Filed: 2/15/2019 1:23:10 PM WEQC

HEINONLINE

Citation:
48 Fed. Reg. 36418 (1983), Wednesday, August 10, 1983,
pages 36241 - 36438

Content downloaded/printed from HeinOnline

Fri Feb 15 15:16:49 2019

-- Your use of this HeinOnline PDF indicates your
acceptance of HeinOnline's Terms and Conditions
of the license agreement available at
https://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

Use QR Code reader to send PDF
to your smartphone or tablet device

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 800 and 806

Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations Under Regulatory Programs; Self-Bonding

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is promulgating new rules on self-bonding pursuant to the Surface Mining Control and Reclamation Act of 1977. States are not required to adopt self-bonding rules. This rule establishes the minimum standards of financial eligibility to self-bond for States that wish to allow self-bonding. The applicant for a self-bond is required to demonstrate at least 5 years of continuous operation and: financial solvency demonstrated by an "A" or higher bond rating; or, a tangible net worth of at least $10 million, plus certain financial ratios; or, ownership of at least $20 million of tangible fixed assets, plus certain financial ratios. The amount of all self-bonds that regulatory authorities may accept would be limited to 25 percent of the applicant's tangible net worth. Several other criteria for self-bonding also are established. A regulatory authority may accept the guarantee of a qualifying parent corporation for its subsidiaries. These rules replace the previous rules which were suspended.

EFFECTIVE DATE: September 9, 1983.

FOR FURTHER INFORMATION CONTACT: Adele Merchant, Office of Surface Mining, U.S. Department of Interior, 1951 Constitution Ave., NW., Washington, D.C. 20240, 202-343-5587.

SUPPLEMENTARY INFORMATION:

I. Background
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.*, in Section 509(c) authorizes self-bonding for States that wish to allow self-bonding for the completion of reclamation work which an operator may fail to perform. The Act requires that an applicant for self-bonding demonstrate to the regulatory authority that it has a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient to self-insure. Pursuant to Section 501(b) of the Act, the Secretary of the Interior must promulgate rules to implement Title V of the Act, of which the self-bonding provision is a part. States wishing to allow self-bonding in their State programs are required to set standards based upon these rules which are no less effective than these rules.

A self-bonding rule, 30 CFR 806.11(b), was first proposed on September 18, 1978 (43 FR 41661 and 41869). The proposed rule would have established general criteria in order for a regulatory authority to accept an applicant's self-bond. Besides the provision required by the Act for an agent to receive service of process, the proposed rules required a demonstration of a history of compliance with the Act, the rules and the State or Federal program over a 10-year period. The criterion for financial solvency proposed was simply that the applicant have a net worth of no less than twice the total amount of bond obligations on all its surface coal mining and reclamation permits. This meant that the total amount of self-bond could not exceed one-half the applicant's net worth. In addition, all parties either owning or having a beneficial interest in the applicant were to execute an indemnity agreement under which each would be jointly and severally liable.

In the final rule of March 13, 1979 (44 FR 14901, 15114 and 15387), the ratio was decreased from one-half of the net worth to one-sixth so as to be more in line with the ratio used by the surety industry. A significant new requirement was added in the final rule. A mortgage or security interest in real or personal property valued at an amount at least equal to the bond was to be granted to the regulatory authority. Another requirement for submission of detailed financial information from an applicant was also added.

A petition to amend the bonding rules was received shortly after the final rules became effective (44 FR 28005, May 14, 1979). One of the sections with which the petitioners were concerned was § 806.11 on self-bonding. The petition was granted (44 FR 51098, September 6, 1979), and on January 24, 1980, a proposed rulemaking notice appeared (45 FR 6028) which dealt with the many comments received on self-bonding and which indicated the somewhat controversial nature of the subject (45 FR 6033). The rulemaking notice (45 FR 6040) proposed to make self-bonding a separate section, § 806.14. Most importantly, only one eligibility standard would have been retained—the applicant would have to have been in continuous operation for 10 years. The net worth to self-bond ratio would have been eliminated. Also, the requirement of a mortgage or security interest was proposed to be dropped.

The final rule, however, published on August 6, 1980 (45 FR 52306), retained the self-bonding rules as they were made final in March 1979. The failure to revise the self-bonding rules precipitated litigation by several groups contending that the rules unduly favored large operators. *National Coal Association and American Mining Congress* v. *Andrus*, Civ. No. 80-2530, and *Pennsylvania Coal Mining Association* v. *Department of the Interior*, Civ. No. 80-2544, both in the U.S. District Court, District of Columbia. A settlement agreement in these matters was entered into in December 1981.

While this litigation was pending, a proposed revision of all the bonding rules was published on September 9, 1981 (46 FR 45082). The proposed revision to self-bonding would have greatly simplified the rules, leaving the adoption of detailed requirements to the States in their programs. Public comments on the proposed revision called for more detailed requirements for self-bonding eligibility, which would have required a substantial change from the proposed rule. In response to the proposed September 9, 1981, self-bonding rule, some commenters requested more detailed Federal guidance for development of self-bonding in State programs. Some commenters believed OSM was doing a disservice to all parties by placing responsibilities on the States to establish self-bond criteria. Some felt that the previous rules should be adopted as the standard of compliance. Other commenters favored publishing minimum standards by which to evaluate State program submittals. Surety companies believed that loosely administered self-bonding programs may preclude surety industry involvement in surface coal mining reclamation bonding.

In light of comments received on the proposed rules and as a result of the agreement reached with the parties in the litigation, OSM suspended, in part, the then-existing self-bonding rules on December 7, 1981 (46 FR 59934). The self-bonding rules in § 806.14 were suspended except for certain general provisions in § 806.14(a), (a)(1), and parts of (a)(5) and (a)(7), which all tracked provisions in Section 509(c) of the Act.

OSM reproposed the self-bonding revisions separately from the other bonding rules on August 20, 1982 (47 FR 36570). Thus, the final revision of the

bonding rules published in a separate final rule consolidated Parts 800, 801, 805, 806, 807, 808 and 809 into one part—Part 800, but did not include provisions related to self-bonding, other than the definition of a self-bond. Under the revised bonding rules (48 FR 32932, July 19, 1983), a "self-bond" means an "indemnity agreement in a sum certain executed by the permittee or the parent guarantor and made payable to the regulatory authority, with or without separate surety."

This rulemaking, which adds the self-bonding rules to 30 CFR Part 800 as § 800.23, establishes more detailed requirements for self-bonding than under the September 1981 rulemaking, but not as many as under the March 1979 rules. The comments discussed in this rulemaking were received in response to the August 20, 1982, proposal.

II. Discussion of Comments and Rules Adopted

General

All self-bonding rules are moved to new § 800.23 in this final rule. The previous suspended and unsuspended self-bonding rules in § 806.14 are deleted and replaced by new § 800.23.

New § 800.23 allows a State to develop a comprehensive self-bonding program to balance the risk of forfeiture versus the benefits to financially sound operators of a self-bonding program. The self-bonding rules establish minimum criteria for allowing an applicant for a surface coal mining and reclamation operation permit to self-bond. States are not required to adopt self-bond rules, but if States choose to allow self-bonding, these rules establish minimum criteria. States choosing to allow self-bonding may adopt more detailed rules that reflect the financial structures of the local industry, if necessary to provide the regulatory authority additional protection from risk of forfeiture.

These final rules establish the following four basic requirements for self-bonding: (1) Continuous operation over a period of 5 years; (2) financial soundness which may be demonstrated by either an "A" or higher bond rating, a tangible net worth of at least $10 million, plus certain financial ratios, or ownership of at least $20 million in tangible fixed assets plus certain financial ratios; (3) submission of a report containing certified financial information and an opinion of an independent certified public accountant based on the applicant's financial statement; and (4) execution of an indemnity agreement. These rules also allow a parent corporation having a controlling interest in a subsidiary which applies for a surface mining permit to guarantee the self-bond of the subsidiary if the parent corporation meets certain requirements.

The self-bonding rules in this rulemaking form the benchmark by which the States can build their own programs if they wish to allow self-bonding of surface coal mining operations. If they choose to allow self-bonding, States can add their own additional relevant criteria. These final rules contain standards general enough to take into account state-specific conditions. A detailed discussion of each of the provisions of the rules and comments received on proposed rules follows.

