

## Hamre, John G.

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**From:** -Adm-Legislative Council  
**Sent:** Thursday, May 28, 2020 3:18 PM  
**To:** Goehring, Doug C.; Stenehjem, Wayne K.; Nelson, Douglas D.; 'barber@srt.com'; gbs630@hotmail.com; Schmidt, James M.; Tuft, Mylynn K.; Thompson, Pamela J.; Glatt, Dave D.; Jacobson, Beth M.; Pfenning, Stacey; contactus@ndbon.org; Schuh, John M.; Kroshus, Brian; Hamre, John G.; Jaeger, Al A.; Silrum, Jim; Bertsch, Kenneth J.; Jones, Chris D.; Alm, Jonathan E.; Kommer, Michelle L.; Hagen, Bruce A.; Hyatt, Chuck R.; Leingang, Carolyn A.; Olson, Margaret I.; Siegel, Barbara; Gaebe, Melanie M.; Kannenberg, Derek P.  
**Cc:** Richter, Vonette J.  
**Subject:** Administrative Rules

### ADMINISTRATIVE RULES COMMITTEE MEETING

The Legislative Management's Administrative Rules Committee reviews all rules recently adopted by administrative agencies. The committee will hold its next meeting on Tuesday, June 9, 2020.

You are invited to appear before the committee and describe the procedure followed by your agency in adopting the rules published in the July 2020 supplement to the North Dakota Administrative Code. As I mentioned in my May 11, 2020, email, Chairman Devlin and I will be in the Senate Chamber at the Capitol for the meeting and the chairman has requested the agency presenters to appear in person in the Senate Chamber as well. The remaining members of the committee will be participating by teleconference. Because the public will have access to the State Capitol beginning June 1, those presenters without security card access will not have any problems accessing the building on June 9. Please remember to use the west entrance.

A copy of the agenda can be found at <http://www.legis.nd.gov/assembly/66-2019/interim/21-5123-02000-meeting-agenda.pdf> for your reference. Please note the time on the agenda scheduled for your presentation. If you or a representative are unable to appear at that time, please notify me as soon as possible.

With respect to the rules published in the July 2020 supplement, the committee is interested in and would like you to testify before the committee concerning the following matters:

1. Whether the rules resulted from statutory changes made by the Legislative Assembly.
2. Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules.
3. A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.
4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.
5. The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.
6. An explanation of the subject matter of the rules and the reasons for adopting those rules.
7. Whether a regulatory analysis was required by North Dakota Century Code (NDCC) Section 28-32-08 and whether that regulatory analysis was issued. Please provide a copy.

8. Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide copies.
9. Whether these rules have a fiscal effect on state revenues and expenditures, including any effect on funds controlled by your agency. If so, please provide copies of a fiscal note.
10. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.
11. If these rules were adopted as emergency (interim final) rules under NDCC Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules. If these rules were adopted as emergency (interim final) rules, what steps were taken to make the rules known to persons who can reasonably be expected to have a substantial interest in the rules?

**Please submit an electronic version of your testimony to me by June 5, if possible.** Because committee members will be using the copy of your testimony we will link to the agenda, **paper copies of your written testimony will not be needed for this meeting.**

The July 2020 rules of your agency can be found at <http://www.legis.nd.gov/admcode/arc202007377.pdf> in the form they will be presented to the committee at the meeting. The page numbers should be used as references for the committee because committee members will have pages with the same numbering. Please contact me if you have any questions.

VONETTE J. RICHTER – LEGAL DIVISION DIRECTOR

VJR/BM



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## ADMINISTRATIVE RULES COMMITTEE

Tuesday, June 9, 2020

Due to public health considerations and in accordance with Executive Order 2020-16, a meeting room will not be available to the public for this meeting. This meeting will be held by teleconference and committee members will receive sign-in or call-in information at least 1 day before the meeting. A live stream of the meeting will be available at: <http://video.legis.nd.gov/>. Written comments regarding the committee's agenda topics may be submitted to: [vrichter@nd.gov](mailto:vrichter@nd.gov).

