

Ohio Department of Natural Resources  
Division of Mineral Resources Management

**\*\* Procedure Directive\*\***

Performance Security 2007-02

SUBJECT: Performance Security Calculation, Adjustments and Releases

EFFECTIVE: October 1, 2007

PURPOSE: Procedures to be used in calculating performance security for new and existing permits, and an outline of how adjustments to, and releases from, the calculated performance security will be handled pending rule promulgation as a result of House Bill 443.

**Background:**

The Division is required to determine the estimated cost of reclamation for all approved permit applications pursuant to ORC 1513.08 (B). The cost estimate shall be based upon the cost to the Division to perform the reclamation in the event of forfeiture of the performance security by the applicant. The cost estimate is required for all applicants irrespective of the method of performance security being provided. Since the cost estimate becomes the basis for the amount of funding available to the Division if the permittee defaults on reclamation obligations, the estimate must be accurate, current throughout the life of the mining and reclamation operations and must cover the full cost of reclamation to the Division.

**Definitions:**

As used in this Procedure Directive

- a) The term "worst-case scenario" means a defined area within a permit or Incremental Mining Unit having the greatest liability to the State for reclamation should forfeiture occur.
- b) The term "incremental mining unit" means an area within the permit where mining and reclamation activities are authorized and are subject to a specific amount of performance security. An Incremental Mining Unit shall be of sufficient size and configuration to provide for efficient mining and reclamation operations, subject to approval by the Division.
- c) The term "eligible applicant" means a company that has held a coal-mining permit in Ohio for a period of not less than five years.
- d) The term "performance security adjustment" means an increase or decrease in the amount of financial assurance required for a permit or Incremental Mining Unit derived from a current engineer's cost estimate. This adjustment does not denote a release.

- e) The term “phase approval request” means a request for recognition of the completion of Phase I or Phase II reclamation within a designated area of a coal mining permit or Incremental Mining Unit (*full cost PS only*).
- f) The term “release” means reclamation has been completed and performance security relinquished for the permit or Incremental Mining Unit.
- g) The term “performance security pool method,” means an option of providing performance security pursuant to ORC 1513.08 (C)(2).
- h) The term “full cost method” means an option of providing performance security pursuant to ORC 1513.08 (C)(1).
- i) The term “substantial known event” means an occurrence of site-specific operational details impacting the cost of reclamation and not specifically itemized in the Cost Estimating Spreadsheet.

### **Surface and Underground Coal Mining Operations and Associated Facilities**

#### **Estimated Cost of Reclamation – Calculation Methodology**

The estimated cost of reclamation will be calculated upon the applicant's worst-case scenario as designated in the proposed mining and reclamation plan. The calculation may be based on the entire application area or an Incremental Mining Unit (IMU) within the permit. Applicants are required to provide an estimated cost of reclamation pursuant to ORC 1513.07 (C)(5). The formula used by the Division to calculate the required amount of performance security will be provided to the applicant by way of a Cost Estimating Spreadsheet. Applicants will be required to enter data on the spreadsheet as it relates to the area(s) designated in their mining and reclamation plan. Calculations will be based on unit prices historically incurred by the Division for bond forfeiture and abandoned mine land (AML) reclamation projects. Unit prices will be updated periodically based upon current project bid proposals received by the Division. The Division will determine the estimated cost at the time of application approval. The estimated cost of reclamation will equate to the Performance Security required for the permit or IMU.

#### **Mine Plan Information**

The amount of detail provided by the applicant in a mine plan will help the Division determine the estimated cost of reclamation. The Division will provide information in the Cost Estimating Spreadsheet such as unit-price costs, administrative costs, project design, construction inspection and contingencies to develop the total estimate. The total cost estimate will be based on the Division's cost factors and information provided by the applicant regarding the following items:

- Removal of all equipment, buildings, conveyors, railroads and other support facilities not proposed as part of the post-mining land use
- Sealing underground mine openings, auger holes, wells or other openings/holes
- Backfilling and grading based on proposed volume/size and number of mining pits and spoil-storage locations
- Obtaining and distributing topsoil or substitute resoiling material

- Stream relocation or reconstruction
- On or off-site wetland mitigation
- Removal of sediment structures and roads
- Revegetation, including seed bed preparation, seeding, mulching, liming, fertilizing and tree planting
- Maintenance of revegetated areas, additional grading, maintenance of drainage controls, sedimentation structures, and roads, until final release of performance security
- Mobilization and de-mobilization of equipment
- Prime farmland restoration
- Special handling of acid/toxic materials, coal waste disposal and/or alkaline addition
- Special clay liners, caps, or other unique construction items in the approved mining and reclamation plan
- Removal of and disposal of substations or fuel tanks, site clean up and the disposal of non-coal waste materials; and other items required to restore the land affected to a condition capable of supporting the uses it was capable of supporting prior to mining, or higher or better uses, per O.R.C 1513.16 A (2)
- Measures to ensure that debris, acid-forming and toxic-forming materials are disposed of in accordance with paragraph (E) of rule 1501:13-9-09 of the Administrative Code and paragraph (J) of rule 1501:13-9-14 of the Administrative Code

Items listed above, but not specifically itemized in the Cost Estimating Spreadsheet, should be included by the applicant as a "Substantial Known Event". Such items should include the basis for determining the cost and the appropriate calculations. The applicant may provide additional site-specific operational details impacting the cost of reclamation in order to improve the accuracy of the overall cost estimate. The mine plan details used as a basis for determining the reclamation cost estimate will become a part of the approved mining and reclamation plan. The Division will inspect the applicant's operation for compliance with such conditions.

