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DEPARTMENT OF THE INTERIOR

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

30 CFR Parts 800, 801, 805, 806, 807, 808, and 809

Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is revising its rules on bonding and insurance requirements for surface coal mining and reclamation operations. The new 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. These final rules are adopted for the permanent regulatory program.

EFFECTIVE DATE: August 18, 1983.

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SUPPLEMENTARY INFORMATION:

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- 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., requires a bond sufficient to cover the cost of reclamation if it had to be performed by a regulatory authority in the event of forfeiture (Section 509(a) of the Act). The Act requires that a bond be posted as a condition of issuance of a permit to an operator. Id. Section 519 of the Act sets criteria for release of a bond upon completion of several phases of reclamation. Regulations are required by Section 501 of the Act to implement a bonding program necessary for a State program or a Federal program.

On March 13, 1979, OSM promulgated the permanent program bonding rules, 30 CFR Chapter VII, Subchapter J, Parts 800-809 (44 FR 15385). A number of the rules were challenged in litigation filed on May 9, 1979, In re: Permanent Surface Mining Regulation Litigation, Civ. No. 79-1144 (D.D.C.). Before a decision was made on two of the bonding issues raised, the following provisions of the rules were suspended by the Director: Sections 806.12(e)(6)(iii) and (g)(7)(iii), which required the immediate cessation of operations upon insolvency of a surety or revocation of a surety's license; and Section 808.12(c), which limited bond liability on the permit area to only the hydrologic balance (November 27, 1979, 44 FR 67942) and (December 31, 1979, 44 FR 77455).

The district court ruled on four other issues in its decision of February 26, 1980 (summary available in Environmental Resource Council publication, 14 Envir. Rep. Cas. 1083, 1099-1101). The district court upheld the rules in Section 808.13(a)(2) on forfeiture and Section 808.14(a) on adjustment of the bond amount. It remanded, however, the rules for public participation in bond release because Section 807.11(e) lacked a provision for informal conferences, and the rules in Section 808.14(b) because they lacked a provision for return of excess forfeited bond amounts.

As a result of an April 1979, petition for rulemaking, OSM concluded that several sections of Subchapter J needed revision (see 44 FR 28005, May 14, 1979, and 44 FR 52098, September 6, 1979). These revisions were proposed on January 24, 1980 (44 FR 6028) and became final on August 6, 1980 (45 FR 52306).

Because of considerable controversy over lack of collateral support in the proposed revision offered for self-bonding rules, the original self-bonding provisions, which included requirements for 100 percent collateral, were retained in the final rules of August, 1980 (45 FR 52314). Rather than proceed with further rulemaking, OSM proposed to undertake a

study of self-bonding (*45 FR 71815*). This study was subsequently cancelled because of budgetary problems and the proposed bonding revision of September 9, 1981 (*46 FR 45096*) called for the States to design their own self-bonding programs.

The August 6, 1980, rulemaking also precipitated litigation -- National Coal Association, American Mining Congress v. Andrus, Civ. No. 80-2530 and Penn. Coal Mining Ass'n v. Dept. of Interior, Civ. No. 80-2544, U.S. District Court, D.C. This litigation has resulted in the suspension of most of the self-bonding rules and of the requirement to bond subsidence control measures (*46 FR 59934*, December 7, 1981). On August 19, 1981, as the result of another rulemaking petition, OSM suspended the availability of a bond amount for reclamation work anywhere within the permit area as authorized by Section 808.12(c) (*46 FR 42082, 42063*).

OSM again prepared a draft rule of all bonding requirements and sent it out for comment on March 25, 1981. Based on comments and recommendations received, OSM developed the proposed rules published on September 9, 1981 (*46 FR 45082*) and which are being made final in this rulemaking.

The rules being published in this rulemaking replace all of the existing and suspended bonding requirements for surface and underground mining and related surface facilities, except Section 806.14 -- Self Bonding. These rules consolidate into Part 800, the provisions of previous Parts 800, 801, 805, 806, 807, 808 and 809. As discussed below under Section 800.23, self-bonding rules were repropounded in a separate rulemaking on August 20, 1982 (*47 FR 36570*). After consideration of comments received, the self-bonding rules will be made final in a separate rulemaking notice and will be added to Section 800.23.

II. DISCUSSION OF COMMENTS AND RULES ADOPTED

The comments largely favored the proposed changes in the bonding rules. Most of the comments came from State regulatory agencies, the coal industry, the surety industry and environmental organizations. The public comment period for these bonding rules opened September 9, 1981, and closed October 9, 1981. A total of 31 commenters filed written statements resulting in over 180 comments. A public hearing was held September 24, 1981, in Washington, D.C., in which one witness, the Joint Committee of the National Coal Association/American Mining Congress, appeared and generally supported the proposed rules. Three public meetings were also held. Because of the general support for the amendments to the rules, they are being made final in the same form as proposed except as noted in the following discussion. The reasons for the changes discussed in the preamble to the proposed rules are incorporated into this document where applicable.

GENERAL COMMENTS

A surety commenter generally favored the proposed rules, but said that as welcome as the changes are "they will do little to alleviate the bonding problems in the coal industry, particularly those of the small to medium size mine operation. Bonding, especially surety bonding, will not be generally available to the coal industry, as long as the reclamation requirements can be changed in mid-term of the permit, the bond amounts can be increased in mid-term of the permit, the liability period stays so long and the bond release procedures remain so burdensome." OSM notes that the various concerns the commenter mentioned are requirements set in Sections 509 and 519 of the Act which cannot be modified by the agency's rulemaking.

A surety commenter urged OSM to investigate the possibility of "grandfathering" existing permits and bonds. The commenter said that as primacy is granted to the eastern States the "repermitting" requirement is going to cause much anguish to those operators working on existing permits who will not be able to qualify for the revised bonds under the new requirements. The commenter felt because of the increased enforcement by the States, the grandfathering of some of these permits and bonds should not greatly compromise the intent of the Act and would save all concerned much trouble.

There is no provision in the bonding rules that would prevent a regulatory authority from considering a reclamation bond already posted as valid for the permitting of the same area under a State program. However, the regulatory authority will still have to determine the amount of bond and should the outstanding bond amount be inadequate, it will have to be supplemented. Furthermore, since surety bonds are contracts between the operators and the surety, any change in the conditions under which a bond is posted would likely be subject to surety approval. OSM cannot by this rulemaking unilaterally modify the terms of those contracts without surety company approval.

One commenter disagreed with OSM's effort in these proposed rules to increase the States' flexibility in establishing bonding programs and suggested that OSM retain all its previous bonding rules so as to maintain specific, enforceable standards. The commenter said to do less would be to leave to the industry, the public and the States the necessity of having to make "ad hoc, standardless decisions on crucial regulatory matters."

OSM disagrees with this comment. The permanent program rules form the benchmark for State programs. As such they provide the minimum standards which State programs must meet. There is no requirement in the Surface Mining Act that the permanent program rules must provide for every possible situation that may arise and as a consequence remove all discretion from the regulatory authorities. Not only do these rules provide for the bonding requirements set in Sections 509 and 519 of the Act, they also provide for the required public involvement in the bonding program.

A commenter noted that the proposed rules for bonding are primarily applicable to private lands and do not adequately address performance bonding for permits on Federal lands, especially where a permit might straddle the border between two States. The commenter suggested that in such a border-straddling situation there would be inconsistent bonding policies because of the difference in the two State bonding programs.

The recently adopted rules revising OSM's permanent program on Federal lands (*48 FR 6912*, February 16, 1983) make a State program, including its bonding provisions, applicable to surface coal mining and reclamation operations on Federal lands in that State. 30 CFR 740.11. Admittedly if an operation borders two States bonding requirements may differ for different parts of a permit area in some instances, and these cases will have to be resolved on a site-specific basis. However, each State's program must have bonding provisions which are consistent with OSM's permanent program regulations adopted today. In no case may the amount of the bond be less than that required to cover the anticipated costs of reclamation.

SECTION 800.1 - SCOPE AND PURPOSE.

The scope and purpose of Part 800 is to set the minimum requirements and responsibilities for filing and maintaining bonds and insurance for surface coal mining and reclamation operations. OSM chose to use only one section, Section 800.1, to state the scope and purpose of this part. Proposed Sections 800.1 and 800.2 were basically the same, so the basic language of Section 800.2 was chosen to represent the scope and purpose of Part 800 in the final rule, Section 800.1. No comments were received on these sections.

SECTION 800.4 - REGULATORY AUTHORITY RESPONSIBILITIES.

Section 800.4 lists all the responsibilities of the regulatory authority in the performance bonding of coal mine operations.

SECTION 800.4(a)

Proposed Section 800.4(a), which makes it a responsibility of the regulatory authority to furnish performance bonding forms, is retained in the final rule unchanged. No comments were received on this provision, which follows Section 509(a) of the Act.

SECTION 800.4(b)

Proposed Section 800.4(b) gives the regulatory authority the responsibility for prescribing the terms and conditions for performance bonds and insurance, which meet the requirements of Part 800.

In the preamble for this proposed rule, OSM omitted the explanation for the removal of the phrase "by regulation" from this rule. A commenter called OSM's attention to the lack of explanation and suggested that it was "both illegal and unwise to encourage the States to prescribe terms and conditions for performance bonds in anything less than statutes and regulations." This comment has been accepted and the language of Section 800.4(b) revised accordingly.

In the final rule, OSM has deleted the proposed phrase "which meet, at a minimum, the requirements of this Part," from Section 800.4(b), as unnecessary since each State program must be consistent with the Federal regulations.

SECTION 800.4(c)

Proposed Section 800.4(c) required the regulatory authority to set the initial bond amount in accordance with Section 800.14. The final provision follows Section 509(a) of the Act and is unchanged from the proposal. Two commenters objected to the deletion of bond adjustments from the listing of regulatory authority responsibilities. Since this responsibility is enumerated by the Act in Section 509(e), it has been reinserted into this paragraph.

SECTION 800.4(d)

In the proposed rule this provision allowed the regulatory authority to accept self-bonds if the permittee met the requirements of Section 800.23 and any additional rules of the State or Federal program. Even though the self-bonding rules in Section 800.23 are not being made final in this rulemaking, this paragraph will refer to Section 800.23 with the understanding that Section 800.23 does not have the force of law until it becomes final. Those requirements of the self-bonding rules in existing Section 806.14 that were left after the suspension notice of December 7, 1981 (*46 FR 59934*), will remain in effect until they are replaced by a new set of final self-bonding rules. Further discussion of OSM's decision to repropose the self-bonding rules is available under Section 800.23 of this preamble. The authority of the regulatory authority to accept self-bonds is described in Section 509(c) of the Act.

Because a self-bond may be accepted together with other types of bonds in a form of combination bonding, the proposed phrase "in lieu of a surety or collateral bond" is an incorrect limitation and is deleted from final Section 800.4(d).

SECTION 800.4(e)

Proposed Section 800.4(e), which established the regulatory authority's responsibility in releasing bond liability, received no comments and is unchanged in the final rule. This rule follows Section 519(b) of the Act.

SECTION 800.4(f)

Proposed Section 800.4(f), which required the regulatory authority to take action to cause forfeiture according to Section 800.50, has been revised to clarify that the regulatory authority must cause forfeiture only under conditions set forth in Section 800.50.

This change resulted from comments pointing out that the paragraph seemed to require that every bond be forfeited to some extent. They suggested that the real intent was that a bond be forfeited under certain conditions as outlined by Section 800.50. OSM recognizes the confusion the proposed wording would have caused and therefore has rephrased the reference to Section 800.50 to clarify that the regulatory authority is to follow the condition and procedures for forfeiture in Section 800.50 of this part.

Several commenters objected to the mandatory provision in proposed Section 800.4(f) that the regulatory authority "shall" cause all or part of a bond to be forfeited, instead of a more discretionary phrasing.

It is the intent of the Act that the regulatory authority complete the reclamation in the event of forfeiture (see Section 509(a) of the Act) by doing the work itself or having it done through a contract with a third party. This being the case, the regulatory authority must cause the bond to be forfeited in the event of operator default in order to have the funds to complete the reclamation. Thus the mandatory language has been adopted.

One commenter suggested adding the phrase "notify the operator of the intention" to cause forfeiture to give the operator a reasonable time to correct the problems. This is already a part of Section 800.50 where notification is the initial step in the forfeiture procedures. Section 800.50 also offers an opportunity for the operator to avoid forfeiture through compliance.

SECTION 800.4(g)

In proposed Section 800.4(g) the regulatory authority had the responsibility to require adequate bond coverage at all times.

There were no comments on this rule and it is promulgated as proposed. This provision follows Section 509(a) of the Act.

SECTION 800.5 - DEFINITIONS.

Section 800.5 establishes definitions in addition to those in 30 CFR 700.5 and 701.5. The definitions in this section are specific to the bonding program. Two important changes will be made as the result of comments. Personal property is removed from being accepted as collateral and an escrow account bond is eliminated as a separate definition since it is a type of collateral bond.

SURETY BOND

A surety bond is defined in Section 800.5 as an indemnity agreement made payable to the regulatory authority and supported by a performance guarantee of a surety licensed in the State where the operation is located. The definition is retained as proposed.

One commenter objected to the requirement that the surety bond be supported by performance guarantees of a corporation "licensed to do business as a surety in the State where the operation is located." The commenter requested acceptance of an insurance bond issued by an insurance exchange such as Lloyd's of London. Because this licensing provision in Section 800.5 is taken directly from Section 509(b) of the Act it will remain unchanged.

However, acceptance of a bond issued by an insurance exchange may be treated as an alternate system under Section 509(c) of the Act. The commenter cited New Mexico's acceptance of such bonds as a form of self-bond. The regulatory authority may accept bonds issued by an insurance exchange under Section 509(c) of the Act if it is allowed under a provision included as part of an approved State program.

COLLATERAL BOND

A collateral bond was defined in the proposed provision as an indemnity agreement supported by deposit with the regulatory authority of one or more of the following: Cash; negotiable bonds of the United States, a State or a municipality; negotiable certificates of deposit; a letter of credit; a perfected first-lien security interest in real or personal property; or investment-grade rated securities having a rating of AAA, AA or A or an equivalent rating. Three changes are made to this definition. First, the use of personal property as collateral is deleted from paragraph (e). Also, the phrase "federally insured or equivalently protected accounts" is added to paragraph (a) to provide protection to the regulatory authority on cash deposits accepted as collateral, and certain editorial changes have been made so that escrow accounts will be included as collateral under cash accounts.

The reasons for these changes are discussed with the comments that initiated them.

A commenter felt that the proposed definition of collateral implied that the regulatory authority may, in the case of forfeiture, obtain collateral upon demand without a hearing. The commenter pointed out that most of the proposed forms of collateral were made payable or endorsed to the regulatory authority upon deposit. The commenter felt this was inconsistent with the proposed provision for hearings in Section 800.50, in that the regulatory authority could collect collateral upon demand prior to the hearing.

The provisions in Section 800.50 protect the operator from the possibility of the regulatory authority obtaining collateral upon forfeiture without allowing opportunity to avoid forfeiture. They do not prevent the regulatory authority from collecting collateral as soon as possible so that reclamation may proceed. It is the responsibility of the operator to be aware of any right of appeal provided under applicable laws.

In Section 800.5(a) the phrase "or the deposit of cash directly with the regulatory authority" is added to the definition of collateral bond since the provision was in the definition of escrow account, now included in the collateral definition.

Cash can be deposited either in an account in a bank, savings and loan, or credit union or directly with regulatory authority.

The same commenter also suggested that a mechanism of collateral assignment be used in place of making collateral directly payable to the regulatory authority. According to the commenter, using this mechanism would place the regulatory authority in the customary position of a secured party, thus allowing better interface between the rules and existing State laws governing foreclosure of collateral. It would also allow the regulatory authority the flexibility to avoid acting as custodian of the collateral.

Under the final rules, the regulatory authority has the necessary flexibility to avoid acting as custodian, since collateral need not remain in direct possession of the regulatory authority, but can be placed in a bank. Also, in regard to certificates of deposit the regulatory authority can use the assignment mechanism.

Two commenters felt that the addition of language giving the regulatory authority the option to accept negotiable certificates of deposit "payable or assigned" weakens the guarantee that the amount and form of bond will cover the costs of reclamation. The commenters felt that placing the regulatory authority in the role of assignee adds problems attendant to the assignee position and that such certificates should be payable directly to the regulatory authority.

OSM agrees that the assignee position can be somewhat riskier and has added language at Section 800.21(a)(3) to protect the regulatory authority against rights of setoff or liens.

Two commenters objected to the proposed inclusion in Section 800.5(f) of securities, other than negotiable government bonds, as collateral bonds. The commenters stated that this was in violation of Section 509(b) of the Act in that the aforementioned securities are not within the scope of permissible types of collateral bonds listed by the Act. The commenters also suggested that using securities not noted in the Act would be more appropriately covered as an alternative bonding system under Section 509(c) of the Act.

The rule as adopted will include the types of securities enumerated in Section 509(b) of the Act, along with alternative types of securities. The additional types of securities noted in paragraph (f) will provide an equivalent assurance against risk of forfeiture as those listed in the Act. Including the alternatives of paragraph (f) will achieve the objectives and purposes of the bonding program and is consistent with Section 509(c) of the Act, which allows alternative systems. To the extent OSM may approve alternative bonding programs as part of individual State programs, OSM also may incorporate acceptable alternatives as part of its nationwide permanent bonding program. Also, the Secretary, in Section 201(c)(2) of the Act, is directed to promulgate rules that are necessary to carry out the purposes of the Act. This provides additional authority for adding other types of collateral that may be accepted as a bond where the protection afforded is equivalent to those specified types listed in the Act.

Several commenters noted that OSM in the preamble of the proposed rule (*46 FR 45085*) suggested that States could add their own requirement that cash be deposited only in the "federally-insured" accounts. OSM also suggested in the preamble that a federally-insured account requirement would be "more stringent" than the proposed Federal rule, which did not include the requirement for a federally-insured account as in the previous rule. The commenters pointed out that placing cash bonds in federally-insured accounts is really no additional burden and should not be considered "more stringent." Also, the commenters noted, by deleting the provision and calling it "more stringent," OSM is preventing those States which are bound by State law not to have State programs more stringent than Federal minimum criteria from using the safer federally-insured accounts. One commenter pointed out that the only flexibility that the proposed rule offered was the flexibility to use riskier accounts.

In this final rule, OSM is requiring that each deposit used as collateral be deposited in "federally-insured or equivalently protected" accounts. This is in response to commenters who felt that the proposed deletion of this requirement added an element of risk for the regulatory authority without providing appreciable flexibility to the regulatory authority or to the operator. OSM agrees that addition of this requirement does not impose a hardship on operators and it reduces the risk to the regulatory authority. OSM has added the option of "equivalently protected"

accounts in order to allow for deposit of cash in accounts that are protected by State-operated insurance programs which provide the same level of protection as federally-insured accounts.

Two commenters suggested that a perfected first-lien security interest in real or personal property proposed in Paragraph (a) cannot be included as a collateral bond under Section 509(b) of the Act. The rule as adopted will include the types of securities listed in Section 509(b) of the Act as well as real property and other identified rated securities. Including real property as a form of collateral achieves the objectives and purposes of the bonding program. The authority for allowing other forms of security and real property as collateral is found in Section 509(c), allowing alternative bonding methods. OSM views the authorization of Section 509(c) as allowing for separate systems of bonding and for separate forms of bonds, such as collateral bonds supported by a perfected first-lien security interest in real property.

OSM has determined, however, that accepting a perfected first-lien security interest in personal property as collateral may present problems. These problems could include situations such as loss of the property, obtaining appraisals of such items, fluctuations in value, and the attachment of liens. Therefore, OSM has deleted personal property as a general form of collateral from the definition of collateral bond in final rule Section 800.5(e)

SELF BOND

A self-bond was defined in proposed Section 800.5 as an indemnity agreement executed by the permittee and made payable to the regulatory authority without separate surety. A commenter noted that the phrase "without separate surety" limited the ability of the State to develop a self-bonding program which includes forms of collateral. The commenter also noted that OSM had approved the State program of New Mexico, which allows a surety bond to be included in a self-bond. The commenter asked that the definition of "self-bond" be modified to include the phrase "with or without separate surety."

OSM agrees that the States should have the flexibility to choose whether to use other forms of surety within their self-bonding programs. Therefore, OSM has changed the self-bond definition to include the phrase, "with or without separate surety."

Another commenter to the proposed self-bonding rules suggested that the definition of self-bond be revised to reflect that under the proposed new self-bonding rules, self-bonds could be executed by a permittee's parent guarantor. This comment has been accepted in the expectation that the final revision to the self-bonding rules will allow such actions.

ESCROW ACCOUNT BOND

An escrow account bond was defined in proposed Section 800.5 as cash deposited in accounts made payable only to the regulatory authority or deposited with the regulatory authority.

A State regulatory authority objected to the separate definition of "escrow account bond" as distinguished from "collateral bond." OSM agrees with the reasoning that an escrow account is a form of collateral bond and should not be separately defined. OSM has deleted the definition of "escrow account bond." Escrow accounts will be included as "cash accounts" in Section 800.5(a) and Section 800.21(d) under the general provisions for collateral bonds.

SECTION 800.10 - INFORMATION COLLECTION.

This new section has been added in order to comply with the Paperwork Reduction Act, Pub. L. 96-511 (*44 U.S.C. 3507*). No substantive provisions are added by this section. It only describes the Office of Management and Budget clearance of the bonding program information collection requirements mandated by Sections 509 and 519 of the Act.

SECTION 800.11 - REQUIREMENTS TO FILE A BOND.

Section 800.11 sets the basic bonding requirements for the operator, establishing the time at which a bond must be posted and alternative methods the operator may choose. The section requires the operator to post a bond before receiving a permit to mine. It allows that a bond may be posted for all of the permit area or that the permit area may be divided into increments and bonded separately or cumulatively.

In the preamble discussion for final Section 800.11 which follows OSM explains the authorization and practical reasons for having incremental and phase bonding. OSM will also clarify that the State has the option of accepting or not accepting a bonding scheme offered by an applicant and has the responsibility to review and approve the specific terms and size of increments to be bonded. A provision is added to allow State and Federal programs to have alternative bonding systems if approved by the Secretary.

A number of other changes have been made for clarity, including some redesignations in Section 800.11(c). Section 800.11 is further discussed with the following comments.

