




**PUBLIC SERVICE COMMISSION  
Reclamation Division**

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**Memorandum**

**TO:** Commissioners Wefald, Cramer and Clark  
Illona Jeffcoat-Sacco  
Bill Binek

**FROM:**  Jim Deutsch, Reclamation Division

**DATE:** March 5, 2008

**SUBJECT:** Submittal of the rule changes in Case No. RC-07-163 to OSM as State Program Amendment No. XXXVII

On February 19<sup>th</sup> we received a favorable legal opinion from the Attorney General on the rule changes proposed in Case No. RC-07-163. Before the Commission can adopt these changes, we also need to receive the Office of Surface Mining's approval of the changes through the State Program Amendment process. The necessary documents have been prepared for the amendment and I recommend the rule changes be submitted to OSM as State Program Amendment No. XXXVII.

The most significant change pertains to the bond ratings for companies that guarantee self-bonds and the others are more minor in nature. Additional language is proposed to NDAC 69-05.2-12-05.1 that will allow the Commission to accept bond ratings from other national recognized rating organizations, in addition to Moody's Investors Service and Standards and Poor's ratings, for companies that guarantee self-bonds.

In NDAC 69-05.2-08-08, premine land use and vegetation data requirements, some terminology used for native grassland descriptions is being updated to reflect that now used by USDA's Natural Resource Conservation Service (NRCS). The use of the terms "range site" and "range condition" are being replaced with "ecological site" and "similarity index".

Also, in the permit approval criteria in NDAC 69-05.2-10-03, a cross reference is being changed to Section 69-05.2-04-01.1, rather than 69-05.2-04-01. This change is due to revised rule numbering that was made several years ago when some new rules were adopted.

The program amendment contains a cover letter to OSM, narrative describing the changes, the rule changes, and a copy of the Attorney General's opinion. Attached is a motion for the March 12<sup>th</sup> Commission meeting to submit the changes to OSM. Also attached is a copy of the materials that will be submitted as State Program Amendment No. XXXVII.

**Attachments**

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**NORTH DAKOTA**  
**STATE**  
**PROGRAM**  
**AMENDMENT XXXVII**

**SUBMITTED BY:**  
**PUBLIC SERVICE COMMISSION**  
**STATE CAPITOL**  
**BISMARCK, NORTH DAKOTA**

**MARCH 12, 2008**

## **Table of Contents**

### **North Dakota State Program Amendment XXXVII**

- A. Letter of Transmittal**
- B. Narrative**
- C. Proposed Rule Changes**
- D. Copy of the Attorney General's Opinion**



# Public Service Commission

## State of North Dakota

### COMMISSIONERS

Susan E. Wefald, President  
Kevin Cramer  
Tony Clark

Executive Director  
Illona A. Jeffcoat-Sacco

600 E. Boulevard Ave. Dept 408  
Bismarck, North Dakota 58505-0480  
web: [www.nd.gov/psc](http://www.nd.gov/psc)  
e-mail: [ndpsc@nd.gov](mailto:ndpsc@nd.gov)  
TTY 800-366-6888 or 711  
Fax 701-328-2410  
Phone 701-328-2400

March 12, 2008

Mr. Allen D. Klein  
Western Regional Coordinating Center  
Office of Surface Mining  
P.O. Box 46667  
Denver, CO 80202-66667

Dear Mr. Klein:

The Public Service Commission is submitting State Program Amendment XXXVII on behalf of the State of North Dakota in order to modify our approved coal regulatory program. The Amendment is submitted under the Surface Mining Control and Reclamation Act of 1977 (Public Law 95-87) and 30 CFR Chapter VII.

State Program Amendment XXXVII contains a few revised rules under North Dakota Administrative Code (NDAC) Article 69-5.2, PSC Case No. RC-07-163. The most significant change pertains to the self bonding provisions in NDAC 69-05.2-12-05.1. Language has been added that will allow the Commission to accept bond ratings from other national recognized rating organizations, in addition to Moody's Investors Service and Standards and Poor's ratings, for companies that guarantee self-bonds. As discussed in the attached amendment narrative, we believe this change is as effective as the counterpart federal rules.

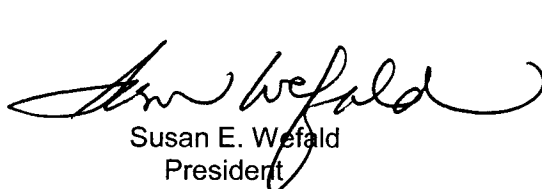
The other changes are more minor in nature. In NDAC 69-05.2-08-08, premine land use and vegetation data requirements, some terminology used for native grassland descriptions is being updated to reflect that now used by USDA's Natural Resource Conservation Service. Also, a cross reference error in NDAC 69-05.2-10-03 is being corrected.

