

JUL 31 2014



## Public Service Commission State of North Dakota

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31 July 2014

Mr. John Walstad  
Code Revisor  
North Dakota Legislative Council  
State Capitol  
600 East Boulevard, 2<sup>nd</sup> Floor  
Bismarck, ND 58505-0360

RE: Amendment to N.D. Admin Code section 69-05.2-12-04  
PSC Case No. RC-11-236

Dear Mr. Walstad:

Enclosed for publication in the North Dakota Administrative Code please find a copy of amendments to Section 69-05.2-12-04 of the North Dakota Administrative Code relating to letters of credit pledged as collateral for a collateral bond.

In support of this filing, enclosed please find copies of:

- 10 July 2014 Public Service Commission Motion, with the amendments as adopted and approved;
- Copy of 6 June 2014 *Federal Register* showing ND rule changes approved by Federal Office of Surface Mining
- Letter from the Attorney General dated 17 January 2012 approving the proposed rules as to legality;
- The Public Service Commission's 26 October 2011 Order Submitting Rules to Attorney General, which summarizes and discusses all comments;
- Written comments (includes 1 August 2011 letter and 9 August 2011 written staff testimony presented at the hearing).

Thank you for your attention to this matter.

Best regards,

  
Illona A. Jeffcoat-Sacco  
General Counsel

encl.

**APPROVED**

DATE: 7-10-14

[Signature]

**MOTION**

**July 10, 2014**

**Public Service Commission  
Reclamation  
Rulemaking**

**Case No. RC-11-236**

Having received approval from the Attorney General and the federal Office of Surface Mining, I move the Commission adopt the proposed amendments to Section 69-05.2-12-04 of the North Dakota Administrative Code and forward them on to the Legislative Council for publication, in Public Service Commission, Reclamation, Rulemaking, Case No. RC-11-236.

**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

■ **Par. 4.** Section 1.6038A-2 is amended by revising paragraphs (d) and (e) to read as follows:

**§ 1.6038A-2 Requirement of return.**

\* \* \* \* \*

(d) *Time for filing returns.* A Form 5472 required under this section must be filed with the reporting corporation's income tax return for the taxable year by the due date (including extensions) of that return.

(e) *Untimely filed return.* If the reporting corporation's income tax return is untimely filed, Form 5472 nonetheless must be timely filed. When the reporting corporation's income tax return is ultimately filed, a copy of Form 5472 must be attached.

\* \* \* \* \*

**§ 1.6038A-2T [Removed]**

■ **Par. 5.** Section 1.6038A-2T is removed.

**John Dalrymple,**  
*Deputy Commissioner for Services and Enforcement.*

Approved: May 21, 2014.

**Mark J. Mazur,**  
*Assistant Secretary for the Treasury (Tax Policy).*

[FR Doc. 2014-13255 Filed 6-5-14; 8:45 am]

BILLING CODE 4830-01-P

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 934**

[SATS No. ND-053-FOR; Docket ID No. OSM-2012-0006; S1D1SS08011000 SX066A00067F144S180110; S2D2SS08011000SX066A00033F14 XS501520]

**North Dakota Regulatory Program**

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

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We are issuing a final decision on an amendment to the North Dakota regulatory program (the "North Dakota program") under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"). Our decision approves the amendment. North Dakota proposed changes to the North Dakota Administrative Code (NDAC) to address letter of credit provisions in the collateral bond rules under Section 69-5.2-12-04. The changes involve financial information and various notices that banks issuing a

letter of credit must provide to the North Dakota Public Service Commission (hereinafter, the "Commission").

**DATES:** *Effective Date:* June 6, 2014.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Fleischman, Denver Field Division, Chief, Telephone: (307) 261-6550, Internet address: [jfleischman@OSMRE.gov](mailto:jfleischman@OSMRE.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the North Dakota Program
- II. Submission of the Proposed Amendment
- III. Office of Surface Mining Reclamation and Enforcement's (OSMRE's) Findings
- IV. Summary and Disposition of Comments
- V. OSMRE's Decision
- VI. Procedural Determinations

**I. Background on the North Dakota Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act . . . ; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the North Dakota program on December 15, 1980. You can find background information on the North Dakota program, including the Secretary's findings, the disposition of comments, and conditions of approval in the December 15, 1980, *Federal Register* (45 FR 82214). You can also find later actions concerning North Dakota's program and program amendments at 30 CFR 934.15, 934.16, and 934.30.