All applicants must develop their mining and reclamation plan in accordance with the permitting requirements of ORC 1513.07 and OAC 1501:13-4-05 and 1501:13-4-14, and contemporaneous reclamation requirements of OAC 1501:13-9-13.

### **Enforcement of Permit Conditions Used to Calculate Reclamation Cost Estimate**

The engineer's estimate of the cost of reclamation and information provided by the applicant to calculate the reclamation cost will become approved operational factors in the permit's mining and reclamation plan. Those operational factors critical to maintaining the liability to the Division within the level of estimated reclamation cost (and therefore available performance security) will be evaluated during routine inspections. If an inspection reveals that an operation is being conducted such that the reclamation liability to the Division has been compromised, appropriate enforcement action will be taken for violation of permit conditions.

## **Methods for Providing Performance Security**

The Division will notify the applicant via certified mail of the estimated cost of reclamation required for a permit or Incremental Mining Unit after review of the information contained in the permit application, including the applicant's cost estimate spreadsheet and requirements contained in the approved mining and reclamation plan. At that time, the applicant must notify the Division of the elected method of providing the required performance security. The method of performance security shall apply to the entire permit. Once an applicant has elected to provide performance security at full cost, the applicant cannot revert to the performance security pool method at a later date for that permit. A permittee may revert to the full cost method by submitting an Application to Revise the Permit and providing the required information to initiate invoicing of the full cost performance security.

### **Full Cost Performance Security**

If an applicant elects to provide performance security at full cost, the applicant may divide the permit area into Incremental Mining Units. The basis of determining the estimated cost of reclamation will be confined to each Incremental Mining Unit within the permit. Incremental Mining Units shall be of sufficient size and configuration to provide for efficient mining and reclamation operations. Each Incremental Mining Unit will be treated independently for the following:

- Determining the cost estimate for reclamation
- Calculating the required amount of performance security
- Phase I and II approval requests
- Adjustments and release of performance security liability
- Phase III final performance security and liability release

Each Incremental Mining Unit will be marked by flagging in the field as shown on the approved application map and mining will be limited to areas within each Incremental Mining Unit upon which performance security has been posted. The Incremental Mining Units may share adjacent facilities under the same permit, such as haul roads, ponds and spoil as needed to facilitate mining and reclamation. Mining of an incremental IMU shall only be authorized once performance security has been provided based on a reclamation cost estimate specific to the IMU.

### **Performance Security Pool Participants**

An applicant choosing to utilize the performance security pool cannot divide the permit application into Incremental Mining Units for purposes of estimating the cost of reclamation. The Division will calculate the estimated reclamation cost based upon the worst-case scenario demonstrated in the mining and reclamation plan for the entire permit. Performance security must be posted at the rate of \$2500/acre, in addition to the severance tax required by ORC 5749.02 (A)(8) for each ton of coal produced from that permit. The required performance security must be posted in accordance with current Division procedure. The permittee will be able to conduct mining operations at any location within the permit provided the number of acres affected does not exceed the number of acres covered by the performance security held by the Division.

## **Performance Security Pool**

Upon issuance of a permit where the applicant has elected reliance on the performance security pool as the method of providing performance security, the Division will notify the Department of Taxation of the obligation of that permittee to pay the additional severance tax rate required by ORC 5749.02 (A)(8). In the event the Division determines that a permittee has not paid all severance taxes as required, appropriate enforcement action will be taken by the Division. If a permittee continues to be delinquent in payment, the Division may issue a cessation order and require the permittee to provide full cost performance security in order to continue mining on that permit.

In the event a permittee participating in the performance security pool fails to reclaim contemporaneously as required by OAC 1501:13-9-13 or an approved alternate schedule, the Division will issue a Notice of Violation (NOV). In the event the permittee fails to comply with the NOV, a Failure to Abate Cessation Order (FTACO) will be issued. Upon issuance of the FTACO, the Division will increase the amount of performance security for that operation from \$2500/acre to \$5000/acre pursuant to 1513.08(E).

## **Review of Estimated Cost of Reclamation/Performance Security**

The Division is required to ensure that the reclamation cost estimate is accurate and current in order to have access to funds in the performance security pool or access to the full cost performance security in an amount necessary to complete reclamation. Although the Division can conduct such reviews at any time, annual reviews are planned to coincide with the submission of annual maps and reports.

