



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

September 24, 2008

John Walstad, Code Revisor  
Legislative Council  
State Capitol  
Bismarck, North Dakota 58505

Re: Public Service Commission  
Reclamation  
Rulemaking  
Case No. RC-07-163

Dear Mr. Walstad:

Enclosed please find a copy of amendments to Article 69-05.2 concerning surface coal mining and reclamation rules. The Commission's January 16, 2008, order includes a summary of the comments and the written record of the agency's consideration of all comments. A copy of the order is attached.

By letter dated February 14, 2008, the Attorney General approved the proposed rules as to their legality. A copy of that letter is also attached. On September 12, 2008, these rule changes were also approved by the federal Office of Surface Mining as being consistent with counterpart federal regulations. On September 24, 2008, the Public Service Commission adopted the rules as approved, and is now submitting the rule changes for publication in the North Dakota Administrative Code.

Thank you for your attention to this matter.

Sincerely,

Darrell Nitschke  
Executive Secretary

Enclosures

1. Copy of Attorney General Opinion
2. Copy of Order Adopting Rules
3. Copy of Proposed Rules
4. Copy of the Regulatory and Takings Assessments
5. Copy of Testimony

25 RC-07-163 Filed: 9/24/2008 Pages: 14  
Letter Submitting Order and Rules to Legislative  
Council for Publication in Administrative Code

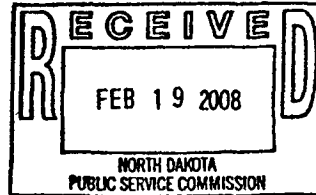


Wayne Stenehjem  
ATTORNEY GENERAL

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

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Reclamation  
Rulemaking**

**Case No. RC-07-163**

**Public Service Commission  
Public Utilities - Electric  
Rulemaking**

**Case No. PU-06-490**

**ORDER**

**January 16, 2008**

**Appearances**

**Commissioners Susan Wefald, Kevin Cramer, and Tony Clark.**

**William Binek, Chief Counsel, as Hearing Officer**

**Preliminary Statement**

On October 3, 2007, the North Dakota Public Service Commission (Commission) issued its notice of proposed rulemaking proposing to revise several sections of the Administrative Code including the following two cases:

**Reclamation: Case No. RC-07-163**

The proposed rule changes in Case No. RC-07-163 affect coal mining and reclamation rules under North Dakota Administrative Code Article 69-05.2. The most significant change pertains to the self-bonding provisions and it will allow the Commission to accept, in addition to Moody's Investors Service and Standards and Poor's ratings, bond ratings from other national recognized rating organizations for companies that guarantee self-bonds. Another change updates the terminology used for native grassland descriptions that are required as part of the pre-mine land use information in permit applications. The other change corrects a cross reference error in the permit approval criteria. The proposed rule changes are not expected to have an impact on the regulated community in excess of \$50,000.

**Public Utilities - Electric – Case No. PU-06-490**

The proposed rule change in Case No. PU-06-490 would amend section 69-09-02-35 of the North Dakota Administrative Code to adopt by reference the 2007 version

**20 PU-06-490**

Pages: 8

**18 RC-07-163**

Pages: 6

Order to Submit Proposed Changes to NDAC  
to Atty General  
by Public Service Commission  
01/16/2008

Order to Submit Proposed Changes to NDAC  
to Atty General  
by Public Service Commission  
01/16/2008

of the National Electric Safety Code for the installation and maintenance of electric supply and communication lines. The NESC is updated periodically, with a new edition issued every five years. The changes proposed would simply adopt the latest NESC 2007 Edition instead of the previously adopted 2002 Edition.

### **Public Hearing**

A public hearing on the proposed rule changes was noticed for and held at 1:00 p.m. November 26, 2007. The hearing was held in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota.

The notice of rulemaking was published once in all official county newspapers as evidenced by the affidavit of publication on file with the Commission. The notice was also forwarded to the Legislative Council for publication at least 30 days in advance of the November hearing.

The Commission allowed, after the conclusion of the rulemaking hearing, a comment period until December 6, 2007, during which data, views, or oral arguments concerning the proposed rulemaking could be received by the Commission and made a part of the rulemaking record to be considered by the Commission.

