



United States Department of the Interior



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

Washington, D.C. 20240

OSMRE Policy Advisory: Self-Bonding

Introduction

When Congress enacted the Surface Mining Control and Reclamation Act of 1977 (SMCRA), it identified several purposes for the new law that would help achieve important public interest and environmental goals. Among those purposes were to: establish a nationwide program to protect society and the environment from the adverse effects of coal mining operations; assure the rights of surface landowners are fully protected from such operations; assure that coal mining is conducted so as to protect the environment; and, wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations. 30 U.S.C. § 1202 (a), (b), (d), and (m).

Congress established the Office of Surface Mining Reclamation and Enforcement (OSMRE) to administer the program established by SMCRA for controlling coal mining and to adopt such regulations as necessary to carry out the purposes and provisions of SMCRA. 30 U.S.C. § 1211(a), (c)(1), (2). OSMRE is also charged with assisting the states in the development of coal mining regulatory programs that meet the minimum standards of SMCRA and to also reflect local requirements. 30 U.S.C. §§ 1202(g), 1211 (c)(9). Twenty-four states have coal mining regulatory programs approved by OSMRE. These states have the primary responsibility to implement their approved programs and regulate coal mining within their boundaries subject to OSMRE oversight. OSMRE and the states that have federally approved regulatory coal programs work together to achieve the goals of SMCRA.

Natural resources regulators in the United States have long recognized the importance of requiring financial assurance for reclamation where natural resources extraction occurs. Posted cash or collateral assurance instruments provide a guarantee that an area disturbed by extraction activities will be reclaimed in the event that the operator does not or cannot fulfill its reclamation obligations. Financial assurance is particularly important to ensure reclamation obligations continue to be met should an operator file for bankruptcy. Some state regulatory authorities have allowed companies, under certain circumstances, to meet their financial assurance obligations through “self-bonds,” *i.e.*, legally binding corporate promises that do not rely upon a third party surety or collateralized instruments.

Historically, approximately ninety percent of the coal produced each year in the United States has been used to generate electricity. The U.S. Energy Information Administration (EIA) reported 24 gigawatts of coal-powered electric generating capacity was retired between 2013-2015. An additional 31 gigawatts has been announced for retirement in 2016, which does not include the unexpected power plant closures that have also been announced this year. The EIA has reported the announced retirement of several more gigawatts of coal-powered electric generating capacity each year through 2021.

In the past several months, three of the largest coal mine operators in the nation have filed for Chapter 11 protection under the U.S. Bankruptcy Code, and it is highly likely additional coal companies will seek bankruptcy protection. Like many companies in the natural resources extraction sector, these coal companies were not sufficiently diversified to adjust to the recent market downturn. These same three companies had held approximately 2 billion dollars of unsecured or non-collateralized self-bonds that various states with federally approved SMCRA regulatory programs previously accepted to guarantee reclamation of land disturbed by coal mining. The bankruptcy filings confirm the existence of significant issues about the future financial abilities of coal companies and how they will meet future reclamation obligations.

Some states have recognized the gravity of the situation and are taking action. Colorado has stopped accepting new self-bonds. Virginia is advancing the necessary process to amend its program to remove self-bonding. We understand that other states are working with coal

companies to replace self-bonds with surety bonds or collateral bonds that are legally sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture. Given these challenges and the attendant threats to the public health, safety, and the environment, this policy guidance is intended to promote appropriate regulatory action and adequate financial assurances.

SMCRA allows state regulatory authorities to accept self-bonds as a matter of discretion; it does not require them to do so. State regulatory authorities that have regularly accepted self-bonds may have done so in the past simply because they found that a mining company or its corporate guarantor met minimum eligibility criteria. However, today's market, recent bankruptcy filings, and the projected significant further reduction in the market for coal, raise serious questions related to the use of self-bonding as a tool to adequately protect the public interest and achieve the goals of SMCRA. Therefore, regulatory authorities should exercise caution before allowing any company to self-bond.

Under SMCRA and its implementing regulations, mine operators, even if they meet applicable eligibility criteria, are not entitled to self-bond; the regulatory authorities have discretion about whether to accept self-bonding. Regulatory authorities should exercise that discretion by considering whether it is at all appropriate to allow any self-bonds under current conditions, particularly given current market conditions and the anticipated reduction in future coal demand. In light of current circumstances, including the significant risks of allowing mine operators and permittees to self-bond, OSMRE provides the following policy advisory on self-bonding under SMCRA.

SMCRA Bonding Requirements

After a coal mining and reclamation permit application has been approved by the state regulatory authority, but before the permit is issued, section 509(a) of SMCRA requires that the applicant must file a reclamation bond with the state regulatory authority to ensure the faithful performance of all of the requirements of SMCRA and the permit. 30 U.S.C. § 1259(a). The amount of the bond must be sufficient to enable the state regulatory authority to complete the

reclamation requirements of the approved permit in the event of forfeiture, or if the operator were to otherwise default on its legal obligations for reclamation. The reclamation bond must be provided to the regulatory authority before the mining permit can be issued and must be in place while coal mining and reclamation occurs.