The July 2020 Administrative Code Supplement may be found at the link below. The PDF is bookmarked for convenience. <https://www.legis.nd.gov/admcode/arc202007377.pdf>

- 10:00 a.m. Call to order  
Roll call  
Consideration of the minutes of the March 4, 2020, meeting
- 10:05 a.m. Presentation by a representative of the State Seed Department regarding the July 2020 rules of the State Seed Board (pages 743-770)
- 10:20 a.m. Presentation by a representative of the Agriculture Commissioner regarding the July 2020 rules of the Agriculture Commissioner (pages 1-68)
- 10:35 a.m. Presentation by a representative of the Attorney General (Fire Marshal) regarding the July 2020 rules of the Attorney General (pages 69-74)
- 10:50 a.m. Presentation by a representative of the Board of Barber Examiners regarding the July 2020 rules of the Board of Barber Examiners (pages 75-78)
- 11:00 a.m. Presentation by a representative of the State Electrical Board regarding the July 2020 rules of the State Electrical Board (pages 79-102)
- 11:15 a.m. Presentation by a representative of the State Department of Health regarding the July 2020 rules of the State Department of Health (pages 103-112)
- 11:30 a.m. Presentation by a representative of the Department of Environmental Quality regarding the July 2020 rules of the Department of Environmental Quality (pages 113-700)
- 12:05 p.m. Break
- 12:25 p.m. Presentation by a representative of the State Board of Nursing regarding the July 2020 rules of the State Board of Nursing (pages 701-714)
- 12:40 p.m. Presentation by a representative of the Public Service Commission regarding the July 2020 rules of the Public Service Commission (pages 715-732)
- 12:55 p.m. Presentation by a representative of the Secretary of State regarding the July 2020 rules of the Secretary of State (pages 733-742)
- 1:15 p.m. Presentation by a representative of the Department of Human Services regarding the July 2020 rules of the Department of Human Services (pages 771-880)
- 1:45 p.m. Presentation by a representative of the Department of Commerce regarding the July 2020 rules of the Department of Commerce (pages 881-905)

2:00 p.m. Committee discussion and directives  
2:15 p.m. Adjourn

**Committee Members**

Representatives: Bill Devlin (Chairman), Rick Becker, Josh Boschee, Kim Koppelman, Andrew Marschall, Brandy Pyle, Dan Ruby, Bernie Satrom, Vicky Steiner, Nathan Toman, Robin Weisz

Senators: Joan Heckaman, Jerry Klein, Randy D. Lemm, Nicole Poolman, David S. Rust

Staff Contact: Vonette J. Richter, Legal Division Director

**TITLE 69**  
**PUBLIC SERVICE COMMISSION**



**JULY 2020**

**CHAPTER 69-06-08**

**69-06-08-01. Energy conversion facility siting criteria.**

The following criteria must guide and govern the preparation of the inventory of exclusion and avoidance areas, and the site suitability evaluation process.

1. **Exclusion areas.** The following geographical areas must be excluded in the consideration of a site for an energy conversion facility.
  - a. Designated or registered national: parks; memorial parks; historic sites and landmarks; natural landmarks; historic districts; monuments; wilderness areas; wildlife areas; wild, scenic, or recreational rivers; wildlife refuges; and grasslands.
  - b. Designated or registered state: parks; forests; forest management lands; historic sites; monuments; historical markers; archaeological sites; grasslands; wild, scenic, or recreational rivers; game refuges; game management areas; management areas; and nature preserves.
  - c. County parks and recreational areas; municipal parks; parks owned or administered by other governmental subdivisions; hardwood draws; and enrolled woodlands.
  - d. Areas critical to the life stages of threatened or endangered animal or plant species.
  - e. Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.
  - f. Areas within one thousand two hundred feet of the geographic center of an intercontinental ballistic missile (ICBM) launch or launch control facility.
  - g. Areas within thirty feet [9.14 meters] on either side of a direct line between an intercontinental ballistic missile (ICBM) launch facility and a missile alert or launch control facilities to avoid microwave interference. This restriction only applies to aboveground structures, not to surface features, such as roads, or belowground infrastructure.
2. **Additional exclusion areas for wind energy conversion facilities.** The following geographical areas must be excluded in the consideration of a site for a wind energy conversion facility:
  - a. Areas within:

- (1) One and one-tenth times the height of the turbine from the nearest edge of an interstate or state roadway right of way;
  - (2) One and one-tenth times the height of the turbine plus seventy-five feet from the centerline of any county or maintained township roadway;
  - (3) One and one-tenth times the height of the turbine from the nearest edge of railroad right of way;
  - (4) One and one-tenth times the height of the turbine from the nearest edge of a one hundred fifteen kilovolt or higher transmission line right of way; and
  - (5) One and one-tenth times the height of the turbine from the property line of a nonparticipating landowner and three times the height of the turbine from an inhabited rural residence of a nonparticipating landowner, unless a variance is granted. A variance may be granted if an authorized representative or agent of the permittee, the nonparticipating landowner, and affected parties with associated wind rights file a written agreement expressing all parties' support for a variance to reduce the setback requirement in this subsection. A nonparticipating landowner is a landowner that has not signed a wind option or an easement agreement with the permittee of the wind energy conversion facility as defined in North Dakota Century Code chapter 17-04.
3. **Avoidance areas.** The following geographical areas may not be approved as a site for an energy conversion facility unless the applicant shows that under the circumstances there is no reasonable alternative. In determining whether an avoidance area should be designated for a facility the commission may consider, among other things, the proposed management of adverse impacts; the orderly siting of facilities; system reliability and integrity; the efficient use of resources; and alternative sites. Economic considerations alone will not justify approval of these areas. A buffer zone of a reasonable width to protect the integrity of the area must be included. Natural screening may be considered in determining the width of the buffer zone.
- a. Historical resources which are not designated as exclusion areas.
  - b. Areas within the city limits of a city or the boundaries of a military installation.
  - c. Areas within known floodplains as defined by the geographical boundaries of the hundred-year flood.
  - d. Areas that are geologically unstable.
  - e. Woodlands and wetlands.
  - f. Areas of recreational significance which are not designated as exclusion areas.
4. **Additional avoidance areas for wind energy conversion facilities.** A wind energy conversion facility site must not include a geographic area where, due to operation of the facility, the sound levels within one hundred feet of an inhabited residence or a community building will exceed fifty dBA. The sound level avoidance area criteria may be waived in writing by the owner of the occupied residence or the community building.
5. **Selection criteria.** A site may be approved in an area only when it is demonstrated to the commission by the applicant that any significant adverse effects resulting from the location, construction, and operation of the facility in that area as they relate to the following, will be at an acceptable minimum, or that those effects will be managed and maintained at an acceptable minimum. The effects to be considered include:

- a. The impact upon agriculture:
    - (1) Agricultural production.
    - (2) Family farms and ranches.
    - (3) Land which the owner demonstrates has soil, topography, drainage, and an available water supply that cause the land to be economically suitable for irrigation.
    - (4) Surface drainage patterns and ground water flow patterns.
    - (5) The agricultural quality of the cropland.
  - b. The impact upon the availability and adequacy of:
    - (1) Law enforcement.
    - (2) School systems and education programs.
    - (3) Governmental services and facilities.
    - (4) General and mental health care facilities.
    - (5) Recreational programs and facilities.
    - (6) Transportation facilities and networks.
    - (7) Retail service facilities.
    - (8) Utility services.
  - c. The impact upon:
    - (1) Local institutions.
    - (2) Noise-sensitive land uses.
    - (3) Light-sensitive land uses.
    - (4) Rural residences and businesses.
    - (5) Aquifers.
    - (6) Human health and safety.
    - (7) Animal health and safety.
    - (8) Plant life.
    - (9) Temporary and permanent housing.
    - (10) Temporary and permanent skilled and unskilled labor.
  - d. The cumulative effects of the location of the facility in relation to existing and planned facilities and other industrial development.
6. **Policy criteria.** The commission may give preference to an applicant that will maximize benefits that result from the adoption of the following policies and practices, and in a proper case may require the adoption of such policies and practices. The commission may also give

preference to an applicant that will maximize interstate benefits. The benefits to be considered include:

- a. Recycling of the conversion byproducts and effluents.
- b. Energy conservation through location, process, and design.
- c. Training and utilization of available labor in this state for the general and specialized skills required.
- d. Use of a primary energy source or raw material located within the state.
- e. Not relocating residents.
- f. The dedication of an area adjacent to the facility to land uses such as recreation, agriculture, or wildlife management.
- g. Economies of construction and operation.
- h. Secondary uses of appropriate associated facilities for recreation and the enhancement of wildlife.
- i. Use of citizen coordinating committees.
- j. A commitment of a portion of the energy produced for use in this state.
- k. Labor relations.
- l. The coordination of facilities.
- m. Monitoring of impacts.
- n. A commitment to install lighting mitigation technology for wind energy conversion facilities subject to commercial availability and federal aviation administration approval.