Section 800.23 Self-bonding

Section 800.23(a)

A new paragraph has been added at § 800.23(a) to define terms specific to the self-bonding rules. Definitions which appeared in various provisions of the proposed rule, and some additional definitions retained from previous rules, are adopted here. These terms are defined: current assets, current liabilities, fixed assets, liabilities, net worth, parent corporation, and tangible net worth. These definitions are necessary to clarify what is meant or required by certain other provisions of § 800.23. Subsequent paragraphs are accordingly redesignated.

The definitions for the terms "tangible net worth," "fixed assets," and "parent corporation" are adopted from proposed §§ 800.23(a)(3)(ii), 800.23(a)(3)(iii) and 800.23(a)(5), respectively, with clarifying changes. "Tangible net worth" means net worth minus intangibles such as goodwill and rights to patents or royalties. "Fixed assets" means plants and equipment but does not include land or coal in place. "Parent corporation" means a corporation which owns or controls the permit applicant.

Two commenters requested the deletion of the proposed phrase "the parent corporation shall have a controlling interest in the applicant." One said that no less liability would fall to that guarantor if it had a 50 percent interest than if it had a 51 percent interest in the subsidiary. Another commenter asked for a definition of "controlling interest."

The final definition of "parent corporation" uses the phrase "owns or controls the permit applicant" rather than the proposed phrase "has a controlling interest." There is no need to define or further specify what is meant by "own or control" because it is unlikely that a corporation will guarantee the self-bond of an applicant unless it assures itself that it can control the activities of the applicant. The assumption of the guarantee by the parent will ensure that the parent has a close direct interest in the success of the applicant.

The definitions for the terms "current assets" and "current liabilities" are retained from previous § 800.5 with clarifying changes. The previous definition of the term "current assets" included cash and assets that are reasonably expected to be realized in cash or sold or consumed within one year. The revised definition of the term expands the period to include conversion within the normal operating cycle of the business. The previous definition of the term "current liabilities" included debt or other obligations that must be paid within a short period of time, usually a year. It also explicitly included dividends payable within one year on preferred stock. The revised definition of the term "current liabilities" includes obligations which are reasonably expected to be paid or liquidated within one year or within the normal operating cycle of the business. With this general definition, there is no need to refer specifically to a particular type of payment, such as a dividend. The definitions of the terms "liabilities" and "net worth" are taken from standard accounting definitions. The word "liabilities" means obligations to transfer assets or provide services to other entities in the future as a result of past transactions. The revised definition of the term "net worth" includes total assets minus total liabilities and is equivalent to owners' equity. This is a more general definition than its predecessor which included preferred and common stock, all surplus accounts and retained earnings.

Section 800.23(b)

Section 800.23(b) was proposed at § 800.23(a). Proposed § 800.23(a) established conditions under which a regulatory authority may accept a self-bond from an applicant for a permit. The rule is based on Section 509(c) of the Act. It is adopted as proposed with some changes. Proposed § 800.23(a)(5) is redesignated § 800.23(c) for clarity as explained later in this preamble under that final rule section.

A commenter suggested changing the phrase in proposed § 800.23(a) "the regulatory authority may accept" to "a self-bond * * * will be accepted by the regulatory authority * * *." The commenter thought that Congress did not intend to allow arbitrary decisions

by the regulatory authority on a case-by-case basis, but only intended to allow regulatory authority discretion in deciding whether to adopt a self-bonding program. The commenter thought that once a program is adopted, the regulatory authority cannot arbitrarily exclude participants.

OSM agrees that the regulatory authority cannot act arbitrarily. However, the language of the Act gives discretion to the regulatory authority on this matter. The regulatory authority needs case-by-case discretion to consider factors particular to a case which may indicate, for instance, that even though the applicant meets the general qualifications of the self-bonding rules, past behavior tending to undercut the soundness of the applicant, or other factors, may dictate refusal. Additionally, under the Act a State regulatory authority is not required to accept self-bonds at all. Use of the word "may" in the final rule recognizes this discretion.

Proposed § 800.23(a) is adopted at § 800.23(b) with the clarification that it is sufficient for either the applicant or the parent corporation guarantor to satisfy the requirements of § 800.23(b)(1) through (b)(4).

Section 800.23(b)(1)

Proposed § 800.23(a)(1) required an applicant for self-bond to designate a suitable agent to receive service of process in the State where the proposed surface mining operation is to be conducted. It is based on Section 509(c) of the Act. No comments were received on this paragraph and it is adopted as proposed, and redesignated § 800.23(b)(1).

Section 800.23(b)(2)

Proposed § 800.23(a)(2) set standards for demonstrating a history of continuous operation as a business entity, as required by Section 509(c) of the Act. It required continuous operation of the entity over a period of 5 years immediately preceding the time of application. Proposed § 800.23(a)(2)(i) allowed consideration of joint ventures with less than 5 years continuous operation if each member had been in continuous operation for at least 5 years. Proposed § 800.23(a)(2)(ii) allowed the regulatory authority to exclude periods of interruption to the operation that were beyond the control of the applicant. Such exclusions were required to be related to the likelihood of continued operation. The provisions of proposed § 800.23(a)(2)–(a)(2)(ii) are adopted at final § 800.23(b)(2)–(b)(2)(ii) with the following changes. A phrase is added to § 800.23(b)(2)(i) to clarify that the 5 years of continuous operation of each member must immediately precede the time of application. Revisions have been made to § 800.23(b)(2)(ii) to clarify that any period of interruption cannot be excluded from the calculation of 5 years of continuous operation if it affects the likelihood of the applicant remaining in business.

Two commenters contended that the requirement for 5 years of continuous operation in proposed § 800.23(a)(2) was too long. One of these said that the 5 year period does not consider years spent planning and developing. The commenter stated that the rule does not make provision for self-bonding during this period and, consequently, the operator would encounter an additional "roadblock" of finding bond elsewhere. The other commenter suggested changing the requirement to 1 year, because this is sufficient time to determine the financial status of the applicant. The commenter felt that meeting the financial criteria, together with the requirement that alternate bond be posted if financial conditions change, assure that reclamation will be completed.

OSM does not agree that a period of less than 5 years would show a history of continuous operation sufficient to authorize self-bonding. This self-bonding program relies heavily on the likelihood that the operator will remain in operation long enough to complete the reclamation plan following mining operations. A period of at least 5 years of continuous operation is necessary to show the business entity's intent and ability to remain in operation and undertake subsequent mining and reclamation.

One commenter asked that the 5 year requirement be waived for subsidiaries with self-bonds guaranteed by the parent corporation. The commenter pointed out that, under Pennsylvania self-bonding rules, a subsidiary can qualify for a self-bond with no time restriction if the parent guarantor demonstrates 10 years of continuous operation.

In § 800.23 (b) and (c), OSM has allowed parent corporations to guarantee self-bonds for subsidiaries. These provisions clarify that this criterion is not applicable to the subsidiary of a parent guarantor if the parent meets the criterion.

One commenter objected to proposed § 800.23(a)(2) because the government in allowing self-bonding is acting as a surety for the public and should require the types of showings a surety would require. In order to establish a high probability that the operator will complete the work, the commenter asserted that the government should study the operator's past compliance history, especially since enactment of the Act. Evidence of a history of non-compliance of cessation orders in particular should be considered. The commenter also said that the 5 year period is arbitrary and that the rule should require continuous operation since August 3, 1976, one year before passage of the Act. The commenter said that the history of continuous operation should antedate the passage of the Act to reflect the ability to maintain operation through passage and implementation of the Act.

OSM agrees that the regulatory authority should consider the operator's past history of compliance and patterns of violation in deciding whether to allow an operator to self-bond. OSM does not intend to establish regulations which would detail how a history of compliance should be judged, however, and leaves this to the regulatory authority who has the final responsibility to accept or reject an application to self-bond.

OSM does not agree that an operator must have been in operation before passage of the Act to show that he or she can maintain operations under the requirements of the Act. The fact that an entity was not yet in existence during the passage and implementation of the Act has little or no bearing on the operator ability to maintain operations under requirements of the regulatory program if it can demonstrate to the regulatory authority a history of continuous operation. To accept such a suggestion would provide an unfair competitive advantage to certain firms that is not rationally related to the goals of the Act.

One commenter approved of the 5 year continuous operation criterion, stating that the previous 10 year requirement was unnecessary. The commenter said the 10 year requirement was based on outdated data from the Small Business Administration which reflected the experience of small, under-capitalized companies. Better indicators of survival are criteria such as capitalization and management.