SECTION 800.11(a)

Section 800.11(a) sets the requirement that before a permit is issued the applicant shall file with the regulatory authority, on a form prescribed and furnished by the regulatory authority, a bond or bonds made payable to the regulatory authority and conditioned on performance of all requirements of the Act, the regulatory program and the permit. Section 800.11(a) follows the provisions in Section 509(a) of the Act. No comments were received on Section 800.11(a), and it has been retained as proposed with minor clarifications.

The phrase "After a surface coal mining and reclamation permit application * * *" is being replaced by the phrase "After a permit application under Subchapter G of this chapter * * *." This is to clarify the type of permit application to which this rule refers.

The term "reclamation plan" has been added at the end of Section 800.11(a) as one of the performance requirements on which the bond must be conditioned. It is the requirements of the reclamation plan that the operator must fulfill in order to complete the requirements set by the Act, the regulatory program, and the permit.

BONDING SCHEMES

In final Section 800.11(d), OSM provides three forms of bonds under the bonding rules: One bond which covers the whole permit area; cumulative bonding; and incremental bonding.

The meaning of a single bond for the entire area is self-evident. If an operator chooses to post such a bond and the regulatory authority elects to accept such a bond, it is posted at the time of permit issuance and covers all of the permit area, even though discrete areas within the permit area may not be disturbed until some time later.

Cumulative bonding is described in detail in the preamble to the proposed revision of the bonding rules of January 24, 1980, *45 FR 6028-6030*. 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 at the time the initial bond is posted. Additions are made to the initial bond so that there is, at any one time, only one bond, which covers the entire area disturbed.

Incremental bonding recognizes a permit area divided into discrete portions, each separate from and independent of another insofar as reclamation work is concerned. Thus, bonding of an increment under this alternative necessarily implies that if there is a default in reclamation responsibility on one increment within the permit area, the regulatory authority cannot forfeit the bond or bonds posted for any other increment and apply those proceeds to the increment on which default has occurred.

Besides these bonding systems, OSM proposed in September 1981 and provides in these new bonding rules, a new concept of separate bonds for separate phases of reclamation. That is, under Section 800.13(a)(2) operators will be allowed, with the approval of the regulatory authority, to post a bond to cover Phase I backfilling, regrading and drainage control work, and another bond to cover Phases II and III requirements.

The total of the phase bonds must be sufficient to cover costs to the regulatory authority to complete the reclamation plan, and bond covering all three phases must be posted before disturbance of the area or increment bonded.

Under Section 800.11(d) the operator has the option of selecting which bond scheme he or she wishes to file. The regulatory authority has the discretion to accept or not accept that which the operator files.

DISCUSSION OF INCREMENTAL BONDING

Incremental bonding finds its authority in Section 509 of the Act, and has been incorporated in the permanent program regulations. Conflicting views have resulted, however, from wording in the March 13, 1979 regulations concerning the area required to be covered by the bond on any increment. One commenter on the initial bonding proposal, *43 FR 41872* (September 18, 1978), argued that allowing a bond, posted for an increment, to be forfeited for any part of the entire permit area flew in the face of contract law principles on which insurance and bonding are based. In short, the commenter argued that if a bond is posted for a discrete area, it should only be forfeited for work to be done on that area. The March 13, 1979 final rule acknowledged the comment and provided in Section 808.12(c) that bond coverage under an increment would apply to the entire permit area only with respect to the protection of the hydrologic balance. (*44 FR 15393*, March 13, 1979). However, in apparent conflict with the provision included in Section 808.12(c), Section 800.11(b) and the accompanying preamble indicated that a bond posted for an increment must be available for reclamation work throughout the permit area. The reason given was that water pollution or other unanticipated problems could occur on increments for which bond had been partially released such that the remaining amount would be inadequate.

The bond liability provisions of Section 808.12(c) were challenged in *re: Permanent Surface Mining Regulation Litigation*, *supra*. Subsequently, a rulemaking petition was filed by the Mining and Reclamation Council of America (MARC) and two insurance carriers to amend the bonding regulations, *44 FR 28005* (May 14, 1979).

Because it appeared that the bonding regulation should be subjected to further rulemaking, the Director of OSM submitted an affidavit to the district court informing it that the contested phrase of Section 808.12(c) would be suspended. See affidavit of Walter N. Heine, October 29, 1979, submitted in Appendix I to Government Round I brief in No. 79-1144, October 29, 1979. On November 27, 1979, the phrase "with respect to protection of the hydrologic balance" was suspended from Section 808.12(c). A proposed revision appeared on January 24, 1980 (*45 FR 6028*), to delete the language limiting bond protection to the hydrologic balance and making it discretionary whether an incremental bond must apply to the entire permit area.

On August 6, 1980 (*45 FR 52306*), a final rule was adopted which deleted the phrase pertaining to protection of the hydrologic balance but retaining the concept that the bond on an increment must apply to the entire permit area.

After the August, 1980 final rule, another rulemaking petition was submitted by MARC, joined by the Surety Association of America, requesting that the requirement extending liability to the entire permit area be modified (*46 FR 16277*, March 12, 1981). Their argument was that the provision extending liability under a bond to the entire permit area prevents sureties from writing bonds for increments. They urged that the section be revised to provide that under forfeiture a bond may be used only for those reclamation operations for which it was posted. By a notice appearing in the Federal Register on August 19, 1981 (*46 FR 42082*), the petition was granted and Section 808.12(c) was suspended in its entirety pending revised rulemaking.

That administrative action was followed by the proposed revision of all bonding rules on September 9, 1981 (*46 FR 45082*). The proposed rule would have made clear that when a bond, posted for an increment, is forfeited, it would be available only for reclamation work for which it was posted.

The history presented above shows that OSM has gone through various changes with respect to precise requirements and methods of acceptable incremental bonding. Congress intended to provide assurance that mined lands would be reclaimed even in the case of an operator default; it did not intend to impose on operators and sureties excessive bonding requirements that could not be implemented. These final bonding rules set forth standards for incremental bonding and release of incrementally bonded areas which fulfill the intent and purpose of the Act. Allowing for incremental bonding is not required by these rules, but is an option that may be adopted by the regulatory authority.

A number of comments were received with respect to incremental bonding. Three commenters urged that the proposed rule be changed and provisions reinstated requiring that the incremental bond cover the entire permit area, rather than bonds being applied to individual increments of the permit area. One commenter was concerned about the possibility that due to unforeseen problems the actual cost of reclamation may be higher than the estimated cost and

subsequent bond. The commenter felt that allowing the regulatory authority to forfeit bonds from other increments for reclamation work on any part of the permit area would allow the bond posted for other increments to make up for the error.

Two commenters further suggested that in the event problems occur on an increment already released from bond liability, but still within the permit area, a fund sufficient to assure completion of all reclamation work must be available. The commenters were also concerned that releasing bonds in increments may not leave enough funds to meet emergency reclamation contingencies affecting the permit area.

These commenters' concerns are addressed by the bond adjustment mechanism provided in these rules. The Act and OSM regulations require that the bonding amount posted be sufficient to cover the cost of reclamation. The bond may not be released until all of the reclamation requirements of the Act and the permit have been met. There is no evidence that Congress intended the operator to carry the burden of bonding not only the cost of anticipated reclamation but also an additional unspecified amount to cover unforeseen problems. Each regulatory authority should be able to estimate the cost of all potential reclamation with reasonable accuracy. If at any time the cost of future reclamation under the bond changes, the regulatory authority is required to adjust the bond accordingly (Section 800.15(a)). Thus, the amount of the bond for any increment must at all times be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority. Additionally, prior to release of the bond, the regulatory authority must consider, among other factors, the degree of difficulty to complete any remaining reclamation and the probability of any future reclamation work being required.

A surety, who in good faith enters into a surety contract for a performance bond, is entitled to a reasonable degree of certainty with respect to that bond and a reasonable ability to verify performance under the bond. By allowing a bond to be written for a specific defined increment, the final rule provides this reasonable level of certainty while ensuring that a sufficient bond is required for each increment to cover the costs of reclamation in the event of forfeiture.

A commenter argued that the incremental bonding program in West Virginia, where the bond is set at a flat rate of \$1,000/acre, would probably result in insufficient funds to complete reclamation. The commenter felt that bonding of the entire permit area on the other hand would probably cover the cost of all reclamation work.

The commenter apparently misunderstands the West Virginia program. The West Virginia bonding program is an alternative bonding program under Section 509(c) of the Act which establishes a central fund to cover the cost of reclamation work that is not covered by forfeited bond amounts. OSM conditionally approved the West Virginia program, but required the State to submit proof that the per-acre bond amounts, as supplemented by the amount in the fund, will be adequate for all potential forfeitures. See *46 FR 5915*, January 20, 1981.

Two commenters suggested that proposed Section 800.11(b) was inconsistent with Section 509 of the Act, which states "the applicant shall file * * * a bond for performance * * * conditional upon faithful performance of all the requirements of this Act and the permit." The commenters said this requires that liability, under even an incremental bonding plan, cover the entire permit area. The commenters also cited a Senate Report in support of inserting a provision that the bond cover the entire permit area. The Senate report states: "The bond must cover the entire area to be mined during the initial term of the permit." S. Rep. No. 95-128, 95th Cong., 1st Sess., 78 (1977).

Another commenter argued that Section 519(c) of the Act, which provides that a bond may not be released until all reclamation requirements of the Act are fully met, prohibited release of incremental bonds until all requirements within the entire permit area are met.

The Act has two primary sections dealing with bonding: Sections 509 and 519. Section 509 of the Act deals with the posting of a bond or bonds to ensure completion of reclamation -- work which the permittee under Section 515 of the Act (for surface mines) and Section 516 of the Act (for underground mines) is obligated to perform. The pertinent provisions of Section 509(a) specify that:

[T]he bond shall cover that area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations within the initial term of the permit. As succeeding increments of surface coal mining and reclamation operations are to be initiated and conducted within the permit area, the permittee shall file with the regulatory authority an additional bond or bonds to cover such increments in accordance with this section. The

amount of the bond required for each bonded area shall depend upon the reclamation requirements of the approved permit; * * *." (Emphasis added.)

Although the legislative history on the precise requirements for incremental bonding is vague, based on the quoted language it is OSM's view that separate bonds covering separate increments of the permit area are authorized.

The Act in Section 509(a) clearly intends that additional bonds for increments of the permit area can be filed as succeeding increments are mined. But, the Act does not explicitly address whether increments can be bonded and released separately and independently from other increments within the permit area.

The statement in Section 509(a) that the first bond posted is to be for operations "within" the "initial" permit term, leads OSM to conclude that Congress did not intend to exclude consideration of a bond which covers an area less than the whole of the area to be mined during the entire permit term so long as at any point in time each portion of disturbed land is subject to a bond covering the cost of reclamation for that area. This is consistent with the statement in the Senate Report cited by the commenter which was a generic statement addressing the scope of bond coverage and not dealing specifically with the question of incremental bonding. A House Report on H.R. 13950, a predecessor to the Act (H. Rep. No. 94-1445, 94th Cong. 2d Sess. (1976) at 114), states that the bond is to cover all or part of the area under permit but must cover the land on which operations are conducted. The use of the phrase "or bonds" in the second quoted sentence from the Act indicates that Congress authorized the posting of more than one bond for a permit area. And the last underscored phrase, "each bonded area," further strengthens the argument for the bonding of separate increments.

The Act provides that a balance should be struck between assuring a coal supply essential to the nation's energy needs and protecting the environment. The intent of the bonding provision is to insure performance of the reclamation plan. In some cases, the area to be mined during a 5-year permit term can require substantial bond amounts to cover costs of reclamation. Requiring a performance bond at the beginning of a permit term for areas which are not to be disturbed until the later years of the permit term could be excessive. Incremental bonding of areas within the permit area helps to avoid excessive bonding requirements while continuing to ensure a bond sufficient to cover the costs of reclamation.

One commenter complained that in its proposal OSM was reversing the position taken in 1979 in the litigation on the permanent program regulations promulgated March 13, 1979. (In re: Permanent Surface Mining Regulation Litigation, *supra*.) In accordance with the petition for rulemaking received from MARC and the Surety Association of America, and in accordance with Executive Order 12291, OSM agreed to reconsider this issue. Thus, a new proposed rule was published on September 9, 1981. In addition, in accordance with the February 1, 1983 remand Order of the U.S. Court of Appeals in *In re: Permanent Surface Mining Regulation Litigation*, No. 80-1810 (D.C. Cir.), OSM has been directed to consider the issues raised in the briefs of the parties to that action. OSM has concluded that its prior position was not warranted and that the Act does not require a bonding system that imposes excessive and unnecessary burdens on the operator and sureties. For this reason, the March 13, 1979 regulations as amended on August 6, 1980 and suspended in part on August 19, 1981, are being revised in this rulemaking.

A commenter suggested that proposed Section 800.11(b) seems to require the regulatory authority to approve any proposal for incremental bonding rather than allowing the regulatory authority discretion in accepting only appropriate incremental bonding schemes. OSM agrees with the concern. The Act allows the regulatory authority discretion in accepting or rejecting various bonding schemes. The rule at Section 800.11(d) has been revised to require regulatory authority approval of an applicant's bond under one of the prescribed schemes and Section 800.11(b) is revised to include all proposed types of bonds.

Some commenters referred to the National Coal Policy Project recommendations on the first bonding rulemaking petition as support for their contention that bonds should be available for work throughout the permit area. (See comment of National Coal Policy Project of Georgetown University, dated June 15, 1979.) Those recommendations do not specifically deal with the issue raised in suspended Section 808.12(c). Rather they are directed at the issue in previous Section 807.12(c) of complete release of a bond on an increment of a permit area versus release of that increment from the permit area. Their recommendation, which was subsequently adopted in the August 6, 1980 rulemaking, was that all of the bond on an increment should be released but that increments should not be released from the permit area until the final increment was released from its bond. The purpose of keeping an increment in the permit area is to retain operator responsibility for any failure that may occur.

OSM in these final bonding rules is retaining similar requirements. All of the bond on an increment may be released following the extended liability period if the regulatory authority concludes that reclamation on the increment has been completed and the requirements of Section 800.40 are satisfied for that increment. The regulatory authority may then retain the increment as part of the permit area if operator liability on the increment is still necessary, or, upon application, the regulatory authority may approve a permit revision to release the increment from the permit area.

DISCUSSION OF PHASE BONDING

A related issue raised by one commenter with respect to proposed Section 800.13 is that in his view separate phases of reclamation cannot be bonded separately. The basis of his opposition is that such phase bonding is not permitted by the Act.

The Act is silent on whether bonding of separate phases is permitted. The phase bonding concept was proposed as a possible solution to objections from the surety industry to the excessive length of time a performance bond must be held. Under the phase bonding system of Section 800.13(a)(2), an operator who may not be able to obtain surety bonding for his entire operation, may have a better chance to obtain surety bonding on one or more phases of the bonding. The operator could post another bond, such as a collateral bond, for the phases of bonding that the surety finds objectionable, e.g., Phases II and III. As with incremental bonding, the use of phase bonding does not negate the requirement that the total amount of the bond on the area at one time must be sufficient to cover all of the reclamation requirements for that area.

If the regulatory authority does not wish to allow phase bonding, it is under no obligation to do so. In setting phase bond amounts, the Phase I amount must be sufficient to complete Phase I reclamation activities, but, in order to be totally released after the completion of Phase I reclamation, cannot exceed 60 percent of the combined bond amount. A second bond would be posted for Phase II and III requirements which must be in an amount sufficient to complete the remaining reclamation. The bond amount retained for Phase III must at least be enough to reestablish vegetation. Release of phase bonds will be handled in much the same way as phased release of regular bonds, in accordance with Section 800.40. For example, after Phase I reclamation is complete on an area or increment and bond release procedures have been followed, the regulatory authority, if satisfied that Phase I reclamation is complete, could release the entire Phase I bond for the area or increment for which it was posted if it did not exceed 60 percent of total bond amount. After Phase II reclamation, an additional amount could be released if sufficient bond is retained, for the period of extended liability, to reestablish revegetation.

REDESIGNATION OF PROPOSED SECTION 800.11 (b) AND (c)

Proposed Section 800.11 (b) and (c) have been reordered and redesignated as Section 800.11 (b), (c) and (d).

Proposed Section 800.11(b) has been separated into Section 800.11(b) (1) and (2). Specifically, Section 800.11(b)(1) requires a bond to cover the entire permit area or that land upon which the operator will conduct surface coal mining and reclamation operations within an identified increment of the permit area. The modification from the proposal specifies that the entire permit area may be covered instead of increments. If the entire permit area is not covered by one bond, Section 800.11(b)(2) calls for additional bonds to be posted as succeeding increments of mining operations are conducted within the permit area.

The introductory language in proposed Section 800.11(c) required that the operator not disturb any land until a performance bond has been accepted by the regulatory authority. Proposed paragraphs (c)(1) (i), (ii) and (iii) explained the types of bonds and schedules an operator may file: (i) Entire permit area performance bond, (ii) cumulative bond and (iii) incremental bond. Proposed paragraph (c)(2) required an applicant to submit a map identifying the incremental areas for bonding and specify the bonds to be filed. Proposed Section 800.11(c)(2) also specified when bonds must be filed.

OSM received a number of comments on proposed paragraph (c) and is making some changes and redesignations to reflect those comments. Two commenters objected to the inclusion of two provisions, Section 800.11 (c)(1) and (c)(2), as part of proposed paragraph (c) suggesting instead that each provision stand on its own as a separate paragraph.

OSM agrees that a better order of the provisions is needed and has redesignated proposed paragraphs (b) and (c) as follows:

PROPOSED PARAGRAPH	NEW PARAGRAPH
(b)	(b)(1), (b)(2).
(c) (introduction)	(c).
(c)(1)(i)	(d)(1).
(c)(1)(ii)	(d)(2).
(c)(1)(iii)	(d)(3).
(c)(2)	(b)(3).

The introductory language in proposed Section 800.11(c) is the entire final Section 800.11(c).

Proposed Section 800.11(c)(1) (i), (ii) and (iii) are included in final Section 800.11(d). Paragraph (d) requires the applicant to file with the approval of the regulatory authority, a bond under one of three schemes, listed as (d)(1), (d)(2) and (d)(3). Paragraph (d)(1) refers to performance bonds for the entire permit area. Paragraph (d)(2) refers to cumulative bonds and Paragraph (d)(3) refers to incremental bonds. These three schemes were described earlier in this preamble.

Proposed Section 800.11(c)(2) has been adopted in part in final Section 800.11(b)(3). It requires identification of bonding areas or increments on maps submitted with the permit application and the bond amount for each area or increment. The proposal for filing each bond amount 30 days in advance of beginning operations in an increment has not been adopted. This provision is unnecessary in light of Section 800.11(c) which prohibits the disturbance of any area prior to acceptance by the regulatory authority of the required bond.

A commenter was concerned about possible administrative problems in keeping track of a large number of increments, especially if there are cutbacks in personnel and funding at the State level. The commenter also recommended that increments be limited to a manageable size, perhaps to set the minimum limit of an increment's size as the area of land to be disturbed in 1 year.

An optimum increment size must be developed on a site-specific basis. However, a provision has been added, new Section 800.11(b)(4), to require that increments shall be of sufficient size and configuration for efficient reclamation.

A State regulatory authority noted that since there is no requirement that the regulatory authority accept all types of bonds, the first line in proposed Section 800.11(c)(1) (new Section 800.11(d)) should read "After the amount of the bond has been determined * * * the [regulatory authority] may accept in fulfillment of the bond requirement either * * *."

OSM agrees that the regulatory authority is not required to accept all types of bonds. Language in new Section 800.11(d) has been changed to reflect this and to require regulatory authority approval of the bond or bonds filed.

The same commenter noted that proposed Section 800.11(c)(1)(i) (new Section 800.11(d)(1)) would require a bond only for the term of the permit. The commenter noted an inconsistency of this rule with proposed Section 800.13 which required that bond liability be for the duration of the mining and reclamation operations. The commenter asked that the first line of Paragraph (c)(1)(i) be changed to read "A performance bond or bonds for the entire permit area; or * * * ." The commenter also felt the operator should have the option to post a bond for the entire area which the proposed rule did not specify. OSM agrees with these comments and has adopted the suggestion in new Section 800.11(d)(1) and also in Section 800.11(b)(1).

The State regulatory authority also noted that it was inappropriate to require a schedule for release of acreage (proposed Section 800.11(c)(1)(ii)) in the section concerning "Requirement to file a bond." OSM agrees and has deleted the requirement for a schedule of release of acreage.

The State further commented that, using the proposed definition in *46 FR 45086 and 45090*, a cumulative bond

would cover the total disturbed area in the permit and that there would be no release of acreage until the entire permit area is reclaimed. Thus, it was concluded that only an incremental bond scheme would have liability released on parts of the permit area. On this point, OSM must disagree. Partial release of bond on a cumulatively bonded permit area is not prohibited by these rules, although liability of a cumulative bond extends over the entire permit area. OSM has added the requirement under the cumulative bond option in Section 800.11(d)(2) that the applicant file not only a cumulative bond schedule, but also a performance bond or bonds in the amount necessary to cover reclamation of the initial area to be affected.

The same regulatory authority felt that in proposed Section 800.11(c)(2) (new Section 800.11(d)(3)) the phrase "proportion of total amount" implied a percentage of bond amount for the entire permit area and was not relevant to the objective of incremental bonding. The amount of bond on an increment is determined and posted only for the reclamation work needed on that particular increment.

OSM agrees and has changed language in new Section 800.11(b)(3) of the final rule to read that the operator shall "specify the bond amount to be filed for each increment." Incremental bonding is based on calculating bond amounts for specific increments and is not based on assigning proportions of a total amount to the individual increments.

The regulatory authority also did not agree with the inclusion in proposed Section 800.11(c)(2) of the phrase "required for the term of the permit" in referring to the amount of bond needed.

OSM agrees that this phrase should not be included. The phrase is unnecessary and confusing, and is not adopted in the final rule.

The Kentucky Coal Association joined the National Coal Association (NCA) in recommending the addition of a new paragraph to Section 800.11 to allow for entire permit areas, increments, or portions of increments to be transferred from the permittee to an agency involved in research to encourage advances in mining and reclamation. The NCA noted that there is neither a specific statutory requirement for bonding of research parcels in Section 711 of the Act nor one excluding them from being bonded. The commenters noted that the present bonding rules do not mention research parcels even though Sections 511(a)(2) and 509(c) of the Act allow for revision of a permit and alternative bonding systems. The NCA suggested that provisions should be made for an alternative bonding system that will achieve the objectives and purposes of the bonding program while encouraging the use of research parcels.