**History:** Amended effective August 1, 1979; July 1, 2006; April 1, 2013; July 1, 2017; July 1, 2018; July 1, 2019; [July 1, 2020](#).

**General Authority:** NDCC 28-32-02, 49-22-18

**Law Implemented:** NDCC 49-22-05.1, 49-22.1-03

#### **69-06-08-02. Transmission facility corridor and route criteria.**

The following criteria must guide and govern the preparation of the inventory of exclusion and avoidance areas, and the corridor and route suitability evaluation process. Exclusion and avoidance areas may be located within a corridor, but at no given point may such an area or areas encompass more than fifty percent of the corridor width unless there is no reasonable alternative.

1. **Exclusion areas.** The following geographical areas must be excluded in the consideration of a route for a transmission facility. A buffer zone of a reasonable width to protect the integrity of the area must be included. Natural screening may be considered in determining the width of the buffer zone.
  - a. Designated or registered national: parks; memorial parks; historic sites and landmarks; natural landmarks; monuments; and wilderness areas.
  - b. Designated or registered state: parks; historic sites; monuments; historical markers; archaeological sites; and nature preserves.

- c. County parks and recreational areas; municipal parks; and parks owned or administered by other governmental subdivisions.
  - d. Areas critical to the life stages of threatened or endangered animal or plant species.
  - e. Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.
  - f. Areas within one thousand two hundred feet of the geographic center of an intercontinental ballistic missile (ICBM) launch or launch control facility.
  - g. Areas within thirty feet on either side of a direct line between an intercontinental ballistic missile (ICBM) launch facility and a missile alert or launch control facilities to avoid microwave interference. This restriction only applies to above ground structures, not to surface features, such as roads, or below ground infrastructure.
2. **Avoidance areas.** The following geographical areas may not be considered in the routing of a transmission facility unless the applicant shows that under the circumstances there is no reasonable alternative. In determining whether an avoidance area should be designated for a facility, the commission may consider, among other things, the proposed management of adverse impacts; the orderly siting of facilities; system reliability and integrity; the efficient use of resources; and alternative routes. Economic considerations alone will not justify approval of these areas. A buffer zone of a reasonable width to protect the integrity of the area will be included unless a distance is specified in the criteria. Natural screening may be considered in determining the width of the buffer zone.
- a. Designated or registered national: historic districts; wildlife areas; wild, scenic, or recreational rivers; wildlife refuges; and grasslands.
  - b. Designated or registered state: wild, scenic, or recreational rivers; game refuges; game management areas; management areas; forests; forest management lands; and grasslands.
  - c. Historical resources which are not specifically designated as exclusion or avoidance areas.
  - d. Areas which are geologically unstable.
  - e. Within five hundred feet [152.4 meters] of a residence, school, or place of business. This criterion shall not apply to a water pipeline transmission facility.
  - f. Reservoirs and municipal water supplies.
  - g. Water sources for organized rural water districts.
  - h. Irrigated land. This criterion shall not apply to an underground transmission facility.
  - i. Areas of recreational significance which are not designated as exclusion areas.
3. **Selection criteria.** A corridor or route shall be designated only when it is demonstrated to the commission by the applicant that any significant adverse effects which will result from the location, construction, and maintenance of the facility as they relate to the following, will be at an acceptable minimum, or that those effects will be managed and maintained at an acceptable minimum. The effects to be considered include:
- a. The impact upon agriculture:
    - (1) Agricultural production.

- (2) Family farms and ranches.
  - (3) Land which the owner can demonstrate has soil, topography, drainage, and an available water supply that cause the land to be economically suitable for irrigation.
  - (4) Surface drainage patterns and ground water flow patterns.
- b. The impact upon:
- (1) Sound-sensitive land uses.
  - (2) The visual effect on the adjacent area.
  - (3) Extractive and storage resources.
  - (4) Wetlands, woodlands, and wooded areas.
  - (5) Radio and television reception, and other communication or electronic control facilities.
  - (6) Human health and safety.
  - (7) Animal health and safety.
  - (8) Plant life.
4. **Policy criteria.** The commission may give preference to an applicant that will maximize benefits that result from the adoption of the following policies and practices, and in a proper case may require the adoption of such policies and practices. The commission may also give preference to an applicant that will maximize interstate benefits. The benefits to be considered include:
- a. Location and design.
  - b. Training and utilization of available labor in this state for the general and specialized skills required.
  - c. Economies of construction and operation.
  - d. Use of citizen coordinating committees.
  - e. A commitment of a portion of the transmitted product for use in this state.
  - f. Labor relations.
  - g. The coordination of facilities.
  - h. Monitoring of impacts.
  - i. Utilization of existing and proposed rights of way and corridors.
  - j. Other existing or proposed transmission facilities.