OSM agrees that the 5 year criterion is sufficient and has adopted § 800.23(a)(2) as proposed, at new § 800.23(b)(2).

One commenter objected to proposed § 800.23(a)(2)(i), allowing joint ventures to self-bond but requiring each member of a joint venture to have five years continuus operation, because joint ventures are "informal amalgamations" of capital and skill combined for a single undertaking. The commenter said that joint ventures are speculative and are

often "the vehicle for circumvention of the provisions of SMCRA." The commenter requested that these applicants be scrutinized and that each entity be required to indemnify the venture.

Although OSM agrees that the regulatory authority should be circumspect when considering joint ventures for self-bonding, joint ventures may be given consideration under this provision. Provisions at § 800.23(e) do require joint and several liability under self-bond indemnity agreements for all who sign, and also that each partner or party with a beneficial interest in the joint venture must sign the indemnity agreement.

Another commenter suggested that the regulatory authority should not have the discretion to disqualify a joint venture under proposed § 800.23(a)(2)(i), each of whose members has been in continuous operation for 5 years.

OSM disagrees. The regulatory authority is in the best position to judge whether a business entity which has been in existence more than 5 years should be given special consideration based on the history of operation of the individual members. The regulatory authority should not accept a self-bond unless it is satisfied that successful reclamation is ensured.

A commenter stated that the standard in proposed § 800.23(a)(2)(ii), for excluding certain periods from consideration when determining the period of continuous operation, is too vague. The commenter cited labor relations problems, interruptions due to storm events, and coal marketing problems as possible obstacles to continuous operation that reflect on the operator's ability to plan and implement an operation. The commenter stated that all information that has a bearing on operator reliability should be studied and weighed according to extenuating circumstances.

OSM agrees that periods of inoperation beyond the applicant's control should be considered in view of the total operation's picture, and weighed according to merit. However, OSM has determined that these various types of interruptions will not be enumerated in the rule, since the list would be extensive and possibly incomplete. The periods of interruption beyond the operator's control may include interruptions due to natural disasters, employee strikes, railroad strikes, and others.

Shutdowns due to market conditions may or may not be beyond the control of the operator. The regulatory authority can assess whether such a shutdown is due in any respect to the applicant's failure to properly manage the operation and whether it relates to the likelihood of the firm remaining in business for a sufficient period to complete the required reclamation.

Another commenter asked that language be added at proposed § 800.23(a)(2)(ii) to allow a subsidiary of a parent guarantor with 5 years continuous operation to qualify for (corporate guaranteed) self-bonding even if the subsidiary has been in operation for less than 5 years. The commenter stated that the proposed rules are not clear on this point.

OSM has clarified this point in the final rules by redesignating proposed § 800.23(a)(5) as § 800.23(c) and by adding language to the introduction of § 800.23(b). The changes clarify that, if the regulatory authority approves, a parent corporation qualifying under § 800.23(b)(1) through (b)(4) may guarantee the self-bond of a subsidiary, even if the subsidiary does not qualify under those paragraphs.

The same commenter suggested that proposed § 800.23(a)(2)(ii) be changed to read: "Periods of interruption to the operation are excluded that were beyond the control. . . . " The commenter said that Congress did not intend to allow such case-by-case discretion to the regulatory authority.

OSM disagrees with this commenter. Section 509(c) of the Act gives discretion to the regulatory authority on whether to accept a self-bond.

Section 800.23(b)(3)

Proposed § 800.23(a)(3) (final § 800.23(b)(3)) established the third condition to be met before a self-bond may be accepted by the regulatory authority. This provision required the applicant to submit financial information in sufficient detail to show that the applicant met at least one of the three financial solvency criteria listed in proposed § 800.23(a)(3)(i), (ii) or (iii). Under the proposal, additional financial solvency tests, such as financial ratios, could have been required by the regulatory authority. The financial criterion at proposed § 800.23(a)(3)(i) allowed a current rating for the applicant's most recent bond issuance of "A" or higher as issued by Moody's Investor Service or Standard and Poor Corporation. Proposed Paragraph (a)(3)(ii) allowed a showing that the applicant had a tangible net worth of at least $10 million. The financial test at proposed § 800.23(a)(3)(iii) was a showing of tangible fixed assets of at least $20 million.

The provisions of proposed § 800.23(a)(3)(i)–(a)(3)(iii) are adopted as proposed at final § 800.23(b)(3)(i)–(b)(3)(iii) except that financial ratios are included in § 800.23(b)(3) (ii) and (iii) in order to provide an extra assurance of financial strength and a relatively easily implemented method of monitoring possible changes in the financial status of an entity. The financial ratios are explained below.

One commenter had numerous objections to the financial criteria requirements in proposed § 800.23(a)(3). The commenter called the proposed criteria "foolhardy" and contended that they avoided the key problem of assuring that the operator will have sufficient unencumbered or unrestricted assets to stand for the work. The commenter said the self-bond should be as effective as a surety bond and that the proposed rules "fail miserably" in this regard. The commenter said that the self-bond should be backed with a pledge of, or priority lien on, unencumbered real or personal property to assure available funds, or that the rule should at least allow this option to the regulatory authority. The commenter said that the criteria of high bond rating, $20 million tangible fixed assets or $10 million net worth have no relation to the existence of and timely access to unencumbered funds. The commenter suggested the use of Standard and Poor or Moody's ratings should be rejected "out of hand." The commenter cited the case of the *Blue Coal Company* discussed at 44 FR 15114–5, March 13, 1979. The commenter contends that Blue Coal Company probably would have qualified under these rules and yet the company went bankrupt. Bankruptcy proceedings can be lengthy and OSM would be an unsecured creditor without priority in such a case. The commenter said that such a potentially large failure can cause more environmental disturbance than numerous small ones.

Although OSM understands the commenter's concerns, the established financial criteria of these rules have a sound basis. OSM agrees that the self-bond should be effective, but does not agree that a pledge of unencumbered real or personal property must be obtained. A pledge of property to secure a bond amounts to a collateral bond which is another available alternative to a surety bond. The purpose of establishing a self-bond program is to recognize that there are companies that are financially sound enough that the probability of bankruptcy is small. A self-bond is allowed both because there are enough assets to allow reclamation in case of bankruptcy, and because there is little probability of bankruptcy. The company that self-bonds signs an indemnity agreement that is a pledge of performance with a promise to pay in

the event of nonperformance, and as such is comparable to a surety bond. The minimum tangible net worth to bond ratio of 4 to 1, required at final § 800.23(d), is intended to assure that where a company self-bonded under these rules becomes bankrupt, sufficient assets are available. This requirement gives some assurance that the regulatory authority would be able to recover funds owed under the indemnity agreement. OSM is aware that bankruptcy proceedings are lengthy and do not have great likelihood for successful total recovery by creditors. The criteria in final § 800.23(b)(3)(i)–(iii) are intended to avoid, to the extent reasonably possible, the acceptance of a self-bond from a company that would enter bankruptcy.

The financial showings required by these rules are such that only well-established, financially sound companies will qualify to self-bond. The Environmental Protection Agency (EPA), in its study of financial tests for owners and operators of hazardous waste facilities, mentions a National Association of Accountants report that found that the failure of firms with a tangible net worth of $10 million or more was "sharply lower" than for other firms (Backer and Gosman, 1978). To increase the likelihood that self-bonds are received only from financially sound firms, OSM is adding requirements for applicants to show certain ratios in order to qualify under the $10 million net worth criterion and under the $20 million fixed assets criterion. A ratio of total liabilities to net worth of 2.5 or less is required. This will assure that the entity is not over-extended, that is, that the debts of the entity are not disproportionate compared to the entity's assets. A ratio of current assets to current liabilities of 1.2 or more is added to assure reasonable liquidity of the company. (The derivation of these specific ratios is explained below.) The added requirement to show ratios will also provide an easily monitored indicator of financial changes in a self-bonded entity. The regulatory authority can thus be forewarned that a replacement bond may be necessary, before a company reaches a point where it is no longer bondable through conventional sources, such as a surety bond or a letter of credit. The ratios will be of particular significance for companies qualifying under the $20 million fixed assets criterion, since the ratios will indicate the asset position of the company.

A rating by Standard and Poor's or Moody's of "A" or higher under § 800.23(b)(3)(i) and a tangible net worth of at least four times the bond amount under § 800.23(d) together will assure a low risk of company bankruptcy for those companies choosing to qualify under § 800.23(b)(3)(i), rather than under § 800.23(b)(3) (ii) or (iii). In order to rate the bond issuance of a company, these ratings services do thorough studies of the financial records of the issuing firms to determine ability to repay the bonds. The services are relied upon heavily by creditors and maintain a high rate of predictive success.