**II. Submission of the Proposed Amendment**

By letter dated February 2, 2012, North Dakota sent us an amendment to its program (SATS number: ND-053-FOR, Administrative Record Document ID. OSM-2012-0006-0002) under SMCRA (30 U.S.C. 1201 *et seq.*). North Dakota submitted the amendment to include changes made at its own initiative.

North Dakota proposed to change the letter of credit provisions in its collateral bond rule at NDAC 69-5.2-12-04 which addresses the financial information that banks issuing a letter of credit must provide to the Commission. Specifically, North Dakota proposed to

revise its rules by adding an option that allows banks to provide a certified copy of financial reports that are required by a Federal banking agency rather than submit a balance sheet that is certified by a certified public accountant (CPA). North Dakota also proposed a change that affects the provision requiring banks to give the Commission notice of actions alleging insolvency or bankruptcy. North Dakota is proposing these changes both in order to avoid conflict with Federal and State banking regulations and to assist banks that may have difficulty submitting CPA certified balance sheets.

We announced receipt of the proposed amendment in the April 25, 2012, *Federal Register* (Vol. 77, No. 80 FR page number 24661). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record Docket ID OSM-2012-0006).

We did not hold a public hearing or meeting because no one requested one. The public comment period ended on May 25, 2012. We did not receive any comments.

**III. OSMRE's Findings**

30 CFR 732.17(h)(10) requires that State program amendments meet the criteria for approval of State programs set forth in 30 CFR 732.15, including that the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of 30 CFR Part 700. In 30 CFR 730.5, OSMRE defines "consistent with" and "in accordance with" to mean (a) with regard to SMCRA, the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act and (b) with regard to the Federal regulations, the State laws and regulations are no less effective than the Federal regulations in meeting the requirements of SMCRA.

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment as described below.

**A. Revisions to North Dakota's Rules That Are the Same as or Similar to the Corresponding Provisions of the Federal Regulations**

North Dakota proposed changes to existing language in subsections (d) and (f) of NDAC Section 69-05.2-12-04. The proposed changes include additional conditions that banks must meet in

order for the Commission to approve a coal operator's collateral bond pledging a letter of credit. The proposed rule changes are intended to ensure that banks issuing letters of credit to the North Dakota Public Service Commission (hereinafter, "the Commission") maintain a certain degree of fiscal health and provide notice to the Commission and permittee of insolvency, bankruptcy, or regulatory requirement violations.

#### 1. Performance Bond—Collateral Bond, at NDAC Sections 69–05.2–12–04(2)(d) and (f)

North Dakota proposed to revise NDAC Section 69–05.2–12–04(2)(d), which deals with notifications of the fiscal health of banks that issue letters of credit to the Commission. As previously written, the rules required that letters of credit submitted to the Commission be accompanied by a balance sheet and that updated balance sheets must be submitted regularly every year. North Dakota's proposed rule change provides banks with an alternative to submit certified copies of financial reports that are already required under Federal banking regulations. The Federal regulations governing collateral bonds pledging letters of credit are found at 30 CFR 800.21(b). The currently-approved State rules provide specific conditions for letters of credit that were found to be no less effective than Federal regulations [69 FR 2663]. Similarly, the proposed revision to NDAC 69–05.2–12–04(2)(d), although relaxing currently-approved State requirements, adds specificity to Federal requirements. Therefore, we find that the proposed change to NDAC 69–05.2–12–04(2)(d) is no less effective than the Federal regulations. Accordingly, we approve it.

North Dakota also proposed to revise NDAC Section 69–05.2–12–04(2)(f), which states that banks shall give prompt notice to the permittee and the Commission of notices received or actions filed alleging insolvency, bankruptcy, or banking regulatory requirement violations that could result in suspension or revocation of the bank's charter or license to do business. The proposed amendment contains language that limits the amount of information provided in the notice to what is permitted by State and Federal banking laws. North Dakota proposed this rule change to avoid conflict with various Federal and State banking regulations. The counterpart Federal regulations to subsection (f) are found at 30 CFR 800.16(e). 30 CFR 800.16(e)(1) requires that the bond shall "provide a mechanism" for a bank to notify the