**History:** Amended effective August 1, 1979; January 1, 1982; February 1, 1995; July 1, 2006; April 1, 2013; [July 1, 2020](#).

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-05.1

**ARTICLE 69-09  
PUBLIC UTILITY DIVISION**

Chapter	
69-09-01	Standards of Service - Gas
69-09-02	Standards of Service - Electric
69-09-03	Pipeline Safety
69-09-04	Uniform Sign Standards - Railroad
69-09-05	Standards of Service - Telephone
69-09-05.1	Accounting Practices
69-09-06	Prohibition on Sale and Direct Industrial Use of Natural Gas for Outdoor Lighting [Repealed]
69-09-07	Small Power Production and Cogeneration
69-09-08	Renewable Electricity and Recycled Energy Tracking System
69-09-09	Wind Facility Decommissioning
<u>69-09-10</u>	<u>Solar Facility Decommissioning</u>

**CHAPTER 69-09-03**

**69-09-03-02. Adoption of regulations.**

The following parts of title 49, Code of Federal Regulations in effect as of ~~December 31, 2017~~July 31, 2019, are adopted by reference:

1. Part 190 - Pipeline Safety Programs and Rulemaking Procedures.
2. Part 191 - Transportation of Natural Gas and Other Gas by Pipeline, Annual Reports, Incident Reports, and Safety-Related Condition Reports.
3. Part 192 - Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards.
4. Part 193 - Liquefied Natural Gas Facilities: Federal Safety Standards
5. Part 194 - Response Plans for Onshore Oil Pipelines
6. Part 195 - Transportation of Hazardous Liquids by Pipeline.
7. Part 199 - Drug and Alcohol Testing.

Copies of these regulations may be obtained from:

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

**History:** Effective June 1, 1984; amended effective July 1, 1986; January 1, 1988; March 1, 1990; February 1, 1992; August 1, 1993; August 1, 1994; February 1, 1996; July 1, 1997; July 1, 1998; September 1, 1999; August 1, 2000; January 1, 2002; November 1, 2003; May 1, 2005; July 1, 2006; April 1, 2008; January 1, 2010; April 1, 2012; April 1, 2015; October 1, 2016; July 1, 2018; July 1, 2020.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 49-02-01.2

## CHAPTER 69-09-09

### 69-09-09-01. Definitions.

1. "Capacity factor" means the ratio of the actual output generated by a facility for a period of time, to the output that could be produced at the nameplate generating capacity of that facility.
2. "Certificate of operation" means an affidavit executed by the owner certifying to the commission a facility's:
  - a. Nameplate generating capacity;
  - b. Annual capacity factor;
  - c. Annual megawatt hour output; and
  - d. Monthly megawatt hour output.
3. "Commercial wind energy conversion facility" means a wind energy conversion facility with one or more wind turbines that has a total nameplate generating capacity equal to or greater than five hundred kilowatts.
4. "Commission" means the public service commission.
5. "Construction" means any clearing of land, excavation, or other action that would affect the environment of the site of a facility, but does not include activities incident to preliminary engineering or environmental studies.
6. "Decommissioning plan" means a plan filed with the commission that includes:
  - a. The anticipated life of the facility;
  - b. A decommissioning cost estimate, excluding salvage ~~value of the turbines and equipment~~offsets that reduce decommissioning cost;
  - c. A description of the method used for determining the decommissioning cost estimate;
  - d. The anticipated manner in which the project will be decommissioned;
  - e. A description of any expected effects on present and future natural resource development; and
  - f. A detailed plan of financial assurance sufficient to ensure decommissioning.
7. "Existing facility" means a facility for which a certificate of site compatibility ~~has been~~was issued prior to July 1, 2017, or, if no certificate of site compatibility was issued, a facility that commenced operation prior to July 1, 2020.
8. "Facility" means a commercial wind energy conversion facility, including wind turbines, ~~turbine towers, tower~~-bases, blades, ~~pad~~-transformers, ~~collector~~cables, lines, substations, concrete, fences, facility access roads, ~~meteorology towers~~, and all areas disturbed by the construction, operation, maintenance, or decommissioning activities.
9. "Owner" means a person who holds a certificate of site compatibility pursuant to North Dakota Century Code chapter 49-22, or if no certificate was issued, a person who owns a facility or part of a facility.

