

FEDERAL REGISTER: 53 FR 994 (January 14, 1988)

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; Bond Release Application

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior (DOI) is amending the rules that govern the information required in an application to release a performance bond to include the name of the permittee and amending the bonding rules to allow third parties to guarantee a self-bond. These revisions are in accordance with the Secretary's brief of March 5, 1984, in which the Secretary addressed the National Wildlife Federation's challenge to the omission of the permittee's name in the published notice of bond release and in response to a June 16, 1986, petition for rulemaking from the National Coal Association/American Mining Congress (NCA/AMC) Joint Committee on Surface Mining Regulations requesting that OSMRE amend its rules to allow third parties to guarantee a self-bond. The rules were proposed on November 26, 1986, with a comment period that closed on February 5, 1987. Six parties commented on this proposal. These final rules are adopted for the permanent regulatory program.

EFFECTIVE DATE: This rule is effective on February 16, 1988.

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 No. (202) 343-7952.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of Comments and Rules Adopted
- III. Procedural Matters

I. BACKGROUND

The Surface Mining Control and Reclamation Act of 1977 (the Act, Pub. L. 95-87), *30 U.S.C. 1201* et seq., sets forth the general regulatory requirements governing surface coal mining operations and the surface impacts of underground coal mining. OSMRE has by regulation implemented the general requirements of the Act and established performance standards to be achieved by different operations. The regulations dealing with the requirements for performance bonding are contained within 30 CFR Chapter VII, Subchapter J, Part 800. This part was revised on July 19, 1983 (*43 FR 32932*) and August 10, 1983 (*43 FR 36429*).

SECTION 800.40 of 30 CFR contains the requirements for release of performance bonds. Sections 800.5 and 800.23 of 30 CFR contain the requirements for acceptance of a self-bond. On November 26, 1986 (*51 FR 42985*) OSMRE proposed to revise these sections.

SECTION 800.5 was proposed to be revised by the removal of the term "parent corporation" from the definition of self-bond, and replaced by the term "corporate guarantor."

SECTION 800.23 was proposed to be revised by the removal of the term "parent corporation" and replaced by the term "corporate guarantor" in the requirements for obtaining a self-bond.

The changes proposed in Sections 800.5 and 800.23 resulted from the acceptance by OSMRE of a petition to change the regulations filed by the Joint National Coal Association (NCA)/American Mining Congress (AMC) Committee on Surface Mining Regulations. This petition, filed according to the rulemaking provisions of 30 CFR 700.12, was published in the Federal Register on October 29, 1985 (*50 FR 43722*) for public comment. On June 16, 1986, OSMRE made a

decision to accept one proposal and to reject two other proposals of the petition. Notice of OSMRE's decision was published in the Federal Register on July 7, 1986 (*51 FR 15047*).

SECTION 800.40(a)(2) was proposed to be revised by the addition of the words "the permittee's name" to the requirements for release of performance bonds. This change was made in response to a commitment made by the Secretary in *In Re: Permanent Surface Mining Regulation Litigation (II)*, Civil Action 79-1144 (D.D.C. 1984).

II. DISCUSSION OF COMMENTS AND RULES ADOPTED

The public comment period for these rules opened on November 26, 1986, and closed February 4, 1987. The commenters generally favored the proposed changes in the bonding rules, with one exception discussed below. A total of six commenters filed written statements resulting in over 12 comments. Two were from State regulatory authorities, two were from coal operators, one was from a national coal industry trade organization, and one was from an environmental group. Five of the commenters favored the change in the self-bonding sections of the rules and one opposed the changes. Two of the commenters supported the change in the requirements for bond release notice and the other four did not comment. No public hearings or meetings were requested and none were held. After considering all the comments on the proposed rulemaking, OSMRE is finalizing the rule with some minor changes based on the comments received.

Some industry commenters proposed that OSMRE reconsider various proposals to revise the existing bonding regulations, discussed in the rulemaking petition of September 19, 1985 (*51 FR 15047*). These comments were not directed to the proposed rulemaking herein and are thus not relevant nor appropriate to this rulemaking.