This same commenter suggested two alternative approaches to self-bonding rules: 1) Require financial analysis of the applicant for 2 years prior to application to document equity sufficient to assure reclamation, and segregate assets and keep them unencumbered and liquid; or 2) require a security interest or property mortgage. The commenter suggested adding the requirement that the operator give full disclosure of other relevant financial obligations. The commenter said national holdings should not be considered because interstate bond forfeitures are often unsuccessful and costly. The commenter cited *Huntington v. Attrill*, 146 U.S. 65 (1892), stating that under this case it is "probable that penal judgments are not entitled to full faith and credit by sister states."

OSM in promulgating new self-bonding rules has attempted to establish a workable system that provides an acceptable degree of risk and a manageable degree of administrative requirements. The first alternative suggested above would add considerably to the paperwork and financial analysis expertise required to implement a self-bonding system. The second alternative would effectively reestablish previous self-bonding rules, that is, they would represent another type of collateral bond. The Act, at Section 509(c), intends that an unsecured self-bond should be an alternative available to the regulatory authority for consideration in a bonding program. OSM agrees with the commenter that full disclosure of other relevant obligations would be helpful, but does not intend to require this in rules. These other obligations will be figured into its liabilities when calculating the applicant's net worth. OSM believes it is sufficient to require at new § 800.23(d) that the applicant's net worth be represented by assets located in the United States and has added this requirement. A judgment obtained as a result of the indemnity agreement is not a penal judgment since the amount would only be commensurate with the actual costs involved in completing the reclamation. No penal sum is involved in executing on an indemnity agreement unless pre-existing State law provides otherwise.

The same commenter asked how the proposed rules would provide for reclamation in the event of bankruptcy, and what would be the status of the regulatory authority? The commenter asked how a corporation can be monitored in the case of a rapid decline in financial health and what can be done?

In the event of bankruptcy, the regulatory authority would probably be in the position of unsecured creditor. Typically, the regulatory authority would have to go through bankruptcy proceedings to secure payment on the indemnity agreement. Bankruptcy proceedings are often lengthy and involved, and the regulatory authority could have to settle on less than 100% payment on the indemnity agreement. The regulatory authority may be left with insufficient funds to complete the reclamation plan and may have to obtain funds elsewhere to do so. For these reasons, it is important for the regulatory authority to monitor the self-bonded entity closely, examining financial statements as necessary and requiring replacement bond when any of the conditions of self-bonding no longer hold. OSM has added a provision at § 800.23(f) to allow the regulatory authority to require that the self-bonded applicant or parent guarantor supply annual updates of financial information to the regulatory authority. OSM has added the requirement to show certain financial ratios at § 800.23(b)(3) (ii) and (iii) to give greater certainty of the financial soundness of the entity and to give the regulatory authority a method by which to monitor changes in the financial status of the self-bonded entity or parent guarantor.

Monitoring of these ratios should help to allow the regulatory authority sufficient warning so that the self-bonded entity can be required to find a suitable replacement bond while its financial condition is still strong enough to qualify the entity for a surety or other type of bond. The regulatory authority could get some signal of a financially troubled company if on-site inspections reveal that reclamation is not contemporaneous. Through the enforcement mechanism, the regulatory authority may be alerted to a decline in a company's financial health as it occurs and can act then to demand other bond.

A regulatory authority stated that the requirement of proposed § 800.23(a)(3) severely limited the number of qualifying operators and that OSM should consider lowering the required

net worth and tangible fixed assets requirements because proposed § 800.23(b) provided real protection by limiting bond amounts to 25 percent of the applicant's net worth.

OSM realizes that the criteria of final § 800.23(b)(3), particularly with the added financial ratios, limit somewhat the number of qualifying applicants, but has not received any information which would indicate that lower limits would provide an acceptable degree of risk against operator failure. Therefore, the requirements are adopted.

One commenter supported the proposed financial indicators as sound and believed they "will provide a workable and reliable approach for rating the creditworthiness and financial health of self-bond applicants." The commenter said that "applicants that satisfy these requirements are almost by definition on-going enterprises with sufficient financial capacity to assure performance of reclamation." Another commenter generally favored the proposed rules but said that "the determination of ability to self-bond should emphasize the financial strength of the applicant and not its size." The commenter said that criteria should include such items as the applicant's bond rating, liabilities to net worth ratio, and audited financial statements, and that the test for solvency should not be based solely on net worth or fixed assets as the rule would allow. A third commenter suggested that OSM adopt self-bonding rules similar to Pennsylvania's. Under Pennsylvania's rules the operator must submit audited financial statements for the three most recent years, the applicant cannot have defaulted on significant obligations for 3 years, and the applicant must demonstrate that forfeiture of bond amounts would not materially affect the ability to stay in business or endanger cash flow. The regulatory authority can also require collateral.

In response to comments, OSM has decided to add the requirement to show financial ratios, based on the requirements for EPA's financial assurance rules for closure and post-closure of hazardous waste facilities, and the background documents supporting those rules. EPA studied various ratios of bankrupt and non-bankrupt firms to determine which ratios have high predictive success for filing for bankruptcy. As a result of this study, in its rules published April 7, 1982, EPA requires that an owner or operator of a hazardous waste facility who wishes to pass a test for financial assurance have two of three listed ratios, among other financial qualifications (47 FR 15032). OSM has adopted two of these ratios in these final rules, with modifications based on industry ratio averages for the coal industry which were supplied by Dun & Bradstreet (Dun & Bradstreet, 1983).

For applicants qualifying by meeting the $10 million net worth or $20 million fixed assets criteria, a current assets to current liabilities ratio of 1.2 or greater is required, and a total liabilities to net worth ratio of 2.5 or less is required. These are slightly less restrictive than EPA requirements because OSM is not allowing a choice of 2 out of 3 ratios as does EPA, and also because the Dun & Bradstreet industry ratios indicate that these figures better reflect industry norms for coal mining companies with $10 million net worth or $20 million fixed assets.

OSM is attempting to provide self-bond rules which will allow unsecured self-bonds without requiring that the regulatory authority employ experts in financial analysis to determine which parties should be allowed to self-bond. Although the suggested Pennsylvania plan may be a viable plan in some States, OSM does not wish to impose such a plan nationwide since it would seem to require such expertise in financial analysis as mentioned above. These final rules, although they do not require collateral, allow the regulatory authority to require collateral if it wishes. Also, at final § 800.23(b)(4) OSM is requiring the financial statements described below.

One commenter objected to proposed § 800.23(a)(3)(i) and stated that, although this criterion may have been aimed at operators with net worth less than $10 million and fixed assets less than $20 million, the bond rating criterion is not applicable for most independent mine owners.

OSM realizes that most independent mine operators that are not heavily capitalized will not issue bonds and will not be rated by Moody's or Standard and Poor's and that they will probably not qualify for a self-bond under these rules. However, OSM believes that its self-bond program must be workable and must provide for unsecured self-bond only for qualified entities which provides a high degree of risk protection to the regulatory authority. These rules promulgated today provide such a system.

A regulatory authority asked that proposed § 800.23(a)(3)(i) make clear that an operator who does not qualify under the bond rating criterion can be underwritten by a State reclamation fund; or OSM should make clear that State alternative bonding systems established under Section 509(c) of the Act are exempt from these self-bonding standards.

An alternative bonding system proposed under Section 509(c) of the Act, and reviewed by the Secretary for approval or disapproval, is judged on its own merit and in light of the State's total bonding program. An alternative bonding system must meet the requirements of Section 509(c) of the Act and 30 CFR 800.11(e) in order to be approved by the Secretary.

A commenter felt that at proposed § 800.23(a)(3)(ii), intangible net worth should be allowed to be included in this test since it offers a "valid and appropriate" indication of net worth. Also, the proportion of intangible worth to tangible property is "fairly insignificant." The commenter also wanted clarification of the meaning of assets minus liabilities in determining net worth, since the commenter calculates this to be zero.

Intangible items include goodwill, patents and royalties, and trademarks, are difficult to evaluate and liquidate, and therefore will not be allowed in the calculation of net worth, except when figuring ratios that consider net worth. These intangibles are not allowed in the calculation of the $10 million net worth criterion or in the calculation for the net worth to bond amount ratio. These criteria become important in the event of a default on a self-bond. The definition of "tangible net worth" is moved to final § 800.23(a)(7).