**History:** Effective October 1, 2008; amended effective July 1, 2017; July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**69-09-09-05. Decommissioning requirements.**

1. Decommissioning the facility includes:

- ~~1.~~ a. Dismantling and removal of all towers, turbine generators, transformers, ~~and~~ fencing, overhead cables, inverters, transformers, substations and other equipment;
- ~~2.~~ b. Removal of underground cables to a depth of twenty-four inches [60.96 centimeters];
- ~~3.~~ c. Removal of foundations, buildings, and ancillary equipment to a depth of:
  - ~~a.~~ (1) Three feet [91.44 centimeters] for facilities constructed before July 1, 2017; and
  - ~~b.~~ (2) Four feet [121.92 centimeters] for facilities constructed on or after July 1, 2017;
- ~~4.~~ d. Site restoration and reclamation to the approximate original topography that existed prior to construction of the facility with topsoil respread over the disturbed areas at a depth similar to that in existence prior to the disturbance; and
- ~~5.~~ e. Grading and restoring topsoil of areas disturbed by the facility, and reseeding according to natural resource conservation service recommendations, unless the commission approves an owner request signed by the applicable landowner, identifying the surface features the landowner prefers to remain in place, and the reason the landowner prefers those features to remain.

2. The commission may waive a decommissioning requirement upon receipt of a request signed by the applicable landowner and finding good cause that the requirement be waived.

**History:** Effective October 1, 2008; amended effective July 1, 2017; July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**69-09-09-07. Existing facilities.**

The owner of an existing facility shall provide financial assurance ~~after the tenth year~~ upon ten years of operation sufficient to complete decommissioning.

**History:** Effective October 1, 2008; amended effective July 1, 2017; July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**69-09-09-08. Financial assurance.**

1. Prior to commencement of construction of a facility, the owner shall provide financial assurance equal to five percent of the estimated cost of construction of the facility that may be used to decommission the facility in the event it is abandoned prior to operation. Within sixty days of receipt of written notice from the owner that the facility is commercially operational and receipt of financial assurance pursuant to subsection 2, the commission shall return or release said financial assurance provided to the commission.
2. Prior to commencement of operation of a facility, the owner shall provide financial assurance that is acceptable to the commission and sufficient to ensure complete decommissioning.
3. Financial assurance may be in the form of a performance bond either as, or combination of, cash escrow held by a federal insured financial institution, a surety bond, irrevocable letter of

credit, ~~self-guarantee~~guarantee, parent guarantee, or another form of financial assurance that is acceptable to the commission to cover the anticipated costs of decommissioning.

4. The commission may allow the owner to provide financial assurance through an incremental bond schedule. To be given consideration, an incremental bond schedule must include an initial bond increment prior to commencement of operation.
5. The commission may accept a ~~self-guarantee~~guarantee or parent guarantee if:
  - a. The owner has been in continuous operation as a business entity for five years preceding the application. The commission may accept a ~~self-guarantee~~guarantee with less than five years of continuous operation if guaranteed with a parent guarantee and the parent company has been in operation for at least five years preceding the application; and
  - b. The owner or parent guarantor has or is one of the following:
    - (1) A current rating in the "A" category or higher for its most recent bond issuance or issuer rating as issued by Moody's Investors Service, Standard 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. If an organization has different ratings among various rating organizations, the commission shall accept the higher of the ratings;
    - (2) 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 liability of 1.2 or greater; or
    - (3) An electric public utility as defined by subsection 2 of North Dakota Century Code section 49-03-01.5.
6. The total amount of an outstanding ~~self-guarantee~~guarantee for decommissioning may not exceed twenty-five percent of the owner's tangible net worth in the United States.
7. The combined total amount of an outstanding ~~self-guarantee~~guarantee and parent guarantee for decommissioning may not exceed twenty-five percent of the owner's and parent guarantor's combined tangible net worth in the United States.
8. If any financial assurance is modified, canceled, suspended, or revoked, the owner shall immediately notify the commission and provide financial assurance as soon as practicable sufficient to ensure complete decommissioning.
9. The commission may require additional financial assurance upon a finding that the current financial assurance for a facility is not sufficient to ensure complete decommissioning.