OSM believes that, while it may be advisable to waive bonding requirements for research parcels, neither Section 711 or Section 509(c) allows a waiver of the financial guarantees required under Section 509 of the Act. Thus, no separate provisions have been included in the final rules for research parcels. The amount of bond for the research will depend on the stage (phase) and the complexity of reclamation, the problems to be encountered, and the amount of work to be done if required to be completed by a third party.

The ability of the party seeking transfer to carry out the terms of the permit is a well-stated requirement in the transfer of permit areas under 30 CFR Part 788. The transferee must post a bond and comply with the permit conditions. Transfer of permits to research organizations is already provided for under permit revision and transfer procedures and is not necessary as a separate provision of bonding.

SECTION 800.11(e)

The final rule retains language found in previous 30 CFR 806.11(b) and moved it to new Section 800.11(e) with minor revisions. A modified version of this paragraph appeared as proposed Section 800.12(b), but is not adopted. Section 800.11(e) allows State and Federal programs to have alternative bonding systems if they are approved by OSM and meet certain objectives. These objectives include assuring that sufficient money will be available to the regulatory authority to complete the reclamation if a default should occur. The alternative bond must also provide a substantial economic incentive for the permittee to comply with all reclamation provisions. This paragraph derives its authority from Section 509(c) of the Act. The modifications from the proposal include the explicit reference to OSM approval of alternative programs rather than Secretarial approval, and use of the phrase "reclamation plan," rather than "reclamation, restoration and abatement." The latter change recognizes that bonding obligations are tied

specifically to reclamation.

A State regulatory authority objected to the original placement of this provision on alternative bonding in Section 800.12 -- "Forms of bonds." The commenter suggested that moving the provision to Section 800.11 would allow both different bond procedures or schemes as well as bond forms. Another commenter objected to omission in proposed Section 800.12(b) of the specific alternative bonding systems that were in previous Section 806.11(b) (1) and (2). Sections 806.11(b) (1) and (2) listed the objectives that alternative bonding systems must meet if OSM is to approve their inclusion in a State program. OSM accepts these suggestions and has added the provision to Section 800.11 as discussed above in order to allow for an alternate system of bonding as well as an alternate bond form.

The alternative bonding provision is in more detail than in the proposed rule because it retains language and objectives from previous Section 806.11(b) in order to clarify what is required from the States in establishing alternative bonding programs.

SECTION 800.12 - FORM OF THE PERFORMANCE BOND.

Section 800.12 is promulgated as proposed except that paragraph (b) concerning acceptability of alternative bonding systems is moved to Section 800.11(e) and proposed Section 800.12(a) has been redesignated. Section 800.12 lists the three types of bonds that may be posted: Surety, collateral or self-bond. These three types are authorized under Section 509 of the Act. Section 800.12 also allows the regulatory authority to accept any combination of these three types of bonds.

Two commenters objected to allowing combinations of bonds to include self-bonds on the grounds that it is not consistent with proper business practices and Section 509(b) of the Act which allows only for the deposit of collateral in the place of a surety bond. The commenters suggested that accepting a self-bond in a bond combination would permit the operator to dilute the "full showing" required in Section 509(c) of the Act and to "bootstrap" a self-bond onto a posting of collateral or surety.

The final rule is consistent with Section 509 of the Act, including Section 509(c). Allowing a combination of self-bond with other bond forms allows the regulatory authority to limit self-bonding to specific levels depending on financial qualifications of a self-bond applicant. This could allow limited self-bonding for an operator who qualifies for a certain dollar amount of self-bond but whose required bond exceeds this amount. Self-bonding should be allowed for applicants who qualify, but self-bond levels must reflect a sound assurance of ability to perform the reclamation.

A commenter requested the addition of the following provision to Section 800.12: "Where the mining operation is owned by two or more persons or entities, the regulatory authority shall allow each person to provide separate financial assurance provided that the total of such assurance is sufficient to accomplish reclamation."

There is no language in the rules that prevents a regulatory authority from accepting separate bonds or financial guarantees from persons or entities who are jointly involved in an operation. The suggested provision would require the regulatory authority to accept separate bonds. OSM would rather keep the flexibility in the rule giving the regulatory authority discretion to accept or not accept separate bonds. Therefore, the provision offered has not been included in the final rule.

The same commenter offered another provision for inclusion in Section 800.12 which would allow for a "blanket" bond concept. It reads as follows:

A blanket bond covering Statewide or countrywide operations may be furnished if the terms and conditions thereof are sufficient to comply with the regulations in this part and if approved by the regulatory authority.

Insufficient detail as to the amount, liability, and extent of control over forfeiture was furnished to adequately evaluate the proposal and to include it in the final rules. OSM does not see any advantage to allowing "blanket"

bonds. If such bonds were allowed, the bond coverage required could be no less than the total amount to cover costs to a third party to complete the reclamation plans of all bonded areas. Therefore, the blanket bond would not offer an appreciable advantage over individual bonds.

SECTION 800.13 - PERIOD OF LIABILITY.

Proposed Section 800.13 required that the liability of the bond be for the duration of the surface coal mining and reclamation operation and for a period coincident with the operator's revegetation responsibility. The proposed section set the liability periods for revegetation completion and agricultural postmining land use and allowed small areas requiring extended liability to be bonded separately with the regulatory authority's approval. Proposed Section 800.13 stated that bond liability is to cover only those actions obligated under the permit and reclamation plan and within the control of the permittee.

A few language changes have been made to clarify requirements of this section. Also, the provisions allowing that the liability period for certain bonds "may be limited," and establishing the periods of extended responsibility for revegetation have not been adopted. Language has been added to clarify that "actions of third parties" for which the operator is not responsible refers to implementation of alternative postmining land use plans.

SECTION 800.13(a)

The first sentence of proposed Section 800.13(a) has been adopted as Section 800.13(a)(1), with one change. Both the proposed and final rules require performance bond liability to extend through the surface coal mining and reclamation operation and the period of extended responsibility for successful revegetation provided in 30 CFR 816.116 or 817.119. The change recognizes that liability under the Act must also continue until achievement of the reclamation requirements of the Act, regulatory program and permit. These obligations, recognized in Section 519(c)(3) of the Act, are independent of the revegetation responsibility.

The remainder of proposed Section 800.13(a) is included in Section 800.13(a)(2) and implements the concept of phase bonding. Specifically, it provides that, with the approval of the regulatory authority, a bond may be posted and approved to guarantee specific phases of reclamation within the permit area provided the sum of phase bonds posted equals or exceeds the total amount required under Section 800.14 and 800.15.

Two commenters objected to allowing liability for bonds on specific phases or increments in proposed Section 800.13(a). The commenters cited Section 509(b) of the Act, which states the "liability under the bond shall be for the duration of the surface coal mining and reclamation operation and for a period coincident with the operator's responsibility for revegetation requirement in Section 515." Therefore, the commenters stated, liability may not be limited to only specific phases or increments. OSM disagrees with the comment. "Liability" is not relieved merely because some of the bond amount for an increment is released. The implementation of phase bonding does not affect the requirement that at all times, the remaining bond must be sufficient to cover the cost of future reclamation.

A State regulatory authority requested clarification as to why in the second sentence of proposed Section 800.13(a) OSM allowed limited liability for specific "increments" when Section 509(b) of the Act clearly states the period of liability and this statement is reiterated in the first sentence of Section 800.13(a). Another commenter stated that the "provision for bonding individual phases of operation is not permitted by the Act. The Act permits only that bonds may be incremented to cover 'areas of land within a permit area' or 'succeeding increments'."

One commenter stated it would greatly help a surety to understand what he is bonding if liability in incremental bonding can be limited to each bonded increment.

Another commenter requested that the second sentence in Section 800.13(a) be changed so that it reads "the liability period for certain bonds 'shall' be limited if * * *." The commenter's reasoning was, if the bond is posted to guarantee only a specific increment, the liability period should be correspondingly limited.

OSM realizes that proposed Section 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 Section 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.

Other comments were more specifically addressed in the discussion on incremental and phase bonding under Section 800.11.

A State regulatory authority, in evaluating the provisions for limited bonds, recommended clarifying Section 800.13(a) to ensure that the regulatory authority has all the bonds needed to complete all phases of reclamation within each increment should forfeiture occur. The commenter said bonds posted to cover phases within an increment should all be posted at the same time, so that all phases are covered by bonds prior to the beginning of operations. OSM agrees that this should be clearly stated and has added language at Section 800.13(a) to provide that the sum of phase bonds posted must equal the total bond required.

Another State regulatory authority, in anticipation of problems in accepting bonds covering phases, requested clarification in Section 800.13(a) that a State is not required to accept this bonding method. The regulatory authority was also concerned that allowing different sureties to bond the separate phases of an increment would create a problem should the reclamation in Phase I fail after release of the bond. The sureties posting bonds for Phases II and III would not want to assume the problems of Phase I, leaving the State without funds to repair the damage. The regulatory authority also said that under its program, bond liability is not released after Phase I even though the bond amount may be released and that the bonds specifically held for Phases II and III reclamation may be applied to Phase I reclamation.

OSM provides in new Section 800.11(d) that the regulatory authority has the discretion to approve or disapprove the bond of an operator. New Section 800.13(a)(2) provides that a bond may be posted "with the approval of the regulatory authority," to further clarify that the regulatory authority decides whether to accept phase or incremental bonding. Phase bonding should not create new problems of extending liability of a bond to other areas or to reclamation requirements for which the bond has already been released. Whether a bond covered all phases and increments or specific phases and increments, its funds are no longer available to the regulatory authority after the bond amount is released. Therefore, the regulatory authority must be satisfied with Phase I reclamation before allowing release of the bond amount associated with the reclamation. After the release of either a separate Phase I bond or the Phase I portion of a bond covering all phases, the remaining monies are only supposed to be sufficient to cover Phases II and III. Thus, while the problem of failed reclamation is real, it is not exacerbated by the use of phase bonding. In any event, new Section 800.50(d) requires that the operator be liable for all costs of reclamation in the event that forfeited bond amounts are insufficient.

PROPOSED SECTION 800.13(b)

Proposed Section 800.13(b) would have set the liability period of 5 or 10 years for completion of vegetation requirements after the last year of augmented seeding, fertilizing, irrigating or other work. This liability period begins again whenever augmented seeding, etc., is required. Proposed Section 800.13(b), which was taken from Section 515(b)(20) of the Act, is not adopted because it is duplicative of the revegetation provisions of the regulations at 30 CFR 816.116 and 817.116.

PROPOSED SECTION 800.13(c)

Proposed Section 800.13(c) would have allowed the regulatory authority to approve selected supplemental reclamation practices after the 5 or 10 year liability period has begun without extending the liability period if they conform to the revegetation standards of Sections 816.116 and 817.116. This provision is not being adopted because it would have duplicated the provisions of draft final Sections 816.116 and 817.116 as these provisions appear in OSM's "Final Environmental Impact Statement OSM-EIS-1: Supplement," (FEIS) Volume III, pp. 152 and 204. If these rules are not finalized, OSM will adopt amendments that, at the least, would incorporate the provisions of

previous Section 805.13(b)(3).

A commenter, comparing the proposed Section 800.13(c) with the draft version of Sections 816.116 and 817.116, objected to the situations set out as acceptable reclamation practices which would not be considered augmentation and would not cause the liability period to be extended. The commenter said the draft revegetation rules and preamble of June 26, 1981 define the following situations when the bond liability period does not have to start over:

- Reseeding or refertilizing small spots where vegetation fails;
- Filling gullies;
- Interseeding and supplemental fertilizing in the West;
- Additional planting of trees and shrubs if this may continue as part of the postmining land use.

The commenter felt these revegetation provisions were vague, easily abused and should be deleted. As an alternative the commenter suggested that OSM rely on Section 800.13(d) which allows problems areas to be separately rebounded.

The commenter also felt the combination of proposed Section 800.13(b) and the revegetation rules was not consistent with the Act's intent to prevent release of part of the bond until vegetation shows itself to be successful. According to the commenter, the Act requires that when a vegetation problem develops which necessitates additional seeding or fertilizer, the 5 or 10 year liability period must start over.

OSM, in proposing revisions to its bond liability rules, has referenced existing revegetation requirements. At this time, the proposed changes to the revegetation rules (*47 FR 12596*, March 23, 1982) have not yet been finalized. References in these final bonding rules to revegetation incorporate the existing revegetation rules that are currently in effect. The comments summarized above refer to draft proposed revegetation rules, some of which may not have been proposed. To the extent applicable, these comments will be addressed in final revisions to the revegetation rules.

FINAL SECTION 800.13(b)

Proposed Section 800.13(d) allowed small areas of the permit, limited in extent and requiring extended liability, to be bonded separately with the approval of the regulatory authority. Access to these small areas could be included as a part of the area requiring extended liability. Final Section 800.13(d) has been revised and adopted in final Section 800.13(b) as discussed below.

Two commenters found the proposal "too open-ended" and said the proposal makes no attempt to discern if the intent of the operator to rebond small areas comes after a legitimate reclamation effort or after failure of a half-hearted attempt. The commenters also noted the proposal limits these types of areas only to ones which are "limited in extent."

Final Section 800.13(b) will allow for the extension of bond liability on limited portions of the bonded area requiring extended liability so as not to delay bond release of the rest of the area. This provision represents a revision of Section 805.13(c) promulgated August 6, 1980, *45 FR 52319*. The regulatory authority will be in the best position to determine whether the operator should be allowed to separate areas from the permit area to be bonded separately when extended liability is required. Because the areas must be "limited in extent," it is not necessary to characterize them also as "small." Thus, the proposed descriptor "small" has not been adopted.

Another commenter requested clarification of the phrase "small, isolated, clearly defined portions" in proposed Section 800.13(d). Because this phrase is not defined, the commenter said, it raises problems of inconsistent management policies by States responsible for Federal lands within their borders.

Mining on Federal land in States which have entered into cooperative agreements requires implementation of the provision by one agency within each such State, the State regulatory authority. Under the revisions to OSM's Federal lands program, referenced earlier, all non-Indian lands within a State will be subject to the same standards. Thus, the rules will not cause inconsistent management.

A commenter objected to the use of the term "checkerboard pattern of failure" in proposed Section 800.13(d) to describe those areas of vegetation failure which may not be considered small and isolated and be separately rebonded. The commenter suggested that the term implies a regularity of failure that may never occur. The commenter noted the failure could be scattered and irregular and this should not be allowed to be separated and approved for rebonding either.

OSM agrees with the commenter and has changed the section to read "such areas shall be limited in extent and not constitute a scattered, intermittent, or checkerboard pattern * * *."

A commenter found that the last sentence of proposed Section 800.13(d) was not clear as to whether the access had to be included in the areas of extended liability or could be in the area which may be released from liability. Two other commenters also felt the last sentence of Section 800.13(d) should be amended so that additional acreage need not be assigned extended liability to cover access disturbances if access to an area of failure is possible from a public road, by foot, by using a hydroseeder or other means that would not disturb vegetation.

OSM agrees with the commenters and has changed the sentence to state clearly that access to the separated areas may be included in the area of extended liability if the regulatory authority determines this is necessary.

FINAL SECTION 800.13(c)

Final Section 800.13(c), proposed as Section 800.13(e), provides that if the regulatory authority approves a long-term agriculture postmining land use in accordance with 30 CFR 816.133 or 817.133, the 5 or 10 year period of liability will begin at the date of initial planting for such long-term agricultural use. There were no comments on this provision and it remains unchanged from the proposed rule except for the addition of the last phrase "for such long-term agricultural use." This provision parallels Section 515(b)(20) of the Act.

SECTION 800.13(d)

Proposed Section 800.13(f) would have stated that the bond liability shall include only obligations under the permit, including completion of the reclamation plan, in such a manner that the land is capable of supporting a postmining land use approved under 30 CFR 816.133(c) or 817.133(c). It also would have provided that actions beyond the control and influence of the permittee which are not responsibilities under the permit need not be covered by the bond.

OSM has revised the corresponding final rule, Section 800.13(d), to clarify that the permittee is excused from bonding for third party actions only insofar as they relate to implementation of approved alternative land use plans by the third party. Final Section 800.13(d) recognizes that only alternative postmining land uses may be approved under draft final Sections 816.133(c) and 817.133(c) as set forth in Volume III of the FEIS. If the postmining land use is not changed, such approval would be made under Sections 816.133(a) or 817.133(a). Thus, the first sentence references Section 816.133, rather than Section 816.133(c).

A commenter objected to the use of the term "capable" in proposed Section 800.13(f), citing this as insufficient to guarantee successful revegetation. The term is taken from Section 515(b)(2) of the Act, and its use here does not establish a performance standard separate from those standards in Parts 816 and 817 for reclamation and revegetation success. A sentence has been added to Section 800.13(d) to clarify that bond liability for prime farmland has a different standard established in Section 519(c)(2) of the Act and Section 800.40(c)(2).

Another commenter requested deletion of the words "and influence" with respect to the permittee's control of third party actions on the grounds that influence is beyond the common law definition of control.

OSM has accepted this request because control provides a sufficient standard upon which the regulatory authority may decide whether the permittee is responsible. Influence is an amorphous standard too difficult to apply.

One commenter was concerned that the coal operator have some protection against disturbance of his reclamation efforts on land that he has leased. The commenter said: "After an operator has completed his mining activities and has properly backfilled, regraded and seeded an area, what recourse does this coal operator have over the fee owner or leasers [sic] to the surface who decide to use this newly reclaimed area for their own purposes. Surely the regulatory authority recognizes this potential problem and we trust that they will provide some means to insure that fairness will prevail. Where a landowner disturbs that surface before the full 5-year period of successful revegetation expires, some means of protection should be afforded the coal operator."

For the regulatory authority to relieve the operator of liability in this case would be a violation of Sections 515(b) (19) and (20) of the Act. However, in answer to the commenter's concern, the terms of the lease and surface owner consent to the postmining land use should delineate the operator and landowner's responsibilities. The reclamation plan should address acceptable practices which may be conducted during the liability period. Reclamation success is subject to performance criteria in Sections 816.116 and 816.133 of the rules. Surface owner consent should require the surface owner to cooperate with the operator in fulfilling reclamation responsibilities.

A State regulatory authority objected to the provision of proposed Section 800.13(f) which allowed that actions not under the control of the permittee or for which he or she is not responsible under the permit need not be covered by the bond. The regulatory authority stated that in its experience many permittees charged with failure to reclaim offer the defense of the "phantom wildcatter" and that the language proposed in Section 800.13(f) encourages this defense. The regulatory authority proposed the provision be changed to read: "Actions of third parties which are demonstrated by the permittee to be beyond the control and influence of the permittee * * *"

Another commenter suggested there must be a limit as to how far the operator's control and influence is assumed to extend. The commenter said the "No Trespassing" signs around reclaimed areas may or may not in a regulatory authority's view be adequate influence and control over the reclamation site. Under some circumstances, additional controls, such as fencing, may not be reasonable or feasible for the operator to install.

OSM did not intend by this provision to relieve the permittee from responsibility for third party actions except for those related to implementation of approved alternative postmining land use plans. OSM regrets any confusion which has been caused and has attempted to clarify its intent in new Section 800.13(d).

SECTION 800.14 - DETERMINATION OF BOND AMOUNT.

Section 800.14 describes those situations and analyses which must be taken into account when the regulatory authority determines the amount of a bond. This section also implements the requirements of the Act that the bond amount be adequate to ensure completion of the reclamation if the work had to be performed by the regulatory authority and that in no event can the bond for an entire permit area be less than \$10,000. Section 800.14 has been slightly restructured, but remains substantively unchanged from the proposed rule. This section follows Section 509(a) of the Act.

A State regulatory authority urged that Section 800.14(a) specify that the cost estimate submitted by the operator to help determine the bond amount should reflect, not today's cost of reclamation, but rather the cost 5 plus years in the future when the bond is near release.

Two other commenters also noted this confusion on estimated costs and suggested Section 800.14(a) was a misinterpretation of Section 509 of the Act by not making it clear the "estimated cost" should be calculated in the context of potentially years and many disturbed acres later. The two commenters felt the cost estimate should only be one factor in determining the bond and that the regulatory authority should also consider historical cost changes, projections based on trends, and administrative overhead in contracting for the reclamation work.

The bond amount, in order to be sufficient to assure completion of the reclamation plan by the regulatory authority, must include administrative costs to the regulatory authority. However, OSM does not agree that the operator should

necessarily have to post a bond in an amount that incorporates inflation factors for 5 years. The section as written provides the regulatory authority with the discretion to consider the potential impact of inflation, but does not require it. Rather, Section 800.15 may be used to provide for adjustment of the bond amount as necessary to cover such problems as inflation.

A commenter objected to omission from Section 800.14 of a provision in previous Section 805.11(a) which required that the amount of the bond reflect an additional amount to restore land to its original premining use if a permittee does not implement the approved alternative postmining land use within the first 2 years.

Final Section 800.14(b) requires instead that the bond amount be sufficient to complete the reclamation plan. The reclamation plan, as defined in 30 CFR 780.23 and 784.15, must include any alternative postmining land uses. Therefore, because the term "reclamation plan" includes the approved alternative postmining land use plans, Section 800.14(b) need only require that the bond amount be sufficient to complete the reclamation plan. If the reclamation plan were to change, bond adjustments could be required. It is unnecessary to include a specific additional provision in the bonding regulations similar to previous Section 805.11(a).

A commenter asked how the requirement in Section 800.14(b) that no bond be less than \$10,000 for an entire permit area fits in with a phase bonding scheme. The commenter wanted to know if the \$10,000 was an initial filing amount or had to be retained in the Phase III bond.

The Act requires in Section 509(a) that "in no case shall the bond for the entire area under one permit be less than \$10,000." This language refers to the total bond initially posted for a permit area. Section 519(c) of the Act further provides for release of bond as reclamation activities are completed, with the requirement that, after the initial 60 percent release of bond, and the successful establishment of revegetation, sufficient bond amount be retained to reestablish revegetation. Section 519(c) does not mention retention of a \$10,000 minimum amount. Therefore, OSM is of the view that the \$10,000 minimum applies to the total bond amount initially posted and need not apply to the bond amount retained following completion of a phase or phases of reclamation and partial bond release. The final rule reflects this view. However, a regulatory authority may choose to require that a \$10,000 bond amount be retained.

SECTION 800.15 - ADJUSTMENT OF AMOUNT.

Section 800.15 implements Section 509(e) of the Act which authorizes the regulatory authority to adjust the bond amount. It sets the notification actions required when a bond is proposed for adjustment and terms under which a permittee may request a reduction of a bond. This section also requires the regulatory authority to review the bond for possible adjustments from time to time and when an approved operation and reclamation plan is modified. Section 800.15 is revised to clarify the difference between bond adjustments and bond release. A provision is also added to allow the regulatory authority to set times for periodic review of the bond.

