

FEDERAL REGISTER: 51 FR 24547 (July 7, 1986)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 800

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program;
Performance Bonds; Petition for Rulemaking

ACTION: Notice of decision on petition for rulemaking.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is making available to the public its final decision on a petition for rulemaking from the Joint National Coal Association/American Mining Congress (NCA/AMC) Committee on Surface Mining Regulations. The petition requested that OSMRE revise the bonding regulations of 30 CFR 800.5, 800.12, 800.16, 800.21 and 800.23. On June 16, 1986, in a letter to the petitioners, the Director made a decision granting one proposal and rejecting the two other proposals in the petition. OSMRE will propose rulemaking to revise 30 CFR 800.23 to allow for third-party guarantees for an applicant's self-bond.

ADDRESS: Copies of this petition, 30 CFR Part 800 and other relevant materials comprising the administrative record of this petition are available for public review and copying at OSMRE, Administrative Record, Room 5315L, 1100 L Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Frank Mancino, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Ave., NW., Washington, DC 20240; telephone 202-343-7952.

SUPPLEMENTARY INFORMATION:

I. PETITION FOR RULEMAKING PROCESS

Pursuant to section 201(g) of the Surface Mining Control and Reclamation Act of 1977 (the Act) any person may petition the Director of OSMRE for a change in OSMRE's regulations. If the petition is granted, the Director initiates a rulemaking proceeding. If the petition is denied, the Director notifies the petitioner in writing, setting forth the reasons for denial. Under Section 700.12(d), the Director's decision constitutes the final decision for the Department of the Interior.

II. THE NCA/AMC PETITION

OSMRE received a letter dated September 19, 1985 from the NCA/AMC Joint Committee on Surface Mining Regulations presenting a petition for revision of certain bonding requirements of 30 CFR Part 800. On October 29, 1985 OSMRE published in the Federal Register (*50 FR 43722*) a request for public comments on the revisions suggested by NCA/AMC.

The decision of the Director accepts one provision of the petition and rejects the two others. As a result of this decision, OSMRE will initiate rulemaking proceedings and publish a Notice of Proposed Rulemaking with an appropriate public comment period. The Director's response to the petitioner on this rulemaking petition appears as an appendix to this notice. The response contains the Director's decision, a summary description of the issues raised by the petitioner, a discussion of OSMRE's current regulatory bonding program, an analysis of the petitioner's proposed regulatory changes, and a discussion of the comments received on the petition.

Dated: June 27, 1986.

James W. Workman, Acting Director.

APPENDIX

This responds to the September 19, 1985, petition for rulemaking to the Office of Surface Mining Reclamation and Enforcement (OSMRE) on behalf of the Joint NCA/AMC Committee on Surface Mining Regulations to amend certain OSMRE bonding regulations.

On October 2, 1985, the Director determined that the petition for rulemaking had sufficient basis to seek public comments on the proposed rule changes. Accordingly, OSMRE published a request for comment on the petition on October 29, 1985, in the Federal Register (*50 FR 43722*). The comment period closed on December 13, 1985. Nine comments were received by OSMRE during the comment period. This letter informs you of my decision to grant the petition in part and to deny the petition in part, which, as provided in 30 CFR 700.12(d), constitutes the final decision for the Department of the Interior.

This letter is divided into six sections. The first section, Final Decision, summarizes this decision. The second section, Substance of the Petition, is a discussion of issues raised by the petitioner. The third section discusses the current OSMRE regulatory program. The fourth section discusses comments submitted by persons other than the petitioner. The fifth section analyzes the proposals of the petition. The sixth section discusses related OSMRE bonding actions.

FINAL DECISION

I am granting in part the petition to initiate rulemaking. As a result, a rule will be proposed to provide for the nonparent guarantees for self-bonding proposed by the petition. OSMRE is developing appropriate language to implement this proposal and will publish a Notice of Proposed Rulemaking (NPR) in the Federal Register.

SUBSTANCE OF THE PETITION

The petitioner expressed concern about some coal mining companies being unable to afford bonds in the amounts reached as a result of the methodology for calculating bond amounts.