The amendment contains a narrative, the proposed changes to North Dakota Administrative Code Article 69-05.2, and a copy of the Attorney General's opinion on the legality of the changes. Due to the limited number and nature of the proposed changes, staff did not prepare a side-by-side comparison of the state rules to the counterpart federal rules.

Please direct any questions you or your staff may have to the Commission's Reclamation Division.

Sincerely,

  
Tony Clark  
Commissioner

  
Susan E. Wefald  
President

  
Kevin Cramer  
Commissioner

## **Narrative for North Dakota State Program Amendment XXXVII**

State Program Amendment XXXVII contains revised rules in North Dakota Administrative Code (NDAC) Article 69-5.2 for surface coal mining and reclamation operations. The most significant change pertains to the bond ratings for self-bonding and the others are more minor in nature.

Additional language is proposed to NDAC 69-05.2-12-05.1 to allow the Commission to accept bond ratings from other national recognized rating organizations, in addition to Moody's Investors Service and Standards and Poor's ratings, for companies that guarantee self-bonds. The Falkirk Mining Company requested this change to include credit rating agencies that have been defined by the United States Securities and Exchange Commission (SEC) as a Nationally Recognized Statistical Rating Organization (NRSRO). Such a designation by the SEC is permitted for use for certain regulatory purposes. Currently, there are several NRSROs, and the top three by market share are Moody's Investors Service, Standard & Poor's Corporation and Fitch Ratings. The proposed rule recognizes the fact that, since the self-bonding rules were originally enacted, various other (in addition to Moody's and Standard & Poor's) rating organizations with strong credentials are now available and are being widely used by both business and government. The utilization of NRSROs provides for reliance upon SEC's expertise to ensure that any ratings agency is not only credible and reliable, but utilizes what has become a market-based standard for ratings designations.

In order for a company to guarantee a self-bond that has a bond rating from another NRSRO (other than Moody's and Standard & Poor's), documentation would have to be provided so show that the rating is equivalent to an "A" or higher issued by Moody's and Standard & Poor's. We believe the revised rule will continue to provide a high degree of risk protection to the State of North Dakota and that is as effective as the counterpart OSM self-bonding provision in 30 CFR 800.23(b)(3)(i). It should be noted that this change is similar to one that the State of Wyoming has submitted for OSM approval.

In NDAC 69-05.2-08-08, premine land use and vegetation data requirements, some terminology used for native grassland descriptions is being updated to reflect that now used by USDA's Natural Resource Conservation Service (NRCS). The use of the terms "range site" and "range condition" are being replaced with "ecological site" and "similarity index". The changes in terminology for native grassland descriptions reflect those now used in NRCS's technical publications. The terms "range site" and "range condition" are now considered obsolete by the NRCS.

In the permit approval criteria under NDAC 69-05.2-10-03, a cross reference is being changed to Section 69-05.2-04-01.1, rather than 69-05.2-04-01. This change is due to revised rule numbering that was made several years ago when some new rules were adopted.

**69-05.2-08-08. Permit applications - Permit area - Vegetation and land use information.**

1. The application must contain the following premining vegetation information:
  - a. A map or aerial photograph at a scale of 1:4,800 that delineates the existing mapping units within each premining land use. The mapping units for different land use categories are:
    - (1) For cropland, each soil mapping unit.
    - (2) For tame pastureland, each soil mapping unit.
    - (3) For native grasslands, each ~~range~~ ecological site. The soil mapping unit in each ~~range~~ ecological site must also be delineated.
    - (4) For woodland, each woodland type, i.e., trees, tall shrubs, and low shrubs.
    - (5) For fish and wildlife habitat, each vegetation type as further specified in subparagraphs a, b, and c.
      - (a) For woodland, each woodland type, i.e., trees, tall shrubs, and low shrubs;
      - (b) For wetlands, wetland classes based on ecological differentiation as set forth in Classification of Natural Ponds and Lakes in the Glaciated Prairie Region (United States department of the interior (1971) or other approved classification system.
      - (c) For grasslands (native or introduced), each soil mapping unit.
    - (6) For shelterbelts, the entire planting.
  - b. For each land use, a comprehensive species list of higher plants and identification of any species of rare, endangered, poisonous, or noxious plants, developed by a thorough reconnaissance of all mapping units.