SECTION 800.15(a)

Proposed Section 800.15(a) requires the regulatory authority to adjust the amount of the bond from time to time as affected land acreage is increased or decreased or cost of future reclamation changes.

A regulatory authority recommended a change to Section 800.15(a) specifying that bond adjustments be made at the time of permit review rather than from "time to time" as proposed. The regulatory authority suggested that "time to time" adjustment of the bond amount creates an irregular and unknown administrative burden. Since bonding is essentially a permit condition, the regulatory authority suggested bond adjustments could easily be included as part of the normal permit review, precluding arbitrary and unfounded requests for bond adjustments.

Two other commenters agreed, adding further that the bond should be reviewed for adjustment only when documentation supports the request. One of the commenters suggested the following change in Section 800.15(a):

The amount of bond * * * shall be adjusted by the regulatory authority when, during review of the permit by the regulatory authority, it is determined that significant changes have been made in the number of acres of affected land or where the cost of future reclamation changes significantly.

As noted Section 800.15(a) follows the requirements of Section 509(e) of the Act. The Act specifies that adjustments be made from "time to time" as necessary. However, to clarify that the regulatory authority may establish a schedule of adjustments, language is added to the final rule to this effect. Such a schedule could be tied to permit review as the regulatory authority urged if such a schedule related to the likely need for adjustments.

SECTION 800.15(b)

Section 800.15(b) requires that when a bond adjustment is proposed the regulatory authority shall notify the permittee, the surety, and any other persons with a property interest in the collateral and provide the permittee with an opportunity for an informal conference.

Section 800.15(b) received no comments. However, a clause is added consistent with new Section 800.21(f), so that persons with an interest in collateral who wish to be notified of proposed bond adjustments, must request such notification. This provision follows Sections 509(e), 519, and 513 of the Act.

SECTION 800.15(c)

Final Section 800.15(c) allows the permittee to request a bond reduction if the permittee submits evidence that a reduction may be warranted. The reduction of bond is considered a bond adjustment if the reduction is based on a change in method of operation or other circumstances which reduces the estimated cost for the regulatory authority to reclaim. Final Section 800.15(c) has been revised to clarify the difference between bond "adjustments" and bond "release" as discussed with the comments below.

A commenter objected to proposed Section 800.15(c) and suggested that the request for adjustment of the bond on acres already disturbed should not be considered a bond release subject to the complicated requirements of Section 800.40. Rather, the commenter recommended replacing the general reference to Section 800.40 for bond adjustments of disturbed acres in Section 800.15 with a rule limiting the applicability of Section 800.40 only to requests for bond adjustments on disturbed acres in Phases II and III of reclamation. The commenter suggests that defining bond release and bond adjustments in the same manner ignores the procedural and economic considerations inherent in the distinction.

OSM disagrees that bond release procedures should or could be applied under Section 800.15 only bond adjustments are requested for land in Phase II or III of reclamation. Section 519 of the Act provides for formal release after completion of Phase I reclamation. Completion of Phase I reclamation cannot result in an adjustment of the bond amount.

Two commenters objected to proposed Section 800.15(c) because it exempted bond adjustment proceedings from public participation when those proceedings involved bond reductions based on a change in method of operation or a decrease in the number of acres to be disturbed.

The commenters stated that the shift from underground to contour surface mining or from stripping to augering does not warrant a reduction of amount without the same degree of scrutiny accorded the original bond determination -- full disclosure and maximum participation by the public.

The commenters also felt that to bypass bond release procedures of Section 800.40, merely because the bond reduction is based on an area not to be mined, had no rational basis. The commenters said a reduction of acreage, where the acreage is a buffer, or a potential drainage area, could have a serious impact that might be overlooked without the public scrutiny and participation.

The commenters stated that the Act was specific in that in any bond release context, citizen participation may not

be abridged. They stated that proposed Section 800.15(c) was not merely illegal, but open-ended and unfounded.

Additionally, the commenters asserted that Section 509(e) of the Act allows only for an upward adjustment of inadequate bonds as explained by a Senate Report: "Subsection (e) provides that the bond or deposit may be adjusted at any time if as a result of experience or changed circumstances, it is determined to be inadequate." S. Rep. No. 95-128, 95th Cong., 1st Sess. 78 (1977).

Another commenter asked for a clarification of Section 800.15(c) as to how a reduction can be due to a decrease in the number of acres already disturbed. The commenter also did not agree with OSM's differentiation between bond adjustment and partial bond release. The commenter suggested instead a previous OSM interpretation that adjustments in bond amounts at the request of the permittee, as opposed to those adjustments made on the motion of the regulatory authority, should be considered bond release request. The commenter said OSM's proposed split in Section 800.15(c) is "not justifiable and flies in the face of Congressional concern for citizen participation."

Section 509(e) of the Act allows for either upward or downward adjustment of the bond amount. Section 509(e) allows for adjustments "as affected land acreage are increased or decreased" and also allows for adjustments "where the cost of future reclamation changes." The Act does not qualify "changes" to mean only upward or only downward changes in cost.

OSM has not included in the final rule any provision characterizing as an adjustment any reduction in bond amount for reclamation work performed on disturbed areas since bond for disturbed areas can only be released or reduced through formal release procedures of Section 800.40. The discussion did not belong in the section pertaining to adjustment of bond amount. This language was confusing and redundant. A sentence has been added to clarify that bond adjustments which involve only undisturbed land or revision of the cost estimate of reclamation are not considered bond release subject to procedures of Section 800.40.

The commenter's concern about operator financial responsibility for buffer zones is addressed as follows: If there is no disturbance to a buffer zone and there will be no surface coal mining and reclamation operations in the buffer zone, it will neither be permitted nor bonded. However, the operator's liability insurance policy under Section 800.60 must cover damage to the buffer zone resulting from the operations. The policy covers all personal injury and property damage for which the operator is responsible under State law.

SECTION 800.15(d)

Section 800.15(d) requires that when an approved permit is revised, the regulatory authority will review the bond for adequacy and, if necessary, call for an adjustment to the bond.

Two commenters felt that in Section 800.15(d) the regulatory authority should also have the responsibility to regularly review and adjust the bond at the time of permit review. The commenters stated that according to Section 511(c) of the Act the permit bond must be reviewed for adequacy in form and amount as part of the permit review. Section 511(c) says "The regulatory authority shall * * * review outstanding permits and may require reasonable revision or modification of the permit provisions during the term of such permit."

Requirements at Sections 800.4 and 800.15 establish regulatory authority responsibility to adjust the bond as necessary. Paragraphs (a) and (d) of Section 800.15 require that the regulatory authority adjust the bond amount as acreage is increased or decreased and, if necessary, as the permit is revised.

SECTION 800.16 - GENERAL TERMS AND CONDITIONS OF THE BOND.

Section 800.16 describes five general terms and conditions for acceptance of a bond. OSM has revised a few phrases in Section 800.16 for clarity and has deleted the provision in proposed Paragraph (e)(2) requiring issuance of a notice of violation (NOV) for loss of bond coverage.

SECTION 800.16 (a) and (b)

Paragraphs (a) and (b) of Section 800.16, which require the bond to be an amount determined by the regulatory authority, received no comments and are unchanged from the proposed rule. These two paragraphs follow Section 509(a) of the Act.

SECTION 800.16(c)

Section 800.16(c), which requires the bond to be conditioned upon faithful performance of all the requirements of the Act, 30 CFR Chapter VII, the regulatory program and the conditions of the permit, has been amended for clarity.

Completion of the "reclamation plan" is added to Section 800.16(c) as a requirement to make clear that the bond is conditioned on performance of the reclamation plan, as well as the other performance requirements. This parallels the addition of similar language at Section 800.11(a).

SECTION 800.16(d)

Section 800.16(d), which requires the bond to be held for a time period provided in Section 800.13, received no comments and is unchanged from the proposed rule. This paragraph follows Section 509(b) of the Act.

SECTION 800.16(e)

Proposed Section 800.16(e)(1) required that the bond provide a mechanism for a bank or surety to give prompt notice to the regulatory authority and permittee of insolvency, bankruptcy or suspensions of license. Proposed Section 800.16(e)(1) has been adopted without change. Proposed Section 800.16(e)(2) would have required that (1) a regulatory authority issue an NOV if the permittee is found to be without bond coverage; (2) if the violation is abated during the allowed time period the violation need not be reported in permit applications as a past violation; and (3) if it is not abated a cessation order will be issued.

In final Section 800.16(e)(2) the term "person" has been deleted, since the term could only have applied to a person who had posted collateral, and, in the case of a bankruptcy of such person, the regulatory authority is protected against claims on the collateral through possession or a perfected security interest.

Industry commenters strongly objected to the proposed provision in Section 800.16(e) for issuing an NOV for loss of bond coverage due to failure of the surety, a bank, a third party providing collateral or a guarantee, or the permittee's self-bond.

The commenters noted that OSM has no power under Section 509 of the Act to issue notices of violation upon the incapacity of the operator's bonding agent. They said the proposed rule was unfair because the operator would have to suffer the civil penalties of Section 518 of the Act that the NOV automatically triggers. The operator must then defend against a penalty proceeding brought against him which may be based on an event that has nothing to do with his own compliance with mining and reclamation standards. The commenters said the proposed automatic NOV would have served no purpose, since the danger that the reclamation will not be achieved is presented only when the operator is unable to pay for the work. As long as mining and reclamation operations are being conducted in compliance with the rules, there is no need for issuing the NOV.

The commenters suggested instead that the regulatory authority "notify any operator who is without bond coverage and specify a reasonable period to replace bond coverage, not to exceed 90 days."

A State regulatory authority felt it should have the power to issue a notice of violation, including specific conditions for continued operation, and should also have the ability to terminate operations when necessary to protect the environment and comply with the Act.

In the final rule for Section 800.16(e)(2), OSM has not adopted the provision for mandatory issuance of an NOV, and instead has specified that a notice must be given by the regulatory authority which specifies a reasonable period

of up to 90 days within which the bond must be replaced. If the bond is not replaced by the end of that period, the operator must cease coal extraction under provisions of Sections 816.132 and 817.132 and immediately begin to reclaim the permit area in accordance with the reclamation plan. Mining operations can resume only upon the posting of a bond acceptable to the regulatory authority.

These changes answer industry's concern for unfair treatment of an operator following loss of bond due to incapacity of the operator's bonding agent. Under the new language the operator will not be penalized for circumstances beyond his or her control, and will be given a reasonable period of time to obtain replacement bond before mining operations must cease and reclamation activities must begin. The regulatory authority will have the power to issue a notice of violation after the period granted for replacement bond has expired if the operator does not obtain a replacement bond and does not cease mining operations and begin reclamation as required. The regulatory authority would have the power to terminate an operation during the replacement period if the environment or public safety is endangered; but such an action would not necessarily stem from loss of bond coverage.

Another commenter was concerned that the proposed references Sections 778.14 and 782.14 should be changed to reflect the renumbering that will occur when the draft proposed permit application rules are finalized. The new Section 800.16(e)(2) does not contain references to the permitting sections since a notice of violation is no longer required for loss of bond coverage pursuant to Section 800.16(e). Therefore, the comment is no longer applicable.

SECTION 800.17 - BONDING REQUIREMENTS FOR UNDERGROUND COAL MINES AND OTHER LONG-TERM COAL-RELATED FACILITIES AND STRUCTURES.

Final Section 800.17 gives the regulatory authority the responsibility to require bond coverage for long-term surface facilities and disturbed surface areas of underground mines. The proposed section set the terms and conditions for these bonds, their liability period, forfeiture conditions and would have included provisions for bonding of subsidence control measures. Language has been added to clarify which facilities and structures are included in this section. Other editorial changes are made. Bonding requirements for subsidence control measures have not been adopted.

A surety company objected to proposed Section 800.17 because it required processing plants and support facilities to be permitted and bonded. The commenter said that this provision exceeds the provisions of the Act and that tipples and processing plants should be considered factories, not surface mining operations. The commenter said he did not believe it was "Congress' intent to require demolition of industrial complexes [for reclamation] just because they may not be used from time to time."

Since the bonding provisions apply only to those areas permitted, these long-term bonding provisions may apply to coal preparation plants which fall within the definition of a surface coal mining operation in Section 701(28) of the Act. A more extensive discussion of which facilities are included in that definition appears in the preamble to the rule revising that definition. The permitting rules in 30 CFR Subchapter G cover facilities and operations to be permitted. The provisions of Section 800.17 apply to those long-term facilities which are permitted under Subchapter G. Language to indicate this has been added to Section 800.17(a).

SECTION 800.17(a)

Final Section 800.17(a) gives the regulatory authority the responsibility to require a bond for all long-term coal-related surface facilities and structures, and for areas disturbed by surface impacts incident to underground mines, for which a permit is required. It also requires the regulatory authority to determine the bond according to Section 800.14, taking into consideration special reclamation techniques that may be used. In Section 800.17(b)(2) OSM has further clarified what is meant by long-term coal-related surface facilities and structures. Generally, the facilities, structures and activities provided for in this section are not expected to be reclaimed within the first few permit terms.

Several commenters suggested further explanation of the proposed phrase "disturbed surface areas of underground" in Section 800.17(a) to make certain it only addresses activities conducted on the surface of lands in connection with underground activities. One of the commenters suggested the following language: "surface areas disturbed by

activities conducted on the surface in connection with underground mining such as surface features of shaft and slope facilities, power lines, bore holes, ventilation shafts, preparation plants, machine shops, etc." OSM agrees that further clarification of the terms proposed in Section 800.17(a) is necessary and has revised Section 800.17(a) accordingly and added language to final Section 800.17(b)(2) providing examples of long-term surface disturbances.

One of the commenters pointed out that areas of potential subsidence should not be included in "disturbed surface areas of underground mines" because those requirements are set out separately in Section 800.17(c). OSM does not include areas of potential subsidence in this phrase. Further discussion follows under Section 800.17(c).

SECTION 800.17(b)

Proposed Section 800.17(b)(1) provided that the liability period for bonds on long-term surface facilities would begin when the permit is issued and extend until all reclamation under the permit has been completed or the bond is replaced or extended. Final Section 800.17(b)(1) adopts the proposal, with two modifications. The word "disturbances" is substituted for the proposed word "facilities." The other modification is described below. Proposed Section 800.17(b)(2) would have provided for long-term continuous coverage by providing that the bond would commence with the issuance of the permit, cover the initial term of the bond permit, and be conditioned to extend, replace or pay the full amount of the bond 120 days before the bond term expires. The corresponding provision of the final rule is Section 800.17(b)(3). The proposed replacement of the bond 120 days before the term expires has been revised to 30 days to parallel the requirement of Section 800.21(b)(2). In addition final Section 800.17(b)(3) does not reference the issuance of the permit for the reason discussed below.

A commenter suggested the wording be changed in proposed Section 800.17(b) (1) and (2) to require the liability period on long-term facilities to begin with the start of construction or disturbances of the surface. This comment has been accepted in part. Section 509(a) of the Act requires a bond to be filed before a permit is issued. Thus, the period of bond liability commences with the issuance of a permit. However, if an incremental or cumulative bonding scheme is used, the bond liability for succeeding increments or areas begins when the bond is posted for the succeeding increments or areas before the initial surface disturbance on those increments or areas. Final Section 800.17(b)(1) has been revised to account for the instances where long-term surface disturbances will occur on succeeding increments. Rather than incorporating a parallel change in new Section 800.17(b)(3), the proposed provision requiring the bond to be posted prior to permit issuance has not been adopted. This change recognizes the incremental bonding provisions of Section 800.11. Since the initial increment may not include the long-term surface disturbance, it is not necessary in such instances that the bond be posted prior to issuance of the permit. The bond must, however, be posted prior to disturbance of the increment including the long-term surface disturbance.

A regulatory authority suggested clarifying that the continuous bond coverage must extend through the 5 or 10 year vegetation liability period. OSM has added Paragraph (b)(4) to Section 800.17 to make it clear the bond coverage must extend through the vegetation liability period and until the bond release provisions of Section 800.40 are satisfied. Bond coverage is required since Section 515(b)(20) of the Act establishes operator responsibility for the extended liability period.

A commenter stated that there are substantial problems with using only a bond renewal mechanism for long-term bonding and suggested instead OSM follow the recommendations of the Mining Task Force of the National Coal Policy Project which urged renewable bonds be tied to a growing escrow account.

The Mining Task Force pointed out in its comments on a May 1979 petition by MARC on the bonding rules, *44 FR 28005*, that the shortcomings of both the fixed period bond and the escrow fund could be corrected if they were used in tandem.

OSM agrees with the commenter that the idea of a fixed term bond to be replaced by an escrow bond could be a good way to establish continuous long-term bonding. This method is allowed under these final bonding rules.

However, the bond renewal or replacement mechanism is also a viable mechanism for establishing continuous bond

coverage and will continue to be allowed under the new rule.

A commenter noted that proposed Section 800.17 (b)(2) and (d) allowed bonds to be posted for a period of time rather than the duration of the operation, and that this type of bonding could be accomplished through the normal permitting process.

The bonds posted for long-term operations must cover a specific period and are conditioned to be extended, replaced or paid in full at least 30 days before expiration, in order to assure continuous coverage. The special provision in Section 800.17(b)(3) provides an opportunity to bond a long-term operation for a specific time period. A fixed term surety bond with termination must have a mechanism for continuous coverage. Thus, forfeiture of the bond is required under final Section 800.17(c) [proposed Section 800.17(d)] if a renewal bond is not posted 30 days before expiration of the bond term.

SUBSIDENCE CONTROL MEASURES

SECTION 800.17(c)

Proposed Section 800.17(c) required that an operator not extend any underground shaft, tunnel or operation until measures to prevent subsidence have been completed or a bond guaranteeing completion of such work is accepted by the regulatory authority.

This paragraph has been deleted from the final rule.

A commenter asked that Section 800.17(c) be revised to reflect that mining measures may call for planned subsidence and that the operator may purchase a structure as a method of preventing subsidence from causing material damage on public or private land. The commenter noted that Section 516(b)(1) of the Act allows for planned subsidence in underground mining.

Additionally, the commenter felt that it would be wasteful to construct preventive measures as required in Section 800.17(c) if the operator had purchased the structure in jeopardy of being damaged by the planned subsidence.

Two commenters recommended deletion of Section 800.17(c). They stated that bonding of subsidence control measures was inappropriate because protection from subsidence is provided under other provisions relating to the operator's permit, subsidence plan and insurance requirements.

In a public meeting a commenter argued against inclusion of subsidence control bonding, Section 800.17(c). He stated that the purpose of Section 509 of the Act on bonding is to assure the completion of reclamation and since subsidence control measures are taken before mining even begins they have nothing to do with postmining reclamation. Therefore, the commenter concluded, subsidence should not be included as a bonding responsibility. The commenter reasoned that the omission of the word "subsidence" in reference to bonding in the Act was obviously intentional on the part of Congress since it dealt with "subsidence" specifically in Section 516 of the Act.

A further argument was that damage to persons or property caused by subsidence is already covered by the liability insurance required under Section 507(f) of the Act and Section 800.60 of the bonding rules.

Lastly, the commenter noted that the proposed rule did not explain what would trigger forfeiture of subsidence bonds, how the money would be used, and that determining the cost of subsidence control measures to set the proper bond amount is impossible.

A regulatory authority felt that the proposed Section 800.17(c) was not clear and the existing provision in 30 CFR 801.16, as amended on August 6, 1981, more adequately describes bonding of subsidence control measures. The commenter said if Section 801.16 is not retained, certain changes should be made in proposed Section 800.17(c).

The regulatory authority felt "measures to prevent subsidence" should be clarified to mean "surface measures to

prevent subsidence," based on OSM's preamble at *46 FR 45088*. Secondly, the regulatory authority felt reference to Section 784.20 which details the measures to prevent subsidence, was too broad and made the rule more burdensome than any previously proposed rule. The regulatory authority recommended the reference be limited to provisions in Section 784.20(b)(3). Lastly, the regulatory authority felt the completed surface measures for control of subsidence should be approved by the regulatory authority before the operator is allowed to extend underground shafts and tunnels, etc.

A commenter suggested that the bond should cover the performance of all requirements contained in the performance standards related to underground mines, including bonds to ensure the performance of required efforts to control or prevent subsidence and mine drainage. The commenter said that eliminating performance bonding for subsidence control measures and mine drainage is illegal.

OSM, on December 7, 1981, suspended Section 801.16(a) which required bonding for subsidence control measures in conjunction with underground mining (*46 FR 59934*). In explaining the suspension, OSM recognized the need to require completion of surface measures to be taken to prevent subsidence, but determined that bonding of these measures was not necessary. The preamble of the suspension notice explained that bonding is unnecessary because these surface measures are not part of the reclamation plan on which the bond amount is based. Surface measures taken to prevent subsidence are completed before the mining operation begins, and the work would not be required if operations ceased due to forfeiture proceedings on the bonded area (*46 FR 59934*).

Bonding for subsidence control measures is neither necessary nor required by the Act. OSM has not adopted proposed Section 800.17(c) which would have required bonding for subsidence control measures. Performance bonding is posted to guarantee performance of a reclamation plan following the mining of an area, while subsidence control measures are completed before mining begins in an area.

Performance bonding continues to be required at Section 800.17(a) for surface disturbances incident to underground mining to ensure that the reclamation plan is completed for those areas. Completion of the reclamation plan as it relates to mine drainage and protection of the hydrologic balance would continue to be covered by the bond with respect to requirements included in Section 784.14.

OSM has added a new paragraph (c) in Section 800.14 both to establish and to clarify an operator's financial responsibility for ensuring that material damage resulting from subsidence will be repaired. It is apparent from the comments that the suspension of Section 801.16 left unclear an operator's responsibility to bond to cover subsidence causing material damage. The new provision states that an operator's financial responsibility under Section 817.121(c) for repairing material damage resulting from subsidence may be satisfied by the liability insurance policy required by Section 800.60.

Protection from subsidence damage is better covered by liability insurance, since bonding is only intended to guarantee performance of the reclamation plan, while insurance protects against damage to surface owners and property.

Moreover, techniques for estimating the extent of necessary land restoration that may result from subsidence have not been developed and the amount of a performance bond based on estimated costs would be pure conjecture. Furthermore, if it is intended in a particular area that there will be no disturbances resulting from surface coal mining operations, that area need not be included in the permit area.

Section 516(d) of the Act requires that the Secretary consider differences between surface and underground coal mining and promulgate any modifications to bonding provisions as necessary to accommodate these differences. The modifications made in this rulemaking recognize these differences.

