



COALEX STATE INQUIRY REPORT - 206

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TOPIC: LIABILITY PERIOD FOR ALTERNATE POSTMINING LAND USE

INQUIRY: The liability period for final bond release in the western states is 10 years. Is there any material available which indicates that the liability period for bond release may be reduced for certain alternative postmining land uses, such as residential development?

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials available in LEXIS. The legislative history and the preamble to the permanent program regulations confirm the liability period of 10 years for western states. Congressional discussions of postmine land use and variances to AOC focused primarily on agricultural uses of reclaimed land - more land available for commercial agriculture and forestry. Industrial and residential development as a postmining land use was addressed in discussions of revegetation requirements. Only one item was identified - an Interior Administrative Law Judge consent decision - that put together relief from the revegetation liability period and complete bond release.

Relevant legislative history and regulatory history, plus the ALJ case, are listed below. Copies are attached.

LEGISLATIVE HISTORY

120 CONG. REC. 24450 (July 18, 1974).

Statement of Mr. Wampler:

"The fact is that if this bill would permit it, the mining and reclamation process could be a means of adding to our total acreage of tillable or grazing land and increasing our food and fiber production."

Statement of Mr. Ruppe:



"We thought frankly that the use of the word 'commercial' would provide for all the agricultural uses here that were sufficiently intensive to provide for a crop that could be sold, used in the cattle business, or could be grown for an economical purpose."

Statement of Mrs. Mink:

"I would like to point out that in section 211 [of an earlier version of the bill] we very definitely said that agriculture is one of the prime goals of proper reclamation. In fact, we place that concept at such a high premium we even provided that the 10-year revegetation period which we required for every other kind of reclamation could be waived where the authority finds that an intensive agricultural postmining use is intended".

Also see discussions of:

1. Revegetation in H.R. Rep. 218, 95th Cong., 1st Sess. 106 (April 22, 1977); and
2. Performance bonds in S. Rep. 128, 95th Cong., 1st Sess 69 (May 10, 1977).

IMPLEMENTATION OF P.L. 95-97: Hearings Before Senate Subcommittee on Public Lands and Resources of the Committee on Energy and Natural Resources, 95th Cong., 2nd Sess. 36 (April 24, 1978) (statement of Walter Heine, Dir., OSM).

In an attachment to his testimony, Mr. Heine provided OSM's answers to Senator Hensen's questions:

"17. Liability for revegetation for ten years is totally unreasonable in most cases. Can a variance to five years be provided when justified?"

"A. The Act requires that operators retain responsibility for success of their revegetation efforts five full years except where rainfall is twenty-six (26) inches or less annually; then the responsibility extends to ten full years. It appears clear the Congress intended no shortening (by regulation) of the time below ten years in the lesser rainfall areas of the country (515(b)(20))."

S. 425, 93rd Cong., 2nd Sess. (1974). Sec. 509 Performance Bonds.

This language appears in the Conference Committee report (H.R. Rep 93-1522) from an earlier version of SMCRA and continued until SMCRA's enactment:

509(b). "Liability under the bond shall be for duration of surface mining and reclamation operation and for a period coincident with operator's responsibility for vegetation requirements in section 515 [Performance Standards]."

H.R. REP. 1073, 93rd Cong., 2nd Sess. 136 (May 30, 1974, H.R. 11500). Sec. 211 Environmental Protection Performance Standards.



"(5) regarding post-mining land uses, any industrial, commercial, residential or public facility development proposed for the affected land must be shown to be compatible with adjacent land uses, obtainable according to need and market, assured of necessary public facilities, supported by public agencies' commitments, financially facillicable, planned according to schedule, and designed by a registered civil engineer in conformance with professional standards to assure the stability, drainage, and configuration necessary for the intended use.

"Variances may be granted from performance standards which require the restoration of the approximate original contour, the covering of all highwalls, the prohibition against placement of spoil on steep slopes, and liability for establishing revegetation, only in cases where industrial, commercial, residential, or public facility development is proposed for post-mining land use and where the regulatory authority, after public notice and public hearing, issues a written finding that the proposed use is a higher or better economic or public use which can only be obtained if one or more of the variances are granted. However, no such variance is to be effective for more than three years, unless substantial progress toward completion of the development is under way according to the schedule shown in the approved mining and reclamation plan."

Also see discussions of variances from:

1. H.R. REP. 1522, 93rd Cong., 2nd Sess. 77 (December 5, 1974; Conference Report to accompany S. 425).
2. H.R. REP. 1445, 94th Cong., 2nd Sess. 119 (August 31, 1976; H.R. 13950).

REGULATORY HISTORY

44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble - Final Rules.

Part 805 Amount and duration of performance bond. 805.13 Period of Liability.
Liability period is coincident with the minimum liability period for assuring the success of revegetation. The period is either five or ten years following the completion of revegetation work, depending upon the average annual precipitation in the area. The period of liability is set in the Act and is unalterable.

Part 816 Performance standards. 816.116 Revegetation: Standards of success.
Exceptions to the ground cover and productivity of the revegetated area "may be granted when the area had previously been mined, the area is to be used for industrial or residential use within two years after grading is completed, when the area is to be used for cropland or when the area is to be developed for fish and wildlife or forestland."

