



## COALEX STATE COMPARISON REPORT - 306

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### **TOPIC:** PROCEDURES FOR FORFEITURE OF SURETY BONDS

**INQUIRY:** Pennsylvania recently amended its SMCRA to require bond sureties to pay the amount of a forfeited bond within 30 days of receiving notice of the forfeiture. One challenger to this amendment argued that the requirement of payment prior to a hearing is a deprivation of due process, prohibited by the 14th Amendment. This case was settled, but additional challenges are anticipated. Do any other states require the payment of forfeited surety bonds prior to a hearing on the merits of the forfeiture? If yes, have there been any challenges to the legislation and what was the outcome? What information on the federal regulations is available?

**SEARCH RESULTS:** A telephone survey of IMCC states was conducted. The states were asked whether they required payment of the bonds prior to a hearing on the merits of the forfeiture. For some states, a description of Pennsylvania's procedures for forfeiting surety bonds was provided and a comparison of procedures requested.

1. Pennsylvania site: 52 PS Sec. 1396.4(h)
2. SMCRA site: 525(d)
3. Federal regulations site: 30 CFR Sec. 800.50 (formerly Sec. 808.11)

A description of Pennsylvania's procedure appears below, followed by the results of the survey. Copies of several state code sections, an OSM Directive, Federal Register preambles to federal regulations and a COALEX State Inquiry Report are attached for your review.

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### **PENNSYLVANIA'S PROCEDURE**

Procedures for revoking bond are separate from procedures for forfeiture of bonds. When a final determination is made to revoke a permit, both the permittee and the surety are notified. Notice of intent to forfeit bonds is then sent to the permittee and



surety indicating that the permittee has 30 days to correct site conditions; both the permittee and the surety have the right to request a conference. If the site conditions are not corrected, the state issues a notice of forfeiture to the permittee and the surety with a demand letter requesting payment of the forfeited bonds within 30 days. If the surety does not pay within that time frame, the state may move to collect. The surety has the right to file an appeal of the bond forfeiture with the Pennsylvania Environmental Hearing Board.

## **ALABAMA**

Alabama does not require payment of forfeited bonds prior to a hearing on the merits. There have been few problems with sureties on forfeited bonds.

## **ARKANSAS**

Arkansas does not require payment of forfeited bonds prior to a hearing on the merits.

## **ILLINOIS**

The surety is not required to pay on the forfeited bonds prior to getting a hearing. A surety can appeal decisions on bond forfeiture but not decisions on permit revocation.

## **INDIANA**

Once a determination is made to revoke a permit, the permittee and surety are sent a demand letter stating that the permittee has 30 days to complete reclamation or the bond is forfeited. During this period both the permittee and surety have several options:

1. The permittee can complete the reclamation.
2. A settlement agreement may be concluded with the surety whereby the surety completes the reclamation with the understanding that failure to perform the all required work will result in demand for the amount of the bonds.
3. The surety can request a hearing on the forfeiture (but not on the earlier permit revocation).
4. The bonds are forfeited.

There has been little litigation on bond forfeitures.

## **KENTUCKY**

Two and a half years ago, a reclamation procedure was instituted which resulted in a reduction of surety challenges to bond forfeiture. Sureties are sent copies of violations. If "failure-to-abate" Cessation Orders (COs) are not contested and permits are to be revoked, the state attorneys begin the process of seeking bond forfeiture. A letter is sent to the surety giving them 30 days to declare if they will exercise the right to complete the



reclamation plan in lieu of forfeiture. If the surety wishes to perform the reclamation, a reclamation agreement is completed, or the surety may decide to pay. At the end of 30 days, if the surety has not responded, a demand letter is sent requesting the forfeited amount.

In some situations where permittees have challenged violations and requested hearings, the regulatory authority may request that the hearing officer revoke the permit and forfeit the bond. In this circumstance, a surety may challenge bond forfeiture at a hearing.

## **MISSOURI**

At present, permit revocation and bond forfeiture proceedings are considered at the same time. While the surety is notified regarding possible permit revocation and bond forfeiture and may participate in the hearing, only the permittee, not the surety, has appeal rights.

Missouri is considering amending its regulations. One possible change may be to send the surety a demand letter after the hearing to revoke a permit in order to give the surety an opportunity to negotiate with the regulatory authority.

## **OHIO**

In Ohio, sureties are notified of NOV's and CO's; this serves as a "pre-notification" of impending bond forfeiture. Permit revocation and bond forfeiture can occur at separate proceedings or at the same time. Bond forfeiture orders are written to both the permittee and the surety. The permittee is informed that their right to reclaim is forfeited; the surety is informed that the permittee has forfeited the right to reclaim and the surety has 60 days to determine if it will complete the reclamation work. If the surety decides to conduct the reclamation, an agreement is completed with the regulatory authority; if the surety does not decide to reclaim, the regulatory authority demands forfeiture. The surety has the right to appeal the bond forfeiture, but not the permit revocation.

## **VIRGINIA**

A notice of intent to forfeit bond is sent to both the permittee and the surety. The permittee has 30 days to correct site conditions. If the conditions are not corrected, a notice of forfeiture is sent to the permittee and the surety with a letter requesting payment on the bond. However, a hold is put on collection if the notice of forfeiture is appealed by the surety.

## **WEST VIRGINIA**

The current regulations call for a letter to be sent to the permittee with notification that the permit will be revoked in 30 days; a copy is sent to the surety. If the permittee does



not request a hearing, a final revocation notice is sent to the permittee and the surety. The final notice provides the surety 14 days to determine if it will perform the reclamation or pay.

A new law, passed by the state legislature to take effect in July, 1994, calls for the forfeited bond to be paid to the special state reclamation fund when a permit is revoked. The special reclamation fund will be used to pay for reclamation. Any moneys remaining from a bond after reclamation of the originally permitted area is completed will remain in the reclamation fund rather than be returned to the surety. Industry is preparing to sue West Virginia because the state changed its regulations, amending its SMCRA program, prior to approval from OSM. [NOTE: A copy of the statute section is attached.]

## ATTACHMENTS

- A. SMCRA Section 525(d)
- B. State Code Sections
  - 1. Pennsylvania: 52 P.S. Section 1396.4(h) (1994).
  - 2. W. Va. Code Section 22-3-17 (1994).
  - 3. Colorado: Reg. Sec. 3.04.1 (1982).
  - 4. Indiana: 310 IAC 12-4-17 (1983).
  - 5. Ohio:
    - a. Reg. Sec. 1501:13-7-06 (1989).
    - b. Statute Sec. 1513.18 (1986).
  - 6. Virginia: Reg. Sec. 480-03-19.800.50 (1985).
- C. OSM Directive, Subject No. REG-10, Transmittal No. 339, "Bond Forfeiture" (Issued date: 5/26/87).
- D. Federal Register Notices
  - 1. 44 FR 14902 (March 13, 1979).
    - a. Part 808.
    - b. Part 805.
  - 2. 46 FR 16276 (March 12, 1981). Performance bonding.
  - 3. 46 FR 42082 (August 19, 1981). Performance bonding.
  - 4. 46 FR 45082 (September 9, 1981). Performance bonding.
  - 5. 48 FR 32932 (July 19, 1983). Parts 800 and 808.
- E. COALEX State Inquiry Report - 146 , "Surety's right to a hearing in bond forfeiture proceedings" (1990). Enclosed with one attachment:
  - 1. ALLIED FIDELITY INSURANCE CO. v ENVIRONMENTAL QUALITY COUNCIL, 753 P 2d 1038 (Wyoming 1988).