In response to the commenter who asserted that subsidence control measures are not necessary in situations where subsidence is planned and any structures in jeopardy of damage had been purchased, the final revisions to Sections 785.20 and 817.121 are expected to alleviate such concern.

SECTION 800.17(d)

Proposed Section 800.17(d) required the regulatory authority to cause forfeiture of a bond pursuant to Section 800.17, if 120 days prior to expiration of the bond, the operator has not filed a bond to cover the revegetation period, has not filed a bond for a new permit term, or the regulatory authority determines the operator is subject to the forfeiture conditions of Section 800.50.

Because proposed Section 800.17(c) is not adopted, proposed Section 800.17(d) is redesignated Section 800.17(c). No comments were received on proposed Section 800.17(d)(1), and it has been promulgated as proposed with minor editorial changes for clarity and the substitution of "30 days" rather than "120 days" prior to bond expiration. Proposed Section 800.17(d)(2) which referenced forfeiture under Section 800.50 is not adopted because it was redundant.

New Section 800.17(c) does not affect the regulatory authority's responsibility for forfeiture actions pursuant to Section 800.50, but gives the regulatory authority the added ability to begin forfeiture actions prior to actual expiration of a bond. Thus, under the final rule, if no replacement bond is supplied before 30 days before bond expiration, the regulatory authority would take forfeiture action during the period before the bond expires. The period of 30 days is considered adequate to ensure that a replacement bond is posted in a timely manner.

SECTION 800.20 - SURETY BONDS.

This section includes conditions specifically set for surety bonds. Minor editorial changes have been made to final Section 800.20 for clarity.

Section 800.20(a) requires a corporate surety to be licensed to do business in the State where the bonded operation is located. No comments were received on Section 800.20(a) and it is unchanged from the proposed. This rule follows Section 509(b) of the Act.

Proposed Section 800.20(b) provided that surety bonds are noncancellable during their terms, except, with approval of the regulatory authority, they may be cancelled for lands not disturbed.

One commenter asked that a provision be included in Section 800.20(b) to preclude a surety bond from expiring during any administrative or judicial proceeding regarding forfeiture.

The addition of such a provision is not necessary. Bonds are posted for performance of reclamation activities including the extended liability period and are conditioned on performance of the activities or on replacement by other suitable bond. Bonds posted under Section 800.17 for specific time periods are conditioned upon bond extension, replacement or payment.

The surety industry raised a concern over provision in proposed Section 800.20(b) for bond cancellation on undisturbed lands. The proposed rule required regulatory authority consent prior to cancellation. The surety industry recommended instead that only a 90-day notice be required for cancellation of a bond on undisturbed lands. The surety industry noted OSM had approved such a cancellation provision in the North Dakota State program. (Section 38-14. 1-16, Part 6 of North Dakota House Bill 1252).

The surety industry's suggestion has not been accepted as a national standard. The provision in Section 800.20(b) for regulatory authority approval for cancellation of bond has been retained. However, a sentence is added requiring the regulatory authority to advise the surety within 30 days of receipt of notice to cancel if cancellation of the bond is to be authorized. This requirement will require timely notification to the surety of the proposed action.

A commenter objected to the omission in proposed Section 800.20(b) of the specific cancellation procedures in previous Section 806.12(e)(1), stating that it increases the possibility of under-coverage for disturbed acreage of gaps in coverage of an area that may not appear at first glance. The commenter suggested that the regulatory authority may not allow a bond to be cancelled if to do so would make the remaining bond insufficient within the meaning of

Section 509(a) of the Act.

Cancellation of a bond posted on land which will not be disturbed may be allowed if the regulatory authority is satisfied that such cancellation is not a violation of the permit and that sufficient bond amount is retained on the permit area to ensure completion of the reclamation plan. If an operator decides not to disturb certain bonded areas that the regulatory authority is satisfied will not be disturbed by other mining operations, there is no need to keep the bond for this area, since reclamation on the area will not be necessary. This is analogous to the bond adjustment provision for undisturbed land.

The exact procedure for cancellation and the precise steps that must be taken are matters that need not be covered in detail in these rules. States may add as much detail as they believe is necessary.

A commenter asked that the phrase "during their terms" in Section 800.20(b) be clarified in light of Section 509(b) of the Act.

The phrase "during their terms" in Section 800.20(b) refers to the term for which the bond is posted, which will be stated in the conditions of the bond as agreed to by the parties involved. Section 509(b) of the Act requires bond liability for the duration of the operation and the extended liability period specified in Section 515. The Act allows for the replacement of the bond or bonds during the period of operation and extended liability. Therefore, although liability under the bond is continuous during the surface coal mining and reclamation operations and the extended liability period, the phrase "during their terms" in Section 800.20(b) refers to the terms for which the individual bonds have been written.

SECTION 800.21 - COLLATERAL BONDS.

Proposed Section 800.21 set the specific conditions for acceptance of collateral bonds, letters of credit and escrow accounts.

OSM has made some editorial changes to Section 800.21 for clarity and added a provision giving the regulatory authority the option to have certificates of deposit made payable or assigned. The provision limiting individual deposits to levels of the Federal Deposit Insurance Corporation (FDIC) or of the Federal Savings and Loan Insurance Corporation (FSLIC) is retained from previous Section 806.12(f)(4) and is included in Sections 800.21 (a)(4) and (d)(4). "Escrow" accounts are changed to "cash" accounts. A provision is added at Section 800.21(f) concerning notification to persons with an interest in collateral of actions pursuant to the bond. Further discussion of these changes follows below with a discussion of the comments.

SECTION 800.21(a)

Proposed Section 800.21(a) set three conditions that must be followed when collateral is used for the reclamation bond. This paragraph stated that collateral except letters of credit and escrow accounts, will be deposited with the regulatory authority by the applicant until authorized for release or replacement, that the value of the collateral will be its current market value and that certificates of deposit will be assigned to the regulatory authority both in writing and upon the books of the bank. These provisions have been adopted as discussed below.

A commenter recognized a problem in requiring the regulatory authority to maintain possession of real and personal property offered as collateral as provided in proposed Section 800.21(a), which excepted only letters of credit and case accounts from having to be directly deposited with the regulatory authority. To remedy this, OSM has added real property to collateral excepted from the requirements of Section 800.21(a). The term "escrow" accounts is changed to "cash" accounts.

As explained in the discussion of Section 800.5, only real property will be included as a form of acceptable collateral in the final rule. Thus, the term "personal property" has been deleted in Section 800.21. Personal property, other than that specifically listed in the definitions of collateral bond in Section 800.5 (a)-(d) and (f), may not be posted as bond. Possession cannot be required of the regulatory authority with respect to real property.

Two commenters disagreed with the provision of proposed Section 800.21(a)(3) which allowed assignment of certificates of deposit (CD's) used as collateral because it did not specify that the issuing bank must waive rights of setoff or liens. The commenters felt that a negotiable certificate which is encumbered, such as with a lien, or whose validity is challenged does not provide assurances equal to a surety bond, as required by Section 509 of the Act. Additionally, the commenters noted the certificates must be of sufficient amount and liquidity as to allow for total reclamation as a forfeiture situation demands even if they are negotiated prior to stated maturity date.

Section 800.21(a)(2) requires that the collateral be valued at market value. Any problems with respect to maturity or liquidity must be considered in setting the value of the collateral. Final Section 800.21(a)(3) has been amended to allow the certificate of deposit to be made payable or assigned, consistent with the definition of collateral bond in Section 800.5. In response to the comment, a sentence is added to protect the regulatory authority from rights of setoff or liens.

A commenter objected to proposed Section 800.21(a) because, with the proposed omission of the previous provision in Section 806.12(f)(4), it would have allowed the regulatory authority to accept collateral bonds which exceed the levels of Federal insurance, i.e., \$100,000 per person per bank under current FDIC protection. Previous Section 806.12(f)(4) required that the regulatory authority not accept an individual certificate for a denomination in excess of \$40,000 or maximum insurable amount as determined by FDIC or FSLIC. OSM agrees with the commenter. Allowing acceptance of certificates of deposits in excess of the maximum protected amount unnecessarily exposes the regulatory authority to liability should the bank fail. Therefore OSM is inserting in the final Section 800.21 the provisions from previous rule Section 806.12(f)(4) as new paragraph (a)(4) for certificates of deposit and at Section 800.21(d)(4) for cash accounts.

SECTION 800.21(b)

Final Section 800.21(b) sets three conditions for letters of credit. The paragraph requires that the letter be issued only by a bank authorized to do business in the United States, that the letter be irrevocable during its term and must be payable upon demand to the regulatory authority upon receipt from the regulatory authority of a notice of forfeiture under Section 800.50. Language is added at Section 800.21(b)(2) to assure continuous bond coverage when using a letter of credit. Other changes are made for clarity. A commenter was concerned about the notification of maturity dates for letters of credit in Section 800.21(b) and asked that the procedures for "draw down" by the regulatory authority be delineated.

Section 800.21(b) requires suitable replacement of a letter of credit at least 30 days before the expiration date and that the letter of credit must be payable to the regulatory authority upon receipt of notice of forfeiture. Procedures for "draw down" in event of forfeiture are best left to the regulatory authority's determination.

Another commenter suggested Section 800.21(b)(3) would be better understood if it read: "The letter must be payable to the regulatory authority upon demand, in part or in full, upon receipt from the regulatory authority * * *"

OSM agrees that this language clarifies the meaning of the paragraph and has adopted similar language in final Section 800.21(b)(3).

SECTION 800.21(c)

Final Section 800.21(c), which generally is adopted as proposed, sets three conditions for use of real property as a collateral bond. The applicant must grant the regulatory authority a first mortgage, first deed of trust or perfected first-lien security interest in real property with the right to sell or otherwise dispose of the property in the event of forfeiture under Section 800.50. The applicant must supply a schedule of the real property involved, including a description of the property, the fair market value as determined by an independent, certified appraiser and proof of possession and title to the real property. The proposed paragraph also stated that land pledged as security could not be mined under any permit.

A commenter pointed out that proposed Section 800.21(c)(2)(iii) only required proof of ownership for real

property, and not personal property offered as collateral. This appears to have been an oversight by OSM in the proposed rule. However, except for specifically listed types, OSM has eliminated personal property as collateral in the final rule. The proof of ownership is handled in rules dealing specifically with those types of acceptable personal property, that is, certificates of deposits, securities and cash. The commenter also felt OSM had made a mistake by eliminating some of the specific protections found in the previous rules (Section 806.12) for collateral bonds. The commenter agreed the State should have flexibility in establishing its programs, but felt the proposed rules did not set appropriate minimums to ensure that the State rules adequately protect the public and the environment.

The commenter does not specify which of the protections found in OSM's previous rules should not have been eliminated. New Section 800.21 establishes adequate guidelines for the regulatory authority to use in accepting collateral bonds. These guidelines give adequate assurance that the intent and purpose of the Act are fulfilled.

A State regulatory authority commented that the provisions of Section 800.21(c)(2), which require assessing collateral at fair market value, was burdensome and contrary to State law.

This provision is not burdensome. To the extent that this regulation may be inconsistent with a particular State law, the provisions of Section 505 of the Act apply. This can be examined in the context of the approval of an individual State program amendment. The provisions at Section 800.21(c)(2) established the minimum standards of protection necessary to ensure the regulatory authority that collateral posted is adequate.

Another commenter suggested adding language to proposed Section 800.21(c)(3) to clarify that land within the permit area which is offered as collateral could be mined once all liability for the operation for which it was serving as security has been released. The commenter believed the wording of the proposed rule prevented land offered as security from ever being mined. Specifically, the commenter offered the following language change for Section 800.21(c)(3): "** * * land pledged as security shall not be mined under any permit while it is serving as security."

OSM agrees and has added similar language to this paragraph to clarify this, but has used the word "disturbed" rather than "mined."

SECTION 800.21(d)

Proposed Section 800.21(d) set three conditions for use of escrow accounts as collateral bonds. This proposed paragraph allowed the operator to supplement a bond with an escrow account deposited in an account made payable only to the regulatory authority or deposited directly with the regulatory authority. It required interest paid on an escrow account to be retained in the escrow account and applied to the bond value of the account unless, with regulatory authority approval, the interest is paid to the operator. Under the proposal, certificates of deposit could be substituted for an escrow account with approval of the regulatory authority. The proposal has been adopted with the following changes.

In new Section 800.21(d), all references to "escrow" have been changed to read "cash," to reflect the change in the definition of collateral at Section 800.5.

The provision requiring a cash account to be deposited in a federally-owned or equivalently protected account is added to final Section 800.21(d)(1). New Section 800.21(d)(4) is added to protect the regulatory authority from uninsured cash accounts.

A regulatory authority commented that the provision of Section 800.21(d)(2), which requires paying out interest on escrow accounts, was an administrative burden and contrary to some State laws.

Section 800.21(d)(2) does not require interest to be paid on cash accounts, but requires that interest amounts that are paid will be retained in the account unless otherwise approved by the regulatory authority. This provision offers sufficient regulatory authority discretion.

SECTION 800.21(e)

Proposed Section 800.21(e) required the estimated bond value of all collateral posted be subject to a margin -- bond value to market value ratio -- determined by the regulatory authority. The margin would reflect legal and liquidation fees, value depreciation, marketability and fluctuations affecting the net cash available to the regulatory authority for completing reclamation. The proposal also provided that the bond value of the collateral be evaluated as part of the permit renewal and the performance bond increased or decreased, if necessary.

No comments were received on proposed Section 800.21(e). Editorial changes have been made for clarification. This paragraph also retains language similar to previous Section 806.12(i) requiring evaluation of the bond value at the time of permit renewal.

SECTION 800.21(f)

A new Section 800.21(f) is added to provide that persons with an interest in collateral posted as bond who desire notification of actions pursuant to the bond must request such notification at the time collateral is offered.

SECTION 800.23 - SELF-BONDING.

In the September 9, 1981 notice, proposed Section 800.23 would have given the State regulatory authority the discretion to establish self-bonding programs and to set their own criteria. Those criteria would have had to provide guarantees equivalent to other bonding methods.

Because the majority of commenters requested more detailed Federal guidance for development of self-bonding in State programs and due to the concern of surety companies that loosely administered self-bonding programs may preclude surety industry involvement in surface coal mining reclamation bonds, the self-bonding section, Section 800.23, was repropose in a separate rulemaking on August 20, 1982. (*47 FR 36570*).

Two commenters noted that surety representatives testifying on the 1979 MARC bonding petition stated that, if self-bonding becomes too prevalent among large firms, the surety agencies may simply pull out of the mining business, stranding small companies altogether. A surety commenter reiterated these previous remarks of the surety industry and also pointed out that the establishment of self-bonding criteria is a complex process and without guidance at the Federal level it will make it very difficult for the States to meet the purpose of the Act.

A State regulatory authority suggested that by withholding further guidance in self-bonding, OSM leaves the States extremely vulnerable. Another commenter added what without minimum self-bonding standards OSM would be creating a patchwork of conflicting State programs, subject to external pressures.

Another State regulatory authority liked the flexibility but asked for more detailed provisions to ensure that businesses are not allowed to bond themselves with a mere promise to pay.

Two commenters noted that without more detailed self-bonding rules any State provision interpreting or controlling the alternative of self-bonding will be more stringent than the OSM rule thus making it unavailable to States forbidden to exceed the Federal minimum criteria.

The same commenters pointed out that the phrase "regulatory authority" as used in Section 509 of the Act does not mean exclusively a State or Federal program since the provisions of Section 509 are applicable during the interim program. The commenter said, therefore, it is entirely rational to assume that OSM should promulgate minimum criteria for self-bonding, which has a great potential for abuse. Two commenters said the proposed rules grant the operator the right to bypass Section 509 of the Act and obviate OSM's responsibility to promulgate national self-bonding minimum criteria.

As a result of these comments and other more specific suggestions, OSM has repropose the self-bonding rules in

an effort to maintain flexibility for development of State programs, while giving the States more detailed standards on which to build their programs.

Therefore, because of the reproposal, those portions of the self-bonding rules in Section 806.14 which were not suspended will remain in effect under Section 806.14 until the repropoed self-bonding rules (*47 FR 36570*) are adopted as final and designated as Section 800.23. Section 806.14 would be deleted at that time.

SECTION 800.30 - REPLACEMENT OF BONDS.

Section 800.30 provides that the regulatory authority may allow the permittee to replace existing bonds with bonds of equivalent coverage. The section also requires the regulatory authority to release the existing bonds only after the regulatory authority has approved and accepted the replacement bond. The section provides that replacement of a bond does not constitute release of a bond covered by Section 800.40. This section contains minor editorial changes from the proposed rule. The purpose of this section is to allow for the substitution of equivalent bonds without altering the amount of coverage, so that an operator can substitute, for example, a cash account bond for a surety bond. The provision has been adopted as proposed.

The surety industry asked that the change they requested for proposed Section 800.20 be made to proposed Section 800.30 to allow a surety bond to be released before a replacement bond has been approved if the existing bond covers only undisturbed land and a 90-day notice is given to the regulatory authority.

OSM is retaining the provision for regulatory authority approval of cancellation of a surety bond on undisturbed lands in Section 800.20. Inclusion of such a provision is not properly part of Section 800.30.

SECTION 800.40 - REQUIREMENTS TO RELEASE PERFORMANCE BONDS.

Proposed Section 800.40 set the information requirements and procedures for applying for bond release and set procedures for the regulatory authority to process the bond release requests. The section provides the procedures the regulatory authority follows in making a decision to release or not release a bond -- inspections, public hearings, and notifications. It also sets the qualifications for release of a bond by phases. It implements the requirements of Sections 513 and 519 of the Act.

OSM has made a number of changes to proposed Section 800.40, most of which were initiated by comments. Provisions are added regarding more precise information in advertisements announcing permits under review for bond release, citizen involvement in that review, notification of bond release proceedings, recordkeeping requirements at informal conferences, location of public hearings and a provision precluding fractionalization of an increment for bond release. Inclusion of topsoil replacement activities in phased release of bonds is clarified, as well as the use of soil surveys and the phrase "equivalent management practices." The order of proposed Paragraphs (g) and (h) is reversed. Additional discussion of these changes is included with the discussion of comments below. The phrase "or deposit" has been eliminated in a number of places because performance bonds include deposits.

SECTION 800.40(a)

Proposed Section 800.40(a)(1) provided that the permittee could file an application with the regulatory authority for release of all or part of a performance bond and that the application may be filed only at specific times of the year identified in the reclamation plan. The review periods set had to allow for proper evaluation of the reclamation and be approved by the regulatory authority.

Proposed Section 800.40(a)(2) required that the permittee place an advertisement which includes the description of the land, opportunity for comments and other particulars for release of bond. The bond release applicant was also required to write letters to those persons, agencies, etc., affected by the coal mining operations as to the applicant's intention to seek release from the bond.

One commenter found the newspaper advertisement requirements in proposed Section 800.40(a)(2) overly detailed

and restrictive.

These requirements are taken from Section 519(a) of the Act and are retained in the final rule.

A commenter objected to the provision in proposed Section 800.40(a)(1) which limited the times when bond release applications may be filed to only times or seasons that allows for proper evaluations of reclamation operations.

Because the regulatory authority is required to conduct an inspection and evaluation of reclamation work within a specified period after the bond release request, requests should be submitted at appropriate times in the growing season.

Identification of the times and seasons when evaluation is most effective assists both the operator and the public. It gives the operator a chance to plan for reclamation operations to be completed during the most effective evaluation period, and gives the regulatory authority the authority to set the most appropriate time to properly evaluate revegetation success and thereby assure the proper reclamation of the land. The provision gives discretion to the regulatory authority to accept requests for bond releases at different times and seasons. Therefore, Section 800.40(a)(1) is retained from the proposed rule. The final rule has been revised, however, to allow the times for an operator to request bond release to be established either in the regulatory program or in the mining and reclamation plan. This change will give the regulatory authority the flexibility to establish such time periods on a programmatic rather than a case-by-case basis.

A coal company objected to the involvement of the public in the final inspection findings and hearings required in proposed Section 800.40(a)(2). The commenter felt the better time for public participation is during the approval of the reclamation plan.

Another commenter took the opposite view feeling instead that the early stages of the bonding process can be adequately handled by the regulatory authority and that citizen involvement is necessary and more useful at bond release.

Opportunity for public participation at the time of bond release is specifically required in Section 519 of the Act. Therefore, this provision is retained in Section 800.40(a)(2).

A commenter pointed out that in proposed Section 800.40(a)(2) an operator seeking bond release must provide copies of letters to adjoining property owners, local governmental bodies, etc., to prove his or her compliance with public participation requirements. The commenter contends that this provision does not require the operator to actually send the letters, but merely to send copies of letters which may have been sent. The commenter suggested the following change to proposed Section 800.40(a)(2): "the applicant shall provide notice in writing to adjoining property owners and shall provide copies of such notices to the regulatory authority * * *."

OSM disagrees with the commenter. The provision states that the applicant "shall submit copies of letters which he or she has sent * * *." (emphasis added). This language clearly requires that the letters be sent to the appropriate parties. OSM is adding "or she" following "which he" for clarity.

The substance of the portion of Section 800.40(a)(2) regarding notice to adjoining owners, governments, etc., is provided for in Section 519(a) of the Act.

Two commenters objected to the contents of the advertisement for bond release listed in proposed Section 800.40(a)(2), stating the permittee's name should also be included, as well as the permit number and date of issuance or renewal. It was the commenters' contention that such information is essential in aiding the public in recognizing the precise permit in question and is consistent with Sections 513 and 519 of the Act in maximizing citizen participation.

OSM agrees that more precise identification of the permit in question would be helpful and has added requirements

to include the permit number and approval date.

SECTION 800.40(b)

Proposed Section 800.40(b) provided that the regulatory authority upon receipt of the bond release request will within 30 days, or as soon as weather conditions permit, conduct an inspection and evaluation of the reclamation work involved. The surface owner, agent or lessee could accompany the regulatory authority on the inspection. The paragraph also required the regulatory authority to consider the difficulty of reclaiming any remaining areas, the presence of any surface or subsurface water pollution, the probability of the future occurrence of water pollution and estimated cost of its abatement. Proposed Section 800.40(b)(2) required that after requirements for public hearings have been met, the regulatory authority is to notify the permittee, the surety or other person with an interest in collateral in writing of its decision to release or not release the bond. Proposed Section 800.40(b) has been adopted with certain revisions discussed below.

A regulatory authority commented that the requirement in proposed Section 800.40(b)(1) to notify the surface owner, agent or lessee of the inspection was beyond the requirements of Section 519 of the Act and appears to require solicitation of citizen inspections. The regulatory authority agreed this notification may be a desirable practice but should be left to the discretion of the regulatory authority.