Section 509(c) and (d) of SMCRA provide flexibility in allowing the regulatory authority to accept, at its discretion, different types of financial assurance instruments: including corporate surety bonds, collateral bonds (cash, certificates of deposit, etc.), self-bonds, or alternative bonding systems. 30 U.S.C. § 1259(c), (d).

Under section 509(c) of SMCRA and OSMRE's implementing regulations at 30 C.F.R. § 800.23, self-bonds are legally binding corporate promises without separate surety or collateral that a regulatory authority may accept from permittees who meet certain financial tests. Applicants or their proposed corporate guarantor must, among other things, demonstrate a history of financial solvency and establish that they have been in continuous operation for a minimum period. 30 U.S.C. § 1259(c). The regulations require the permittee to satisfy certain financial tests to be eligible for self-bonding. 30 C.F.R. § 800.23. SMCRA also allows states to establish alternative bonding systems that meet the objectives of the reclamation bond requirements. 30 U.S.C. § 1259(c). State regulatory programs vary as to the financial instruments that they deem acceptable.

OSMRE Policy

In accordance with OSMRE's responsibility to assist the states in achieving proper implementation of their state regulatory programs under SMCRA, OSMRE will more closely review instances in which states accept self-bonds for mining operations to ensure that the mine operators and corporate guarantors have the financial strength to qualify for self-bonding. OSMRE also provides states the following guidance to assist states with their bonding decisions:

Self-Bonding Advisory #1: Each approved regulatory authority has primary responsibility to implement its approved program to protect society, surface landowners, and the environment

from the adverse effects of coal mining and to ensure coal is mined in compliance with all requirements of the permit and the coal mining laws, including bonding. To ensure bonding requirements are being met, and in accordance with OSMRE and federally approved state bonding regulations, regulatory authorities that had elected to accept self-bonds should immediately assess whether companies that are currently self-bonded remain eligible by making a thorough inquiry into the company's financial health utilizing all the tools at their disposal and all pertinent information available. Where a parent or non-parent corporate guarantee is made, the same inquiry into the financial health of the guarantor should be made. In conducting this review, regulatory authorities should read federal and state regulations broadly to make an exhaustive, proactive inquiry into whether any company that is currently self-bonded remains eligible. If the regulatory authority determines that a currently self-bonded coal mine operator is no longer eligible to self-bond or may soon become ineligible to self-bond, the regulatory authority should exercise its authority to require those operators to replace any self-bonds with surety bonds or collateral bonds as those terms are defined in 30 C.F.R. § 800.5(a) and (b). Furthermore, due to the aforementioned issues and industry uncertainties, regulatory authorities are urged to be proactive and pursue an orderly replacement of existing self-bonds.

Self-Bonding Advisory #2: Under SMCRA and OSMRE's implementing regulations, while each approved regulatory authority may choose to accept self-bonds from applicants that meet the eligibility requirements, whether to accept a self-bond is a matter within the regulatory authority's discretion. Given the current conditions of the coal market, the announced retirement of a significant amount of coal-fired power plants this year, the forecasted retirements of coal-fired power plants through 2021, and the approximately \$2 billion in self-bonded obligations previously held by just three companies now in, or recently emerged from, bankruptcy, each regulatory authority should exercise its discretion and not accept new or additional self-bonds for any permit until coal production and consumption market conditions reach equilibrium, events which are not likely to occur until at least 2021.

Self-Bonding Advisory #3: Among other things, Section 509(c) of SMCRA requires an applicant for self-bonding to demonstrate a history of financial solvency and continuous operation to the satisfaction of the regulatory authority. 30 U.S.C. § 1259(c). The federal

regulations at 30 C.F.R. § 800.23 further require the applicant to submit financial statements to provide a showing of financial health. This demonstration of financial solvency and continuous operation must be sufficient to satisfy the regulatory authority that the reclamation plan will be completed and the self-bonded entity will remain solvent for the duration of the surface coal mining and reclamation operation and for a period coincident with the operator's responsibility for revegetation requirements in section 515 of SMCRA, 30 U.S.C. § 1265. With respect to the continuous operation requirement, in situations where a bankruptcy reorganization plan has resulted in the creation of a new company, the new company would need to be in existence for at least five years, as required by 30 C.F.R. § 800.23(b)(2), before it would be eligible for self-bonding. In evaluating the financial solvency requirement, a regulatory authority should always evaluate the present and future financial circumstances of every applicant. This includes carefully evaluating the financial information of a company that is likely to file for, has filed for, or has emerged from, bankruptcy to determine whether it meets the self-bonding criteria. A bankruptcy filing by a permittee, applicant, parent corporation guarantor, or other corporate guarantor, or related entity suggests that there may be serious factual issues as to the company's ability to meet the financial tests in 30 C.F.R. § 800.23(b)(3) and (4). Therefore, prior to approving any self-bond applications (*see* Self-Bonding Advisory #2), regulatory authorities should document how the permittee, applicant, parent corporation, guarantor, or related entity meets all the self-bonding criteria.


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August 5, 2016
Date

cc: Regional Directors
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