As to the calculation for net worth, the basic accounting equation is: Assets equals liabilities plus owners' equity. Therefore, net worth is equivalent to owners' equity. As described earlier, a definition of net worth is included in final § 800.23(a).

One commenter stated that the fixed assets measure at proposed § 800.23(a)(3)(iii) provides no assurance of the applicant's financial strength and does not assure any net worth. Secured parties would claim collateral, leaving little for bond payment.

Fixed assets of $20 million assures lender confidence in the applicant's business ability or that the applicant is well-capitalized. Besides this qualification, the applicant would need to have a net worth of at least four times the applicant's total self-bond obligations to qualify. Also, the above-described requirements for financial ratios provide an acceptable degree of risk from bankruptcy and, in the case of bankruptcy, help to assure that assets, when liquidated, will provide funds sufficient to cover bonded amounts.

Three commenters, including two regulatory authorities, recommended that the restrictions on land and coal in place be deleted from proposed § 800.23(a)(3)(iii). They said that these items have significant value and can be easily appraised. One of the commenters said that only land and coal under permit should be deleted.

Unimproved land will not be allowed in the fixed assets calculations because values are subject to great variation and appraised values are often unreliable. Coal in place is not easily liquidated and its value depends on mining and market conditions, and therefore it is not included. The definition of "fixed assets" has been moved to final § 800.23(a)(3).

Section 800.23(b)(4)

Proposed § 800.23(a)(4) (final § 800.23(b)(4)) established requirements for financial reports based on the applicant's financial statements for the latest completed fiscal year and would have required an independent certified public accountant (CPA) to provide an opinion of the applicant's ability to meet all obligations under the reclamation plan. The changes made to the proposed rule are discussed below with the relevant comments.

Several commenters felt that the requirement for an independent CPA's opinion on the applicant's ability to meet future obligations should be deleted. One of these commenters spoke for the American Institute of Certified Public Accountants (AICPA). This commenter's concerns were generally repeated by the others. This commenter said that CPA's are required by the AICPA's Code of Professional Ethics to adhere to generally accepted accounting standards when preparing an audit of a company's records. The audit does not predict the outcome of future events, but only establishes an opinion as to whether the financial statements give a fair assessment of a company's financial picture at the time of the opinion.

Another of the commenters suggested that language be added to read "* * * and the accountant's opinion of the applicant's ability *on the date of the opinion,* to meet * * *"

OSM recognizes the merit of these comments and has revised the language of final § 800.23(b)(4) to delete the requirement for a certified public accountant's opinion on the applicant's ability to meet future obligations. Instead, the independent CPA's audit or review opinion is required on the accuracy of the information in the financial statement.

One commenter said that the requirement in proposed § 800.23(a)(4) to include any specific information requested by the regulatory authority was "vague, unreasonable and arbitrary." The commenter suggested this language: "The report shall include all of the specific financial information set forth above in these self-bonding regulations." Another commenter suggested changes to clarify what would be required in a CPA report. The language could read: "The applicant submits a statement of net worth or tangible fixed assets that is certified by an independent certified public accountant * * *." A third commenter suggested that the rule should require a standard audited report and that any additional information requested by the regulatory authority not contained in the audited certified financial report could be submitted unaudited. The commenter said that for large firms, audited statements are easily obtainable since they are filed with the Securities and Exchange Commission (SEC), but it is unreasonable to require that additional specific information be audited separately. This commenter suggested that proposed § 800.23(a)(4) be changed to read:

> The applicant submit[s] a report prepared by an independent certified public accountant in conformity with generally accepted accounting principles, examining the applicant's financial statements for the latest completed fiscal year. Any additional specific financial information requested by the regulatory authority, which is not contained in the certified financial report, may be submitted unaudited.

OSM realizes that the language of the proposed paragraph was lacking and that it was unclear. OSM has clarified final § 800.23(b)(4) with editorial changes and by adding language. Proposed § 800.23(a)(4) has been divided into separate paragraphs in final § 800.23(b)(4) (i), (ii), and (iii). Final § 800.23(b)(4)(i) requires that the applicant submit a financial statement for the latest complete fiscal year accompanied by a report by an independent certified public accountant and containing the accountant's audit opinion or review opinion. The audit opinion is required in certain reports filed with the SEC by many large corporations. The review opinion is allowed to save the expense of an audit opinion to those companies that do not submit annual reports to the SEC. The review opinion gives equivalent protection to the regulatory authority. If either opinion contains an adverse opinion, the self-bond application must be denied.

Final § 800.23(b)(4)(ii) requires that for current fiscal year quarters that have ended and for which a CPA opinion has not yet been obtained because the fiscal year has not yet ended, unaudited financial statements must be submitted to the regulatory authority along with the opinion required in § 800.23(b)(4)(i). This will provide the regulatory authority with a current picture of the financial state of a company that is in the middle of a fiscal year.

Final § 800.23(b)(4)(iii) requires the applicant to submit additional information required by the regulatory authority, but allows this additional information to be submitted unaudited.

Section 800.23(c) (proposed §800.23(a)(5))

Proposed §800.23(a)(5) would have given the regulatory authority the option to allow a parent corporation guarantor to guarantee the self-bond of a subsidiary, if the parent qualified under the self-bonding rules. This paragraph has been adopted as final §800.23(c), and the language changed to clarify that an applicant need not qualify under new §800.23 (b)(1) through (b)(4) if the self-bond is guaranteed by a qualifying parent corporation guarantor. Proposed §800.23(a)(5) (i), (ii) and (iii) are adopted as final §800.23(c) (1), (2), and (3), respectively, and establish the terms of the corporate guarantee. The parent corporation is required in these final rules to meet all self-bonding qualifications of §800.23 (b)(1) through (b)(4). A self-bond guaranteed by a parent corporation guarantor is subject to all requirements of §800.23.

One commenter suggested that proposed §800.23(a)(5) be redesignated as §800.23(b) and revised to make clear that a corporation guarantee is not always required, but is an available alternative. OSM agrees that this provision should appear in a separate paragraph for clarity, and has changed the rule accordingly from the proposed, and redesignated it §800.23(c).

A commenter suggested a change at proposed §800.23(a)(5) to read "the guarantor *and not the applicant* meets the conditions" to clarify that the tests apply to the guarantor and not the subsidiary. Another commenter said that the rules should allow self-bonding for subsidiaries if the parent meets the qualifications and guarantees the subsidiary's self-bond.

OSM agrees that if the parent corporation qualifies and is willing to guarantee the subsidiary's self-bond, the subsidiary need not pass the financial tests in §800.23(b)(3). OSM has clarified this in the final rules.

Three commenters recommended allowing "third party" guarantees rather than just parent corporation guarantees.

One felt that requiring a corporate guarantee is arbitrary and unreasonable. Another said OSM gives no reason for restricting such guarantees only to the parent corporation. Another said that the guarantor may not be a corporation. A regulatory authority said that utility companies should be allowed to guarantee permittees with whom they have contractual agreements.

OSM does not agree that a third party guarantee will give sufficient assurance of a strong, direct interest in the successful mining and reclamation operations of the guaranteed party. Only a parent corporation that actually owns or controls the applicant has the necessary influence to affect management decisions of the operator and is able to supply quickly needed capital, labor or expertise in case of problems. For this reason the requirement that a guarantor be a parent corporation has been retained. Other forms of bonds by third parties must meet the surety requirements for surety bonds.

Section 800.23(c)(1)

Proposed § 800.23(a)(5)(i) provided that, if the applicant failed to complete the reclamation plan, the guarantor would do the reclamation or would be liable under the indemnity agreement to provide the funds for the regulatory authority to do so. There were no comments on this paragraph but language is added to clarify that the parent guarantor is liable to complete the reclamation plan or provide funds sufficient to complete the reclamation, but "not to exceed the bond amount." Otherwise, it is promulgated as proposed as final § 800.23(c)(1).

Section 800.23(c)(2)

Proposed § 800.23(a)(5)(ii) provided for cancellation of the corporate guarantee of the applicant's self-bond if notice was sent to the applicant and to the regulatory authority at least 90 days before cancellation, and the regulatory authority accepts the cancellation. The paragraph is adopted as proposed in final § 800.23(c)(2).

One commenter suggested changing "corporate guarantee" to "third-party guarantee" consistent with the commenter's suggested change to proposed § 800.23(a)(5). OSM has rejected this request consistent with the explanation under new § 800.23(c) above.