OSM agrees that this is not an express requirement of the Act. These persons specified in Section 800.40(b)(1) will be apprised of the intent to request bond release through the newspaper advertisement and the notice other parties receive. However, there is no specific notification of when an inspection will be made. Such persons are ones having a direct interest in the lands and are not the general public. Therefore, the language is retained. A sentence has been added to Section 800.40(b)(1) to allow any person, with an interest in the bond release, access to the areas subject to bond release at the discretion of the regulatory authority. The permittee cannot prevent surface owner access to the area in question. This new provision parallels that under Section 513 of the Act pursuant to the informal conference on permit applications. As written, no right of citizen access is presumed; but the procedure is set forth to assist citizens in supporting their possible contention of reclamation inadequacy.

A regulatory authority objected to the requirement in proposed Section 800.40(b)(2) to advise "a person with collateral interest" of the decision on the release of the bond because the regulatory authority might not know all parties with an interest and the list might be extensive.

OSM agrees with this comment and has included a provision requiring notification to only those persons specifically requesting such notice when posting the collateral. A person posting collateral may want such a stipulation, especially when relying on release of the collateral at a predetermined time. In addition to the change in Section 800.40, OSM has added a new Section 800.21(f) requiring that persons who contribute collateral to an applicant's bond and wish to be notified of bond release proceedings and decisions, must request, in writing at the time they are posting the collateral, to be so notified.

OSM has also included a provision requiring a regulatory authority to notify persons who either filed objections in writing or who were a party to the hearing proceedings, if any, of its decision to release or not to release all or part of the performance bond.

SECTION 800.40(c)

Final Section 800.40(c) allows the regulatory authority to release the bond in whole or in part if it is satisfied the reclamation or phase of reclamation had been accomplished as required by the Act. The paragraph also sets conditions for bond release after successful completion of each of three phases of reclamation. This paragraph implements Section 519(c) of the Act.

A State regulatory authority suggested the addition of a statement to Section 800.40(c) which would require bond releases be considered only for entire increment areas, precluding any fractional release of an increment. To allow bond releases on fractions of increments, the regulatory authority said, would necessitate surveys to determine the

extent of the disturbed acreage.

OSM agrees that, at a minimum, release should only be considered for a phase or phases of reclamation on an entire incremental area. OSM has added language at Section 800.40(c) to reflect this.

A commenter suggested proposed Section 800.40(c) be clarified to show that the regulatory authority has the authority to release bonds on both the entire permit area and on increments. The commenter suggested that the phrase "the bond or deposit for the entire permit area or incremental area" replace the proposed phrase "said bond or deposit" in proposed Section 800.40(c).

The commenter also felt the above change should be carried through to proposed Section 800.40(c)(1). Proposed Section 800.40(c)(1) allowed release of 60 percent of the bond on the applicable permit area after completion of Phase I reclamation, that is, after the operator completes the backfilling, regrading and drainage control for the bonded area. The commenter suggested the word "permit" be deleted from the phrase "applicable permit area" in Section 800.40(c)(1). OSM agrees with this commenter and has incorporated the suggested changes into the final rule.

A State regulatory authority indicated that in the proposed rule preamble, *46 FR 45089*, OSM incorrectly referred to the Act as specifically "excluding topsoil replacement" from Phase I bond release and incorrectly carried this interpretation to its proposed Section 800.40(c)(1). Prior to this proposal, OSM had included topsoil in Phase I reclamation work, but reconsidered its inclusion because commenters noted that topsoil replacement is seasonal and may require different equipment than that used in the overburden replacement process.

However, the regulatory authority felt Phase I reclamation under the Act is meant to "define that portion of total reclamation that entails the bulk of the expense involved in reclaiming a minesite." The regulatory authority said that when this major portion of reclamation is completed, the Act then allows the regulatory authority to release 60 percent of the bond.

Another commenter agreed with the regulatory authority's belief that topsoil replacement could be an integral part of the backfilling and grading operation and, most importantly, because topsoil replacement is a major expense it should be considered as Phase I reclamation.

It was the regulatory authority's opinion that OSM should not define Phase I reclamation except to state that it must include backfilling and regrading (including replacement of topsoil if the regulatory so chooses), drainage control and any other items specified by the regulatory authority.

OSM agrees and wishes to clarify its interpretation of Section 519(c) of the Act regrading topsoil replacement noted in the proposed rule preamble. OSM did not intend to state that the Act excludes topsoil replacement from Phase I, but meant to say that the Act did not necessarily include topsoil replacement in Phase I operations. OSM has attempted to revise the rules on phase release of bonds to more closely reflect the wording of the Act. OSM has inserted in Section 800.40(c)(1) the phrase "regarding (which may include replacement of topsoil)" to further clarify that the regulatory authority has discretion to include or not include topsoil replacement in Phase I reclamation.

Proposed Section 800.40(c)(2) provided that after successful completion of Phase II reclamation the regulatory authority may release part of the bond, but must retain sufficient funds in case a third party is to reestablish revegetation and to cover the 5- to 10-year revegetation liability period. The proposed paragraph required that no part of the bond be released if the applicable lands are contributing suspended solids to streamflow or runoff in excess of requirements of Section 816.49, and if soil productivity for prime farmlands has not been returned to equivalent levels of yield as nonmined lands. Proposed Section 800.40(c)(2) also required that where a silt dam is to be permanent, part of the bond may be released only if provisions for sound future maintenance have been made with the regulatory authority.

A commenter believed that additional guidance is necessary in proposed Section 800.40(c)(2) to estimate the

percent of total bond which would be required to cover only Phases I and II. Not knowing the specific percentage that the bond may be reduced after Phase II could create problems at the time the Phase I and II bonds are first being considered.

Another commenter supported the provision in Section 800.40(c)(2) giving States flexibility in establishing bond release percentages after Phase II reclamation because it allows the States to set strong economic incentives for the operator to complete reclamation properly and on schedule.

A commenter opposed the elimination in proposed Section 800.40(c)(2) of the 25 percent limit on Phase II bond release. The proposed rule required that enough of the bond be retained to cover the cost of a third party reestablishing the vegetation and for the 5 or 10 year liability period. The commenter felt that 15 percent is the minimum bond that should be retained after Phase II and noted that the Mining Task Force of the National Coal Policy Project also supported this opinion. (Pages 5-6 of June 15, 1979 report.)

Land reclamation costs vary greatly not only from different regions of the country but even within the same mining operation. The establishment of the 25 percent Phase II maximum bond release amount was arbitrary. Its elimination ties the setting of the remaining bond amount to the actual projected remaining reclamation costs involved. Thus, in some instances, the amount retained after Phase II release could exceed 15 percent. For the final rule, the amount that may be released after Phase II focuses on the cost to the regulatory authority of reestablishing vegetation. That is the precise requirement of Section 519(c)(2) of the Act. Under this final rule the regulatory authority will have the discretion to determine the actual cost of the reclamation work that may need to be done should a failure occur.

A commenter indicated that the reference in proposed Section 800.40(c)(2) to suspended solids should refer to Section 816.42 on water quality standards and effluent limitations, rather than Section 816.49, which deals with permanent and temporary impoundments.

In new Section 800.40(c)(2) OSM has changed the references to specific sections to reference the Act and 30 CFR Chapter VII, Subchapter K, in order to avoid confusion that may be caused by rule changes to that Subchapter.

A commenter was concerned because proposed Section 800.40(c)(2) did not specifically state that the standards for successful revegetation must be met prior to bond release. The commenter stated the provision contained standards for only sediment loads and prime farmland and that additional success standards must be added to cover the massive amount of mined land in the West which is rangeland or federally-owned.

Section 800.40(c)(2) is taken directly from the Act, Section 519(c)(2). The paragraph does require that the regulatory authority retain an amount sufficient to reestablish revegetation when "determining the amount to be released after successful revegetation has been established." (Emphasis added.) Standards for success are established in the permit.

A commenter felt that because the phrase "under equivalent management practices" was not included in the provision for bond release on prime farmlands in proposed Section 800.40(c)(2) the rule is in conflict with the Act. The phrase "under equivalent management practices" has been added in the final Section 800.40(c)(2).

A State regulatory authority was also concerned that it was OSM's intention to limit proof of productivity to information contained in soil surveys and that such a position by OSM would have serious consequences in its State. The regulatory authority felt that Section 800.40(c)(2) is too ambiguous and allows the reader to believe that soil productivity can only be determined through a soil survey. The authority suggested the following language change " * * until soil productivity from prime farmland has returned to equivalent levels of yield as non-mined land of the same soil type in the surrounding area under equivalent management practices. Soil types are to be determined from soil surveys pursuant to section 507(b)(16) of the Act."

The language in question is taken directly from the Act, Section 519(c)(2). Therefore, OSM has retained the language as proposed. However, the final rule has also been revised to refer to the standards in 30 CFR Part 823 which includes requirements for determining productivity levels on prime farmlands.

A regulatory authority objected to the provision in proposed Section 800.40(c)(2) for "sound future maintenance" of silt dams to be made permanent contending that it appears to conflict with section 519(c) of the Act, which authorizes bond release once reclamation has been accomplished. The regulatory authority felt that if the pond [silt dam] or any other facility is part of the approved postmining land use and meets the standards of the Act, there is no authority or any need for a requirement regarding future maintenance.

Section 800.40(c)(2) repeats verbatim the provision of section 519(c)(2) of the Act except that a citation to Subchapter K is made instead of section 515(b)(8) of the Act. While a rule need not always repeat requirements of the Act, deletion of the provision as the regulatory authority urges would not change the Act's requirements for "sound future maintenance" of permanent silt dams. Therefore, the rule is not revised as suggested.

A commenter requested an additional requirement in Section 800.40(c)(2) to provide that the amount retained be sufficient to also cover the reclamation of the land if the proposed postmining land use does not occur.

If the proposed postmining land use does not occur, the operator is required to establish proper vegetation and otherwise reclaim the mined land to its original or higher use. In reviewing an operator permit application and in assessing the bond amounts required to complete the reclamation plan contained therein, the regulatory authority must consider that in the event a postmining land use described in the reclamation plan is not achieved, an alternate plan for reclamation is necessary. Bond amounts required should reflect this possibility.

SECTION 800.40(c)(3)

Final Section 800.40(c)(3) allows for bond release at completion of Phase II after successfully completing all surface coal mining and reclamation activities, but not before the expiration of the 5 or 10 year liability period specified in Section 816.116 and Section 817.116. The paragraph also requires that no bond be fully released until all reclamation requirements of the Act and the permit are met.

A commenter indicated that proposed Section 800.40(c)(3) may conflict with provisions of proposed Section 800.13(a) by preventing complete release of the final portion of a bond until the entire reclamation plan has been completed.

Another commenter also spotted the confusion between the two provisions and suggested the following change be made to proposed Section 800.40(c)(3): "* * * that no bond shall be fully released until all reclamation requirements of the Act and the permit are fully met for the area for which the bond was posted."

The wording for Section 800.40(c)(3) comes from section 519(c)(3) of the Act. As stated above with respect to a bonding of separate increments, OSM interprets this provision to allow release of the final portion of a bond posted on an increment if the regulatory authority determines that all requirements of the Act and the permit have been fully met for the increment. As described earlier, the period of liability described in Section 800.13(a) has been modified to reflect the requirements of Section 519(c) of the Act.

SECTION 800.40(d)

Proposed Section 800.40(d) required that if the regulatory authority disapproves the bond or portion of the bond for release the regulatory authority shall notify the permittee in writing, stating the reasons for the disapproval and corrective action that can be taken.

A commenter believed that the provision in proposed Section 800.40(d) for persons to be notified of bond release was not consistent with the notification provision in Section 800.40(b)(2), which requires the permittee, the surety or other persons with an interest in the collateral be notified.

OSM has corrected this inconsistency by adding to Section 800.40(d) the requirement to notify the surety or other person interested in the collateral if they have requested notification. OSM has also required that persons with an

interest in collateral who want notification of bond release must request such a notice in writing with the posting of collateral. (See Section 800.21(f).) Section 800.40(d) is derived from Section 519(d) of the Act.

SECTION 800.40(e)

Section 800.40(e) requires that the regulatory authority notify the appropriate municipalities when a bond or part of a bond is to be released for surface coal mining operations within those municipalities. This notification is to be by certified mail at least 30 days prior to release of the bond.

No comments were received on proposed Section 800.40(e) and the provisions will become final as proposed. This provision is taken directly from Section 519(e) of the Act.

SECTION 800.40(f)

Proposed Section 800.40(f) allowed written objections to the release of a bond and requests for a public hearing to be filed with the regulatory authority by any person with a valid legal interest which may be adversely affected by the release, or any responsible officer of a Federal, State or local government agency which has jurisdiction by law, special expertise with respect to the environmental, social or economic impacts of the operation, or is authorized to develop or enforce environmental standards. The objections must be filed within 30 days after the final publication of the bond release notice. Should a public hearing be requested, the regulatory authority shall within 30 days after the request inform all interested parties as to the time and place of the hearing. The public hearing is to be held in the locality of the surface coal mining operation involved or at the State capital, at the option of the objector. The regulatory authority shall also advertise the time and place of the hearing in a newspaper of general circulation. Changes were made from the proposed paragraph to delete redundant language and to clarify requirements. Also, the option for the objector to have the hearing held at the location of the regulatory authority, is added.

A commenter objected to the provisions of proposed Section 800.40(f) because the regulatory authority was not required to forward comments from persons objecting to bond release to the permittee for review and response. Inclusion of such provision is unnecessary. Such comments would be open to the operator to review and respond to if he desires. It may not be necessary to forward copies of comments to the permittee in each instance. If after reviewing the comments, the regulatory authority decides not to release the bond, the permittee will be notified of the actions required to correct any problems and will be afforded an opportunity for a hearing as provided for under Section 519(d) of the Act and Section 800.40(d) of these rules.

A State regulatory authority took issue with the provision in proposed Section 800.40(f) that allows for the bond release public hearing to be located at the State capital at the option of the objector. The authority suggested an amendment to allow for the hearing to be held at the regulatory authority's office at the option of the regulatory authority.

An industry commenter also objected to the hearing being held at the State capital because it would impose a burden on the permittee and would "effectively exclude" local citizen participation due to distance and travel costs. The commenter suggested that the burden of travel be placed on the hearing requestor.

Another regulatory authority wanted all public hearings to be held at the State capital with the objector's consent.

OSM based proposed Section 800.40(f) on Section 519(f) of the Act, which requires a hearing in the locality of the land to be released from bond and offers the option of the State capital to objectors. It is not clear whether the drafters of the Act envisioned that all regulatory authorities would be located in their State capitals. Many, in fact, are located there. However, for those cases where the State capital is not near either the locality or the offices of the regulatory authority, OSM has inserted an additional option with the phrase "at the office of the regulatory authority." But, since the Act specifically offers the discretion of choosing the State capital to the objector, no other change relating to this provision has been made to Section 800.40(f).

A State regulatory authority asked for clarification of the phrase "Any person with a valid legal interest which might

be affected by release of the bond * * *" in the first part of Section 800.40(f). The regulatory authority wanted to know who has the authority to make the judgment whether a person has a valid legal interest affected by the release of the bond.

The term "person" is defined in Section 701(19) of the Act as "an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." The term "person with a valid legal interest" is defined in 30 CFR 700.5. The regulatory authority has the responsibility to make the determination on whether a person has such an interest.

Section 800.40(f) quotes the provisions of Section 519(f) of the Act in regard to this provision.

A commenter suggested that the language of proposed Section 800.40(f) be revised to specify what was required within the 30-day period following the receipt of a request for public hearing.

As proposed, it appeared that the public notice of hearing as well as the hearing itself was required within the same 30-day period.

Neither the previous rule nor the proposed revision specified the time period in which notice must be given of a planned hearing. The commenter is correct in assuming that public notice of hearings as well as the hearing are required within the same 30-day period. Section 519(f) of the Act requires that the hearing be held within that period. OSM will not add provision for a time period within which the hearing date must be announced, but believes this is better left to the discretion of the regulatory authority.

PROPOSED SECTION 800.40(g) [Final Section 800.40(h)]

Proposed Section 800.40(g) provided that the regulatory authority may hold an informal conference as provided in Section 513 of the Act to resolve written objections to a bond release. Proposed paragraph (g) has been redesignated as paragraph (h) in the final rule and proposed paragraph (h) has been redesignated as final paragraph (g). This is done to keep related provisions together.

A commenter objected to proposed Section 800.40(g) because it did not have a provision whereby persons who participated in an informal conference may be advised as to its outcome. The commenter noted that Section 514(a) of the Act specifically requires that after an informal conference the regulatory authority shall furnish to all parties of the proceedings a written finding of the regulatory authority and the reasons for said finding.

A provision has been added to the rule to require a finding of the regulatory authority based on the informal conference and the reason for such finding to be furnished to parties who participate in the conference. Section 513(b) of the Act also requires a record be made of the informal conference, unless waived by all parties, and made available to those parties. OSM has added a sentence in final Section 800.40(h) to emphasize this requirement.

PROPOSED SECTION 800.40(h) (Final Section 800.40(g))

Final Section 800.40(g), proposed as Section 800.40(h), allows that for the purposes of a hearing on bond release the regulatory authority shall have the authority to administer oaths, subpoena witnesses or printed materials and take evidence including but not limited to inspections of the land affected. A verbatim record of each public hearing shall be made and a transcript made available.

A commenter suggested that proposed Section 800.40(h) should be tied more directly to Section 800.40(f) since the provisions apply to hearings and not to informal conferences of the preceding paragraph, Section 800.40(g). OSM agrees with this comment and has switched the position of the two paragraphs as described above. A reference to Section 800.40(f) on public hearings has been included in final Section 800.40(g) implements Section 519(h) of the Act.

SECTION 800.50 - FORFEITURE OF BONDS.

Proposed Section 800.50 required that the regulatory authority cause forfeiture when conditions of the reclamation plan, the permit or the bond are not met. This section allowed the regulatory authority to withhold forfeiture proceedings if a third party or surety company agrees to complete reclamation. It also set the procedures for forfeiture and the restrictions in using the funds obtained in forfeiture. The provisions of Section 800.50 have been rearranged for clarity.

SECTION 800.50(a)

Proposed Section 800.50(a) required the regulatory authority to take action to forfeit all or part of a bond for any permit area or increment if reclamation operations are not conducted according to the reclamation plan or the permit, or the operator defaults on conditions of the bond. Final Section 800.50(a) also includes operator refusal or inability to reclaim an unabated violation as cause for forfeiture. The reclamation plan is not mentioned in final Section 800.50(a) because it is incorporated in the permit.

Final Section 800.50(a)(1), which was proposed as Section 800.50(b), sets the procedures the regulatory authority must follow in the event it must cause forfeiture of a bond. Section 800.50(a)(1) requires the regulatory authority to notify the permittee and the surety by certified mail of the determination to cause forfeiture of all or part of the bond including the reasons for such determination and amount to be forfeited. Final Section 800.50(a)(2), which was proposed as Section 800.50(b)(2), requires that the permittee and surety be advised under what conditions the forfeiture may be avoided.

A commenter objected to proposed Section 800.50(a), which made bond forfeitures mandatory rather than discretionary. The commenter said Section 509 of the Act does not provide for a bond to be automatically subject to forfeiture. The commenter suggested the following language change to provide the operator a chance to correct any conditions alleged by the regulatory authority to constitute a default without triggering a bond forfeiture proceeding: "The regulatory authority shall take action to notify the operator of its intention to forfeit all or part of a bond for any permit area or an increment of a permit area for unabated violations or conditions of the reclamation plan, or terms of the permit * * *."

Mandatory language in this rule has been retained so that when forfeiture action is necessary it is enforceable. The grounds for mandatory forfeiture are similar to those in previous Section 808.13(a).

The surety industry asked that OSM clarify how phase bonds are handled in forfeiture under Section 800.50(a).

Forfeiture under phase bonds will not differ greatly from other forfeiture proceedings. Forfeiture of bond for an area or increment that has not had any bond release will require forfeiture on Phase I bond as well as the bond for Phases II and III, in order to provide sufficient funds for complete reclamation. Forfeiture of phase bonds after partial release will involve forfeiture of the total of the phase bonds remaining for the area or increment for which forfeiture is necessary. Any excess funds remaining after reclamation will be distributed to the parties from whom they were collected, as determined by the regulatory authority, or as previously agreed to by the parties.

Two commenters objected to the proposed elimination of specific mandatory and discretionary forfeiture provisions of previous Sections 808.13 (a) and (b). The commenters felt that an operator who is complying with the rules in correcting violations and conducting reclamation as specified in the permit should not be threatened by forfeiture. Only the operator who cannot continue to comply, refuses to reclaim, or defaults on the conditions of the bond should be subject to forfeiture action.

The commenters also noted that previous Section 800.13(b) set out situations where informal adjustment of the economic situation short of bond forfeiture is possible. The commenters felt that failure to set our criteria for forfeiture as was done in the previous rules hampers regulatory flexibility and aids neither industry nor the public.

Another commenter, also concerned with the elimination of the criteria of Section 808.13, asked for clarification as to whether OSM meant to deny the regulatory authority the right to forfeit bonds if the permittee has been

adjudicated bankrupt, become insolvent, subject to attachments and liens on equipment and collateral or the permittee cannot demonstrate the ability to continue to operate.

In considering actions in which forfeiture is required, OSM has included refusal or inability to conduct reclamation of unabated violations, failure to fulfill the terms of the permit and default on the conditions of the bond. Other factors may apply to the need for forfeiture, but these three are the major grounds for forfeiture action. Whether a specific set of facts will lead to forfeiture depends upon whether the permit terms are met and bond conditions are satisfied. The factors mentioned by the commenter may be considered within that context. General terms and conditions of bonds are set forth in Section 800.16 and another specific forfeiture condition is contained in Section 800.17(c). Other specific instances when forfeiture may be initiated may be added by States in their programs.

Compliance, even after the initial notice of forfeiture, is preferable to forfeiture. The final rules have been amended to add conditions under which forfeiture may be avoided. Section 800.50(a)(2)(i) provides for withholding forfeiture if the permittee or a third party agrees to perform reclamation operations under a compliance schedule which meets the permit conditions. Final Section 800.50(a)(2)(ii) allows the surety to complete the reclamation plan or the relevant portion of the reclamation plan, if the surety demonstrates an ability to complete such reclamation. These two means of avoiding forfeiture were taken from previous Section 808.11(b) and provide discretion to the regulatory authority about which the commenters were concerned. These had been proposed as Section 800.50(a) (1) and (2).

