OSM Region IV, 818 Grant Avenue, Scarritt Building, 5th Floor, Kansas City, Missouri 64106; 913-758-2193.

OSM Region V, Post Office Building, 1823 Stout Street, Denver, CO; 80205, 303-837-5511.

Dated: May 8, 1979.

Walter N. Heine,
Director, Office of Surface Mining Reclamation and Enforcement.

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PETITION TO INITIATE RULEMAKING

Mining and Reclamation Council of America, Petitioner.

Petition

Pursuant to the provisions of Section 201(g) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* (Supp. 1978) and the requirements of 30 CFR 700.12, The Mining and Reclamation Council of America (MARC), Green Mountain Company and The Travelers Indemnity. Company hereby petition the Director of the Office of Surface Mining Reclamation and Enforcement to initiate a rulemaking proceeding to amend certain provisions of 30 CFR Subchapter J, Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations.

Petitioner Mining and Reclamation Council of America is a national trade association representing companies, individuals and state associations involved in the surface coal mining industry. MARC now has over 220 member companies from 26 states and 18 affiliate associations from 13 states with a total representation of nearly 3,000 companies who produce approximately 70% of the U.S.'s coal production. MARC's primary goal is to aid in bringing about an orderly expansion of the surface coal mining industry.

Petitioner Green Mountain Company is a multidisciplinary firm aiding the coal mining industry in resource development during planning and exploration, environmental monitoring during operation, reclamation and revegetation, and finally, in support of reclamation *bond release*. Green Mountain Company has broad experience in dealing with bonding/surety companies and with state regulatory agencies in developing bonding procedures and methodologies.

Petitioner The Travelers Indemnity Company is a major underwriter of reclamation bonds for surface coal mining companies, particularly in Appalachia. Representative of the company's involvement in the Surety Department of its Pittsburgh office which handles in excess of 400 surety accounts. The ability of the company to continue to provide this service to the surface coal mining industry is dependent upon the provisions of Subchapter J.

Petitioners seek amendments to certain provisions in 30 CFR Subchapter J to insure the regulations comply with the requirements of the Act and the intent of Congress. These amendments are necessary to enable surety companies to continue to provide reclamation bonds to coal operators so that they can obtain permits under the OSM regulations. Small operators, in particular, are having a very difficult, if not impossible, time in obtaining bonds; these amendments will constitute to a solution to the small operators' problems. Rapid clarification on this matter is needed to avoid companies being needlessly forced out of business because they fail to qualify for a bond due to unfair requirements.

1. The Proposed Amendments: Petitioners request that the following changes be made to 30 CFR, Subchapter J:

CHANGE

Part 800.11(b) Requirement to file bond page 15386, should be changed to read as follows:

"An operator shall not disturb surface acreage or extend any underground shafts, tunnels or operations prior to receipt of approval from the regulatory authority of a performance bond covering the surface acreage to be affected of the permit area."

Justification

Section 509(a) specifically limits the required bonded area to only the area of land covered by the permit. Further support is provided in statutory language of the Act under the definition of permit area, Section 701:

"(17) 'permit area' means the area of land indicated on the approved map submitted by the operator with his application, which area of land shall be covered by the operator's bond as required by Section 509 of this Act and shall be readily identifiable by appropriate markers on the site;"

Congress did not contemplate or provide for the requirement of bonding affected areas. Only through regulatory definition is permit area and affected area defined as being one in the same. Section 701(28)(b) definition of surface coal mining operation with reference to permitting and bonding states: "the areas upon which such activities occur or where such activities disturb the natural land surface." Additional support can be found in Section 516(b)(10) and 516(d) for recognizing the distinct differences between surface and deep mines:

CHANGE

Part 805.11 Determination of Bond Amount page 15387, add new Part 805.11(a)(b)

The amount of performance bond may be determined on a cumulative basis rather than an individual cost per acre where the resulting bond is sufficient to cover the cost of reclaiming the full area which would be disturbed at any given time.

Justification

The basis for the bond as indicated in section 509(a) of the Act is to be sufficient in amount to assure the completion of the reclamation plan, if the work has to be performed by the regulatory authority in the event of forfeiture and not to place a burden on the operator. Therefore, on a composite basis of permitting and bonding 100 acres at a bond rate of \$1,000.00 per acre the resulting \$100,000 performance bond would be sufficient to assure reclamation of say a 20 acre disturbed area. The amount of disturbed acres would remain constant through the mining sequence. As new areas are being disturbed, mined areas are constantly being reclaimed. Whereas, when viewed from an individual basis, \$1,000 per acre would not be sufficient to reclaim 100 acres if all 100 acres were disturbed at one time. As a result of PL 95-87 and subsequent regulations requiring the operator to keep operations current, the amount of disturbed acreage which would be subject to full reclamation would be limited in most cases to a constant amount and never would the entire permit area be subject to the full reclamation standards at one time.

