

FEDERAL REGISTER: 56 FR 59992 (November 26, 1991)

DEPARTMENT OF THE INTERIOR

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

30 CFR Part 800

Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations Under Regulatory Programs

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the United States Department of the Interior (DOI) is amending its bonding regulations to require a written affirmation of the completion of each phase of land reclamation when bond release for that phase is being sought. The regulations are being amended to help provide additional assurance and evidence that all applicable reclamation activities have been accomplished in accordance with the regulatory program and the individual's approved permit.

EFFECTIVE DATE: December 26, 1991.

FOR FURTHER INFORMATION CONTACT: John Mosesso, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone (202) 343-1480 (commercial and FTS).

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of Final Rule
- III. Response to Comments
- IV. Procedural Matters

I. BACKGROUND

Current OSM regulations at 30 CFR 800.40 require that a permittee, when applying for a release of all or part of a performance bond, describe in a newspaper advertisement, the nature, extent and results of the reclamation work for which he is requesting bond release. In this requirement, it is implicit that all reclamation requirements of the regulatory program and the individual mining permit have been met. However, OSM believes that better reclamation can be assured with an explicit statement regarding reclamation that has been completed. The rule was proposed on September 25, 1990 (*55 FR 39240*) and the comment period closed November 26, 1990.

II. DISCUSSION OF FINAL RULE

Both section 519 of the Surface Mining Control and Reclamation Act of 1977 (the Act) *30 U.S.C. 1269*, and the permanent program regulations (30 CFR 800.40), require that all reclamation requirements be completed before a permanent program bond can be fully released. However, neither the Act nor the regulations require an explicit written statement by the permittee that all reclamation requirements specified in his permit have been completed. This rule would require such a statement as part of the bond release application. The notarized statement would increase the importance of the bond release request and would document the reclamation evolution of a site. It would be especially useful in cases where the release involved only a phase or increment of an operation. This certification would become part of the permit file maintained by the regulatory authority and would thereby help dispel issues regarding previously completed and released reclamation. Further, it would be of great value to individuals charged with processing bond release applications. Most importantly, the certification would serve as a written record indicating that the permittee had examined the requirements of his permit and investigated the nature and extent of reclamation. It would specify that all applicable reclamation responsibilities had been completed. Such a statement would, at the final bond release stage, provide additional evidence of the fact that the operation is completed and has met all reclamation requirements.

III. RESPONSES TO COMMENTS

Comments were received from State regulatory agencies, the coal industry and environmental organizations. The public comment period for the bond release certification rule opened September 25, 1990 and closed November 26, 1990. A total of 11 commenters filed written statements resulting in over 41 comments. The reasons given in the preamble to the proposed rules for the changes from prior rules are incorporated into this document where applicable.

Approximately one third of the commenters generally favored the proposed rules and agreed with OSM that the documentation provided by a notarized statement would be helpful at time of final bond release of the entire operation. This would be especially important when various size increments have gone through Phase I and II bond release at different times over the permit term. One commenter supporting the amendments noted that the responsibility for assuring that all requirements have been met should not solely be the responsibility of the regulatory authority. The commenter went on to explain that states find it difficult to maintain an institutional knowledge of constantly changing reclamation plans and requirements because of the high turnover rate of personnel. OSM believes that the certification statement will be an additional piece of information to assist the states in evaluating revised reclamation plans when a bond release application is received, especially during periods of staff transition.

Two commenters recommended that the certificate should demonstrate that the permittee has met all applicable Federal standards. OSM agrees only to the extent that the applicant must certify that applicable reclamation standards have been satisfied. In primary states, this will be the state program standard.

One commenter suggested that to prevent false and self-serving certification, the statement should not only be notarized, but sworn to as an affidavit under penalty of perjury. OSM agrees with the commenter that false certification should be discouraged. No need exists, however, to require the filing of a sworn affidavit. The filing with OSM or a regulatory authority of a false certification, even if not sworn, would be violative of law and subject to appropriate sanction. Thus the final rule discourages false filings.

Two commenters noted that neither the Act nor the regulations require a notarized statement for bond release. Both section 519 of the Act, *30 U.S.C. 1269*, and the permanent program regulations (30 CFR 800.40), require that all reclamation requirements be completed before a permanent program bond can be fully released. OSM believes that it is prudent to require a permittee to provide an explicitly written statement, certifying that all applicable reclamation activities have been accomplished at the time of bond release request. The requirement for a notarized statement would increase the importance of the bond release request and document the reclamation evolution of a site. The general enabling provisions of section 201(c) and section 501 of the Act, *30 U.S.C. 1211(c)* and 1251, provide the Secretary with ample authority to promulgate and publish rules imposing such requirements.

Several commenters noted that the State or Federal regulatory authority (RA) has non-delegatable responsibility to evaluate a request for bond release. The commenters stated that a single affidavit, i.e. notarized statement, is not a substitute for the RA's determination, and written finding, before bond release, as to completeness and compliance of the reclamation effort. While OSM recognizes that the notarized statement is not a substitute for the regulatory authority's determination, OSM's position is that a written affirmation of the completion for bond release will encourage operators to look at their postmining land use plan more clearly to ensure that they meet the requirements for bond release. OSM reaffirms the continued responsibility of the RA to determine the completeness and compliance of the reclamation effort prior to bond release. Upon request for bond release, the notarized statement is an additional piece of information used by the RA to evaluate the extent of reclamation according to the approved plan. Most importantly, the certification would serve as a written record indicating that the permittee had examined the requirements of his permit and investigated the nature and extent of reclamation. It would specify that all applicable reclamation responsibilities had been completed.