regulatory authority, or in this case the Commission, of actions filed alleging insolvency, bankruptcy, or banking regulatory requirement violations that could result in suspension or revocation of the bank's charter or license to do business. Furthermore, 30 CFR 800.16(e)(2) requires that the permittee shall promptly notify the regulatory authority of the aforementioned actions. Since North Dakota's proposed rule change does not weaken the requirement that a "mechanism" exists for banks to notify the Commission of alleged insolvency, bankruptcy, or banking regulatory requirement violations, we find that the proposed change to NDAC 69–05.2–12–04(2)(f) is no less effective than the counterpart Federal regulations at 30 CFR 800.16(e) and we approve it.

#### IV. Summary and Disposition of Comments

##### Public Comments

We asked for public comments on the amendment (Administrative Record Document ID No. OSM–2012–0006–0002), but did not receive any.

##### Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various State and Federal agencies with an actual or potential interest in the North Dakota program (Administrative Record Docket ID No. OSM–2012–0006).

We received responses from both the Bureau of Land Management (BLM) and the Mine Safety and Health Administration (MSHA). BLM stated in a letter dated February 17, 2012, that they had no comments on North Dakota Amendment XXXIX (Administrative Record Document ID No. OSM–2012–0006–0004). MSHA stated in a letter dated March 5, 2012, that they concurred with the proposed revisions and had no further comment (Administrative Record Document ID No. OSM–2012–0006–0006).

##### Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) and the Clean Air Act (42 U.S.C. 7401 *et seq.*).

None of the revisions that North Dakota proposed to make in this amendment pertain to air or water quality standards. Although OSM did not ask EPA to concur on the

amendment, we did request EPA to comment on the amendment (Administrative Record ID No. OSM–2012–0006–0005). EPA did not respond to our request.

##### State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On February 7, 2012, we requested comments on North Dakota's amendment (Administrative Record Document ID No. OSM–2012–0006–0005), but neither responded to our request.

#### V. OSMRE's Decision

Based on the above finding, we approve North Dakota's February 1, 2012 amendment.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 934, which codify decisions concerning the North Dakota program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrates that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### VI. Procedural Determinations

##### Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

##### Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

##### Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and

the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

*Executive Order 13132—Federalism*

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be “in accordance with” the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations “consistent with” regulations issued by the Secretary pursuant to SMCRA.

*Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

*Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy*

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1)

considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

*National Environmental Policy Act*

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C) *et seq.*

*Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*)

*Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

*Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of \$100 million.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

*Unfunded Mandates*

This rule will not impose an unfunded Mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the federal regulation did not impose an unfunded mandate.

**List of Subjects in 30 CFR Part 934**

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 12, 2014.

Allen D. Klein,  
*Director, Western Region.*

For the reasons set out in the preamble, 30 CFR part 934 is amended as set forth below:

**PART 934—NORTH DAKOTA**

■ 1. The authority citation for part 934 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 934.15 is amended in the table by adding a new entry in chronological order by “Date of Final Publication” to read as follows:

**§ 934.15 Approval of North Dakota regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
February 1, 2012	June 6, 2014	NDAC 69–5.2–12–04.

[FR Doc. 2014-13293 Filed 6-5-14; 8:45 am]  
BILLING CODE 4310-05-P

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 944

[SATS No. UT-049-FOR; Docket ID No. OSM-2012-0015; S1D1SS08011000 SX066A00067F144S180110; S2D2SS08011000SX066A00033F14 XS501520]

#### Utah Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.  
**ACTION:** Final rule; Approval of Amendment.

**SUMMARY:** We are approving an amendment to the Utah regulatory program (the "Utah program") under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"). Utah proposed revisions to and additions of rules about ownership and control. Utah revised its program to be consistent with the corresponding Federal regulations.

**DATES:** *Effective Date:* June 6, 2014.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Fleischman, Chief, Denver Field Division, Telephone: 307-261-6550, Internet address: [jfleischman@OSMRE.gov](mailto:jfleischman@OSMRE.gov).

