



COALEX STATE INQUIRY REPORT - 37

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TOPIC: ALTERNATIVE BONDING PROGRAMS

INQUIRY: A report on the bonding and alternative bond system, specifically relating to self-bonding, escrow accounts in lieu of surety or fixed collateral-type bonds, bonding for subsidence protection, bonding for demolition of building and other structures, bonding for underground mines, rates and fees, and whether administrative costs are incorporated into the bond amount.

SEARCH RESULTS:

A COALEX search was conducted to compare the various alternative bonding systems that have been developed by the states and approved by the Office of Surface Mining (OSM). Six states were identified as having adopted alternative bonding systems: Indiana, Missouri, Ohio, Virginia, West Virginia, and Wyoming.

OSM's Bonding System

In order to fully understand the alternative state bonding systems, it is first necessary to review the requirements for bonding under the Surface Mining Control and Reclamation Act (SMCRA) and the OSM regulations.

Under SMCRA, each operator must file a performance bond with the regulatory authority after he receives a permit to conduct surface coal mining and reclamation operations, but before the permit is issued and mining commences. The amount of the bond must be sufficient to assure the completion of reclamation of affected areas in accordance with the environmental protection standards of SMCRA. (SMCRA Sec. 509(a); 30 USC Sec. 1259(a))

The required bond may be filed under either of two primary systems for bonding: (1) a single bond covering the whole permit area or (2) cumulative bonding. Under a single bond, the bond posted at the time of permit issuance must cover all areas under the permit, even though some sections within the bonded area would not be disturbed until some time in the future.

Under cumulative bonding, a bond is posted covering the initial area to be disturbed. As successive incremental areas are to be disturbed the operator posts additional bond in accordance with a schedule submitted to the regulatory authority. Additions are made to the initial bond as mining proceeds, so that there is, at any one time, only one bond, which covers the entire area disturbed. The regulatory authority may partially release the cumulative bond when reclamation is completed; however, liability under the remaining bond continues to apply to the entire permit area. (30 CFR Sec. 800.11(d))



A third bonding system, incremental bonding, was included in the federal regulations, but was subsequently ruled invalid and remanded by the U.S. District Court in IN RE: PERMANENT SURFACE MINING REGULATIONS LITIGATION, Civ. No. 79-1144, slip op. (DDC October 1, 1984). This decision is currently under appeal to the U.S. Court of Appeals.

Under incremental bonding, a permit area is divided into discrete portions, each separate from, and independent of, another insofar as reclamation responsibility is concerned. Thus, incremental bonding implies that if there is a default in reclamation on one increment within the permit area, the regulatory authority could not forfeit the bond or bonds posted for any other increment and apply those amounts to the increment on which the forfeiture occurred. (30 CFR Sec. 800.11(b), (d))

A number of states adopted incremental bonding systems under OSM 1979 regulations. It is uncertain at this time whether the remand of the OSM regulations will affect these state systems. For purposes of this report, incremental bonding systems are not discussed as alternative bonding systems.

In addition to the above bonding systems, under Sec. 509(c) of SMCRA, a state may adopt an alternative bonding system. The alternative systems must meet two criteria: (1) it must be sufficient to ensure that adequate funding will be available for completion of the required reclamation plan for any areas which may be in default at any time; and (2) it must provide a substantial economic incentive for the permittee to comply with all reclamation provisions. (SMCRA Sec. 509(c); 30 USC Sec. 1259(c)) The alternative bonding provisions of the Act are implemented in 30 CFR Sec. 800.11(e) of the OSM regulations.

INDIANA

Indiana's alternative bonding system includes an operator's bond and a reclamation fund. The amount of the operator's= bond is calculated from a bond rate per acre established for the mine. The per acre bond rate is based upon the probable difficulty of reclamation, and may be no less than \$3,000 per acre, and no more than \$10,000 per acre, with a minimum bond for the entire permit area of \$10,000. (310 IAC 13-4-8)

The operator's bond is supplemented through a fund which provides monies to assist in reclamation of lands affected by surface mining after August 3, 1977. The reclamation fund is financed with an annual operator's fee consisting of \$2,000 for each permit application and \$1,000 annually thereafter, due on the anniversary date of permit issuance. If the operator's fee is not paid within 60 days of the time when it becomes due, the permit becomes invalid. (Indiana Code Sec. 13-4.1-6-8)