OSMRE wishes to emphasize that although OSMRE has not proposed to include certain provisions in its national rules, States may submit for OSMRE's approval alternative systems under section 509(c) of the Act that will achieve the objectives and purposes of the bonding program as set forth in section 509.

SECTIONS 800.5 AND 800.23 - DEFINITIONS AND SELF-BONDING.

Section 800.5 contains definitions applicable to this section. OSMRE proposed to revise the definition of self-bond, to include a corporate guarantor in place of a parent corporation. Based on the comments received, as discussed below, OSMRE has adopted the proposal to define a self-bond to include a corporate guarantor but has revised the definition to require the permit applicant to execute the indemnity agreement as well as the corporate guarantor. The term "applicant" has been used instead of the term "permittee" in the definition to reflect the language of section 509 and to label more accurately the status of the potential permittee at the time the indemnity agreement is executed.

Section 800.23 contains the requirements for the qualification, acceptance and replacement of self-bonds. OSMRE proposed to revise this section by replacing the term "parent corporation guarantor" wherever it appeared with the term "corporate guarantor". The changes would have occurred in paragraphs (b), (c), (d), (e)(1), (e)(2), (e)(3), (f) and (g). Based on the comments received, OSMRE has retained the original provisions of 30 CFR 800.23 for those paragraphs dealing with parent guarantors of a self-bond, but has added new language concerning non-parent guaranteed self-bonds and included requirements for the self-bond applicant whenever a non-parent entity guarantees the self-bond. One new provision relating to non-parent guarantors is contained in new paragraph 820.23(c)(2).

Section 800.23(g) obligates a permittee to post an alternate bond in the same amount as the self-bond if the financial conditions of the permittee or corporate guarantor no longer satisfy the financial criteria of Sections 800.23(b)(3) and 800.23(d). OSMRE wishes to clarify that under Section 800.12(d) the alternate bond may consist of a self-bond guaranteed by a non-parent corporate guarantor and one or more of the other types of bonds. However it should be emphasized that under such circumstances a self-bond can only be used in an amount which will satisfy the applicable financial criteria and that the total amount of the combination bond must be equivalent to the self-bond being replaced.

OSMRE also wishes to clarify that the "continuous operation" requirement of Section 800.23(b) that must be satisfied by the applicant and each guarantor may be satisfied by continuous operation as a business entity. It does not mean that the entity must have been in the coal mining business for five years.

One regulatory authority commenter suggested that OSMRE require in these final regulations that any corporate or third party guarantor must comply with State licensing requirements applicable to corporations which underwrite bonds,

if fees are charged for their services. OSMRE did not accept this proposal because it is beyond the intent of SMCRA to deal with corporate licensing requirements that are the subject of State laws and regulations other than SMCRA. This rule is not intended to affect the applicability of any state licensing requirement.

One environmental organization commenter opposed the proposed revisions to both Sections 800.5 and 800.23 on the grounds that: (1) The proposal was not consistent with the Act; (2) the third party guarantor would have no interest in the successful mining and reclamation of the guaranteed operation; (3) the signing of an indemnity agreement by a utility or other non-parent guarantor might not be legally enforceable; (4) OSMRE or the States have no practical experience of non-parent guarantees of self-bonding and parent company self-bonding; (5) self-bonds are inherently riskier than surety bonds; (6) Congress intended that the objectives of self-bonding to be the same as for other types of bonding; and (7) the proposal decreases the permittee's responsibilities for reclamation. These issues will be discussed in turn.