Section 800.23(c)(3)

Proposed § 800.23(a)(5)(iii) established the condition under which the regulatory authority could accept the cancellation of the corporate guarantee. Suitable replacement bond was required to be in place before the cancellation date.

No comments were received on this paragraph. However, language has been added, consistent with new bonding rules for surety bonds at § 800.20(b) (48 FR 32932, July 19, 1983), to allow for cancellation of a corporate guarantee if the bonded area has not yet been disturbed and the regulatory authority approves. Otherwise, it is promulgated as proposed as final § 800.23(c)(3).

Section 800.23(d) (proposed § 800.23(b))

Proposed § 800.23(b) is adopted as § 800.23(d). The proposed paragraph required that the total amount of self-bonds posted and/or guaranteed by a firm cannot exceed 25 percent of tangible net worth of the firm. The proposal has been adopted with the change discussed below.

Several commenters thought the required net worth to bond ratio was too high. One said that independent small operators would not qualify "without having to financially involve others."

Two commenters thought that a 50 percent requirement was better. One commenter suggested 100 percent, or a 1 to 1 ratio of net worth to bond amount. One commenter requested deletion of this requirement altogether because proposed § 800.23 (a)(1) through (a)(4) establish the applicant's financial well-being. The commenter called the requirement "arbitrary, unreasonable and capricious."

One commenter thought the proposed net worth to bond ratio was not high enough, and that it was arbitrary. This commenter suggested retaining the previous requirement of a 6:1 ratio of net worth to bond amount, to be more in keeping with the rates used by the surety industry.

Although the requirements of these rules are such that only well-established, financially solvent business entities will qualify for self-bonding, there is always an element of risk involved in underwriting the obligations of such companies. The 25 percent restriction provides a financial cushion, in the event that a self-bonded entity should fail, to allow the regulatory authority to attempt to recoup self-bonded amounts from the assets of the bankrupt entity. A 6 to 1 ratio is considered overly restrictive, especially in light of other required financial tests.

Two commenters asked for clarification of whether all self-bonds of the applicant are considered in determining the net worth to bond ratio. One asked whether the paragraph meant only the self-bonds written to the regulatory authority in the State, and the other commenter questioned whether it meant just those for surface coal mining operations.

OSM has modified the language of the paragraph to clarify that all self-bonds of the applicant for surface coal mining and reclamation operations shall be considered and that, to facilitate recovery of self-bonded amounts in the event of bankruptcy, net worth must be net worth in the United States. Self-bonds for other types of operations are not considered because they will be included as liabilities on the applicant's balance sheet.

One commenter asked that a ratio of 4 to 1 tangible net assets to bond amount be allowed instead of a 4 to 1 net worth to bond amount. The commenter said this gives greater opportunity to self-bond at no added risk to the regulatory authority.

OSM disagrees. A tangible net assets to bond amount ratio of 4 to 1 could allow a company with a low net worth to qualify, which would afford less protection to the regulatory authority.

One commenter said that OSM should specify that a company which does not qualify for self-bonding would not have to pass a net worth test to use a collateral bond, surety bond or letter of credit.

Although a company need not pass a net worth test to use a collateral bond, surety bond or letter of credit under the federal bonding rules, OSM does not agree that language is needed in § 800.23 to clarify this. Separate requirements are established in 30 CFR Part 800 for each of these bonding options which do not include a showing of net worth to bond amount ratio.

Section 800.23(e) (proposed § 800.23(c))

Final § 800.23(e), which was proposed as § 800.23(c), establishes the requirement for submittal of, and sets terms for, an indemnity agreement. Section 800.23(e) specifies who is required to sign the indemnity agreement and what rights the regulatory authority acquires by its acceptance. The indemnity agreement specifies the amount of the bond and specifies the applicant's and other parties' liability in the event of forfeiture.

No comments were received on the introductory provision of proposed § 800.23(c), which required an indemnity agreement to be submitted, and it is adopted as proposed as the introductory language in final § 800.23(e).

Section 800.23(e)(1)

Proposed § 800.23(c)(1) required that the indemnity agreement must be executed by all parties who are bound

by it. Such an agreement would be a joint and several obligation of the parties. This provision is derived from previous § 806.14(a)(6) (iii).

A commenter suggested a language change to read: "The indemnity agreement shall be executed by all persons and parties who are bound by it and where two or more persons or parties are involved, the regulatory authority shall allow each party to provide separate financial assurance for its proportionate share of the reclamation obligation, provided that the total of such assurance is sufficient to accomplish reclamation."

The commenter said that joint and several liability should not be imposed on joint ventures, since that would amount to one participant underwriting the bond of another.

To achieve the goals of these rules, joint and several liability should be imposed on joint ventures. A joint venture is often established for the purpose of a single business undertaking and OSM needs assurance that all the participants will have an incentive to hold the venture together through all surface coal mining operations on a self-bonded permit.

Proposed § 800.23(c)(1) is adopted as proposed as final § 800.23(e)(1), with one change to clarify that the parent corporation guarantor is required to sign the indemnity agreement.

Section 800.23(e)(2)

Proposed § 800.23(c)(2) pertained to corporations and parent corporation guarantors entering into an indemnity agreement. It required that the indemnity agreement be signed by two corporate officers and supported by the corporation's board of directors. It was taken from previous § 806.14(a)(6)(i)(A).

One commenter recommended deletion of proposed § 800.23(c)(2) since OSM would not lose much protection because the requirements are contained in § 800.23(c)(1). The commenter said also that it is impractical to obtain the consent of the board of directors and suggested that the provision, if retained, be changed to read "* * * and supported by documentation of such authority acceptable to the regulatory authority." Two other commenters suggested similar changes.

OSM has adopted the requirement for signature by two authorized corporate officers. However, OSM agrees with the commenters that documentation of the corporate officers' authority to bind the corporation is sufficient and the corporation's board of directors need not sign an individual letter of consent. The paragraph is revised accordingly.

Two commenters recommended that an indemnity agreement be accepted with only one signature by an authorized corporate officer.

OSM does not consider it a burden on the corporation to obtain the signatures of two corporate officers on the indemnity agreement. For such an infrequent and important action, the approval of two corporate officers will better assure that the corporation and OSM are protected from possible unauthorized actions of an individual. This requirement is retained. The paragraph is revised as explained above and included as final § 800.23(e)(2).

Section 800.23(e)(3)

Proposed § 800.23(c)(3), adopted as § 800.23(e)(3), specified requirements for applicants which are partnerships, joint ventures and syndicates. Each partner and each member of a joint venture of syndicate with a direct or indirect beneficial interest in the applicant was required to be bound by the agreement. The provision was based on previous § 806.14(a)(6)(i)(C) and (iv). It is adopted as proposed.

A commenter recommended deletion of this provision because proposed § 800.23(c)(1) contained everything in proposed Paragraph (c)(3).

OSM has rejected this suggestion because this provision clarifies who is to be bound by the indemnity agreement.

Another commenter considered this provision too broad because it binds persons who do not necessarily have control in the company.

The purpose of the provision is to bind persons who do not necessarily have total control. In the types of ventures listed, it is not uncommon that no one person has controlling capability.

Section 800.23(e)(4)

Proposed § 800.23(c)(4) established the requirement for the applicant or parent corporation guarantor to pay the regulatory authority, upon forfeiture, the sum necessary to complete the reclamation plan. The provision required that, if permitted under State law, the indemnity agreement when under forfeiture would operate as a judgment against the liable parties. It is adopted in § 800.23(e)(4) with the changes described below.

Two commenters suggested adding a provision to allow the applicant or guarantor to complete the reclamation plan to avoid being required to pay, consistent with proposed § 800.23(a)(5)(i) and previous § 808.11. Two commenters suggested limiting the amount of bond forfeiture, not to exceed the face amount, or "not to exceed the bond amount . . . pursuant to § 800.14 . . ." necessary to complete the reclamation plan. This would clarify the limit of liability under a self-bond, consistent with limitations on liability for other bond types.

OSM agrees with these commenters and has revised final § 800.23(e)(4) accordingly. The reference to previous § 808.13 in the first sentence of the proposed paragraph is changed to new § 800.50 in the final rule.

Two commenters requested deletion of the last sentence of proposed § 800.23(c)(4). They said that confession of judgment is supported by law only in some States, and since it cannot be applied uniformly, it must be deleted. One added that it is prohibited in some States and that a permittee might contest an order of forfeiture.