**History:** Effective October 1, 2008; amended effective July 1, 2017; [July 1, 2020](#).

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**CHAPTER 69-09-10**  
**SOLAR FACILITY DECOMMISSIONING**

Section

<u>69-09-10-01</u>	<u>Definitions</u>
<u>69-09-10-02</u>	<u>Decommissioning Responsibility</u>
<u>69-09-10-03</u>	<u>Abandonment and Useful Life - Certificate of Operation</u>
<u>69-09-10-04</u>	<u>Decommissioning Period</u>
<u>69-09-10-05</u>	<u>Decommissioning Requirements</u>
<u>69-09-10-06</u>	<u>Decommissioning Plan</u>
<u>69-09-10-07</u>	<u>Existing Facilities</u>
<u>69-09-10-08</u>	<u>Financial Assurance</u>
<u>69-09-10-09</u>	<u>Failure to Decommission</u>
<u>69-09-10-10</u>	<u>Solar Energy Conversion Facility - Waiver</u>

**69-09-10-01. Definitions.**

1. "Capacity factor" means the ratio of the actual output generated by a facility for a period of time, to the output that could be produced at the nameplate generating capacity of that facility.
2. "Certificate of operation" means an affidavit executed by the owner certifying to the commission a facility's:
  - a. Nameplate generating capacity;
  - b. Annual capacity factor;
  - c. Annual megawatt hour output; and
  - d. Monthly megawatt hour output.
3. "Commercial solar energy conversion facility" means a solar energy conversion facility that has a total nameplate generating capacity equal to or greater than five hundred kilowatts.
4. "Commission" means the public service commission.
5. "Construction" means any clearing of land, excavation, or other action that would affect the environment of the site of a facility, but does not include activities incident to preliminary engineering or environmental studies.
6. "Decommissioning plan" means a plan filed with the commission that includes:
  - a. The anticipated life of the facility;
  - b. A decommissioning cost estimate, excluding salvage offsets that reduce decommissioning cost;
  - c. A description of the method used for determining the decommissioning cost estimate;
  - d. The anticipated manner in which the project will be decommissioned;
  - e. A description of any expected effects on present and future natural resource development; and
  - f. A detailed plan of financial assurance sufficient to ensure decommissioning.

7. "Existing facility" means a facility for which a certificate of site compatibility has been issued prior to July 1, 2020, or, if no certificate of site compatibility was issued, a facility that commenced operation prior to July 1, 2020.
8. "Facility" means a commercial solar energy conversion facility, including solar modules, racking, anchors, bolts, foundations, bases, transformers, cables, lines, substations, concrete, fences, facility access roads, towers, and all areas disturbed by the construction, operation, maintenance, or decommissioning activities.
9. "Owner" means a person that holds a certificate of site compatibility pursuant to North Dakota Century Code chapter 49-22, or if no certificate was issued, a person that owns a facility or part of a facility.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

#### **69-09-10-02. Decommissioning responsibility.**

The owner is responsible for decommissioning the facility and for all costs associated with decommissioning.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

#### **69-09-10-03. Abandonment and useful life - Certificate of operation.**

1. After construction of a facility is complete, the owner annually shall file a certificate of operation with the commission for that facility by April first of each year.
2. A facility is presumed to be at the end of its useful life if its annual capacity factor is less than five percent for two consecutive years.
3. A facility is presumed to be abandoned if, after commencement of construction and prior to completion, a period of twenty-four consecutive months has passed with no significant construction.
4. A presumption under this section may be rebutted by filing a plan for commission approval outlining the steps and schedule for continuing construction or operation of the facility.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

#### **69-09-10-04. Decommissioning period.**

The owner shall begin decommissioning within twelve months after abandonment or the end of its useful life. Decommissioning must be completed within twenty-four months after abandonment or the end of its useful life unless the commission approves a plan specifying the steps and schedules to return the facility to operation.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

#### **69-09-10-05. Decommissioning requirements.**

##### 1. Decommissioning the facility includes:

- a. Dismantling and removal of all panel racking, photovoltaic modules, supports, anchors, towers, fencing, overhead cables, inverters, transformers, substations, and other equipment;
- b. Removal of underground cables to a depth of twenty-four inches [60.96 centimeters];
- c. Removal of pilings and anchors, foundations, buildings, and ancillary equipment to a depth of four feet [121.92 centimeters].
- d. Site restoration and reclamation to the approximate original topography that existed prior to construction of the facility with topsoil respread over the disturbed areas at a depth similar to that in existence prior to the disturbance; and
- e. Grading and restoring topsoil of areas disturbed by the facility, and reseeding according to natural resource conservation service recommendations.