#### SUPPLEMENTARY INFORMATION:

- I. Background on the Utah Program
- II. Submission of the Proposed Amendment
- III. Office of Surface Mining Reclamation and Enforcement's (OSM's) Findings
- IV. Summary and Disposition of Comments
- V. OSM's Decision
- VI. Procedural Determinations

#### I. Background on the Utah Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act . . . and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Utah program on January 21, 1981. You can find background information on the Utah program, including the Secretary's

findings, the disposition of comments, and conditions of approval of the Utah program in the January 21, 1981, *Federal Register* (46 FR 5899). You can also find later actions concerning Utah's program and program amendments at 30 CFR 944.15 and 944.30.

#### II. Submission of the Proposed Amendment

By letter dated June 25, 2012, Utah sent us an amendment to its program (Administrative Record Number OSM-2012-0015-0002) under SMCRA (30 U.S.C. 1201 *et seq.*). Utah sent the amendment in response to an October 2, 2009 letter (Administrative Record No. OSM-2012-0015-0003) we sent to Utah in accordance with 30 CFR 732.17(c).

We announced receipt of the proposed amendment in the September 5, 2012 *Federal Register* (77 FR 54491). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record No. OSM-2012-0015-0001). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on October 5, 2012. We received comments from three Federal agencies.

By letter dated November 2, 2012, Utah sent us a supplemental to the June 25, 2012 amendment proposal (Administrative Record No. OSM-2012-0015-0008). Utah sent the supplemental amendment to address two minor revisions that were inadvertently omitted from the June 25th submittal.

We announced receipt of the supplemental proposed amendment in the December 12, 2012 *Federal Register* (77 FR 73966). In the same document, we reopened the public comment period on the amendment's adequacy (Administrative Record No. OSM-2012-0015-0010). That public comment period ended on December 27, 2012. We did not receive any additional comments during the second comment period.

#### III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment.

#### *Revisions to Utah's Rules That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations*

Utah proposed revisions to the following rules containing language that is the same as or similar to the corresponding sections of the Federal regulations.

R643-874-160 corresponding to 30 CFR 874.16, AML contractor eligibility (general);

R643-875-200 corresponding to 30 CFR 875.20, AML contractor eligibility (noncoal);

R645-100-200 corresponding to 30 CFR 701.5, Definitions of "Applicant/Violator System," "Control or Controller," "Knowingly" (deleted), "Knowing or Knowingly," "'Owned or controlled' and 'Owns or Controls'" (deleted), "Own, Owner, or Ownership," "Transfer, Assignment or Sale of Permit Rights," "Violation," "Violation, Failure, or Refusal," "Violation Notice," "Willful or Willfully," and "Willful Violation;"

R645-300-132 corresponding to 30 CFR 773.8, Review of compliance and entry of information into the AVS;

R645-300-132.100 corresponding to 30 CFR 773.9 through 773.11, Review of applicant, operator and ownership and control information, permit history, and compliance history;

R645-300-132.120 through -132.121 corresponding to 30 CFR 773.14(3) & (4), Challenging ownership and control listings;

R645-300-132.150 through -132.150.11 corresponding to 30 CFR 773.25 through 773.28, Challenging ownership and control listings;

R645-300-132.200 corresponding to 30 CFR 773.14, Provisionally issued permits;

R645-300-132.400 corresponding to 30 CFR 773.12, Permit eligibility determinations;

R645-300-132.500 corresponding to 30 CFR 773.13, Unanticipated events or conditions at remaining sites;

R645-300-133 corresponding to 30 CFR 773.15, Written findings for permit application approval;

R645-300-148 corresponding to 30 CFR 774.12(c), Updating ownership and control information;

R645-300-160 through -162 corresponding to 30 CFR 773.21, Improvidently issued permits;

R645-300-164 corresponding to 30 CFR 773.22 and 773.23, Improvidently issued permit rescission procedures;

R645-300-171 through -173 corresponding to 30 CFR 778.9, Certifying and updating permit application information;

R645-300-180 through -183.2 corresponding to 30 CFR 774.11, Post-permit issuance requirements based on ownership and control information;

R645-301-111 corresponding to 30 CFR 778.11, Minimum requirements for legal, financial, compliance, and related information;

R645-301-112.200 through -112.420 corresponding to 30 CFR 778.11 and



Wayne Stenehjem  
ATTORNEY GENERAL

STATE OF NORTH DAKOTA  
**OFFICE OF 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

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Reclamation  
Rulemaking**

**Case No. RC-11-236**

**ORDER SUBMITTING RULES TO ATTORNEY GENERAL**

**October 26, 2011**

**Appearances**

Commissioners Tony Clark, Brian P. Kalk, and Kevin Cramer

**Preliminary Statement**

On June 22, 2011, the North Dakota Public Service Commission (Commission) issued a formal Notice of Proposed Rulemaking and an Abbreviated Notice proposing to revise Section 69-05.2-12-04 of the Administrative Code. The proposed amendments pertain to the collateral bond provisions for surface coal mining and reclamation operations.