1. CONSISTENCY OF THE PROPOSED REVISIONS WITH THE ACT

The commenter opposed this proposal on the grounds that section 509(c) of the Act does not authorize the acceptance of a self-bond by a party other than the permit applicant. OSMRE believes that the final rule is consistent with section 509(c) of SMCRA and is promulgating the rule as revised in response to many of the suggestions of the commenter. Section 509(c), which provides general guidance on self-bonding, neither prohibits a system that allows for a written guarantee on an applicant's self-bond nor limits the Secretary's discretion to provide for such a guarantee of a "self-bond". The intent of the performance bonding provision of section 509 is to provide a means of ensuring that reclamation requirements established by the Act will be fulfilled. The intent is not to financially penalize permittees but to have their performance guaranteed. Such guarantees can be obtained through a corporation licensed to do business as a surety, through posting of collateral or through filing a "self-bond", as defined by OSMRE. In developing the bonding regulations over the years, OSMRE has promulgated various provisions for achieving the intent of section 509.

In response to the commenter's concerns, the language being adopted in the final rule has been modified in a number of respects to emphasize that it is the permittee who posts the self-bond and that the third party functions as the guarantor. As mentioned above, the definition of "self-bond" reflects that in each instance, the permit applicant must be a person who executes the indemnity agreement, and not just the non-parent guarantor, as was proposed. Also the final rule recognizes that in situations involving non-parent corporate guarantors, the applicant must meet the "history or financial solvency and continuous operation" requirements of section 509(c) in order to become eligible for self-bonding. Thus, under new paragraph 800.23(c)(2) the applicant must meet the requirements of solvency and continuous operation set forth in 30 CFR 800.23(b) (1), (2) and (4). However, the final rule allows the "assets test" of 30 CFR 800.23(b)(3) to be met by the non-parent corporate guarantor. The regulatory authority may require additional financial information from the applicant under paragraph (b)(3), when such information is needed. The non-parent corporate guarantor must meet the standards of Section 800.23(b) (1) through (b) (4) to serve in that capacity.

2. THIRD-PARTY GUARANTOR'S INTEREST IN THE MINING OPERATION

The commenter cited preamble language from OSMRE's bonding rulemaking of 1983 (*48 FR 36424*) to support the view that OSMRE should not accept third party guarantees for self-bonds, on the basis that self-bonds did not provide sufficient assurance of a direct interest in the successful mining and reclamation operations of the permittee. OSMRE believes that its policy position in 1983 is no longer appropriate due to recent events in the bonding and surety industries.

Bonding regulations, as well as other OSMRE regulations have changed over the years and the policy set forth in the previous rulemaking have changed with changing conditions, new data and information. A regulatory agency is not bound by previous positions merely on the basis of consistency and should adjust its policy on the basis of experience and new information. Regulatory changes can be made on the basis of experience of new information on the operation of performance bonding in coal mining reclamation, an area that has changed considerably since the passage of the first set of OSMRE bonding regulations on in 1979. The assertion by the commenter that OSMRE must not change the regulations because of assumptions by OSMRE in previous rulemaking actions is not reasonable in view of new information and data contradicting those assumptions.

Recent events have shown that surety bonds do not always provide risk-free guarantees of reclamation. Guarantees provided by a surety company usually become worthless when the surety experiences bankruptcy and/or liquidation. At least 9 sureties and two banks have recently failed, affecting more than 400 mining companies, 25,000 permitted acres

and over 8 million tons of annual coal production. These surety and bank failures have resulted in regulatory authorities not having the necessary funds to perform reclamation. Based on this experience and new information, OSMRE has concluded that a financially sound corporate guarantor may be in as good or better position to guarantee reclamation than some surety companies. In all its previous rulemaking, surety guarantees were considered by OSMRE to contain minimal risk and that they would almost always provide the funds needed for reclamation, in the event of forfeiture (*44 FR 15114*, March 13, 1979). However, the recent surety failures demonstrate that the issue of direct interest in an operation is less important than the financial soundness of any guarantors, be they parent, non-parent, surety or banks. OSMRE believes that the regulatory authority needs to monitor and track all such guarantors' financial soundness through either its State insurance commission, or the Treasury Circular 570 which lists those sureties authorized to do business with the Federal government. The issue of the non-parent corporation's lack of interest in successful reclamation is directly addressed by making such a corporation party to the indemnity agreement. Once legally bound to ensure reclamation, the corporate guarantor should have the requisite interest in the permittee fulfilling its reclamation obligations. Therefore, the commenter's objection on the basis of direct interest in the operation is rejected.