"(10) with respect to other surface impacts not specified in this subsection including the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are cited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities, operate in accordance with the standards established under section 515 of this title for such effects which result from surface coal mining operation: Provided, the Secretary shall make such modifications in the requirements imposed by this subparagraph as are necessary to accommodate the distinct difference between surface and underground coal mining;

"(d) The provisions of title V of this Act relating to State and Federal programs, permits, bonds, inspections and enforcement, public review, and administrative and judicial review shall be applicable to surface operations and surface impacts incident to an underground coal mine with such modifications to the permit application requirements as are

necessary to accommodate the distinct difference between surface and underground coal mining. The Secretary shall promulgate such modifications in accordance with the rulemaking procedure established in section 501 of this Act."

CHANGE

Part 805.13(b) Period of liability page 15387, changed to read as follows:

"In addition to the period necessary to achieve compliance with all requirements of the Act, this chapter, the regulatory program and the permit including the standards for the success of revegetation as required by 30 CFR 816.116 and 817.116, the period of liability under performance bond shall continue for a minimum period beginning with the last year of augmented seeding, fertilizing, irrigation or other work. The minimum period of liability shall continue in areas of more than 26.0 inches average annual precipitation, for not less than five years or in areas of 26 inches or less average annual precipitation, for not less than ten years. The period of liability shall begin again whenever augmented seeding, fertilizing, irrigation or other work is required or conducted on the site prior to bond release *when the regulatory authority determines that if these practices were not conducted successful vegetation could not be established. This regulation does not preclude and will not result in the period of liability beginning again when normal and reasonable good husbandry practices are being followed.* "

Justification

As written the regulation is in conflict with the best available technology now being employed by many operators as a successful management practice for establishment of revegetation. This practice is not unlike that currently being used throughout the agricultural industry. As a result of penalizing an operator for using good husbandry practices, most if not all, will stop refertilizing and reseeded in their revegetation programs.[Page 28007]

CHANGE

Part 805.13 Period of liability page 15387, include new part 805.13(e), to read as follows:

"The period of liability in this part shall not be extended as a result of failure to complete an alternative post mining land use plan so long as all other conditions of part 807 are met. "

Justification

It is unreasonable to require to surety to assume liability for completion of an alternative post mining land use plan as a condition of release of a performance bond. There is no way that a surety can guarantee that an agricultural use is implemented, houses built, or an industrial complex developed. In many cases a third party land owner who may be different than the operator would be required to develop the post mining land use and would not be held liable under performance bond by the Surety. Therefore the surety could not have any guarantee that the land owner would develop the property as part of the operators post mining land use.

CHANGE

Part 805.14(a) Adjustment of Amount page 15387, should be changed to read as follows:

"The amount of the performance bond liability applicable to a permit should be adjusted by the regulatory authority as the acreage in the permit area is revised, methods of mining operation change, standards of reclamation change or when the cost of future reclamation, restoration or abatement work changes. The regulatory authority shall notify the permittee *and surety* of any proposed bond adjustment and provide the permittee *and surety* an opportunity for an informal conference on the adjustment. The regulatory authority shall review each outstanding performance bond at the time the permit reviews are conducted under 30 CFR 788.11, and re-evaluate those performance bonds in accordance with the standards in Section 805.11."

Justification

The surety because of the nature of the performance bond and the indefinite liability should be given the same notification and opportunity as the permittee in cases of bond adjustments and bond releases.

CHANGE

Part 805.14 (a) & (b) Adjustment of bond amount page 15387, should be changed to read as follows:

"(a) The amount of the performance bond liability applicability to a permit shall be adjusted by the regulatory authority as the acreage in the permit area is revised, methods of mining operation change, standards of reclamation changes or when the cost of future reclamation, restoration or abatement work changes. The regulatory authority shall notify the permittee *and surety* of any proposed bond adjustment and provide the permittee *and surety* an opportunity for an informal conference on the adjustment. The regulatory authority shall review each outstanding performance bond at the time that permit reviews are conducted under 30 CFR 78.11, and re-evaluate those performance bonds in accordance with the standards in Section 805.11.

(b) A permittee *and surety* may request reduction of the required performance bond amount upon submission of evidence to the regulatory authority proving that the permittee's method of operation or other circumstances will reduce the maximum estimated cost to the regulatory authority to complete the reclamation responsibilities and therefore warrant a reduction of the bond amount." (Delete: "The request shall be considered as a request for partial bond release in accordance with the procedures of Part 807 of this Chapter.")

Justification

The surety because of the nature of the performance bond and the indefinite liability should be given the same notification and opportunity as the permittee.

Adjustment to bond amounts has a statutory basis under Section 509(e):

"(e) The amount of the bond or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the regulatory authority from time to time as affected land acreages are increased or decreased or where the cost of future reclamation changes."

Adjustments to bond amounts are extremely unusual in surety markets and highly undesirable from the point of the surety. Coal operators could be faced with closing operations as a result of being unable to provide a sufficient financial statement that would satisfy a surety to allow extension of bond liability as a result of adjustments in bond amount. The most immediate effect of this regulation will develop during implementation of state approved programs when operators are required to submit new permit applications requiring possibly increased amounts of bond for existing bonded acreage and new bonds for areas which were previously not required to be bonded such as associated structures.