The proposed changes relate to letters of credit that are pledged as collateral and to the financial information and notices that banks issuing a letter of credit must provide to the Commission. The proposed amendment will not have an impact on the regulated community in excess of \$50,000.

**Public Hearing and Comments**

The Abbreviated Notice was published once in all 52 official county newspapers the week of July 2 through July 8, 2011. The Notice of Intent to Amend Administrative Rules and Notice of Public Hearing and proposed rules were also sent to those identified as interested or affected parties. The notices were forwarded on June 30, 2011, to the Legislative Council for publication.

A public hearing on the proposed rule changes was noticed for and held at 10:00 a.m. August 9, 2011. The hearing was held in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota. Commission staff testified at the hearing to explain the proposed rule. A representative for BNI Coal, Ltd. testified in support of the proposed rule, but also requested that some modifications to the proposed rule related to the information and notices that banks must provide when issuing a letter of credit. A letter with proposed language changes was also submitted on August 2, 2011.

The Commission allowed, after the conclusion of the rulemaking hearing, a comment period until August 19, 2011, 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. No other comments were received after the hearing.

### Discussion

Staff prepared and filed a statement regarding the required regulatory analysis, takings assessment, small entity regulatory analysis, and small entity economic impact statement.

Staff testified at the hearing explaining the proposed changes and that the rules adopted by the Commission must be as effective as counterpart federal rules issued by the Office of Surface Mining. Although BNI testified in support of the proposed rule changes, some additional modifications were requested regarding the format of the financial information that banks issuing a letter of credit can provide to the Commission. The proposed rule was then modified in a manner very similar to that requested by BNI.

No other comments were received and no other changes are being made to the proposed rules.

### Order

The Commission orders:

The proposed changes to Section 69-05.2-12-04 of 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 approved as to legality.

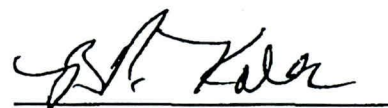
### PUBLIC SERVICE COMMISSION



**Kevin Cramer**  
Commissioner



**Tony Clark**  
Chairman



**Brian P. Kalk**  
Commissioner

**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

**MARILYN FOSS**

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August 1, 2011

Public Service Commission  
600 East Boulevard Avenue, Dept. 408  
Bismarck, ND 58505-0480

**RE: Case No RC-11-236**



Gentlemen:

BNI Coal, Ltd. ("BNI") appreciates this opportunity to comment on the proposed rule changes to the collateral bond provisions of N.D.A.C. § 69-05.2-12-04. **BNI supports the proposed rule changes with clarification as described below and very much appreciates the attention that the PSC and its staff have given to improving the rule so that it more "user friendly" for BNI and other permittees.**

BNI has more than once attempted to take advantage of the current rule to obtain and post a bank issued letter of credit as a collateral bond to secure BNI's reclamation obligations, but has found no bank that would issue a letter of credit upon terms that would meet the requirements of the rule as it is currently written. Two insurmountable problems of "form over substance" emerged:

➤ §§ 69-05.2-12-04(d) currently requires an issuing bank to submit a CPA certified balance sheet to establish compliance with its ten percent credit limit. The problem with this is simply that state and federal banking laws do not require all banks to have "bank only", CPA "certified" or audited balance sheets. However, all banks do submit detailed, quarterly Reports of Condition and Income t to their state and federal bank regulators. The reports are filed under penalty of perjury and include the bank's balance sheet showing the bank's stock, surplus capital and retained earnings in a schedule currently denominated as Schedule RC- Balance Sheet. **Allowing an issuing bank to establish its compliance with the PSC's credit limit by submitting Report of Condition and Income information is a positive change which BNI heartily endorses.** However, the full report with all of its schedules can be lengthy and not all schedules are public, although Schedule RC- Balance Sheet is. If balance sheet information is what the Commission needs, a bank should have the option of limiting its submission of Report of Condition and Income information to the balance sheet, recognizing that the full public schedules are available online. Furthermore, we believe minor clarifying language should be added to the rule to eliminate questions about the substance of the bank's certification. To meet both of these goals, we suggest the proposed language as it relates to the submission of the Reports of Condition and Income be revised to state, "or an excerpt from its most recent reports of condition and income as prescribed by the federal financial institutions examination council and filed by the bank with its primary federal regulator consisting at a minimum of a copy of the attestation page 1 and balance sheet schedule, together with a written certification by the bank that the copies are true and accurate and are from a report of condition and income that was filed with a stated federal bank regulatory agency on a stated date. A copy of the bank's most recent balance sheet or report of condition and income information must be provided with