3. LEGALITY OF UTILITY OF OTHER NON-PARENT GUARANTOR SIGNING AN INDEMNITY AGREEMENT

The commenter asserted that signing of an indemnity agreement by a utility or other non-parent guarantor might not be legally enforceable. The proposed rule has been revised to respond to the comment. Paragraph (e)(2) has been revised to require the filing of an affidavit certifying that the signing of the indemnity agreement by the guarantor is valid under existing State and Federal law. Such an affidavit would preclude the unlawful agreement hypothesized by the commenter. This paragraph also contains a requirement that such guarantor provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond; this provides additional protection against possible legal conflicts.

4. OSMRE AND STATE EXPERIENCE WITH NON-PARENT GUARANTEES OF SELF-BONDING AND PARENT COMPANY SELF-BONDING

The commenter asserts that, because OSMRE and the States have no practical experience of non-parent guarantees of self-bonding and parent company self-bonding, it should not promulgate the proposed revision. The commenter cited *51 FR 42985* (November 26, 1986) and takes exception to the example of non-parent, self-bond envisioned by OSMRE. OSMRE believes that self-bonding with parent or non-parent guarantor as allowed by this final rule is as effective as surety bonding and will fully meet the intent of SMCRA to ensure that reclamation occurs in the event of operator non-performance. Mining operators have alleged to OSMRE that the reason for lack of applications for self-bonds at the Federal level is the high standard of the financial criteria of the regulations. It is important to note that these financial criteria are not changed by the proposed rulemaking for self-bond guarantees. Under the proposed rule, any party that seeks to guarantee the self-bond of a permittee must qualify according to the financial standards of 30 CFR 800.23, including the execution of an indemnity agreement to bind equally the permittee and the guarantor. This legally binding agreement is not changed by this revision to the OSMRE rules. Such an indemnity agreement binds all parties, be they corporate sureties, partnerships, public utility corporations, or other corporate guarantors regardless of their interest in the mining operation.

5. SELF-BONDS ARE INHERENTLY RISKIER THAN OTHER BOND TYPES

The experiences of the previous five years do not bear out the generalization that self-bonds are riskier than surety guarantees. Surety failures have occurred in a number of States. The commenter's contention that surety bonds can be covered by reinsurance has not been the experience in recent surety failures in the area of surface mining operations. OSMRE and State regulatory authorities have initiated forfeiture proceedings on some mining operations which were guaranteed by those sureties now out of business. As discussed above, the probability of collecting funds to perform reclamation from these sureties is quite low. The previous fears that self-bonding would be abused as a means to circumvent reclamation requirements have not materialized. Moreover, whatever concerns may exist concerning non-guaranteed self-bonds, this final rule authorizes a category of self-bonds which are guaranteed in every instance by a financially sound corporation. In fact such corporations may be more financially sound than certain sureties.

6. CONGRESSIONAL INTENT THAT OBJECTIVES OF SELF-BONDING TO BE THE SAME AS FOR OTHER TYPES OF BONDING

The commenter asserted that the Congress intended the objectives of self-bonding to be the same as for other types of bonding, that is, the assurance of the completion of the reclamation plan, at no expense to the public. OSMRE agrees with this statement and this final rule reflects this objective.

OSMRE is changing the bonding regulations because experience and new information warrants change. These rules are consistent with the objectives of bonding, and continue to assure the completion of the reclamation plan at no expense to the public. At no time does OSMRE intend to deviate from the Congressionally mandated purpose of bonding.

7. PERMITTEE RESPONSIBILITIES FOR RECLAMATION

A commenter asserted that the proposed revisions to Sections 800.5 and 800.23 decreases the responsibility of a permit applicant to comply with the reclamation plan. OSMRE disagrees. This rule does not diminish the permittees's responsibility to perform reclamation. What it does do is to provide another class of financially responsible entities to guarantee that the permittee meets its obligations. In the earliest OSMRE rulemaking on self-bonding, OSMRE stated that "the indemnity agreement provides joint and several liability for all individuals involved in a particular operation (and) gives all of them a significant incentive to comply with the Act." (*44 FR 15117*, March 13, 1979). This has not changed.