OSM disagrees with these commenters. With this provision, States which are permitted to do so can obtain funds more expeditiously, especially in case of a bankruptcy.

Section 800.23(f)

A new paragraph is added at § 800.23(f) in response to a comment, and to assure regulatory authorities the means by which to monitor the continued financial health of a self-bonded applicant or a parent guarantor.

A regulatory authority asked how it will know that the financial conditions under which the self-bond was approved have changed. The commenter suggested requiring annual submission of proposed § 800.23(a)(4) requirements and immediate notification of a change in conditions, since permit review may only be required at mid-term.

OSM agrees that the regulatory authority could need annual updates of the financial information of the self-bonded applicant or parent guarantor and has added a new paragraph at § 800.23(f) to give regulatory authorities flexibility to require this. It is important that the regulatory authority have access to these financial data in order to monitor the financial health of the entity. The commenter's suggestion for immediate notification of a change in conditions is addressed in new § 800.23(g).

Section 800.23(g) (proposed § 800.23(d))

Proposed § 800.23(d) is adopted as final § 800.23(g). Proposed § 800.23(d) required that, if the financial conditions of the applicant or guarantor changed at any time during the period the self-bond was posted, so that they did not meet required conditions, the permittee must, within 90 days, post an alternate form of bond. If suitable substitute bond was not obtained, provisions of § 800.16(e)

would apply. The provision is adopted as proposed with an addition which requires that the self-bonded firm notify the regulatory authority of a change in financial conditions where the self-bonded applicant of parent guarantor no longer meets the required conditions.

A commenter suggested changing "parent corporation guarantor" to "third party guarantor" consistent with the commenter's suggestion to allow a guarantee by a party other than a parent corporation. OSM has denied this request as explained in the discussion of final § 800.23(c).

The requirement to notify the regulatory authority immediately of a change in conditions whereby financial criteria are no longer met, has been added in response to the comment discussed under § 800.23(f) above and consistent with requirements at new § 800.16(e)(1) of the permanent bonding program.

General Comments

Comments that do not relate to any specific section of the rule are summarized and discussed below.

One commenter suggested a change to the definition of self-bonding to allow for an indemnity agreement executed by a third party since proposed § 800.23(a)(5) allowed a parent corporation guarantor. The commenter also suggests deletion of "with or" from "with or without separate surety" to reflect the true meaning of self-bond.

OSM agrees with the first suggestion and has made a change to the definition of self-bond to reference the parent guarantor. Since the definition was not included in this proposed rulemaking notice, the change has been incorporated in the final rulemaking notice for the bonding rules. However, OSM will not adopt the second suggestion because the regulatory authority has the discretion to require separate surety on a self-bond even though these rules do not require such separate surety.

Several commenters were generally opposed to the proposed new self-bonding rules, for various reasons. Two commenters said that the rules favor large operators and do not consider small and medium-size operators who may have a sound financial footing.

OSM realizes that some small and medium-size operators who are financially sound will be excluded from the self-bonding option under these rules. In order to allow such companies to be considered for self-bonding, detailed rules would have to be established and an elaborate review system would have to be used to study financial statements on a case-by-case basis. Expert financial analysts would have to be retained for this purpose in each regulatory authority office that adopted self-bonding. OSM has determined that, at this time, these final rules which establish simpler, although rather stringent, criteria are preferable.

One commenter felt that earlier self-bonding rules are appropriate and that the proposed rules do not contain enough disincentive to avoid non-compliance or enough protections against insolvency. If insolvency occurs, the commenter asserted, taxpayers would have to pay for reclamation. The commenter said that State-specific conditions, local industry structure, and consideration of small companies should have little bearing on self-bonding rules. The Act was meant to establish national standards to assure mined land reclamation.

The rules promulgated today establish national standards which allow only well-established, financially sound companies to qualify for self-bonding. While there is still some degree of risk since the self-bonds are no longer required to be backed by secured property interests, there are controls established to warn of changes in the financial position of self-bonded parties. The degree of risk of self-bonded operator insolvency is considered small. In the event a self-bonded operator becomes bankrupt, there is a chance that the regulatory authority would not be able to collect sufficient funds on the indemnity agreement to complete the reclamation plan. In such cases, the burden could ultimately fall on taxpayers to supply funds for reclamation. However, the potential savings to operators by allowing self-bonding, and, by the establishment of stringent eligibility criteria, the small risk of operator default may make it worthwhile to consider taking such a risk.

The regulatory authority in deciding whether to allow an applicant to self-bond should bear in mind that the reclamation plan must be completed, even if funds are unavailable from the self-bonded applicant under the indemnity agreement.

One commenter opposed the proposed rules because they ignore historic dialogue on the impact of self-bonding on the surety industry, on the States' ability to make good the reclamation on such bonds, and on the quality of the mining environment. The commenter said that the net result of the rules could be that the surety industry will withdraw from coal operation reclamation bonding.

While OSM is aware of the previous dialogue on the possible impact of self-bonding rules on the surety industry's willingness to bond coal mine operations, OSM has weighed the stringency of eligibility criteria versus surety industry unwillingness to write reclamation bonds for only those companies which would not qualify for self-bonding. OSM has struck a reasonable balance in the eligibility criteria adopted here. It is the intent of Section 509(c) of the Act to allow for self-bonds under financially safe circumstances and only if the regulatory authority wishes to allow self-bonding. OSM is obliged to establish regulations in line with the intent of Section 509(c). At the same time OSM has amended its overall bonding program to consider the concerns of the surety industry and to allay, where possible, surety objections to certain of the requirements of the bonding regulations. For example, the new bonding regulations allow separate bonds to be posted for separate phases of bonding, so that an operator can obtain surety bonding for backfilling, regrading and drainage control requirements, and can post other types of bond for the long term phases of reclamation. Therefore, while some of the larger coal mine companies may be withdrawn from the pool of possible surety-bonded operations, more flexible general bonding provisions will allow sureties to consider bonding for some companies that would not have qualified for surety bonding under previous rules.

Several commenters generally favored the proposed new rules, with some changes suggested which are discussed with the specific provisions. One called the proposed rules a great improvement over "needlessly detailed" previous rules and "preferable to the lack of direction" in the proposed September 9, 1981, self-bonding rules. One said the proposed rules present a "viable and effective self-bonding mechanism" and go a long way toward assuring a "realistically and reasonably available" system to qualified operators.

OSM agrees that these rules are preferable to previous rules and proposals. However, States wishing to strengthen these rules by requiring a security interest in property for example, or States not wishing to allow self-bonding at all, may do so.

Two commenters objected to the amount of flexibility that the proposed rules would give to the States. One said that the discretion afforded the States contravenes congressional intent for nationwide standards so that States cannot use concessions to operators to attract them to the State. The other commenter said that this flexibility ignores the fact that self-bonding is

unpopular among the States and the surety industry. The commenter called the rules unacceptably lax with potentially disastrous economic and environmental impacts. This commenter stated that the regulatory authority does not really have the discretion to deny self-bond to a qualified applicant in States where laws can be "no more stringent than" OSM rules. The commenter said that bonding is of national significance and needs national standards, and urged OSM to retain previous standards or strengthen proposed ones. The commenter said that political pressure on the States to provide the flexibility of self-bonding is contrary to Section 101(g) of the Act because it may result in competition in interstate commerce. The commenter called OSM's claim of rules that form a benchmark "legally erroneous since OSM must fully implement Title V."

The self-bonding rules promulgated today set standards that are based on observations of the national business and mining community. They set criteria which are realistically restrictive and which allow the regulatory authority to judge on a case-by-case basis, and using regional experience, whether to accept an individual self-bond. The standards contained in these rules are not lax, but represent low-risk standards which, when properly implemented, will provide an opportunity for financially sound and well-established companies to self-bond some or all of their coal mine reclamation obligations. As explained above, with these rules and the revised overall bonding program OSM has established rules which it believes represent a reasonable compromise in response to surety concerns.

These self-bond rules are entirely optional and the regulatory authority is under no obligation to adopt self-bonding rules in a bonding program. The States are not under any pressure from OSM to adopt self-bonding rules, nor does the Act require it. A State program is not deficient if it does not adopt a self-bonding program. Even in States where standards must be adopted which are no more stringent than Federal standards, the regulatory authority maintains the ultimate discretion over whether to adopt a self-bonding program or to accept the unsecured self-bond of the applicant. That is, a State must decide for itself within the framework of its laws, whether it may choose not to adopt self-bonding rules.