What happens to the operators who are able to comply with the performance standards of the act but are unable to financially or otherwise meet the additional bond capacity necessary to remain in business? Again, the adverse economic impacts such as loss of job, tax revenue and energy have not been properly addressed.

CHANGE

Part 806.11(b) Form of the performance bond. Pages 15387-15389, Delete this entire section, which stipulates the conditions under which self-bonding will be approved. Section should be rewritten to require only the information specified in the Act.

Justification

The section as written goes beyond the intent of the Act which provided for self-bonding "when the applicant demonstrates to the satisfaction of the regulatory authority the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation..." OSM's requirements in Section 806.11(b)(2) for the operator to show a net worth of six times the total self-bonded amount is clearly an arbitrary evaluation of a showing of financial solvency. Additionally, the requirements in Section 806.11(b)(3) and (4) for a mortgage or security interest in real or personal property are nowhere required by the Act. Such a mortgage or interest is merely another form of collateral and should not be included under the self-bonding provisions. These requirements are clearly beyond the intent of Section 509(c) of the Act.

CHANGE

Part 807.11(b)(7) Procedure for seeking release of performance bond page 15391, Delete:

(7) State that written comments, objections, and requests for a public hearing or informal conference may be submitted to the office of the regulatory authority provide the address of that office, and the closing date by which comments, objections, and requests must be received.

Justification

The Act under section 519(a) is specific in regards to the contents of a newspaper advertisement of application and does not list this as being one of the items. This is clearly an area where regulation has gone beyond the intent of the Act.

CHANGE

Part 807.12 Criteria and schedule for release of performance bond, page 15392, should be deleted in its entirety and rewritten as follows:

"The regulatory authority may release portions of the liability of the performance bond applicable to the permit if the authority is satisfied that the reclamation covered by the bond or deposit or portion thereof has been accomplished as required by the Act according to the following schedule.

"(1) 60% of the total bond liability applicable to the bond (areas) shall be released upon completion of backfilling, regrading and drainage control of the disturbed area.

"(2) Additional (amounts) of bond may be periodically released after regulatory authority is satisfied that a successful permanent diverse vegetation has been established on the disturbed area. When determining the amount of bond to be released after successful revegetation has been established the regulatory authority shall retain that amount of the bond sufficient for a third party to cover the cost of reestablishing revegetation.

"(3) The full amount of the bond may not be released until the expiration of the period specified for operator responsibility in section 515 of reestablishing revegetation or so long as the lands to which the release would be applicable are contributing suspended solids to stream flow or runoff outside the permit area in excess of applicable State and Federal Laws."

Justification

The regulations as written do not allow for the full release of 60% of the bond liability upon completion of backfilling, regrading and drainage control as the Act contemplated. In addition regulation Section 807.12(c) precludes release of bond under Section 807.12(b)(1) and (2) by restricting the maximum performance released at any time prior to the completion or reclamation phase III on the entire permit area. The amount of release is determined by multiplying the ratio between the acreage on which reclamation phase III has been completed and the total acreage in the permit area times the total liability on the performance bonds applicable to permit times 15%. Therefore, no bond can be released until reclamation phase III is completed which includes the extended period of liability.

NET PART[Page 28008]

Section 809(a) Bonding requirements for underground coal mines, refuse areas, preparation plants, coal loading facilities and associated structures and facilities.

Section 809(a)(1) *Authority*.

Sections 101, 102, 501, 516(b)(10), 516(d) and 701(28)(b).

Section 809(a)(2) *Scope*.

This part sets forth applicable requirements for bonding underground coal mines, refuse areas, preparation plants, coal loading facilities and associated structures and facilities.

Section 809(a)(3) *Objective*.

The objective of this part is to provide minimum standards for bonding underground coal mines, refuse areas, preparation plants, coal loading facilities and associated structures and facilities under 516(d).

Section 809(a)(4) *Responsibility*.

All persons seeking to engage or engaging in surface coal mining and reclamation operations subject to this section shall comply with this part.

Section 809(a)(5) *Requirements*.

a. All of the provisions of part 800 shall apply to bonding underground coal mines, refuse areas, preparation plants, coal loading facilities, and associated structures and facilities except that:

1. The regulatory authority shall recognize the specific difference between surface coal mining and underground coal

mining and associated structures and facilities in determining the amount and duration of performance bond liability.

2. The period of liability for responsibility under each bond may be established for a fixed renewable period of time of not less than 5 years.

3. Nothing in this part shall exempt the regulatory authority from allowing an operator to establish an escrow account in conjunction with or separately from a performance bond to insure upon abandonment the reclamation of the disturbed area covered in the permit. Furthermore, as part of the approved reclamation plan the regulatory authority may grant variances to allow associated structures or facilities not posing an eminent danger to health, safety or well being of the environment or people of the area to remain in place upon completion of their use.

[FR Doc. 79-14995 Filed 5-11-79; 8:45 am]

BILLING CODE 4310-05-M