Part 816 Performance standards. 816.133 Postmining land use.
"Under this Section, alternative postmining land uses may be approved by the regulatory authority when they are found to be higher or better uses when compared to the premining use in situations where the land will be returned to approximate original contour; or an industrial, commercial, agricultural, residential, or public facility (including recreational facilities)".



Notices of suspension of certain rules:

44 FR 67942 (NOVEMBER 27, 1979). Part of the definition of "irreparable harm to the environment" in 805.13(d).

45 FR 51545 (AUGUST 4, 1980). Parts of 816.116(b) and 816.133(c).

45 FR 52306 (AUGUST 6, 1980). Final rules. Part 805 Amount and duration of performance bond. 805.13 Period of liability.

805.13(f). "Proposed Paragraph (f) was added at the request of commenters to the petition who suggested that the implementation of the postmining land use is not a requirement of the bond.

"A comment was received objecting to the proposal that excludes bonding the implementation of an approved postmining land use. OSM has referred to Section 515(b)(2) of the Act and has determined that the operator is responsible only for restoring the land to a condition capable of supporting the proposed postmining land use; that is, those reclamation actions specified in the reclamation plan. Although the objector has a good point, the statute does not support that interpretation, and the Section is adopted as proposed."

48 FR 32932 (JULY 19, 1983). Final rules. Bond and insurance requirements.

The revised rules "continue to require sufficient bonding to assure completion of the reclamation plan, but have been revised to afford flexibility to the regulatory authority and to the coal mine operator in choosing a bonding plan."

See, in particular, Section 800.13 Period of liability (formerly 805.13):

"OSM realizes that proposed Sec. 800.13(a) was confusing as to limiting the period of liability on 'certain' bonds. The liability period required in Section 515(b)(20) of the Act must be met before the total performance bond can be totally released for an area or increment. However, as discussed earlier in the preamble, if phase bonding is implemented, it is possible to release the entire amount of a phase bond while maintaining liability and bond coverage on the area or increment to which that phase bond applies. OSM has made changes to new Sec. 800.13(a)(2) to clarify its intent that bond may be approved to guarantee a specific phase of reclamation. The proposed language concerning limiting the liability period has not been adopted."

Notices re: suspension and reinstatement of 800.13(a)(2).

50 FR 7274 (FEBRUARY 21, 1985). Notice of suspension. Sec. 800.13(a)(2), discussed above, was one of the regulations suspended as a result of the district court decision.

53 FR 21764 (JUNE 9, 1988). Notice of reinstatement of suspended rules, including 800.13(a)(2), as a result of the court of appeals decision.



INTERIOR ADMINISTRATIVE DECISION

TIPPLE SERVICE, INC. v OSM, Docket No. NX 91-28-R (1991).

From the attachment to the consent decision:

"[Successful completion of the detailed reclamation work] will relieve the permittee of any revegetation period of liability and will allow a complete bond release of the permitted area upon satisfaction of the above work."

ATTACHMENTS

- A. COLORADO regulations:
 - 1. Reg. Sec. 3.02.3 (1982) Performance Bond Requirements.
 - 2. Reg. Sec. 3.03.1 (1987) Release of Performance Bonds.
- B. 120 CONG. REC. 24450 (July 18, 1974).
- C. H.R. REP. 218, 95th Cong., 1st Sess. 106 (April 22, 1977).
- D. S. REP. 128, 95th Cong., 1st Sess 69 (May 10, 1977).
- E. IMPLEMENTATION OF P.L. 95-97: Hearings Before Senate Subcommittee on Public Lands and Resources of the Committee on Energy and Natural Resources, 95th Cong., 2nd Sess. 36 (April 24, 1978) (statement of Walter Heine, Dir., OSM).
- F. S. 425, 93rd Cong., 2nd Sess. (1974). Sec. 509 Performance Bonds. [Conference Committee Report (H.R. Rep 93-1522).]
- G. H.R. REP. 1073, 93rd Cong., 2nd Sess. 136 (May 30, 1974, H.R. 11500). Sec. 211 Environmental Protection Performance Standards.
- H. H.R. REP. 1522, 93rd Cong., 2nd Sess. 77 (December 5, 1974; Conference Report to accompany S. 425).
- I. H.R. REP. 1445, 94th Cong., 2nd Sess. 119 (August 31, 1976; H.R. 13950).
- J. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble - Final Rules. Sections 805.13, 816.116 and 816.133.
- K. 44 FR 67942 (NOVEMBER 27, 1979). Notice of suspension. Part of the definition of "irreparable harm to the environment" in 805.13(d).
- L. 45 FR 51545 (AUGUST 4, 1980). Notice of suspension. Parts of 816.116(b) and 816.133(c).
- M. 45 FR 52306 (AUGUST 6, 1980). Final rules. Part 805 Amount and duration of performance bond. 805.13 Period of liability.
- N. 48 FR 32932 (JULY 19, 1983). Final rules. Bond and insurance requirements.
- O. 50 FR 7274 (FEBRUARY 21, 1985). Notice of suspension. Sec. 800.13(a)(2), discussed above, was one of the regulations suspended as a result of the district court decision.
- P. 53 FR 21764 (JUNE 9, 1988). Notice of reinstatement of suspended rules, including 800.13(a)(2), as a result of the court of appeals decision.
- Q. TIPPLE SERVICE, INC. v OSM, Docket No. NX 91-28-R (1991).