The petitioner sought amendment to 30 CFR 800.5, 800.12, 800.16, 800.21 and 800.23 for the following three proposals:

(1) Allowance for third party nonparent self-bonding. This proposal would amend 30 CFR 800.23 to allow a permit applicant to have its self-bond guaranteed by any third party that meets the conditions of 30 CFR 800.23.

(2) Authority for the creation of a sinking fund by a permit applicant or third party to displace bonding liability. This proposal would amend the regulations so that a permittee or third party could place current revenues into a fund that would cover the calculated bond costs.

(3) Revision of the financial criteria of the self-bonding regulations. This proposal would revise 30 CFR 800.23 to provide for the consideration of the following items in determining the self-bonding limit for a permittee:

- Length and type of sales contract
- Financial strength of the operator
- Operating and regulatory compliance history of the operator
- Stability of customer
- Contract provisions
- Size of operation and production
- Type of capital investment
- Land tenure provisions
- Fixed asset value of the coal reserve
- Marketing history

In addition, the proposal would change the limit of 25 percent of an applicant's tangible net worth for self-bonding purposes to allow for an upward adjustment whenever an applicant can assure continued operation, considering the above financial factors.

CURRENT OSMRE REGULATORY PROGRAM

OSMRE regulations at 30 CFR Part 800 establish the requirements of bonding and insurance for all applicants for a surface coal mining operation permit. The current regulations at 30 CFR 800.12, provide for three separate types of bonding: surety bonds, collateral bonds, and self-bonds. The regulations also provide the criteria for determining bond amounts, release of bonds, the period of liability, bond adjustment, bond replacement, bond forfeiture, and liability insurance.

30 CFR 800.23 establishes the provisions for self-bonding. The present self-bonding regulations allow an applicant for a permit or its parent company to obtain a self-bond if financial information is submitted to show that the applicant or parent meets the criteria for approval. The criteria for approval require either: 1) A minimum bond rating of "A" for its most recent bond issues; 2) a tangible net worth of at least \$10 million, a ratio of 2.5 or less of total liabilities to net worth and a ratio of 1.2 or more of current assets to current liabilities; or 3) fixed assets in the U.S. of at least \$20 million, and a ratio of 2.5 or less total liabilities to net worth and a ratio of 1.2 or more of current asset to current liabilities.

In addition to the above criteria and the financial information, an applicant for a self-bond cannot have more than 25 percent of its net worth committed to self-bonds.

Collateral bonds are defined in 30 CFR 800.5 as cash accounts, negotiable bonds of the U.S., a State or a municipality, negotiable certificates of deposit, irrevocable letters of credit, first-lien security interest in real property or other investment-grade rated securities of at least an "A" rating or equivalent, all of which are endorsed to the regulatory authority.

30 CFR 800.21 establishes the criteria for collateral bonds and requires that cash accounts be established in a Federally insured or equivalently protected institution. This section provides for payment of interest on such accounts to the operator as approved by the regulatory authority and limits each account to less than \$100,000 or an amount determined by the Federal Deposit Insurance Corporation. The total bond including the cash account is not to be less than the amount determined under 30 CFR 800.40.

COMMENTS RECEIVED

OSMRE received 9 comments on the petition for rulemaking. These comments can be divided into two groups: Those favoring the entire petition, and those in favor of certain specific provisions of the petition. No comment was against the entire petition.

Those commenters in favor of the entire petition stated that they supported the petition because of the high costs of surety bonding and because obtaining a surety bond was becoming more difficult.

One commenter who supported the petition recommended that the Director encourage all parties to propose any ideas or alternatives which would assist in solving the problems of bond limits and availability. Another commenter stated that the provision for sinking funds must be more specific and establish criteria to ensure that such funds could be used only for reclamation costs. Another commenter opposed the proposal which could allow the self-bond limit to include consideration of long-term contracts, specifically, and opposed the general economic and financial factors on the grounds that it places the regulatory authority in a position of speculation on future economic conditions.

ANALYSIS OF NCA/AMC RECOMMENDED CHANGES

(1) THIRD PARTY NONPARENT SELF-BONDING.

