

CHAPTER 69-05.2-12

PERFORMANCE BONDS - LIABILITY INSURANCE

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69-05.2-12-01. Performance bond - General requirements.

1. Permit applicants shall submit an estimate of bond for the entire permit area or that area specified in subsection 5.
2. The commission will review the estimated bond amount, approve or modify the required amount and notify the applicant.
3. Liability on the bond must cover all surface coal mining and reclamation operations to be conducted within the legally described area attached to the bond.
4. The applicant may file either the entire bond for the permit term or an incremental bond schedule and bond required for the first scheduled increment. Increments must be of sufficient size and configuration to provide for efficient reclamation operations should reclamation by the regulatory authority become necessary under section 69-05.2-12-18.
5. When the permittee elects to increment the amount of the bond, the permittee shall:
 - a. Furnish a legal description of each incremental area.
 - b. Furnish a schedule when each increment will require bond.
 - c. Furnish with the application the estimated costs for the commission to complete the reclamation plan for the initial increment.
 - d. Provide the estimated cost to complete the reclamation plan for the next increment at least ninety days prior to the expected starting date of mining.
6. The permittee will be notified of the commission's bond determination within thirty days of receipt of the permittee's reclamation cost estimate for the next bond increment.

7. The permittee shall not disturb the bond area prior to commission approval of the entire bond or incremental bond covering the area to be affected.
8. Once surface coal mining operations have begun within the bond area, adequate bond coverage must be in effect at all times. Except as provided by subsection 3 of section 69-05.2-12-03, operating without a bond is a violation of a permit condition.
9. The indemnity agreement for a collateral bond or self-bond must be executed according to the following:
 - a. If a corporation or rural electric cooperative:
 - (1) By two officers authorized to sign the agreement by a resolution of the board of directors, a copy of which must be provided; and
 - (2) To the extent the history or assets of a parent organization are relied upon to make the required showings for a collateral bond or self-bond, by every parent organization at any tier.
 - b. If a partnership, each general partner and each parent organization or principal investor. "Principal investor" or "parent organization" means anyone with a ten percent or more beneficial ownership interest, directly or indirectly, in the applicant.
 - c. If married, the permit applicant's spouse, if directly involved as part of the business on a regular basis or as an officer of the organization.
10. The name of each person who signs the indemnity agreement must be typed or printed beneath the signature. The agreement is binding jointly and severally on all who execute it.
11. The commission may allow the posting of more than one bond to guarantee specific phases of reclamation within the permit area provided the sum of phase bonds posted equals or exceeds the total amount required under sections 69-05.2-12-07 and 69-05.2-12-08. The scope of work to be guaranteed and the liability assumed under each phase bond must be specified in detail and approved by the commission before posting the bonds.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988; May 1, 1992; January 1, 1993; March 1, 2004.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16

69-05.2-12-02. Performance bond - Form of the performance bond.

The form for the performance bond shall be either:

1. A surety bond;
2. A collateral bond;
3. A self-bond; or
4. A combination of the above.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16

69-05.2-12-03. Performance bond - Surety bond.

Surety bonds shall be subject to the conditions of subsections 6 and 7 of North Dakota Century Code section 38-14.1-16 and the following conditions:

1. The notice required by subsection 6 of North Dakota Century Code section 38-14.1-16 shall be by certified mail to the permittee and the commission and is not effective until received by both.
 - a. Cancellation is not effective for lands subject to bond coverage which are disturbed after receipt of notice, but prior to approval by the commission.
 - b. The commission may approve cancellation if a replacement bond is filed by the permittee prior to the cancellation date, or the permit is revised so that the surface coal mining operations approved under the permit are reduced to cover all the costs for completion of reclamation operations.
2. The bond must provide that:
 - a. The surety will promptly notify the permittee and the commission of any notice received or action filed alleging the insolvency or bankruptcy of the surety, or alleging any violations of regulatory requirements which could result in suspension or revocation of the surety's license to do business.
 - b. If the surety becomes unable to fulfill its obligations under the bond, it shall immediately notify the permittee and the commission.
 - c. The surety and permittee are jointly and severally liable.
 - d. The surety may not cancel the bond during the period of liability, except as provided in subsection 6 of North Dakota Century Code section 38-14.1-16 and subsection 1 of this section.
3. Upon the incapacity of a surety by reason of bankruptcy, insolvency, or suspension or revocation of its license to do business in North Dakota, the permittee is deemed to be without bond coverage and shall, after receiving notice from the commission, substitute for that surety, a surety licensed to do business in North Dakota, or provide a substitute performance bond. If substitution is not made within thirty days, the commission may suspend the permit. If substitution is not made within ninety days, the commission will suspend the permit, and the operator shall cease surface mining activities and comply with section 69-05.2-13-11.