The following discusses the comments that were received:

#### **Reclamation: Case No. RC-07-163**

Commission staff testified at the hearing to explain the changes proposed to North Dakota Administrative Code Article 69-05.2, rules for surface coal mining and reclamation operations. The most significant rule change was based on a suggestion from the Falkirk Mining Company, a subsidiary of The North American Coal Corporation, and it pertains to the self-bonding provisions in North Dakota Administrative Code Section 69-05.2-12-05.1. A representative from The North American Coal Corporation also testified at the hearing and provided a letter of support for the proposed self-bonding change.

The Commission's comment period ended December 6, 2007. No other comments were received.

#### **Public Utilities - Electric – Case No. PU-06-490**

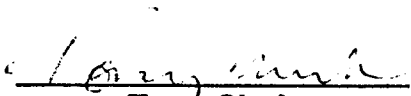
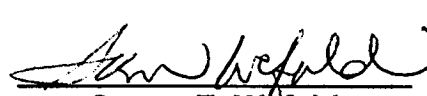

Commission staff testified at the hearing that the purpose of adopting the 2007 Edition of the National Electric Safety Code is to ensure that North Dakota safety requirements keep pace with industry standards. Staff testified that in practice the utilities are already applying the 2007 Edition.

The Commission's comment period ended December 6, 2007. No other comments were received.

**Order**

The Commission orders that the proposed changes to the North Dakota Administrative Code, as attached to and made a part of this order, be submitted to the Attorney General for an opinion that the rules are in compliance with North Dakota Century Code Section 28-32-14 and are approved as to their legality.

**PUBLIC SERVICE COMMISSION**

 _____ <b>Tony Clark</b> Commissioner	 _____ <b>Susan E. Wefald</b> President	 _____ <b>Kevin Cramer</b> Commissioner
---	--	---

**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

**PUBLIC SERVICE COMMISSION  
Reclamation Division**

\*\*\*\*\*

**Memorandum**

**TO:** Case No. RC-07-163  
**FROM:** Jim Deutsch  Reclamation Division  
**DATE:** September 13, 2007  
**SUBJECT:** Regulatory and Takings Assessment for mining and reclamation rule changes proposed in Case No. RC-07-163

The Reclamation Division has prepared Regulatory and Takings Assessments as required by North Dakota Century Code (NDCC) Sections 28-32-08.1 and 28-32-09 for the mining and reclamation rule changes proposed in Case No. RC-07-163. NDCC Section 28-32-08.1 requires an agency to prepare a regulatory analysis with regard to the impact of the proposed rules on small entities. NDCC Section 28-32-09 requires an agency to prepare a written assessment if the proposed rule changes are considered a constitutional takings that may limit the use of private real property. The rule changes proposed in Case No. RC-07-163 are minor and affect the self-bonding provisions, update some terminology involving Natural Resource Conservation Service descriptions for native grassland, and a cross-reference error is being corrected.

NDAC 28-32-08.1 requires a regulatory analysis which considers utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. The following addresses the provisions of subsection 2 of NDAC 28-32-08.1 with regard to the rule changes proposed in Case No. RC-07-163:

**NDCC 28-32-08.1(2)(a) – Establishment of less stringent compliance or reporting requirements for small entities.**

No additional compliance standards or reporting requirements are proposed by the rule changes.

**NDCC 28-32-08.1(2)(b) – Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities.**

No additional compliance standards or reporting requirements are proposed by the rule changes.

**NDCC 28-32-08.1(2)(c) – Consolidation or simplification of compliance or reporting requirements for small entities.**

As previously noted, no additional compliance standards or reporting requirements are proposed by these rule changes. However, since the Commission's mining and reclamation rules must be consistent with and as effective as counterpart federal rules, we cannot consolidate or simplify the requirements for small entities and maintain an approved state regulatory program for surface coal mining and reclamation operations.

**NDCC 28-32-08.1(2)(d) – Establishment of performance standards for small entities to replace design or operational standards required in the proposed rule.**

No additional performance standards are proposed by these rule changes. Since the Commission's mining and reclamation rules must be consistent with and as effective as counterpart federal rules, we cannot adopt special performance standards for small entities and maintain an approved state regulatory program for surface coal mining and reclamation operations.