In the 1983 revisions to the bonding regulations (*48 FR 36425*) OSMRE considered allowing the guarantee of self-bonds by companies which were not parent to the permit applicant. At that time, OSMRE decided not to consider the provision on the grounds that it did not provide sufficient assurances of a direct interest in the successful reclamation operations of the permit applicant. However, OSMRE has recently been given information on large mines where nonparent parties have a direct interest in the operation of the mine. For instance, the San Juan mine is operated by Utah

International in New Mexico which is the sole supplier of coal to the San Juan power plant. In this situation, the owner of the San Juan power plant, Public Service Company of New Mexico, would have a significant economic interest in the permittee to safeguard the proper operation and reclamation of the San Juan mine. Therefore, allowance of such a provision would not necessarily entail greater risk to the regulatory authority. OSMRE has decided that the issue should be reexamined at this time, and a proposed rule incorporating the suggested provision to allow third party guarantors, if certain safeguards are present, is warranted. Precise details of such provisions, including appropriate safeguards, will be developed.

(2) AUTHORITY FOR THE CREATION OF A SINKING FUND.

The petitioner proposes that "authority should be granted for the permittee or third party nonparent to create a sinking fund for reclamation costs that would at least partially displace bonded liability." Section 509(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), *30 U.S.C. 1259(a)*, requires an applicant to file with the regulatory authority a performance bond meeting certain specified conditions. A sinking fund as requested by the petitioners would not satisfy the requirements of section 509(a) for a bond of a particular amount to be posted prior to permit issuance.

Section 509(c) of SMCRA authorizes the approval of alternative systems that will achieve the objectives and purposes of section 509. The petitioners failed to demonstrate how an alternative system employing a sinking fund would achieve the purposes and objectives of section 509. A sinking fund under the control of the permittee or third party nonparent would not provide the regulatory authority the necessary control over the set aside funds, or a priority claim in the event of permittee insolvency, to ensure the satisfactory completion of reclamation, as required by Section 509. Therefore, OSMRE rejects this proposal of the petitioner.

(3) REVISION OF THE SELF-BONDING LIMIT AND CONSIDERATION OF FINANCIAL FACTORS.

30 CFR 800.23 was established to provide for self-bonding. The requirements of this section are indicators of a company's solvency, which can be determined and monitored by a regulatory authority without specialized financial expertise. The revised criteria proposed by the petitioners could substantially increase the burden on the regulatory authority, both in terms of the amount of work to be done and the type of expertise that would have to be established. The petitioner has not convinced OSMRE that the benefits which could be obtained from changing the criteria in Section 800.23 outweigh the added complexity of analysis that would result. As to two of the criteria proposed by the petitioner - namely land tenure provisions, and the fixed asset value of the coal reserve in place -- OSMRE considered during the 1983 rulemaking allowing unimproved land and coal reserves to be part of the calculation of fixed assets (*48 FR 36424*) but decided against this because such values could not be reliably appraised due to market fluctuations. Because such values can fluctuate from year to year, consideration of such factors would impose an unacceptable level of risk to the regulatory authority. Therefore, OSMRE does not accept the proposal of the petition to amend this part of the regulations for the consideration of certain financial or economic factors in calculating the fixed assets of a company.

With regard to the suggestion that the 25 percent net worth limitation of a self-bond be changed to a minimum limit that can be adjusted upward where the assurance of continued operation is reinforced by the financial and economic factors recommended by the petition, OSMRE concludes that such a revision would not provide adequate assurance of continued operation unless the regulatory authority also considers the financial and economic factors recommended by the petition. OSMRE is not willing to accept such factors for inclusion in the self-bonding regulations for the reason discussed above. Therefore, the proposal to change the present net worth limit for self-bonds is not accepted.

Based on the foregoing, I have concluded that the proposal for nonparent guarantees for the self-bond of a permit applicant, proposed by the petitioner, is acceptable for a proposed regulatory revision. The two other proposals, revision of the self-bond limits and proposal of a sinking fund, will not be accepted for regulatory revision at this time for the reasons discussed in the above section.