

NORTH DAKOTA
STATE
PROGRAM
AMENDMENT XXXIX

SUBMITTED BY:

PUBLIC SERVICE COMMISSION

STATE CAPITOL

BISMARCK, NORTH DAKOTA

FEBRUARY 1, 2012

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Public Service Commission

State of North Dakota

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February 1, 2012

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 XXXIX on behalf of the State of North Dakota in order to modify our approved coal regulatory program. This program 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 XXXIX contains some changes to the collateral bond rule under North Dakota Administrative Code (NDAC) Article 69-5.2, PSC Case No. RC-11-236. The changes relate to letters of credit that are pledged as the collateral for a collateral bond and involve the financial information and notices that banks issuing a letter of credit must provide to the Commission. An option is being added to allow a bank to provide a certified copy of financial reports that are already required by a federal agency instead of the bank's balance sheet that is certified by a certified public accountant. Another change affects the provision requiring banks issuing a letter of credit to give the Commission notice of actions alleging insolvency or bankruptcy. This is being revised to require this notice only to the extent allowed by state or federal banking regulations.

The amendment contains a narrative, the proposed changes North Dakota Administrative Code Article 69-05.2, and a copy of the Attorney General's opinion on the legality of the changes. Since our letter of credit provisions are more detailed than those in OSM rules under 30 CFR 800.21(b), 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,


Kevin Cramer
Commissioner


Tony Clark
Chairman


Brian P. Kalk
Commissioner

Narrative for North Dakota State Program Amendment XXXIX

State Program Amendment XXXIX contains a revised rule under North Dakota Administrative Code (NDAC) Article 69-5.2 for surface coal mining and reclamation operations. The change pertains to the letter of credit provisions for collateral bonds.

This amendment modifies the collateral bond provisions under North Dakota Administrative Code Section 69-05.2-12-04. The proposed changes relate to letters of credit that are pledged as the collateral for a collateral bond and involve the financial information and notices that banks issuing a letter of credit must provide to the Commission. An option is being added to allow a bank to provide a certified copy of financial reports that are already required by a federal agency in place of a balance sheet that is certified by a certified public accountant (CPA). The Reclamation Division had been informed that some banks find it difficult to provide the CPA certified balance sheets, but they can more easily provide the same information by submitting copies of reports that are already required by federal banking regulators.

Another change is being made to the provision that requires banks give the Commission notice of actions alleging insolvency or bankruptcy. This is being revised to require notice only to the extent allowed by state or federal banking regulations. State and federal banking regulators have informed the Reclamation Division that the existing rule is in conflict with certain banking regulations that restrict banks from giving certain information to others.

A public hearing on the proposed rule changes was held August 9, 2011 in Bismarck and some minor modifications were made in response to the comments that were received. An Attorney General's opinion that the rule changes are legal was received by the Commission on January 18, 2012. Since North Dakota's letter of credit provisions are more detailed than those in OSM rules under 30 CFR 800.21(b), a side-by-side comparison of the state rules to the counterpart federal rules was not prepared.

PROPOSED RULE

69-05.2-12-04. Performance bond - Collateral bond. The guarantor of a collateral bond may be the permit applicant or a qualified third party.

1. Collateral bonds are subject to the following conditions:
 - a. All collateral must be kept in the commission's custody until authorized for release or replacement.
 - b. Collateral must be valued at market value.
 - c. Certificates of deposit must be assigned to the state, in writing, and upon the books of the issuer.
 - d. Except for certificates issued by the Bank of North Dakota, the commission will not accept an individual certificate in excess of one hundred thousand dollars, or the maximum amount insured by the federal deposit insurance corporation and the federal savings and loan insurance corporation, whichever is greater.
 - e. An issuer shall waive all rights of setoff or lien against the certificate.
 - f. The commission will accept only automatically renewable certificates of deposit.
 - g. The permit applicant shall deposit sufficient collateral to assure the commission will be able to liquidate the certificates prior to maturity, upon forfeiture, for the amount of the bond.
2. A collateral bond pledging a letter of credit may be approved by the commission subject to the following conditions:
 - a. The permit applicant has obtained prior commission approval for the bank issuing the letter of credit.
 - b. The commission may accept a letter of credit which is irrevocable for a term of at least one year if:

- (1) The letter of credit is automatically renewable for additional terms unless the bank gives at least ninety days prior written notice to the commission and the permittee of its intent to terminate the letter of credit at the end of the current term.
 - (2) The commission has the right to draw upon the letter of credit before the end of its term and convert it into a cash collateral bond if the permittee fails to replace the letter of credit with other acceptable bond within thirty days of the bank's notice to terminate the credit.
- c. The letter of credit must be payable to the commission in part or in full upon demand and receipt from the commission of a notice of forfeiture issued in accordance with sections 69-05.2-12-16 and 69-05.2-12-18 or demand for payment under paragraph 2 of subdivision b.
- d. The commission will not accept letters of credit from a bank for a permittee, on permits held by that permittee, in excess of ten percent of the bank's total equity (stock, surplus capital, and retained earnings) as shown on a balance sheet certified by a certified public accountant. Alternatively, the bank may provide an excerpt from its most recent report of condition and income as prescribed by the federal financial institutions examination council that is filed with its primary federal regulator. At a minimum, the excerpt must include copies of the attestation page and the balance sheet schedule from the report and a written certification by a bank officer that the copies are true and correct and identify the federal bank regulatory agency and date that the report was filed. A copy of the bank's most recent balance sheet or the excerpt from the report of condition and income must be provided with the letter of credit and. In addition, updated balance sheets that are certified by a bank officer as being true and correct must be submitted annually to the commission within ninety days after the close of the bank's fiscal year.
- e. A letter of credit is governed by:
- (1) The laws of the state of North Dakota.

- (2) The current version of the uniform customs and practices for documentary credits, published by the international chamber of commerce.
- f. Letters of credit shall provide that the bank, to the extent allowed by state and federal banking laws and regulations, will give prompt notice to the permittee and the commission of notices received or actions filed alleging the insolvency or bankruptcy of the bank or alleging violations of regulatory requirements that could result in suspension or revocation of the bank's charter or license to do business. In the event of actions which could result in suspension or revocation of the bank's charter or license, the commission has the right to draw upon the letter of credit before the end of its term and convert it into a cash collateral bond if the permittee fails to replace the letter of credit with a substitute bond within thirty days after receipt of such a notice from the commission. If a substitute bond is not filed and the commission is unable to draw on the letter of credit, the commission will suspend the permit and the operator shall cease surface coal mining activities and comply with section 69-05.2-13-11.
3. For a collateral bond the guarantor shall execute an indemnity agreement according to subsections 9 and 10 of section 69-05.2-12-01.
4. Persons with an interest in collateral posted as a bond, who desire notice of actions relating to the bond, shall request the notice in writing to the commission when collateral is offered.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988; May 1, 1990; March 1, 2004; _____.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16

File - 2011 Rule Change

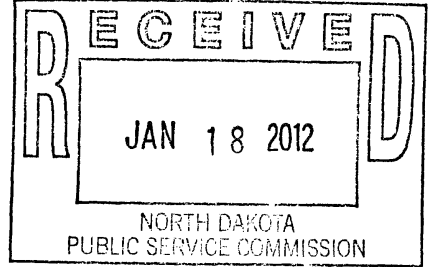


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ATTORNEY GENERAL

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OPINION

January 17, 2012



Ms. Illona A. Jeffcoat-Sacco
General Counsel
Public Service Commission
600 E Boulevard Ave Dept 408
Bismarck, ND 58508-0480

Dear Ms. Jeffcoat-Sacco:

The Office of Attorney General has examined the proposed amendment to N.D.A.C. § 69-05.2-12-04 concerning performance and collateral bonds related to surface coaling mining and reclamation operations (Public Service Commission Case No. RC-11-236), 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, 2) a regulatory analysis was not issued or requested, 3) a takings assessment was not prepared, 4) a small entity regulatory analysis and an economic impact statement were not prepared because the proposed rule changes do not impose any additional compliance or reporting requirements or performance standards on small entities, and 5) the proposed rules are within the agency's statutory authority.

These administrative rules are in substantial 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