A State regulatory authority questioned whether in accepting a permittee's obligation for reclamation after forfeiture, the State or the surety assumes the obligation for phase releases, water quality control, National Pollution Discharge Elimination System (NPDES) monitoring, and revegetation.

All plans and specifications found in the permit must be met in contracting for completion of reclamation. However, neither the regulatory authority nor the contractor assumes the liability of the permittee.

A regulatory authority requested the phrase "except for partial releases authorized under 30 CFR 800.40 * * *" be amended in proposed Section 800.50(a)(2) to make partial release discretionary because it had no intention of making partial releases once bond forfeiture was initiated. The regulatory authority suggested the following language: "* * * except that the regulatory authority may approve partial releases under 30 CFR 800.40 * * *." OSM recognizes that there could have been a potential problem in Section 800.50(a)(2)(ii) and has inserted a provision clearly giving the regulatory authority discretion in authorizing partial releases of bond.

A regulatory authority objected to the notification requirements in proposed Section 800.50(b)(1) (final Section 800.50(a)(1)) on the grounds that the permittee would have already received notice of the forfeiture by way of a notice of violation. The regulatory authority also objected to the requirement in proposed Section 800.50(b)(2) that it also advise the permittee and the surety of a right of appeal, reasoning that it was not the position of the regulatory authority to advise these parties of their legal rights to appeal.

Ordinarily the permittee will be on notice with respect to his or her failure to reclaim prior to forfeiture. However, bond forfeiture is a separate action by the regulatory authority for which separate notice is required. Whereas the permittee would have likely received previous notices, a surety will probably not receive notice until forfeiture is to be taken. A surety in such an instance must be apprised of the pending forfeiture and due process requirements which dictate that the permittee receive notice of the action as well.

OSM agrees with the commenter on proposed Section 800.50(b)(2) that the requirement of notification of rights of appeal should not be included as a regulatory authority responsibility. The regulatory authority should notify the permittee and surety, if any, that there is an opportunity for an administrative appeal to be taken, but recognizes that affected parties should be presumed to be aware of their rights.

SECTION 800.50(b)

Final Section 800.50(b)(1), proposed as Section 800.50(b)(3), requires a regulatory authority to proceed to collect the forfeited amount if actions to avoid forfeiture have not been taken, or if appeal rights are not exercised within a time established by the regulatory authority or are unsuccessful. Final Section 800.50(b)(2), proposed Section 80.50(d), requires the use of collected funds for reclamation.

The surety industry objected to the lack of guidelines in proposed Section 800.50(b)(1) for the regulatory authority in determining how much of the bond needs to be forfeited. The commenter asked that the amount of the forfeited bond be based on the estimated cost to complete reclamation. The surety industry cited a decision in an Ohio State Court (In re: Travellers Indemnity Company vs. Charles Call, No. 80-CV-07-4107, Franklin County Court of Common Pleas, Nov. 25, 1980) in which it was held that the surety was entitled to an estimate of the cost to complete the reclamation upon which the amount of bond to be forfeited would be based.

The manner in which the regulatory authority arrives at the amount to be forfeited is best left to its discretion. The amount proposed has to be reasonable and cannot be arbitrary or capricious. To require that the regulatory authority provide an estimate of the amount would be premature because the costs may not be known in advance. Furthermore, the entire bond has to be available for the necessary reclamation. Conditioning its availability upon the accuracy of a cost estimate runs counter to congressional intent that the bond will assure that reclamation will be accomplished. In addition, final Section 800.50(d)(2) requires the return of funds unused in the reclamation effort. Therefore, the comment is not accepted.

Two commenters felt that in proposed Section 800.50(b)(1) the regulatory authority should determine the amount of bond that is to be forfeited based on "total" contracting costs -- administrative as well as operational.

The regulatory authority may determine the amount to be forfeited based on the total costs it will incur in either using State employees to do the reclamation work or contracting with an outside party. In either case, the State could include its administrative and other costs routinely allowed under cost accounting principles. However, should the amount forfeited be greater than the actual costs, the excess must be remitted to the surety or permittee.

SECTION 800.50 (c) and (d)

Proposed Section 800.50(c) provided that upon default the regulatory authority may forfeit any and all bonds to complete the reclamation operations for which the bonds were posted. This has been adopted with one addition.

Proposed Section 800.50(d) required the regulatory authority to use the forfeited funds to contract for completion of the reclamation plan on the permit area or increment to which the bond coverage applies. This has been adopted in Section 800.50(b)(2), as noted above.

Final Section 800.50(d)(1) recognizes the operator's continuing liability for reclamation costs if the bond amount is insufficient and it authorizes reclamation to be conducted prior to collection of additional funds from the operator.

Several commenters found Section 800.50 (c) and (d) too restrictive in allowing forfeited funds to be used only for reclamation operations for which the bond applies. This prohibits the use of forfeited funds to cover reclamation costs of another increment or for other situations not included in the reclamation plan. The commenters said the proposal derogates from the meaning of the Act which states that the bond is conditional upon faithful performance of all requirements of the Act and the permit. They said the proposal was "entirely inconsistent with the goal of successful reclamation of the entire permit area."

The commenters were concerned that under proposed Section 800.50 (c) and (d) that situations will arise where the bond has been released on a given increment and no funds are available to perform reclamation occasioned by an emergency or cumulative impact appearing after that phase or increment is finished and bond released.

One commenter further noted that the only time there would be problems in extending incremental bond coverage to the entire permit area is when different sureties bond different increments and when different bonding methods are

used on different increments. The commenter felt these two problems could be specifically dealt with allowing for coverage of the entire permit area.

These comments are addressed in the earlier discussion on incremental and phase bonds. As noted there, although the bonds for separate increments may be limited to the discrete increments, in order to comply with Section 519(c)(3) of the Act, the bond on an increment may not be fully released until the reclamation plan, including extended liability, is fully completed for the increment for which the bond is posted.

One commenter felt the existence of phase bonds in forfeiture proceedings should be recognized in proposed Section 800.50(d). The commenter recommended the following word change " * * * contract for completion of the reclamation plan * * * on the permit area, incremental acreage or bonded phase on which * * * ."

The commenter's recommendation is accepted and a phrase added to recognize separate bonding of phases in final Section 800.50(b)(2).

Several commenters disagreed with OSM's response in the proposed rule, *46 FR 45091*, to the decision of the district court. (In re: Permanent Surface Mining Regulation Litigation, 14 Envir. Rep. Cas. 1100-1101, February 26, 1980). The district court remanded OSM's rule for not having a provision for returning unused portions of a forfeited bond.

OSM proposed in Section 800.50 to allow the regulatory authority to determine amounts to be forfeited, and omitted a provision requiring unused portions to be returned. In response to the comment and the district court decision, OSM is adding the following provision to final Section 800.50(d)(2): "In the event the amount of performance bond forfeited is more than the amount necessary to complete reclamation operations, the unused funds shall be returned by the regulatory authority to the party from whom they were collected."

One of the commenters was further confused by OSM's statement at *46 FR 45091*, in explaining that funds not used to contract for reclamation would be refunded. OSM stated, "However, this rationale may not apply if bond forfeiture renders a penal sum rather than a performance guarantee." The commenter wanted to know if this statement meant that unused funds will not be refunded if bond forfeiture is a penalty action. The commenter felt penalty assessment and collection processes are separate and distinct from bond forfeiture actions and questioned the power of the regulatory authority to keep unused bond money and call it a penalty.

A surety commenter also noted OSM's preamble statement and wanted to ensure that no misconception arose regarding the term "penal sum" when used in performance bond forms. The commenter explained as follows:

[In] the explanatory comments with regard to this section which appeared on *46 FR 45091* there seems to be some confusion with respect to the terms "penal sum" and "performance guarantee." In the surety industry, the term "penal sum" when used in conjunction with the amount of bond is not meant to convey that the entire bond can be construed to be a penalty. Most bonds use the term "penal sum" and they are only "penalty" bonds when the provisions of the bonds specifically provide this. Surface mining bonds in most instances are considered to be bonds that guarantee performance of the reclamation work required by the permit. They are damage bonds and respond by guaranteeing to pay the cost of the necessary reclamation work up to the bond penalty even if they use the term "penal sum."

In order to clarify the matter, OSM views a reclamation bond as one guaranteeing the performance of reclamation work. Therefore, it is not a penal bond. Upon forfeiture only the amount necessary to complete the reclamation work can be used by the regulatory authority. Use of the term "penal sum" has no bearing on the amount of the bond which the regulatory authority may retain. OSM concurs in the view expressed by the surety commenter.

A State regulatory authority requested an amendment of proposed Section 800.50(d) regarding the provision requiring forfeited funds be used only within the permit area to which they apply. The State said it intends to include the administrative costs of securing a reclamation contract as part of the initial bond amount. Therefore, they argued the regulatory authority should have the option of allocating forfeited funds not needed for reclamation to a general fund for administrative costs associated with contracting for reclamation. Only the administrative portion of the bond would be allocated to the fund. The State felt this general fund for handling contract costs would best suit their

practice of seeking a bid for several permit areas in the same general region at the same time.

A State may establish a certain percentage of any contract for its administrative costs, but such a practice has to have a sound accounting basis, including distribution of costs, to avoid retaining more of the forfeited funds than the costs involved. Should the costs of reclamation, including properly allowable and allocable costs, be less than the amount of the forfeited bond, the excess must be returned to the surety or operator.

A State regulatory authority requested an addition of a new paragraph (e) to Section 800.50 to clearly establish that the operator's liability is not limited to the amount of the performance bond and is not necessarily satisfied by that bond's forfeiture. The regulatory authority felt the performance bond requirement was not meant to supplant the operator's underlying obligation to reclaim all the land disturbed under his permit. The following language was suggested:

In the event the forfeited bond is insufficient to pay for the full cost of reclamation, the operator shall be liable for remaining costs. The regulatory authority may complete, or authorize to be completed, reclamation of the bonded parcel and may recover from the operator all costs of reclamation in excess of the forfeited bond.

The operator does have the underlying obligation to fully reclaim disturbed lands. A regulatory authority, in having reclamation performed on which the operator has defaulted in his obligation, may incur costs in excess of the forfeited amount. To make clear that the regulatory authority may recover that excess amount from the operator, the suggested addition is made to Section 800.50 in paragraph (d)(1).

SECTION 800.60 - TERMS AND CONDITIONS FOR LIABILITY INSURANCE.

Proposed Section 800.60 implements the requirements of Section 507(f) of the Act that each permittee have liability insurance providing coverage for personal injury and property damage. This section sets the minimum coverage required, the duration of the policy, notification procedures and provides for an exception when the operator meets the requirements of State self-insurance provisions.

SECTION 800.60(a)

Final Section 800.60(a) provides that the regulatory authority must require the applicant to submit with the permit application a certificate issued by an insurance company authorized to do business in the United States certifying that the applicant has a public liability insurance policy in force for the surface coal mining and reclamation operations for which the permit is sought. The certificate shall provide for personal injury and property damage protection in an amount adequate to compensate any persons injured or property damaged as a result of the surface coal mining and reclamation operations and who are entitled to compensation under State law. Minimum coverage for bodily injury and property damage shall be \$300,000 for each occurrence and \$500,000 aggregate.

A commenter objected to the minimum dollar amounts specified in proposed Section 800.60(a) and states that OSM has given no justification for setting them. The commenter noted it is a common and preferred practice by coal companies to insure all their operation locations under one policy rather than allocating specific minimum amounts to each location as required in Section 800.60(a). The commenter said the operator may carry liability insurance that is "adequate to compensate any persons damaged * * * and entitled to compensation" as required by Section 507(f) of the Act, but would not comply with the individual minimum requirements of Section 800.60(a). The commenter felt that, in light of Section 101(f) of the Act, the State regulatory authority should be given the discretion to decide what type of coverage is "adequate."

Section 800.60(a) does not prohibit the type of policy which the commenter states is commonly purchased by companies having more than one operation. One policy could cover multiple operations. However, Section 507(f) requires that the policy be written "in an amount adequate to compensate any person damaged * * *." Thus, it is appropriate to provide for minimum amounts of liability coverage. See also the discussion in connection with the original rule, Section 806.14, at *44 FR 15119*.

A commenter requested that the sentence in proposed Section 800.60(a) that begins "The certificate shall provide * * *" be rewritten and clarified. The commenter notes that a certificate cannot "compensate property damaged" as the phrase "shall provide for" implies. The commenter also felt the phrase "to all persons" is not needed.

OSM agrees with this comment and has revised Section 800.60(a) for clarity but no substantive changes have been made. The proposed term "all persons" has been changed to "any persons" to parallel the statutory language.

SECTION 800.60(b)

Final Section 800.60(b) requires that the policy be maintained in full force during the life of the permit or any renewal, including completion of all reclamation operations. This paragraph is adopted as proposed, with one revision discussed below.

A State regulatory authority was concerned that Section 800.60(b) requires that the policy need only remain in effect during the term of the permit or any renewal. The regulatory authority noted that reclamation may continue after the permit term has expired, but feels the insurance policy should remain in effect during the reclamation period.

OSM agrees with this comment and has made a change to Section 800.60(b) to specify that the liability insurance policy must continue in force until the end of the liability period for completion of reclamation. Section 800.60(b) follows Section 507(f) of the Act, which provides that it is to remain in effect during the length of all reclamation operations. This includes the period of extended liability under Section 515(b)(20) of the Act.

SECTIONS 800.60 (c) and (d)

Section 800.60(c) provides that the policy have a rider requiring the insurer to notify the regulatory authority when major changes are made to the policy. Section 800.60(d) allows the regulatory authority to accept, in lieu of proof of a public liability insurance policy, evidence from the applicant that it satisfies State self-insurance requirements approved by the regulatory program. No comments were received on these two provisions, which follow Section 507(f) of the Act, and they are unchanged from the proposed. They also retain the provisions of previous Section 806.16 (c) and (d).

SECTION 800.70 - BONDING FOR ANTHRACITE OPERATIONS IN PENNSYLVANIA.

Section 800.70(a) provides that all the provisions of Subchapter J shall apply to bonding and insuring anthracite surface operations in Pennsylvania except that the specified bond limits and the period of liability shall be determined and established according to Pennsylvania State law and rules. Section 800.70(b) also provides that should the Pennsylvania State regulatory program be amended, persons engaged in anthracite surface mining shall comply with the additional rules the Secretary may issue in order to meet the purposes of the Act. Lastly, the proposed Section 800.70(c) requires that nothing in this part shall exempt anthracite operations from requirements of Subchapter J except as set forth in Section 800.70.

No comments were received on this section but editorial changes have been made for clarity. Proposed Section 800.70(c) is not adopted because it was redundant. Section 800.70 is necessary to implement the provision of Section 519 of the Act which allows State standards to be applicable to anthracite surface coal mines and makes some of the bonding provisions in Sections 509 and 519 of the Act applicable.

REFERENCE MATERIALS

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

The American Law Institute, 1978. Uniform Commercial Code. National Conference of Commissioners on Uniform State Laws. 994 pp.

Baughn, William H. and Charles E. Walker, 1978. The Bankers' Handbook. Homewood, Illinois: Dow Jones -- Irwin. 1205 pp.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The information collection requirements contained in Part 800, as enumerated in Section 800.10 of this rule, have been approved by the Office of Management and Budget under *44 U.S.C. 3507* and assigned clearance number 1029-0043. The information required will be collected and used by the regulatory authority in implementing bonding responsibilities for surface and underground mining activities to ensure that companies have suitable bonding and that the reclamation is completed. The information being collected is to meet requirements of Sections 509 and 519 of the Act and the obligation to respond is mandatory.

Executive Order 12291 and Regulatory Flexibility Act

The DOI has determined that this document is not a major rule and does not require a regulatory impact analysis under Executive Order 12291. The DOI certifies that this document will not have a significant economic effect on a substantial number of small entities and therefore does not require a regulatory flexibility analysis under Public Law 96-354. The flexibility of these rules should provide availability of surety bonding to small operators.

National Environmental Policy Act

An environmental assessment (EA) was prepared analyzing the individual impacts on the human environment which the revision of bonding rules in Part 800 will have. On the basis of this EA, it was determined that adopting these rules will not constitute a major Federal action significantly affecting the quality of the human environment. In addition, an EA was prepared which analyzed the cumulative impacts of adopting these rules in relation to certain other proposed revised rules. In a Finding of No Significant Impact (FONSI) based on this latter EA, the revision of the bonding rules was considered to be in category I, a category of revisions for which the analysis of impacts was sufficiently certain to support a finding of no significant impact. Both EAs and FONSI are on file in the Administrative Record located at 1100 L Street NW., Room 5315, Washington, D.C.

LIST OF SUBJECTS IN 30 CFR PART 800

Administrative practice and procedure, Coal mining, Insurance, Reporting and recordkeeping requirements, Surety bonds, Surface mining, Underground mining.

For the reasons set forth in the preamble, 30 CFR Parts 800, 801, 805, 806, 807, 808 and 809 are amended as set forth herein.

Dated: July 14, 1983.

J. J. Simmons III, Under Secretary.

1. Subchapter J is revised to read as follows:

SUBCHAPTER J -- BONDING AND INSURANCE REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS

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

Section

800.1	Scope and purpose.
800.4	Regulatory authority responsibilities.
800.5	Definitions.
800.10	Information collection.
800.11	Requirement to file a bond.
800.12	Form of the performance bond.
800.13	Period of liability.
800.14	Determination of bond amount.
800.15	Adjustment of amount.
800.16	General terms and conditions of bond.
800.17	Bonding requirements for underground coal mines and long-term coal-related surface facilities and structures.
800.20	Surety bonds.
800.21	Collateral bonds.
800.30	Replacement of bonds.
800.40	Requirement to release performance bonds.
800.50	Forfeiture of bonds.
800.60	Terms and conditions for liability insurance.
800.70	Bonding for anthracite operations in Pennsylvania.

Authority: *30 U.S.C. 1201 et seq.*, Pub. L. 95-87.

SECTION 800.1 - SCOPE AND PURPOSE.

This part sets forth the minimum requirements for filing and maintaining bonds and insurance for surface coal mining and reclamation operations under regulatory programs in accordance with the Act.

SECTION 800.4 - REGULATORY AUTHORITY RESPONSIBILITIES.

- (a) The regulatory authority shall prescribe and furnish forms for filing performance bonds.
- (b) The regulatory authority shall prescribe by regulation terms and conditions for performance bonds and insurance.
- (c) The regulatory authority shall determine the amount of the bond for each area to be bonded, in accordance with Section 800.14. The regulatory authority shall also adjust the amount as acreage in the permit area is revised, or when other relevant conditions change according to the requirements of Section 800.15.
- (d) The regulatory authority may accept a self-bond if the permittee meets the requirements of Section 800.23 and any additional requirements in the State or Federal program.
- (e) The regulatory authority shall release liability under a bond or bonds in accordance with Section 800.40.

(f) If the conditions specified in Section 800.50 occur, the regulatory authority shall take appropriate action to cause all or part of a bond to be forfeited in accordance with procedures of that section.

(g) The regulatory authority shall require in the permit that adequate bond coverage be in effect at all times. Except as provided in Section 800.16(e)(2), operating without a bond is a violation of a condition upon which the permit is issued.

SECTION 800.5 - DEFINITIONS.

(a) **SURETY BOND** means an indemnity agreement in a sum certain payable to the regulatory authority, executed by the permittee as principal and which is supported by the performance guarantee of a corporation licensed to do business as a surety in the State where the operation is located.

(b) **COLLATERAL BOND** means an indemnity agreement in a sum certain executed by the permittee as principal which is supported by the deposit with the regulatory authority of one or more of the following:

(1) A cash account, which shall be the deposit of cash in one or more federally-insured or equivalently protected accounts, payable only to the regulatory authority upon demand, or the deposit of cash directly with the regulatory authority;

(2) Negotiable bonds of the United States, a State, or a municipality, endorsed to the order of, and placed in the possession of, the regulatory authority;

(3) Negotiable certificates of deposit, made payable or assigned to the regulatory authority and placed in its possession or held by a federally-insured bank;

(4) An irrevocable letter of credit of any bank organized or authorized to transact business in the United States, payable only to the regulatory authority upon presentation;

(5) A perfected, first-lien security interest in real property in favor of the regulatory authority; or

(6) Other investment-grade rated securities having a rating of AAA, AA, or A or an equivalent rating issued by a nationally recognized securities rating service, endorsed to the order of, and placed in the possession of, the regulatory authority.

(c) **SELF-BOND** means an indemnity agreement in a sum certain executed by the permittee or the parent company guarantor and made payable to the regulatory authority, with or without separate surety.

SECTION 800.10 - INFORMATION COLLECTION.

The information collection requirements contained in Sections 800.11, 800.15(c), 800.21, 800.40, 800.50(a), and 800.60 have been approved by the Office of Management and Budget under *44 U.S.C. 3507* and assigned clearance number 1029-0043. The information is being collected to meet the requirements of Sections 509 and 519 of the Act, which require all applicants to file a bond with the regulatory authority prior to a permit being issued, and require written requests for bond release. This information will be used by the regulatory authority to ensure that sufficient funds are available for reclamation. The obligation to respond is mandatory.

SECTION 800.11 - REQUIREMENT TO FILE A BOND.

(a) After a permit application under Subchapter G of this chapter has been approved, but before a permit is issued, the applicant shall file with the regulatory authority, on a form prescribed and furnished by the regulatory authority, a bond or bonds for performance made payable to the regulatory authority and conditioned upon the faithful performance of all the requirements of the Act, the regulatory program, the permit, and the reclamation plan.

(b)(1) The bond or bonds shall cover the entire permit area, or an identified increment of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations during the initial term of the permit.

(2) As surface coal mining and reclamation operations on succeeding increments are initiated and conducted within the permit area, the permittee shall file with the regulatory authority an additional bond or bonds to cover such increments in accordance with this section.

(3) The operator shall identify the initial and successive areas or increments for bonding on the permit application map submitted for approval as provided in the application (under Parts 780 and 784 of this chapter), and shall specify the bond amount to be provided for each area or increment.

(4) Independent increments shall be of sufficient size and configuration to provide for efficient reclamation operations should reclamation by the regulatory authority become necessary pursuant to Section 800.50.

(c) An operator shall not disturb any surface areas, succeeding increments, or extend any underground shafts, tunnels or operations prior to acceptance by the regulatory authority of the required performance bond.