##### 2. The commission may waive a decommissioning requirement upon receipt of a request signed by the applicable landowner and finding good cause that the requirement be waived.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

#### **69-09-10-06. Decommissioning plan.**

##### 1. Prior to the commencement of operation of a facility, the owner shall have an approved decommissioning plan.

##### 2. The commission shall make a determination on the decommissioning plan no later than sixty days after the decommissioning plan is deemed complete by the commission.

##### 3. A decommissioning cost estimate for a facility:

- a. Must be made by a professional engineer licensed by the state of North Dakota and at the owner's expense;
- b. May include a decommissioning cost estimate, including salvage value, in addition to the decommissioning cost estimate, excluding salvage value;
- c. Must be updated and filed with the commission ten years after initial approval of the decommissioning plan and then continue to be updated and filed with the commission every five years until decommissioning is complete.

##### 4. The commission may at any time require the owner to file an updated decommissioning plan.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

#### **69-09-10-07. Existing facilities.**

The owner of an existing facility shall provide financial assurance upon ten years of operation sufficient to complete decommissioning.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**69-09-10-08. Financial assurance.**

1. Prior to commencement of construction of a facility, the owner shall provide financial assurance equal to five percent of the estimated cost of construction of the facility that may be used to decommission the facility in the event it is abandoned prior to operation. Within sixty days of receipt of written notice from the owner that the facility is commercially operational and receipt of financial assurance pursuant to subsection 2, the commission shall return or release said financial assurance provided to the commission.
2. Prior to commencement of operation of a facility, the owner shall provide financial assurance that is acceptable to the commission and sufficient to ensure complete decommissioning.
3. Financial assurance may be in the form of a performance bond either as, or combination of, cash escrow held by a federal insured financial institution, a surety bond, irrevocable letter of credit, guarantee, parent guarantee, or another form of financial assurance that is acceptable to the commission to cover the anticipated costs of decommissioning.
4. The commission may allow the owner to provide financial assurance through an incremental bond schedule. To be given consideration, an incremental bond schedule must include an initial bond increment prior to commencement of operation.
5. The commission may accept a guarantee or parent guarantee if:
  - a. The owner has been in continuous operation as a business entity for five years preceding the application. The commission may accept a guarantee with less than five years of continuous operation if guaranteed with a parent guarantee and the parent company has been in operation for at least five years preceding the application; and
  - b. The owner or parent guarantor has or is one of the following:
    - (1) A current rating in the "A" category or higher for its most recent bond issuance or issuer rating as issued by Moody's Investors Service, Standard 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. If an organization has different ratings among various rating organizations, the commission shall accept the higher of the ratings;
    - (2) 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 liability of 1.2 or greater;  
or
    - (3) An electric public utility as defined by subsection 2 of North Dakota Century Code section 49-03-01.5.
6. The total amount of an outstanding guarantee for decommissioning may not exceed twenty-five percent of the owner's tangible net worth in the United States.
7. The combined total amount of an outstanding guarantee and parent guarantee for decommissioning may not exceed twenty-five percent of the owner's and parent guarantor's combined tangible net worth in the United States.

8. If any financial assurance is modified, canceled, suspended, or revoked, the owner immediately shall notify the commission and provide financial assurance as soon as practicable sufficient to ensure complete decommissioning.
9. The commission may require additional financial assurance upon a finding that the current financial assurance for a facility is not sufficient to ensure complete decommissioning.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**69-09-10-09. Failure to decommission.**

If the owner does not complete decommissioning, the commission may take action to complete decommissioning, including action to require forfeiture of a bond. The entry into a participating landowner agreement constitutes agreement and consent of the parties to the agreement, their respective heirs, successors, and assigns, that the commission may take such action as may be necessary to decommission a facility, including the exercise by the commission, commission staff, and their contractors of the right of ingress and egress for the purpose of decommissioning the facility.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**69-09-10-10. Solar energy conversion facility - Waiver.**

The commission may grant a waiver of any requirement described in sections 69-09-10-03, 69-09-10-06, or 69-09-10-08 for a commercial solar energy conversion facility with a nameplate generating capacity of no more than five megawatts of electricity upon a motion demonstrating good cause for the waiver.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27