MISSOURI

The Missouri alternative bonding system provides a reclamation fund to be used to complete reclamation after the proceeds from any applicable performance bond have been exhausted. The operator's bond is established at not more than \$500 per acre, but not less than \$10,000 per permit. (RSMO 444.950; 10 CSR 407.010)



All permittees are also required to pay an assessment to the fund based on the tonnage of coal sold, shipped or otherwise disposed of. The assessment is 30 cents per ton on the first 50,000 tons of coal sold in a calendar year, and 20 cents per ton for the next 50,000 tons sold from the permittee's Missouri operations. The Missouri reclamation fund is also financed through a 25 cents per ton penalty, in addition to normal civil penalties, for delinquent payment of fees and for delinquent reclamation. (RSMO 444.800-444.970)

The Missouri reclamation fund differs from other state funds, because the operator's per acre bond can be fully released after "pit reclamation", that is, after backfilling, regrading, placement of topsoil and initial seeding of the pit area. Operator liability is maintained on the areas during Phase II and III reclamation periods (revegetation and extended liability period). However, in lieu of the operator bond, the fund serves as the bond on the areas for these phases. The operator is required to go through formal release procedures, including public participation, before liability is released.

OHIO

The Ohio bonding system includes a set bond amount of \$2,500 per acre, with a minimum amount required of \$10,000. If the bond on a forfeited increment is insufficient to pay the costs of reclamation, the bond on any other incremental areas may also be forfeited up to an amount equal to the costs of reclamation. (Ohio Admin. Code, Sec. 1501:13-7)

If the total amount of the operator's performance bond is insufficient to complete the required reclamation work, an additional amount can be drawn from a special fund in the State Treasury, known as the Supplemental Forfeiture Special Account, to cover the balance. The funds in the Forfeiture Special Account are to be used "to reclaim permit areas upon which any bond has been forfeited..." (Ohio Revised Code, Secs. 1513.08, 1513.18, 1513.181)

Thus, there are two principal sources of funds for the completion of reclamation work on which the operator has defaulted in his or her obligation: the operator's bond amount of \$2,500 per acre, and the Supplemental Forfeiture Special Account. The Forfeiture Special Account is funded in at a level of \$2 million. Once funds are withdrawn from the Forfeiture Special Account, the Chief is authorized to request the State Auditor to transfer as much as one million dollars annually from another account, the Unreclaimed Lands Special Account to the Forfeiture Special Account, to maintain the Forfeiture Special Account at the 2 million dollar level.

Any funds which are obtained through forfeiture of a reclamation bond, are to be placed in the Forfeiture Special Account. Also excise taxes on the severance of coal are levied at the rate of one cent per ton for purpose of funding the Forfeiture Special Account, and 4 cents per ton for the purpose of funding the Unreclaimed Lands Special Account. The one cent per ton excise tax is only levied for the calendar year following any year where the amount in the Forfeiture Special Account falls below 2 million dollars and a transfer of 1 million dollars from the Unreclaimed Lands Special Account fails to raise the balance in the Forfeiture Special Account above the 2 million dollar level. (Ohio Revised Code, Sec. 5749.02)



Under the Ohio alternative bonding system as originally submitted, OSM determined that, based upon a backlog of forfeitures existing in 1982, that it may be several years before reclamation work on newly forfeited bonds could be accomplished under the alternative bonding system proposed. For this reason, the Ohio program was initially conditioned on Ohio providing assurance of more timely reclamation on sites where bond may be forfeited. The current deadline for resolving this condition is April 30, 1985. (47 FR 34688 (AUGUST 10, 1982))

VIRGINIA

Under the Virginia alternative bonding system, a Coal Surface Mining Reclamation Fund (Fund) was established, and operators have the option of participating in the fund or bonding the costs of reclamation directly. For operators to participate in the Fund, they must meet certain eligibility requirements and pay an entrance fee. If the operator decides not to participate in the Fund, the bond amount is set based upon the actual anticipated cost of reclamation. (Va Stat., Sec. 45.1-270.2-270.4)

Operator's that participate in the Fund are required to bond at the rate of \$1,000 per acre for underground mines, with a total bond of not less than \$10,000; and, for surface mines, \$2,500 per acre for the first 10 acres and \$1,500 for each additional acre, with a total amount of not less than \$25,000. Additional rates are established for combined surface, underground, preparation, etc. operations. (Va Reg., Sec. V809.12)

The Fund is financed through an excise tax that is levied when the amount in the Fund drops below \$750,000. The tax is deferred any time the amount in the fund exceeds one million dollars, except that each operator must pay an entrance fee and the tax during the first year of operation, and continue to pay until the amount in the Fund exceeds \$1 million. The entrance fee is \$2,500 for surface mines, and \$1,500 for underground mines.