Performance security pool participants will continue to provide annual maps showing acres affected and reclaimed. The Division will review all available information during the annual map review and will update the initial cost estimate if appropriate. The revised cost estimate will become a part of the permit file for purposes of obtaining funds from the performance security pool in the event the permittee defaults on reclamation obligations.

Permits that have provided performance security at full cost will be required to provide an updated cost estimate for reclamation at the time of annual report and map submission and review. If the Division determines that the cost estimate needs to be increased, the permittee will be billed for the additional amount of performance security at the time of approval of the annual map and report.

## **Performance Security Adjustments**

A permittee may request a Performance Security Adjustment of the amount of performance security if the permittee provides documentation proving that the actual cost of reclamation to the Division is less than the current engineer's estimate (for example, if the permittee has decided not to mine certain areas in the approved plan, thereby reducing the cost of reclamation to the Division). The Division will review the documentation provided by the applicant and will make a determination in accordance with 1513.08 (F). Proposed adjustments by the Chief are subject to the informal conference proceedings outlined below.

## **Informal Conferences for Performance Security Adjustments**

Pursuant to 1513.08 (E) a permittee may request an informal conference with the chief concerning a proposed adjustment to the performance security for a permit. Pursuant to OAC 1501:13-14-05, if an informal conference is requested, the chief or his representative shall hold an informal conference on the performance security adjustment for a permit within a reasonable time not to exceed 60 days from receipt of a Notification of Election for an Adjacent Area Application, Application to Revise a Coal Mining Permit, or Application for Incidental Boundary Revision, or from approval of the annual report and map. The informal conference will be held in the locality of the coal mining operation proposed for adjustment or in Franklin County, at the option of the permittee. The date, time, and location of the informal conference shall be advertised by the chief in a newspaper of general circulation in the locality at least two weeks prior to the scheduled conference date. An electronic or stenographic record shall be made of the conference proceeding unless waived by all parties. The record shall be maintained and shall be accessible to the parties until final release of the permittee's performance security. If the permittee requesting the informal conference stipulates agreement prior to the requested informal conference and withdraws the request, the informal conference need not be held.

### **Releases of Performance Security**

#### **Performance Security Pool Participants**

In accordance with current procedures, reclamation based releases of performance security will be provided to a permittee upon completion of the existing phases of reclamation for areas shown as reclaimed on an annual, final or other reclamation map. The schedule for release of performance security shall be in accordance with OAC 1501:13-7-05, (i.e. 50 percent, 35 percent or 15 percent of the posted performance security for each completed phase of reclamation as currently defined in the OAC).

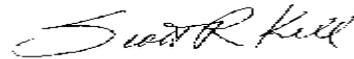
#### **Full Cost Performance Security**

Permittees providing performance security at full cost may submit a "Phase Approval Request" on a form provided by the Division. Phase Approval Requests will provide a tool for DMRM to acknowledge that all field conditions have been met relative to completion of the requirements for backfilling and grading (Phase I), and the establishment of permanent vegetation (Phase II) as they are defined in 1513 ORC and 1501 OAC. Phase Approval Requests will apply to areas designated within a permit or incremental mining unit (IMU) where reclamation has been completed. An updated map showing all areas affected and reclaimed within the permit, or IMU, shall be used as the basis for determining the area of the proposed "Phase Approval Request". If such areas meet all applicable reclamation standards, including appropriate public notice pursuant to ORC 1513.16 (F) and OAC 1501:13-7-05, the Division will provide written notice of such approval(s). At the time of the annual map review, the permittee shall identify those areas that have been reseeded and seeded, and provide the last date of augmented seeding on the Division's "Planting Report". This information will establish the period of extended responsibility for revegetation pursuant to 1501:13-9-15. Release of performance security will be deferred until the entire permit or incremental mining unit meets the criteria specified in 1501:13-7-05(B)(1)(a), and 1501:13-7-05(B)(1)(b).

When mining is complete and the entire affected area within a permit or IMU has received the Phase I Approval Request, the operator may submit an updated engineer's cost estimate spreadsheet and request a release of the performance security pursuant to 1513.16 (F)(3)(a). The revised cost estimate will determine the basis for the amount of performance security that must be retained.

The permittee may submit an updated engineer's cost estimate spreadsheet, and a request for performance security release when the final Phase II Approval Request has been approved for the entire permit or IMU. Upon approval of the cost estimate, the updated performance security will be divided equally into a per-acre dollar figure based on the remainder of acres affected within the permit or IMU.

The permittee shall submit a Request for Approval of Successful Reclamation (Phase 3), with appropriate public notice, pursuant to 1501:13-7-05(B)(1)(c), when the period of extended responsibility (5-year maintenance period) is completed for each of the previously identified reclamation areas. Performance security will be released from the designated reclamation area upon approval of the Phase III release.



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Scott R. Kell, Acting Chief