

Presented by: Jim Deusch
Director of AML & Reclamation Divisions
Public Service Commission

Before: Administrative Rules Committee
Representative Bill Devlin, Chairman

RE: North Dakota Administrative Code Section 69-05.2-12-04
PSC Case No. RC-11-236

Date: September 15, 2014

TESTIMONY

Mr. Chairman and committee members, my name is Jim Deusch, Director of AML and Reclamation Divisions for the North Dakota Public Service Commission. The Commission asked me to testify today regarding the referenced rulemaking proceeding.

The responses to the questions posed to us by the Legislative Council's staff are presented below. In each case, the question is restated prior to our response.

1. Whether the rules resulted from statutory changes made by the Legislative Assembly.

No.

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.

Mining and reclamation rules adopted by the Commission as part of the coal regulatory program must be as effective as counterpart regulations adopted by the Office of Surface Mining Reclamation and Enforcement (OSM) within the Department of the Interior. North Dakota's reclamation law is based on the federal Surface Mining Control and Reclamation Act of 1977. However, the changes proposed in this rulemaking proceeding were not mandated by OSM and they were optional.

- 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.**

On June 22, 2011, the Commission issued a Notice of Intent to Adopt and Amend Administrative Rules and Notice of Public Hearing. The notice of the rulemakings was published in daily newspapers throughout the state as required by North Dakota Century Code Chapter 28-32. A public hearing was held on August 9, 2011, in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota.

At the conclusion of the rulemaking hearing the Commission allowed a ten-day comment period, until August 19, 2011, for anyone to file comments on the proposed rules that would be made a part of the record to be considered by the Commission. Following receipt of the Attorney General's opinion on the rule changes on January 18, 2012, the proposed rule changes were then submitted to the Office of Surface Mining (OSM) on February 2, 2012 for its approval as a formal amendment to our federally approved program. On April 25, 2012, OSM published a notice in the Federal Register about the proposed rule changes with a thirty day comment period. OSM did not receive any comments, but the approval notice was not published in the Federal Register until June 6, 2014.

- 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.**

Other than staff testimony to explain the proposed rule changes, only one other person testified at the hearing. A representative of BNI Coal, Ltd. spoke briefly in support of the proposed changes since they made a request to the Commission for the rule change. As part of BNI's oral and written comments they also requested some additional changes to the rule language and these were made before the proposed rule was submitted to the Attorney General. No other comments were received during or after the hearing. The proposed rules contain revisions requested by BNI.

- 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.**

Legal notices associated with this rulemaking proceeding (which included one other PSC rulemaking case as well) cost \$1,978.68. The cost for legal notice associated with just the mining and reclamation rulemaking proceeding before you today was one-half, or \$989.34. Other than staff time, no other significant costs were incurred.

6. An explanation of the subject matter of the rules and the reasons for adopting those rules.

The proposed changes pertain to letters of credit that are pledged as the collateral if that form of a collateral bond is used by a mining company to meet its performance bond requires. The specific changes involve the financial information and notices that banks issuing a letter of credit must provide to the Commission. An option is being added to allow a bank to provide a certified copy of a financial report that is already required by a federal agency in place of a balance sheet that is certified by a certified public accountant. Another change relates to notices that banks must give the Commission if there are actions alleging bank's insolvency or bankruptcy. This is being revised to require that notice only to the extent allowed by state or federal banking regulations. BNI Coal, Ltd. requested these changes because some banks they do business with will not issue letters of credit for the collateral bonds under the current 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.

A copy of the Regulatory Analysis, Small Entity Analysis and Takings Assessment for the proposed rules is attached. The proposed rules are not expected to have an impact on the regulatory community in excess of \$50,000.

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 a copy.

Yes, any impacts to small entities were analyzed and a copy of that analysis is attached.

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.

The rules changes do not have a fiscal effect on state revenues and expenditures.

- 10. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.**

Yes, that assessment was conducted and it is part of the attached the Regulatory Analysis, Small Entity Analysis and Takings Assessment.

- 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?**

These rules were not adopted as emergency rules.

Mr. Chairman, this completes my testimony. I would be happy to respond to any questions the committee might have.