One commenter endorsed the objective of allowing more State flexibility and felt the proposed rules achieve this.

OSM agrees that States should have the flexibility to consider regional conditions within the framework of national standards.

A State regulatory authority questioned the Secretary's authority to propose self-bonding regulations under Section 509(c) of the Act. The regulatory authority quoted this Section to emphasize that it gives discretion to the *regulatory authority* to accept the self-bond when the "applicant demonstrates to the satisfaction of the regulatory authority" the required tests. The regulatory authority also said that Section 501(b) of the Act does not explicitly or implicitly mandate the Secretary to formulate self-bonding rules.

Section 501(b) of the Act requires the Secretary to promulgate regulations implementing Title V of the Act. These regulations are promulgated today in accordance with Section 509(c) of the Act. They establish usable standards for self-bonding that are applicable nationwide. Full discretion is given to the regulatory authority to adopt or not adopt these rules, or if adopted, to deny or accept an applicant for self-bond who qualifies under these rules.

One commenter discussed the 1979 Mining and Reclamation Council (MARC) petition to rewrite the self-bonding rules to require only that information required by the Act. At that time, The National Coal Policy Project Mining Task Force recommended that the proposal be rejected because 1) the self-bonding language of the Act closely resembles that of Alabama's surface mining law which is virtually unuseable, and 2) if large companies self-bond, the surety industry will probably pull out of the bonding market. The commenter urged OSM not to consider going back to just the language of the Act.

OSM agrees that the language of the Act should be supplemented with more detailed regulations to judge whether a State self-bonding program could be acceptable, and is therefore promulgating these final self-bonding rules. OSM believes that the surety industry will find these rules, coupled with the revised bonding program, to represent a reasonable compromise.

One commenter urged OSM to recommit to a study to the scope and focus proposed by OSM in August, 1980, and to restore the rules of August 6, 1980 (45 FR 52306) pending the study.

OSM intends to pursue resolution of the problem of providing a self-bond program which maximizes the number of eligible participants while minimizing the risk to the regulatory authority. The rules promulgated today minimize risk and administrative burden to the regulatory authority, but may deny entities that are potentially excellent business risks the opportunity to self-bond. Such a study as that proposed will take time and need additional resources. In the meantime, OSM is adopting rules which provide more flexibility than the suspended ones, yet still minimize the risk of accepting self-bonds from operators who will default in reclamation.

One commenter said that the factor which provides the greatest amount of protection to the regulatory authority is its power to choose not to grant a self-bond or to "revoke self-bond status once granted." The commenter pointed out that self-bonding is a privilege and not a right.

OSM agrees that regulatory authority discretion to allow or disapprove a self-bond application on a case-by-case basis is an important part of the self-bonding program. These final rules provide needed guidance, and establish a solid foundation on which to make a judgment. The regulatory authority should consider its own experience with local operations when making a final decision on whether to allow a self-bond.

Deletions

Provisions of previous § 806.14(a), (a)(1), part of (a)(5) and (a)(7) which were not suspended in the December 7, 1981, notice are removed. In this rulemaking, § 800.23 (b), (b)(1), (b)(2) and (g) retain the intent of these paragraphs.

Reference Materials

Reference materials used to develop these rules are as follows:

Backer, M. and M.L. Gosman. 1978. *Financial Reporting and Business Liquidity.* New York: National Association of Accountants. pp. 143–179.

Dun and Bradstreet. 1982. *Prospect Reports, April, 1982.*

Dun and Bradstreet. 1983 *Special Industry Norm Report.*

Environmental Protection Agency. 1981. *Background Document for the Financial Test & Municipal Revenue Test for Financial Assurance for Closure and Post-Closure Care.* EPA. 149 pp. Standard and Poor's Corporation. 1979. *Standard and Poor's Rating Guide.* New York: McGraw Hill, Inc. p. 6.

III. Procedural Matters

Paperwork Reduction Act

The information collection requirements in 30 CFR Part 800 were approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3507 and assigned clearance number 1029–

0043. This approval is codified under § 800.10.

The information required will be collected and used by regulatory authorities in implementing the bonding responsibilities for surface and underground mining activities to ensure that companies have adequate financial ability to qualify for self-bonding. The information required by § 800.23 is mandatory of an operator who elects to self-bond its reclamation obligation in those States which choose to allow self-bonding.

Executive Order 12291 and Regulatory Flexibility Act

The Department of the Interior (DOI) examined the proposed rules according to the criteria of Executive Order 12291 (February 17, 1981). OSM determined that these were not major and did not require a regulatory impact analysis because they would impose only minor costs on the coal industry and coal consumers. These rules may allow some cost savings to companies which are allowed to self-bond and would therefore not have to pay surety-bond premiums.

The DOI has also determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that these rules would not have a significant economic impact on a substantial number of small entities. Small entities will continue to obtain surety bonds or to post collateral to insure performance reclamation.

National Environmental Policy Act

OSM has prepared an environmental assessment (EA) on this rule and has found that it would not significantly affect the quality of the human environment. The EA is on file in the OSM Administrative Record, Room 5315, 1100 L Street, NW., Washington, D.C.

List of Subjects

30 CFR Part 800

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

30 CFR Part 806

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

Accordingly, 30 CFR Parts 800 and 806 are amended as set forth herein.

Dated: August 4, 1983.

Wilbert L. Dare,

Acting Deputy Assistant Secretary, Energy and Minerals.

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

1. Section 800.23 is added to read as follows:

§ 800.23 Self-bonding.

(a) *Definitions.* For the purposes of this section only:

Current assets means cash or other assets or resources which are reasonably expected to be converted to cash or sold or consumed within one year or within the normal operating cycle of the business.

Current liabilities means obligations which are reasonably expected to be paid or liquidated within one year or within the normal operating cycle of the business.

Fixed assets means plants and equipment, but does not include land or coal in place.

Liabilities means obligations to transfer assets or provide services to other entities in the future as a result of past transactions.

Net worth means total assets minus total liabilities and is equivalent to owners' equity.

Parent corporation means corporation which owns or controls the applicant.

Tangible net worth means net worth minus intangibles such as goodwill and rights to patents or royalties.

(b) The regulatory authority may accept a self-bond from an applicant for a permit if all of the following conditions are met by the applicant or its parent corporation guarantor:

(1) The applicant designates a suitable agent to receive service of process in the State where the proposed surface coal mining operation is to be conducted.

(2) The applicant has been in continuous operation as a business entity for a period of not less than 5 years. Continuous operation shall mean that business was conducted over a period of 5 years immediately preceding the time of application.

(i) The regulatory authority may allow a joint venture or syndicate with less than 5 years of continuous operation to qualify under this requirement, if each member of the joint venture or syndicate has been in continuous operation for at least 5 years immediately preceding the time of application.

(ii) When calculating the period of continuous operation, the regulatory authority may exclude past periods of interruption to the operation of the business entity that were beyond the applicant's control and that do not affect the applicant's likelihood of remaining in business during the proposed surface coal mining and reclamation operations.

(3) The applicant submits financial information in sufficient detail to show that the applicant meets one of the following criteria:

(i) The applicant has a current rating for its most recent bond issuance of "A" or higher as issued by either Moody's Investor Service or Standard and Poor's Corporation;

(ii) The applicant has a tangible net worth of at least $10 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater; or

(iii) The applicant's fixed assets in the United States total at least $20 million, and the applicant has a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater.

(4) The applicant submits;

(i) Financial statements for the most recently completed fiscal year accompanied by a report prepared by an independent certified public accountant in conformity with generally accepted accounting principles and containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion;

(ii) Unaudited financial statements for completed quarters in the current fiscal year; and

(iii) Additional unaudited information as requested by the regulatory authority.

(c) The regulatory authority may accept a written guarantee for an applicant's self-bond from a parent corporation guarantor, if the guarantor meets the conditions of paragraphs (b)(1) through (b)(4) of this section as if it were the applicant. Such a written guarantee shall be referred to as a "corporate guarantee." The terms of the corporate guarantee shall provide for the following:

(1) If the applicant fails to complete the reclamation plan, the guarantor shall do so or the guarantor shall be liable under the indemnity agreement to provide funds to the regulatory authority sufficient to complete the reclamation plan, but not to exceed the bond amount.

(2) The corporate guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the regulatory authority at least 90 days in advance of the cancellation date, and