A number of commenters questioned the need for further documentation "of the reclamation evolution of a site" because the Act and the regulations already impose extensive requirements documenting the reclamation history. OSM disagrees with this comment. OSM is aware that in certain instances operators may not take the time to review their permit and proceed with reclamation that was not approved causing delays in bond release. The proposed rule would help assure that operators would follow their approved postmining land use plans before beginning reclamation to avoid unnecessary reclamation costs or delays in bond release.

A number of commenters expressed concern that further documentation would impose an excessive administrative burden upon the permittee and regulatory authority without any commensurate benefit. OSM disagrees with this comment. The request for certification has been estimated to require an average of 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining data needed and completing and reviewing the collection of information.

A number of commenters argued that a problem does not exist with regard to the need for a notarized statement. OSM believes that a request for a notarized statement will discourage those situations where a request for bond release is premature. Premature requests for bond releases can be categorized into two groups: (1) Operators that have not adequately completed the approved reclamation, or (2) operators that have proceeded with reclamation that was not approved. The unapproved reclamation would then lead the operator to request a revision to the reclamation plan. Revisions to reclamation plans are not automatically approved and must be processed by the regulatory authority in accordance with program standards. OSM believes that a notarized statement which certifies that all applicable reclamation activities have been accomplished may also help avoid situations where an operator requests bond release when an outstanding violation exists.

A frivolous request for bond release is often the result of failure to survey the reclaimed site to ensure that all structures and equipment have been removed, that all reclamation has been successfully accomplished, or that the period of liability is complete before requesting final bond release.

A number of commenters asserted that the proposal to require a notarized statement is no longer valid in light of the recent court decision regarding termination of jurisdiction. On August 30, 1990, the United States District Court for the District of Columbia set aside the regulation that provided for the termination of regulatory jurisdiction over a fully reclaimed surface coal mining operation after bond release unless the decision to release the bond was obtained by collusion, fraud or misrepresentation of a material fact. The Court set aside that regulation on the grounds that liability under the Act is perpetual, regardless of the completion of reclamation and release of the operator's performance bond. *NWF v. Lujan*, Nos. 88-2416 etc. (D.D.C. 1990).

OSM disagrees with these commenters because this rule has a basis independent of supporting termination of jurisdiction. As stated above, it encourages operators to assure that reclamation is complete prior to submittal of a bond release application. Moreover, if the Department prevails on its pending appeal of the termination of jurisdiction rule, the certification would provide a stronger basis for establishing misrepresentation at the time of bond release when reclamation was not complete at that time.

IV. PROCEDURAL MATTERS

Effect in Federal Program States and on Indian Lands

The rules apply through cross-referencing in those States with Federal Programs. This includes California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal Programs for these States appear at 30 CFR parts 905, 910, 912, 921, 922, 933, 937, 938, 941, 942 and 947 respectively. The rules also apply through cross-referencing to Indian lands under Federal programs for Indian lands as provided in 30 CFR part 750.

Federal Paperwork Reduction Act

The collection of information contained in this rule have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0043.

The final rule revises Section 800.10 of the regulations in order to update the data concerning the Paperwork Reduction Act and the collections of information contained in 30 CFR part 800. The revision will add to Section 800.10, the average time it takes to comply with the collections of information required by part 800 and the addresses to whom comments on the requirements may be sent. Section 800.10 specifies that the average reporting burden is 28 hours per response. This is the total burden for all of the requirements contained in part 800 and includes the 15 minutes per response which it is estimated that the new requirement contained in this rule will add.

Executive Order 12291 and Regulatory Flexibility Act

The DOI has determined that this document is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 *U.S.C.* 601 et seq. The rule does not distinguish between small and large entities. The economic effects of the proposed rule are estimated to be minor and no incremental economic effects are anticipated as a result of the rule.

National Environmental Policy Act

OSM has prepared an environmental assessment (EA), and has made a finding that this rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 *U.S.C.* 4332(2)(C). The environmental assessment and finding of no significant impact are on file in the OSM Administrative Record, room 5131, 1100 L St., NW., Washington, DC.

Author

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LIST OF SUBJECTS IN 30 CFR PART 800

Insurance, Reporting and record keeping requirements, Surety bonds, Surface mining, Underground mining.

Accordingly, 30 CFR part 800 is amended as set forth below:

Dated: August 9, 1991.

Dave O'Neal, 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 continues to read as follows:

Authority: 30 *U.S.C.* 1201 et seq., as amended; and Pub. L. 100-34.

2. Section 800.10 is revised to read as follows:

SECTION 800.10 - INFORMATION COLLECTION.

The collection of information contained in Sections 800.11, 800.21(c), 800.23(b)(2), 800.23(b)(3), 800.40(a), and 800.60(a) have been approved by the Office of Management and Budget under 44 *U.S.C.* 3501 et seq. and assigned clearance number 1029-0043. The information will be used to determine if reclamation bonds are sufficient to comply with the Act. Response is required to obtain a benefit in accordance with the requirements of 30 *U.S.C.* 1201 et seq. Public reporting burden for this collection of information is estimated to average 28 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue NW., Rm 5415 L, Washington, DC 20240 and the Office of Management and Budget, Paperwork Reduction Project (1029-0043), Washington, DC 20503.

3. Section 800.40 is amended by adding paragraph (a)(3) to read as follows:

SECTION 800.40 - REQUIREMENT TO RELEASE PERFORMANCE BONDS.

(a) Bond release application.

* * * * *

(3) The permittee shall include in the application for bond release a notarized statement which certifies that all applicable reclamation activities have been accomplished in accordance with the requirements of the Act, the regulatory program, and the approved reclamation plan. Such certification shall be submitted for each application or phase of bond release.

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