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Public Service Commission
Reclamation
Rulemaking**

Case No. RC-11-236

**Statement on Regulatory Analysis, Small Entity Analysis and Takings
Assessment**

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 amendment relates to letters of credit that are pledged as collateral, as well as the financial information and notices that banks issuing a letter of credit must provide to the Commission. An option is being added to allow a bank to provide a certified copy of financial reports that are already required by a federal agency instead of a balance sheet that is certified by a certified public accountant. In addition, a change is being proposed that banks give the Commission notice of actions alleging insolvency or bankruptcy only to the extent allowed by state or federal banking regulations. It should also be noted that any mining and reclamation rules adopted by the Commission must be as effective as the counterpart federal rules that have issued by the federal Office of Surface Mining within the Department of the Interior.

Regulatory Analysis

N.D.C.C. § 28-32-08 requires an agency to prepare a regulatory analysis if the rule is expected to have an impact on the regulated community in excess of fifty thousand dollars. The law provides, in part:

2. The regulatory analysis must contain:
 - a. A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
 - b. A description of the probable impact, including economic impact, of the proposed rule;
 - c. The probable costs to the agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues; and

- d. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why the methods were rejected in favor of the proposed rule.

These proposed changes provide additional flexibility to permit applicants and their banks, so not additional costs are expected. If anything, the additional flexibility should result in costs on regulated industry being reduced. A regulatory analysis is not required since the proposed rules are not expected to have an impact on the regulated community in excess of fifty thousand dollars.

Small Entity Regulatory Analysis

N.D.C.C. § 28-32-08.1 requires that before adoption of any proposed rule, the adopting agency prepare a regulatory analysis in which the agency considers options to minimize adverse impact on small entities. The law provides, in part:

2. . . . The agency shall consider each of the following methods of reducing impact of the proposed rule on small entities:
 - a. Establishment of less stringent compliance or reporting requirements for small entities;
 - b. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities;
 - c. Consolidation or simplification of compliance or reporting requirements for small entities;
 - d. Establishment of performance standards for small entities to replace design or operational standards required in the proposed rule; and
 - e. Exemption of small entities from all or any part of the requirements contained in the proposed rule.

The proposed rule changes do not impose any additional compliance or reporting requirements or performance standards on small entities.

Takings Assessment

N.D.C.C. § 28-32-09 requires an entity to prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of private real property. The law provides, in part:

1. . . . The agency's assessment must:

- a. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.
- b. Clearly and specifically identify the purpose of the proposed rule.
- c. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.
- d. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.
- e. Identify the source of payment within the agency's budget for any compensation that may be ordered.
- f. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

Given that the proposed rules do not limit the use of private real property, a written assessment of the constitutional takings is not required.

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Public Service Commission
Reclamation
Rulemaking**

Case No. RC-11-236

**Small Entity Economic Impact Statement
October 17, 2011**

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 amendment relates to letters of credit that are pledged as collateral, as well as the financial information and notices that banks issuing a letter of credit must provide to the Commission. An option is being added to allow a bank to provide a certified copy of financial reports, or portions thereof, that are already required by a federal agency instead of a balance sheet that is certified by a certified public accountant. In addition, a change is being proposed that banks give the Commission notice of actions alleging insolvency or bankruptcy only to the extent allowed by state or federal banking regulations. It should also be noted that any mining and reclamation rules adopted by the Commission must be as effective as the counterpart federal rules that have issued by the federal Office of Surface Mining within the Department of the Interior.

Small Entity Economic Impact Statement

N.D.C.C. § 28-32-08.1(3) requires that before adoption of any proposed rule that may have an adverse impact on small entities, the adopting agency shall prepare an economic impact statement that includes consideration of:

- a. The small entities subject to the proposed rule;
- b. The administrative and other costs required for compliance with the proposed rule;
- c. The probable cost and benefit to private persons and consumers who are affected by the proposed rule;
- d. The probable effect of the proposed rule on state revenues;
and
- e. Any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule.

The proposed rule changes in Case No. RC-11-236 will not have an adverse impact on small entities since no additional requirements are being imposed on them as stated in the Statement on Regulatory Analysis, Small Entity Analysis and Takings Assessment for this case.

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