The tax is levied at the rate of 2 cents per clean ton of coal produced by surface mines; 1 cent per clean ton of coal produced by underground mines; and one-half cent per ton of coal processed or loaded by a preparation or loading facility. No permittee is required to pay tax on more than five million tons produced per year; and not more than two and one-half cents per ton total for coal originally surface mined, and one and one-half cents per ton total for coal originally underground mined. The tax must be paid within thirty days of the end of each calendar quarter that the tax is in effect. (Va Reg., Sec. V809.14)

WEST VIRGINIA

The West Virginia alternative bonding system requires a bond for each operation at the rate of \$1,000 per acre (or fraction of an acre), with a minimum bond of \$10,000. In order to supplement the amount of the bond provided by individual operators, the state established a special reclamation fund provided by taxes levied on the amount of coal produced by each operator. The amount of money in the fund can fluctuate between approximately one and two million dollars. The tax of one cent per ton is levied on each active mining operation, at any time the fund drops below one million dollars, and continues until the end of the quarter



in which the fund is replenished to the two million dollar level. Monies contained in the fund are to be used for reclamation of areas where the bonds provided by individual operators is not sufficient to cover the actual costs of reclamation. (W.Va. Statute, Sec. 20-6-12(b), (g))

The main difficulty in approval of the West Virginia alternative bonding system, was satisfying the requirement that sufficient funds, on a continuing basis, would be available to the state to fully cover the costs of reclamation on all forfeited lands. To satisfy this concern, the OSM required the state to submit a statistical and actuarial study demonstrating that the special reclamation fund would be solvent and that depletions from the fund would be sufficiently controlled by the special reclamation tax. It was not until submission of the requested actuarial study that the alternative system was finally approved. (See 46 FR 5915 (JANUARY 21, 1981); 48 FR 8447 (March 1, 1983))

WYOMING

Wyoming's alternative bonding system establishes a bond consisting of two parts: an area bond and an incremental bond. The area bond covers the cost of rough backfilling work required to render the affected land in a condition so that the reclaimed land surface generally resembles the approved postmining reclamation contours. The incremental bond covers all the remaining reclamation requirements such as topsoil replacement, revegetation and sediment control measures.

Both bonds are required to be renewed each year with public participation provided. The area bond will be set or adjusted upward based on costs for rough backfilling work to be done during the upcoming year.

The incremental bond amount covers the estimated costs of performing all reclamation requirements other than those covered by the area bond. Unlike the area bond amount, the amount of the incremental bond is increased for the renewal period by adding the past year's unreleased bond amount to the amount necessary to complete reclamation for the renewal period. The incremental bond calculation must be supported by detailed cost estimates for activities such as grading, rip rapping, topsoil placement seed bed preparation, seeding and all other miscellaneous activities.

Neither bond can be reduced outside the bond release procedures unless the operator demonstrates that costs are less than what were originally proposed, based on a change in method of operation, or there is a decrease in number of acres projected to be disturbed. (Land Quality Division of the Department of Environmental Quality; Rules and Regulations; Chapter XIII, Sec. 2)

ATTACHMENTS:

- A. Indiana Statute, Sec. 13-4.1-6-8 and Reg., Sec. 310 IAC 124-8.
- B. Ohio Statute, Secs. 1513.18 and 5749.02.
- C. Virginia Regs., Secs. V809.6, V809.11, V809.12, V809.13, V809.14, V809.15, V800.11;
- D. Virginia Statute, Secs. 45.1-270.3, 45.1-270.4.
- E. West Virginia Statute, Sec. 20-6-12.
- F. Wyoming Reg., Sec. 2.