- c. A description of each mapping unit delineated under subdivision a. This description must include:
- (1) The acreage [hectarage] of each mapping unit for each surface owner within the permit area.
  - (2) An assessment of the productivity of cropland, tame pastureland, and native grassland based on published data, historic data, or quantitative data.
  - (3) Natural resource conservation service ~~range—condition~~ similarity index in percent for native grassland.
  - (4) A detailed description of number and arrangement of trees and shrubs, probable age of trees, height of trees, and characteristics of understory vegetation for woodland and fish and wildlife habitat where woodland is the vegetation type.
  - (5) A detailed description of community structure, assemblages of plant species, water conditions, and size for fish and wildlife habitat where wetlands are the vegetation type.
  - (6) A description of number and arrangement of trees and shrubs, length and number of rows, and associated plant species for shelterbelts.
  - (7) When required for the proposed success standard, a quantitative assessment of applicable vegetation parameters using methods approved by the commission.
- d. A detailed narrative describing the nature and variability of the vegetation in each mapping unit and land use category, based on a thorough reconnaissance and qualitative assessment.

**History:** Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; June 1, 1997.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14, 38-14.1-24

**69-05.2-10-03. Permit applications - Criteria for permit approval or denial.**

6. In addition to the requirements of subsection 3 of North Dakota Century Code section 38-14.1-21, no permit or significant revision will be

approved, unless the application affirmatively demonstrates and the commission finds, in writing, on the basis of information in the application or otherwise available, which is documented in the approval and made available to the applicant, that:

- a. The permit area is not on any lands subject to the prohibitions or limitations of North Dakota Century Code section 38-14.1-07 or the area has met the application review procedures of section ~~69-05.2-04-01~~ 69-05.2-04-01.1.

**History:** Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990; May 1, 1992; June 1, 1994; July 1, 1995; June 1, 1997; May 1, 2001: \_\_\_\_\_.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-21, 38-14.1-33

#### **69-05.2-12-05.1. Performance bond - Self-bond of permit applicant.**

1. The commission may accept a self-bond if the following conditions are met:
  - a. The applicant designates an agent for service of process in the state.
  - b. The applicant has been in continuous operation as a business entity the five years preceding the application. The commission may allow a joint venture with less than five years of continuous operation if each member has been in continuous operation for the five years preceding the application.
  - c. The applicant submits financial information in sufficient detail to show one of the following:
    - (1) The applicant has a current ~~Moody's Investor Service or Standard and Poor's~~ rating for its most recent bond issuance of "A" or higher as issued by Moody's Investors Service, Standards and Poor's Corporation or an equivalent rating by any other nationally recognized statistical rating organization, as defined and approved by the United States securities and exchange commission, that is acceptable to the commission.
    - (2) The applicant has a tangible net worth of at least ten million dollars, a ratio of total liabilities to net worth of 2.5 or less,

and a ratio of current assets to current liabilities of 1.2 or greater.

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

d. The applicant submits:

- (1) Financial statements for the last complete fiscal year audited by an independent certified public accountant, and a report containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion; and
- (2) Financial statements for completed quarters in the current fiscal year and additional information requested by the commission.

e. "Tangible net worth" means net worth less intangibles.

**History:** Effective May 1, 1988; amended effective January 1, 1993; \_\_\_\_\_.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-16



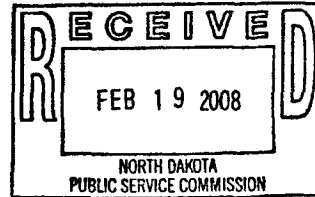
Wayne Stenehjem  
ATTORNEY GENERAL

STATE OF NORTH DAKOTA  
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL  
600 E BOULEVARD AVE DEPT 125  
BISMARCK, ND 58505-0040  
(701) 328-2210 FAX (701) 328-2226

OPINION

February 14, 2008



Ms. Illona A. Jeffcoat-Sacco  
Executive Director  
North Dakota Public Service Commission  
600 E Boulevard Ave Dept 408  
Bismarck, ND 58505-0480

Dear Ms. Jeffcoat-Sacco:

The Office of Attorney General has examined the proposed amendments to N.D.A.C. Art. 69-05.2 concerning reclamation operations for surface coal mining (Case No. RC-07-163) and the proposed amendment to N.D.A.C. § 69-08-02-05 concerning use of the National Electrical Safety Code for electric service (Case No. PU-06-490), along with the notice of the proposed rules, the publication of that notice, and the filing of that notice with the Legislative Council. This office has also determined that 1) a written record of the agency's consideration of any comments to the proposed rules was made for the rules that received comments, 2) a regulatory analysis was issued, 3) a takings assessment was prepared, 4) a small entity regulatory analysis and an economic impact statement were prepared, and 5) the proposed rules are within the agency's statutory authority.

These administrative rules are in compliance with N.D.C.C. ch. 28-32 and are hereby approved as to their legality. Upon final adoption, these rules may be filed with the Legislative Council.

Sincerely,

Wayne Stenehjem  
Attorney General

eee/vkk

cc: John Walstad, Legislative Council