**NDCC 28-32-08.1(2)(e) – Exemption of small entities from all or any part of the requirements contained in the proposed rule.**

No additional compliance standards or reporting requirements are proposed by these rule changes. Since the Commission's mining and reclamation rules must be consistent with and as effective as counterpart federal rules, we cannot exempt small entities from the rules that are being modified and maintain an approved state regulatory program for surface coal mining and reclamation operations.

While the proposed rule changes in Case No. RC-07-163 will not limit the use of private real property, the six items listed in NDCC 28-32-09 are addressed below:

**NDCC 28-32-09(1)(a) – Assess the likelihood that the proposed rule may result in a taking or regulatory taking.**

None of these proposed rule changes affect the use of private real property so they will not result in any taking.

**NDCC 28-32-09(1)(b) - Clearly and specifically identify the purpose of the proposed rule.**

The purpose of the proposed rule is to allow the Commission, for self-bonding purposes, to accept bond ratings from other national recognized rating organizations in addition to Moody's Investors Service and Standards and Poor's ratings, update terminology in existing revegetation rules, and correct a cross reference.

**NDCC 28-32-09(1)(c) - Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.**

We do not expect any impact on private property owners as a result of the proposed rule changes. The changes involve self bonding for mining permits, the update of terminology in existing revegetation rules, and the correction of a cross reference error.

**NDCC 28-32-09(1)(d) - Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.**

We do not expect the proposed rules to constitute a taking; therefore, there should be no cost to the state.

**NDCC 28-32-09(1)(e) - Identify the source of payment within the agency's budget for any compensation that may be ordered.**

Not applicable, the proposed rule changes will not limit the use of private real property.

**NDCC 28-32-09(1)(f) - Certify that the benefits of the proposed rule exceed the estimated compensation costs.**

Not applicable, the proposed rule changes will not limit the use of private real property.

**Testimony for Case No. RC-07-163**

**Proposed Changes to NDAC Article 69-05.2  
Surface Coal Mining and Reclamation Operations**

**November 26, 2007**

I am Jim Deutsch, Director of the Public Service Commission's Reclamation Division, and I will discuss the rule changes in Case No. RC-07-163. The changes are proposed to North Dakota Administrative Code Article 69-05.2, rules for surface coal mining and reclamation operations. The most notable change involves the self-bonding provisions and it is based on a request from the Falkirk Mining Company. The other changes are staff initiatives that update some terminology used in vegetation data requirements and to correct a cross-reference error.

The proposed changes to NDAC 69-05.2-08-08, permit applications data requirements for vegetation and land use, replace the terms "range site" and "range condition" with "ecological site" and "similarity index" when referring to information for native grassland. These changes are proposed since the USDA's Natural Resource Conservation Service revised these terms in its technical guidance documents that are used for native grassland evaluations.

In NDAC 69-05.2-10-03, the cross reference to Section 69-05.2-04-01 is being changed to 69-05.2-04-01.1. This change is needed due to a revised numbering scheme in Chapter 69-05.2-04 that was adopted several years ago.

A change to the self-bonding provisions in NDAC 69-05.2-12-05.1 is proposed that will allow the Commission to accept a self-bond that is guaranteed by a company that has a bond rating issued by other nationally recognized rating organizations as defined and approved by the U.S. Securities and Exchange Commission. Such a rating would have to be equivalent to an "A" or higher rating issued by Moody's Investors Service or Standard and Poor's. The current rule, which is based on the Federal Office of Surface Mining's (OSM) self-bonding regulations that were adopted in the early 1980's, only allows companies to guarantee self-bonds if they have an "A" or higher rating from Moody's or Standard and Poor's.

The change to NDAC 69-05.2-12-05.1 was requested by the Falkirk Mining Company and is similar to one that the State of Wyoming has before OSM for approval. In addition to Moody's and Standard and Poor's, there are currently five other bond rating companies that have been designated as a nationally recognized rating organization by the SEC. These include Fitch Inc. and the A.M. Best Company. Accepting bond ratings from one of these nationally recognized rating service companies as proposed by the rule changes should provide the same level of protection as bond ratings currently allowed from Moody's or Standard and Poor's.

Regulatory and takings assessments for these rule changes have been prepared and copies are available for review. This concludes my testimony on the mining and reclamation rule changes proposed in Case No. RC-07-163.