In terms of permittee responsibility, a permit holder is liable for reclamation specified by his permit. The permittee is liable for correcting violations and payment of fines or penalties associated with such violations. In the event of a forfeiture, the permittee is the party declared in forfeiture. Under most circumstances, the permittee would be unable to obtain any other coal mining permit. The permittee will be obligated to the party guaranteeing its self-bond under the indemnity agreement and will also be liable under such an agreement.

SECTION 800.40 - REQUIREMENT TO RELEASE PERFORMANCE BONDS.

Section 800.40 contains the requirements for release of performance bonds. Subsection 800.40(a)(2) contains the requirements for public notification of bond release. This notification must contain the permit number and approval date, the location of the area affected, the acreage affected, the type and amount of bond, the portion of the bond to be released, the reclamation work performed and the result achieved, and the name and address of the regulatory authority to whom comments, objections or requests for public hearings on the proposed release are sent. These requirements were originally found at Section 807.11, promulgated on March 13, 1979 (*44 FR 14902*). During the rule revisions of 1983, this section was incorporated into a new Section 800.40 and the phrase, "the permittee's name" was removed from the section. The proposed revision was to restore the phrase to the requirements of this section. No commenter was opposed to this revision and OSMRE is promulgation the rule as proposed.

REFERENCE MATERIALS

Reference materials used to develop these final rules are as follows:

OSMRE, Proceedings of the Workshop on Coal-Mined Land Reclamation Bonding, September 11, 1986. 182 pp.
Washington Post, "Insurance Firm's Fall Raises Questions", "The Insurance Regulators", various articles on April 11-17, 1986 Land Marc, "The Bonding Crisis", All articles of November/December 1986 Issue. 29 pp.

OSMRE, "Monthly bond Insolvency Report Summary", January 1987.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The information collection requirements contained in 30 CFR Part 800 have been approved according to Office of Management and Budget procedures under *44 U.S.C. 3501* et seq., and assigned clearance number 1029-0043.

Executive Order 12291

The U.S. Department of the Interior (DOI) has examined the final rule according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not major and does not require a regulatory impact analysis. The rule will provide an additional alternative method of bonding which may result in lower costs for bonding to the coal industry.

Regulatory Flexibility Act

The DOI has also determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., that the final rule would not have a significant economic impact on a substantial number of small entities. This rule will impact a relatively small number of coal operators the majority of which would not be small operators.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) of the impacts on the human environment by this proposed rulemaking. This EA is on file in the OSMRE Administrative Record at the address listed in the "ADDRESSES" section of this preamble. Based upon this EA, OSMRE has made a Finding of No Significant Impact on the quality of the human environment (FONSI) in accordance with OSMRE procedures under the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4332(2)(c).

Author

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LIST OF SUBJECTS IN 30 CFR PART 800

Insurance, Reporting and Recordkeeping requirements, Surety bonds, Surface mining, Underground mining.

Accordingly, 30 CFR Part 800 is amended to read as follows.

Date: December 3, 1987.

J. Stephen Griles, Assistant Secretary for Land and Minerals Management.

PART 800 -- BOND AND INSURANCE REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS UNDER REGULATORY PROGRAMS

1. The authority citation for Part 800 is revised to read as follows:

Authority: Pub. L. 95-87, as amended, (30 U.S.C. 1201 et seq.), and Pub. L. 100-34.

2. Section 800.5 is amended by revising paragraph (c) to read as follows:

SECTION 800.5 - DEFINITIONS.

* * * * *

(c) Self-bond means an indemnity agreement in a sum certain executed by the applicant or by the applicant and any corporate guarantor and made payable to the regulatory authority, with or without separate surety.