(d) The applicant shall file, with the approval of the regulatory authority, a bond or bonds under one of the following schemes to cover the bond amounts for the permit area as determined in accordance with Section 800.14:

(1) A performance bond or bonds for the entire permit area;

(2) A cumulative bond schedule and the performance bond required for full reclamation of the initial area to be disturbed; or

(3) An incremental bond schedule and the performance bond required for the first increment in the schedule.

(e) OSM may approve, as part of a State or Federal program, an alternative bonding system, if it will achieve the following objectives and purposes of the bonding program:

(1) The alternative must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time; and

(2) The alternative must provide a substantial economic incentive for the permittee to comply with all reclamation provisions.

SECTION 800.12 - FORM OF THE PERFORMANCE BOND.

The regulatory authority shall prescribe the form of the performance bond. The regulatory authority may allow for:

(a) A surety bond;

(b) A collateral bond;

(c) A self-bond; or

(d) A combination of any of these bonding methods.

SECTION 800.13 - PERIOD OF LIABILITY.

(a)(1) Performance bond liability shall be for the duration of the surface coal mining and reclamation operation and for a period which is coincident with the operator's period of extended responsibility for successful revegetation provided in Section 816.116 or Section 817.116 of this chapter or until achievement of the reclamation requirements of the Act, regulatory programs, and permit, whichever is later.

(2) With the approval of regulatory authority, a bond may be posted and approved to guarantee specific phases of reclamation within the permit area provided the sum of phase bonds posted equals or exceeds the total amount required under Sections 800.14 and 800.15. The scope of work to be guaranteed and the liability assumed under each phase bond shall be specified in detail.

(b) Isolated and clearly defined portions of the permit area requiring extended liability may be separated from the original area and bonded separately with the approval of the regulatory authority. Such areas shall be limited in extent

and not constitute a scattered, intermittent, or checkerboard pattern of failure. Access to the separated areas for remedial work may be included in the area under extended liability if deemed necessary by the regulatory authority.

(c) If the regulatory authority approves a long-term, intensive agricultural postmining land use, in accordance with Section 816.133 or Section 817.133 of this chapter, the applicable 5 or 10 year period of liability shall commence at the date of initial planting for such long-term agricultural use.

(d)(1) The bond liability of the permittee shall include only those actions which he or she is obligated to take under the permit, including completion of the reclamation plan, so that the land will be capable of supporting the postmining land use approved under Section 816.133 or Section 817.133 of this chapter.

(2) Implementation of an alternative postmining land use approved under Sections 816.133(c) and 817.133(c) which is beyond the control of the permittee, need not be covered by the bond. Bond liability for prime farmland shall be as specified in Section 800.40(c)(2).

SECTION 800.14 - DETERMINATION OF BOND AMOUNT.

(a) The amount of the bond required for each bonded area shall:

- (1) Be determined by the regulatory authority;
- (2) Depend upon the requirements of the approved permit and reclamation plan;
- (3) Reflect the probable difficulty of reclamation, giving consideration to such factors as topography, geology, hydrology, and revegetation potential; and
- (4) Be based on, but not limited to, the estimated cost submitted by the permit applicant.

(b) The amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work has to be performed by the regulatory authority in the event of forfeiture, and in no case shall the total bond initially posted for the entire area under one permit be less than \$10,000.

(c) An operator's financial responsibility under Section 817.121(c) of this chapter for repairing material damage resulting from subsidence may be satisfied by the liability insurance policy required under Section 800.60.

SECTION 800.15 - ADJUSTMENT OF AMOUNT.

(a) The amount of the bond or deposit required and the terms of the acceptance of the applicant's bond shall be adjusted by the regulatory authority from time to time as the area requiring bond coverage is increased or decreased or where the cost of future reclamation changes. The regulatory authority may specify periodic times or set a schedule for reevaluating and adjusting the bond amount to fulfill this requirement.

(b) The regulatory authority shall --

- (1) Notify the permittee, the surety, and any person with a property interest in collateral who has requested notification under Section 800.21(f) of any proposed adjustment to the bond amount; and
- (2) Provide the permittee an opportunity for an informal conference on the adjustment.

(c) A permittee may request reduction of the amount of the performance bond upon submission of evidence to the regulatory authority proving that the permittee's method of operation or other circumstances reduces the estimated cost for the regulatory authority to reclaim the bonded area. Bond adjustments which involve undisturbed land or revision of the cost estimate of reclamation are not considered bond release subject to procedures of Section 800.40.

(d) In the event that an approved permit is revised in accordance with Subchapter G of this chapter, the regulatory authority shall review the bond for adequacy and, if necessary, shall require adjustment of the bond to conform to the permit as revised.

SECTION 800.16 - GENERAL TERMS AND CONDITIONS OF BOND.

(a) The performance bond shall be in an amount determined by the regulatory authority as provided in Section 800.14.

(b) The performance bond shall be payable to the regulatory authority.

(c) The performance bond shall be conditioned upon faithful performance of all the requirements of the Act, this chapter, the regulatory program, and the approved permit, including completion of the reclamation plan.

(d) The duration of the bond shall be for the time period provided in Section 800.13.

(e)(1) The bond shall provide a mechanism for a bank or surety company to give prompt notice to the regulatory authority and the permittee of any action filed alleging the insolvency or bankruptcy of the surety company, the bank, or the permittee, or alleging any violations which would result in suspension or revocation of the surety or bank charter or license to do business.

(2) Upon the incapacity of a bank or surety company by reason of bankruptcy, insolvency, or suspension or revocation of a charter or license, the permittee shall be deemed to be without bond coverage and shall promptly notify the regulatory authority. The regulatory authority, upon notification received through procedures of paragraph (e)(1) of this section or from the permittee, shall, in writing, notify the operator who is without bond coverage and specify a reasonable period, not to exceed 90 days, to replace bond coverage. If an adequate bond is not posted by the end of the period allowed, the operator shall cease coal extraction and shall comply with the provisions of Section 816.132 or Section 817.132 of this chapter and shall immediately begin to conduct reclamation operations in accordance with the reclamation plan. Mining operations shall not resume until the regulatory authority has determined that an acceptable bond has been posted.

SECTION 800.17 - BONDING REQUIREMENTS FOR UNDERGROUND COAL MINES AND LONG-TERM COAL-RELATED SURFACE FACILITIES AND STRUCTURES.

(a) Responsibilities. The regulatory authority shall require bond coverage, in an amount determined under Section 800.14, for long-term surface facilities and structures, and for areas disturbed by surface impacts incident to underground mines, for which a permit is required. Specific reclamation techniques required for underground mines and long-term facilities shall be considered in determining the amount of bond to complete the reclamation.

(b) Long-term period of liability.

(1) The period of liability for every bond covering long-term surface disturbances shall commence with the issuance of a permit, except that to the extent that such disturbances will occur on a succeeding increment to be bonded, such liability will commence upon the posting of the bond for that increment before the initial surface disturbance of that increment. The liability period shall extend until all reclamation, restoration, and abatement work under the permit has been completed and the bond is released under the provisions of Section 800.40, or until the bond has been replaced or extended in accordance with Section 800.17(b)(3).

(2) Long-term surface disturbances shall include long-term coal-related surface facilities and structures, and surface impacts incident to underground coal mining, which disturb an area for a period that exceeds 5 years. Long-term surface disturbances include, but are not limited to: surface features of shafts and slope facilities, coal refuse areas, powerlines, bore-holes, ventilation shafts, preparation plants, machine shops, roads, and loading and treatment facilities.

(3) To achieve continuous bond coverage for long-term surface disturbances, the bond shall be conditioned upon extension, replacement, or payment in full, 30 days prior to the expiration of the bond term.

(4) Continuous bond coverage shall apply throughout the period of extended responsibility for successful revegetation and until the provisions of Section 800.40 have been met.

(c) Bond forfeiture. The regulatory authority shall take action to forfeit a bond pursuant to this section, if 30 days prior to bond expiration, the operator has not filed: (1) A performance bond for a new term as required for continuous coverage, or (2) a performance bond providing coverage for the period of liability, including the period of extended responsibility for successful revegetation.

SECTION 800.20 - SURETY BONDS.

(a) A surety bond shall be executed by the operator and a corporate surety licensed to do business in the State where the operation is located.

(b) Surety bonds shall be noncancellable during their terms, except that surety bond coverage for lands not disturbed may be cancelled with the prior consent of the regulatory authority. The regulatory authority shall advise the surety, within 30 days after receipt of a notice to cancel bond, whether the bond may be cancelled on an undisturbed area.

SECTION 800.21 - COLLATERAL BONDS.

(a) Collateral bonds, except for letters of credit, cash accounts, and real property, shall be subject to the following conditions:

(1) The regulatory authority shall keep custody of collateral deposited by the applicant until authorized for release or replacement as provided in this subchapter.

(2) The regulatory authority shall value collateral at its current market value, not at face value.

(3) The regulatory authority shall require that certificates of deposit be made payable to or assigned to the regulatory authority, both in writing and upon the records of the bank issuing the certificates. If assigned, the regulatory authority shall require the banks issuing these certificates to waive all rights of setoff or liens against those certificates.

(4) The regulatory authority shall not accept an individual certificate of deposit in an amount in excess of \$100,000 or the maximum insurable amount as determined by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation.

(b) Letters of credit shall be subject to the following conditions:

(1) The letter may be issued only by a bank organized or authorized to do business in the United States;

(2) Letters of credit shall be irrevocable during their terms. A letter of credit used as security in areas requiring continuous bond coverage shall be forfeited and shall be collected by the regulatory authority if not replaced by other suitable bond or letter of credit at least 30 days before its expiration date.

(3) The letter of credit shall be payable to the regulatory authority upon demand, in part or in full, upon receipt from the regulatory authority of a notice of forfeiture issued in accordance with Section 800.50.

(c) Real property posted as a collateral bond shall meet the following conditions:

(1) The applicant shall grant the regulatory authority a first mortgage, first deed of trust, or perfected first-lien security interest in real property with a right to sell or otherwise dispose of the property in the event of forfeiture under Section 800.50.

(2) In order for the regulatory authority to evaluate the adequacy of the real property offered to satisfy collateral requirements, the applicant shall submit a schedule of the real property which shall be mortgaged or pledged to secure the obligations under the indemnity agreement. The list shall include --

(i) A description of the property;

(ii) The fair market value as determined by an independent appraisal conducted by a certified appraiser; and

(iii) Proof of possession and title to the real property.

(3) The property may include land which is part of the permit area; however, land pledged as collateral for a bond under this section shall not be disturbed under any permit while it is serving as security under this section.

(d) Cash accounts shall be subject to the following conditions:

(1) The regulatory authority may authorize the operator to supplement the bond through the establishment of a cash account in one or more federally-insured or equivalently protected accounts made payable upon demand to, or deposited directly with, the regulatory authority. The total bond including the cash account shall not be less than the amount required under terms of performance bonds including any adjustments, less amounts released in accordance with Section 800.40.

(2) Any interest paid on a cash account shall be retained in the account and applied to the bond value of the account unless the regulatory authority has approved the payment of interest to the operator.

(3) Certificates of deposit may be substituted for a cash account with the approval of the regulatory authority.

(4) The regulatory authority shall not accept an individual cash account in an amount in excess of \$100,000 or the maximum insurable amount as determined by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation.

(e)(1) The estimated bond value of all collateral posted as assurance under this section shall be subject to a margin which is the ratio of bond value to market value, as determined by the regulatory authority. The margin shall reflect legal and liquidation fees, as well as value depreciation, marketability, and fluctuations which might affect the net cash available to the regulatory authority to complete reclamation.

(2) The bond value of collateral may be evaluated at any time but it shall be evaluated as part of permit renewal and, if necessary, the performance bond amount increased or decreased. In no case shall the bond value of collateral exceed the market value.

(f) Persons with an interest in collateral posted as a bond, and who desire notification of actions pursuant to the bond, shall request the notification in writing to the regulatory authority at the time collateral is offered.

SECTION 800.30 - REPLACEMENT OF BONDS.

(a) The regulatory authority may allow a permittee to replace existing bonds with other bonds that provide equivalent coverage.

(b) The regulatory authority shall not release existing performance bonds until the permittee has submitted, and the regulatory authority has approved, acceptable replacement performance bonds. Replacement of a performance bond pursuant to this section shall not constitute a release of bond under Section 800.40.

SECTION 800.40 - REQUIREMENT TO RELEASE PERFORMANCE BONDS.

(a) Bond release application.

(1) The permittee may file an application with the regulatory authority for the release of all or part of a performance bond. Applications may be filed only at times or during seasons authorized by the regulatory authority in order to properly evaluate the completed reclamation operations. The times or seasons appropriate for the evaluation of certain types of reclamation shall be established in the regulatory program or identified in the mining and reclamation plan required in Subchapter G of this chapter and approved by the regulatory authority.

(2) Within 30 days after an application for bond release has been filed with the regulatory authority, the operator 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 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 operator'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 applicant 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.

(b) Inspection by regulatory authority.

(1) Upon receipt of the bond release application, the regulatory authority shall, within 30 days, or as soon thereafter as weather conditions permit, conduct an inspection and evaluation of the reclamation work involved. The evaluation shall consider, among other factors, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of future occurrence of such pollution, and the estimated cost of abating such pollution. The surface owner, agent, or lessee shall be given notice of such inspection and may participate with the regulatory authority in making the bond release inspection. The regulatory authority may arrange with the permittee to allow access to the permit area, upon request by any person with an interest in bond release, for the purpose of gathering information relevant to the proceeding.

(2) Within 60 days from the filing of the bond release application, if no public hearing is held pursuant to paragraph (f) of this section, or, within 30 days after a public hearing has been held pursuant to paragraph (f) of this section, the regulatory authority shall notify in writing the permittee, the surety or other persons with an interest in bond collateral who have requested notification under Section 800.21(f), and the persons who either filed objections in writing or objectors who were a party to the hearing proceedings, if any, of its decision to release or not to release all or part of the performance bond.

(c) The regulatory authority may release all or part of the bond for the entire permit area or incremental area if the regulatory authority is satisfied that all the reclamation or a phase of the reclamation covered by the bond or portion thereof has been accomplished in accordance with the following schedules for reclamation of Phases I, II, and III:

(1) At the completion of Phase I, after the operator completes the backfilling, regrading (which may include the replacement of topsoil) and drainage control of a bonded area in accordance with the approved reclamation plan, 60 percent of the bond or collateral for the applicable area.

(2) At the completion of Phase II, after revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan, an additional amount of bond. When determining the amount of bond to be released after successful revegetation has been established, the regulatory authority shall retain that amount of bond for the revegetated area which would be sufficient to cover the cost of reestablishing revegetation if completed by a third party and for the period specified for operator responsibility in Section 515 of the Act for reestablishing revegetation. No part of the bond or deposit shall be released under this paragraph so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by Section 515(b)(10) of the Act and by Subchapter K of this chapter or until soil productivity for prime farmlands has returned to the equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to Section 507(b)(16) of the Act and Part 823 of this chapter. Where a silt dam is to be retained as a permanent impoundment pursuant to Subchapter K of this chapter, the Phase II portion of the bond may be released under this paragraph so long as provisions for sound future maintenance by the operator or the landowner have been made with the regulatory authority.

(3) At the completion of Phase III, after the operator has completed successfully all surface coal mining and reclamation activities, the release of the remaining portion of the bond, but not before the expiration of the period specified for operator responsibility in Section 816.116 or Section 817.116 of this chapter. However, no bond shall be fully released under provisions of this section until reclamation requirements of the Act and the permit are fully met.

(d) If the regulatory authority disapproves the application for release of the bond or portion thereof, the regulatory authority shall notify the permittee, the surety, and any person with an interest in collateral as provided for in Section 800.21(a)(4), in writing, stating the reasons for disapproval and recommending corrective actions necessary to secure the release and allowing an opportunity for a public hearing.

(e) When any application for total or partial bond release is filed with the regulatory authority, the regulatory authority shall notify the municipality in which the surface coal mining operation is located by certified mail at least 30 days prior to the release of all or a portion of the bond.

(f) Any person with a valid legal interest which might be adversely affected by release of the bond, or the responsible officer or head of any Federal, State, or local governmental agency which has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation or which is authorized to develop and enforce environmental standards with respect to such operations, shall have the right to file written objections to the proposed release from bond with the regulatory authority within 30 days after the last publication of the notice required by Section 800.40(a)(2). If written objections are filed and a hearing is requested, the regulatory authority shall inform all the interested parties of the time and place of the hearing, and shall hold a public hearing within 30 days after receipt of the request for the hearing. The date time, and location of the public hearing shall be advertised by the regulatory authority in a newspaper of general circulation in the locality for two consecutive weeks. The public hearing shall be held in the locality of the surface coal mining operation from which bond release is sought, at the location of the regulatory authority office, or at the State capital, at the option of the objector.

(g) For the purpose of the hearing under paragraph (f) of this section, the regulatory authority shall have the authority to administer oaths, subpoena witnesses or written or printed material, compel the attendance of witnesses or the production of materials, and take evidence including, but not limited to, inspection of the land affected and other surface coal mining operations carried on by the applicant in the general vicinity. A verbatim record of each public hearing shall be made, and a transcript shall be made available on the motion of any party or by order of the regulatory authority.

(h) Without prejudice to the right of an objector or the applicant, the regulatory authority may hold an informal conference as provided in Section 513(b) of the Act to resolve such written objections. The regulatory authority shall make a record of the informal conference unless waived by all parties, which shall be accessible to all parties. The regulatory authority shall also furnish all parties of the informal conference with a written finding of the regulatory authority based on the informal conference, and the reasons for said finding.

SECTION 800.50 - FORFEITURE OF BONDS.

(a) If an operator refuses or is unable to conduct reclamation of an unabated violation, if the terms of the permit are not met, or if the operator defaults on the conditions under which the bond was accepted, the regulatory authority shall take the following action to forfeit all or part of a bond or bonds for any permit area or an increment of a permit area:

(1) Send written notification by certified mail, return receipt requested, to the permittee and the surety on the bond, if any, informing them of the determination to forfeit all or part of the bond, including the reasons for the forfeiture and the amount to be forfeited. The amount shall be based on the estimated total cost of achieving the reclamation plan requirements.

(2) Advise the permittee and surety, if applicable, of the conditions under which forfeiture may be avoided. Such conditions may include, but are not limited to --

(i) Agreement by the permittee or another party to perform reclamation operations in accordance with a compliance schedule which meets the conditions of the permit, the reclamation plan, and the regulatory program and a demonstration that such party has the ability to satisfy the conditions; or

(ii) The regulatory authority may allow a surety to complete the reclamation plan, or the portion of the reclamation plan applicable to the bonded phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the approved reclamation plan. Except where the regulatory authority may approve partial release authorized under Section 800.40, no surety liability shall be released until successful completion of all reclamation under the terms of the permit, including applicable liability periods of Section 800.13.

(b) In the event forfeiture of the bond is required by this section, the regulatory authority shall --

(1) Proceed to collect the forfeited amount as provided by applicable laws for the collection of defaulted bonds or other debts if actions to avoid forfeiture have not been taken, or if rights of appeal, if any, have not been exercised within a time established by the regulatory authority, or if such appeal, if taken, is unsuccessful.

(2) Use funds collected from bond forfeiture to complete the reclamation plan, or portion thereof, on the permit area or increment, to which bond coverage applies.

(c) Upon default, the regulatory authority may cause the forfeiture of any and all bonds deposited to complete reclamation for which the bonds were posted. Unless specifically limited, as provided in Section 800.11(d)(3), bond liability shall extend to the entire permit area under conditions of forfeiture.

(d)(1) In the event the estimated amount forfeited is insufficient to pay for the full cost of reclamation, the operator shall be liable for remaining costs. The regulatory authority may complete, or authorize completion of, reclamation of the bonded area and may recover from the operator all costs of reclamation in excess of the amount forfeited.

(2) In the event the amount of performance bond forfeited was more than the amount necessary to complete reclamation, the unused funds shall be returned by the regulatory authority to the party from whom they were collected.

SECTION 800.60 - TERMS AND CONDITIONS FOR LIABILITY INSURANCE.

(a) The regulatory authority shall require the applicant to submit as part of its permit application a certificate issued by an insurance company authorized to do business in the United States certifying that the applicant has a public liability insurance policy in force for the surface coal mining and reclamation operations for which the permit is sought. Such policy shall provide for personal injury and property damage protection in an amount adequate to compensate any persons injured or property damaged as a result of the surface coal mining and reclamation operations, including the use of explosives, and who are entitled to compensation under the applicable provisions of State law. Minimum insurance coverage for bodily injury and property damage shall be \$300,000 for each occurrence and \$500,000 aggregate.

(b) The policy shall be maintained in full force during the life of the permit or any renewal thereof, including the liability period necessary to complete all reclamation operations under this chapter.

(c) The policy shall include a rider requiring that the insurer notify the regulatory authority whenever substantive changes are made in the policy including any termination or failure to renew.

(d) The regulatory authority may accept from the applicant, in lieu of a certificate for a public liability insurance policy, satisfactory evidence from the applicant that it satisfies applicable State self-insurance requirements approved as part of the regulatory program and the requirements of this section.

SECTION 800.70 - BONDING FOR ANTHRACITE OPERATIONS IN PENNSYLVANIA.

(a) All of the provisions of this Subchapter shall apply to bonding and insuring anthracite surface coal mining and reclamation operations in Pennsylvania except that --

(1) Specified bond limits shall be determined by the regulatory authority in accordance with applicable provisions of Pennsylvania statutes, rules and regulations promulgated thereunder, and implementing policies of the Pennsylvania Department of Environmental Resources.

(2) The period of liability for responsibility under each bond shall be established for those operations in accordance with applicable laws of the State of Pennsylvania, rules and regulations promulgated thereunder, and implementing policies of the Pennsylvania Department of Environmental Resources.

(b) Upon amendment of the Pennsylvania permanent regulatory program with respect to specified bond limits and period of revegetation responsibility for anthracite surface coal mining and reclamation operations, any person engaging in or seeking to engage in those operations shall comply with additional regulations the Secretary may issue as are necessary to meet the purposes of the Act.

PARTS 801, 805, 807, 808, and 809 -- [REMOVED]

2. 30 CFR Parts 801, 805, 807, 808, and 809 are removed.

PART 806 -- FORM, CONDITIONS, AND TERMS OF PERFORMANCE BONDS AND LIABILITY INSURANCE -- [AMENDED]

SECTIONS 806.1, 806.11, 806.12, 806.13, 806.15, 806.16, AND 806.17 [REMOVED]

3. SECTIONS 806.1, 806.11, 806.12, 806.13, 806.15, 806.16, and 806.17 are removed.

(Pub. L. 95-87, 30 U.S.C. 1201 et seq.)

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