the letter of credit and updated balance sheets or report of condition and income information must be submitted annually to the commission within ninety days after the close of the bank's fiscal year.

➤ Banks have informed BNI Coal, Ltd. that the mandate in § 569--5.2-12-04(2)(f) for a bank to notify " 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" conflicts with state and federal banking laws relating to the confidentiality of bank examinations. We understand federal and North Dakota state bank regulators have confirmed this to PSC staff. Because a bank may not comply with both the current rule and applicable bank laws and regulations, a bank that issues a letter of credit that conforms to the current rule places itself at risk for violating banking laws (something that itself can, technically speaking, jeopardize the bank's charter). In addition, occasionally, the regulatory examination process includes a discussion about whether a particular practice conforms to regulatory requirements. Many such discussions are concluded without a citation of violation or other regulatory consequence, even though the discussion may have been begun with an "allegation" of an apparent violation. **Substituting the word "citing" for "alleging" in the regulation and inserting the proviso that notice is required " to the extent allowed by state and federal banking laws and regulations" should resolve the issue for banks by removing a conflict between two sets of governing laws without interfering with the PSC's acknowledged need to be able to assess the status of the banks that are issuing the letters of credit.** As it happens, bank regulators do not close banks without first issuing some type of enforcement order, even as the vast majority of banks that are subject to an enforcement order successfully comply with it and see the enforcement order lifted. In any case, however, critical bank regulatory agency enforcement orders are generally public and, once issued, may be promptly disclosed by banks to the PSC. The proposed rule change (with the noted, slight revision) should allow the banks to issue a letter of credit that includes the disclosure obligation and also allow PSC to meaningfully evaluate the bank's status and whether to accept its letter of credit as a collateral bond.

BNI expects to attend the hearing on August 9 and to be available then or at the convenience of staff or the commission to address any questions there may be about these comments. Please direct any questions to me.

Again, BNI sincerely thanks the commission and staff for undertaking this rulemaking proceeding. We believe the adoption of the changes (revised as we suggest) will allow us to reduce our bond costs substantially to the ultimate benefit of North Dakota's consumers of electricity.

Sincerely Yours,



Marilyn Foss

Cc: Pat Clement via email transmission

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Reclamation  
Rulemaking**

**Case No. RC-11-236**

**PUBLIC SERVICE COMMISSION STAFF TESTIMONY**

**August 9, 2011**

I am Mike Berg, Environmental Engineer with the Reclamation Division of the Public Service Commission.

The Commission is proposing to amend the collateral bond provisions for surface coal mining and reclamation operations 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 will be added to allow a bank to provide a certified copy of financial reports that are already required by a federal agency instead of a balance sheet that is certified by a certified public accountant (CPA). Staff has 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.

In addition, a change is being proposed to the provision that requires banks 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. 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 this information to others. These letter of credit rule changes were proposed at the request of BNI Coal, Ltd. based on their experience in trying to obtain letters of credit from banks as the collateral for a collateral bond.

The mining and reclamation rule changes adopted by the Commission must be as effective as the counterpart federal rules that have issued by the federal Office of Surface Mining (OSM) within the Department of the Interior. Reclamation Division staff does not believe OSM will have any concerns with these rule changes since the current PSC rules are more specific than the counterpart federal rules.

The Commission received written comments on behalf of BNI Coal, Ltd. in support of the proposed rule changes; however, these comments also suggest a couple modifications to the rule changes as they were proposed. No other comments in this rulemaking case have been received.

This concludes my testimony.