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3. Section 800.23 is amended by redesignating paragraphs (c) introductory text, (c)(1), (c)(2) and (c)(3) as (c)(1), (c)(1)(i), (c)(1)(ii) and (c)(1)(iii), by adding new paragraph (c)(2), by adding a new sentence at the end of paragraph (d), and by revising paragraphs (e)(2), (e)(4), (f) and (g), to read as follows:

SECTION 800.23 - SELF-BONDING.

* * * * *

(c) * * *

(2) The regulatory authority may accept a written guarantee for an applicant's self-bond from any corporate guarantor, whenever the applicant meets the conditions of paragraphs (b)(1), (b)(2) and (b)(4) of this section, and the guarantor meets the conditions of paragraphs (b)(1) through (b)(4) of this section. Such a written guarantee shall be referred to as a "non-parent corporate guarantee." The terms of this guarantee shall provide for compliance with the conditions of paragraphs (c)(1)(i) through (c)(1)(iii) of this section. The regulatory authority may require the applicant to submit any information specified in paragraph (b)(3) of this section in order to determine the financial capabilities of the applicant.

(d) * * *

For the regulatory authority to accept a non-parent corporate guarantee, the total amount of the non-parent corporate guarantor's present and proposed self-bonds and guaranteed self-bonds shall not exceed 25 percent of the guarantor's tangible net worth in the United States.

(e) * * *

(2) Corporations applying for a self-bond, and parent and non-parent corporations guaranteeing an applicant's self-bond shall submit an indemnity agreement signed by two corporate officers who are authorized to bind their corporations. A copy of such authorization shall be provided to the regulatory authority along with an affidavit certifying that such an agreement is valid under all applicable Federal and State laws. In addition, the guarantor shall provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the indemnity agreement.

* * * * *

(4) Pursuant to Section 800.50, the applicant, parent or non-parent corporate guarantor shall be required to complete the approved reclamation plan for the lands in default or to pay to the regulatory authority an amount necessary to complete the approved reclamation plan, not to exceed the bond amount. If permitted under State law, the indemnity agreement when under forfeiture shall operate as a judgment against those parties liable under the indemnity agreement.

(f) A regulatory authority may require self-bonded applicants, parent and non-parent corporate guarantors to submit an update of the information required under paragraphs (b)(3) and (b)(4) of this section within 90 days after the close of each fiscal year following the issuance of the self-bond or corporate guarantee.

(g) If at any time during the period when a self-bond is posted, the financial conditions of the applicant, parent or non-parent corporate guarantor change so that the criteria of paragraphs (b)(3) and (d) of this section are not satisfied, the permittee shall notify the regulatory authority immediately and shall within 90 days post an alternate form of bond in the same amount as the self-bond. Should the permittee fail to post an adequate substitute bond, the provisions of Section 800.16(e) shall apply.

4. Section 800.40 is amended by revising paragraph (a)(2) to read as follows:

SECTION 800.40 - REQUIREMENT TO RELEASE PERFORMANCE BONDS.

(a) * * *

(2) Within 30 days after an application for bond release has been filed with the regulatory authority, the permittee shall submit a copy of an advertisement placed at least once a week for four successive weeks in a newspaper of general circulation in the locality of the surface coal mining operation. The advertisement shall be considered part of any bond release application and shall contain the permittee's name, permit number and approval date, notification of the precise location of the land affected, the number of acres, the type and amount of the bond filed and the portion sought to be released, the type and appropriate dates of reclamation work performed, a description of the results achieved as they relate to the permittee's approved reclamation plan, and the name and address of the regulatory authority to which written comments, objections, or requests for public hearings and informal conferences on the specific bond release may be submitted pursuant to Section 800.40 (f) and (h). In addition, as part of any bond release application, the permittee shall submit copies of letters which he or she has sent to adjoining property owners, local governmental bodies, planning agencies, sewage and water treatment authorities, and water companies in the locality in which the surface coal mining and reclamation operation took place, notifying them of the intention to seek release from the bond.

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