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

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16

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. 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; October 1, 2014.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16

69-05.2-12-05. Performance bond - Self-bond of permit applicant.

Repealed effective June 1, 1983.

69-05.2-12-05.1. Performance bond - Self-bond of permit applicant.

1. The commission may accept a self-bond if the following conditions are met:
 - a. The applicant designates an agent for service of process in the state.
 - b. The applicant has been in continuous operation as a business entity the five years preceding the application. The commission may allow a joint venture with less than five years of continuous operation if each member has been in continuous operation for the five years preceding the application.
 - c. The applicant submits financial information in sufficient detail to show one of the following:
 - (1) The applicant has a current rating of "A" or higher for its most recent bond issuance 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.
 - (2) The applicant has a tangible net worth of at least ten million dollars, a ratio of total liabilities to net worth of 2.5 or less, and a ratio of current assets to current liabilities of 1.2 or greater.
 - (3) The applicant's fixed assets in the United States total at least twenty million dollars and the applicant has a ratio of total liabilities to net worth of 2.5 or less, and a ratio of current assets to current liabilities of 1.2 or greater.

- d. The applicant submits:
 - (1) Financial statements for the last complete fiscal year audited by an independent certified public accountant, and a report containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion; and
 - (2) Financial statements for completed quarters in the current fiscal year and additional information requested by the commission.
 - e. "Tangible net worth" means net worth less intangibles.
- 2. The commission may accept a written guarantee for an applicant's self-bond from any third-party guarantor, whenever the applicant meets the provisions of subdivisions a, b, and d of subsection 1 and the guarantor meets the provisions of subdivisions a, b, c, and d of subsection 1. The commission may require the applicant to submit information pertaining to the provisions of subdivision c of subsection 1 in order to determine the financial capabilities of the applicant. The written guarantee must provide that:
 - a. If the applicant fails to complete the reclamation plan, the guarantor shall do so or the guarantor shall be liable under the indemnity agreement to provide to the commission funds, up to the bond amount, sufficient to complete the reclamation plan.
 - b. The guarantee must remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the commission at least ninety days in advance of the cancellation date, and the commission accepts the cancellation.
 - c. The cancellation may be accepted by the commission if the applicant obtains suitable replacement bond before the cancellation or if the covered lands have not been disturbed.
 - 3. The total amount of the outstanding and proposed self-bonds for surface coal mining and reclamation operations may not exceed twenty-five percent of the applicant's or third-party guarantor's tangible net worth in the United States.
 - 4. If the commission accepts a self-bond, an indemnity agreement executed by the applicant and any third-party guarantor must be submitted subject to the following:
 - a. The indemnity agreement is executed according to subsections 9 and 10 of section 69-05.2-12-01.
 - b. An affidavit is submitted certifying that such an agreement is valid under all applicable federal and state laws.
 - c. The guarantor provides a copy of the corporate authorization demonstrating that it may guarantee the self-bond and execute the indemnity agreement.
 - d. In the event of forfeiture, the applicant or third-party guarantor will complete the approved reclamation plan for the land in default or pay to the commission an amount necessary to complete the approved reclamation plan, not to exceed the bond amount.
 - 5. Self-bonded permittees and third-party guarantors shall submit an update of the information required under subdivisions c and d of subsection 1 within ninety days after the close of their fiscal years.
 - 6. If the financial conditions of the permittee or the third-party guarantor change so that the criteria of this section are not satisfied, the permittee shall notify the commission immediately and post an alternate bond in the same amount as the self-bond. If substitution is not made

within thirty days, the commission may suspend the permit. If substitution is not made within ninety days, the commission shall suspend the permit and the operator shall cease surface mining activities and comply with section 69-05.2-13-11.

History: Effective May 1, 1988; amended effective January 1, 1993; January 1, 2009.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16

69-05.2-12-06. Performance bond - Replacement of bonds.

1. The commission may allow permittees to replace one form of bond with another, if the liability is transferred to the replacement bonds.
2. Bonds must remain in effect until the commission has approved replacement bonds.
3. Bond replacement is not a release of bond.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988; January 1, 1993.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16

69-05.2-12-07. Performance bond - Determination of bond amount.

1. The amount of bond required is the estimated cost for the commission to perform the reclamation, restoration, and abatement work required.
2. The amount of bond required for each bonded area will:
 - a. Be determined by the commission;
 - b. Depend upon the requirements of the approved permit and reclamation plan;
 - c. Reflect the probable difficulty of reclamation considering topography, geology, hydrology, and revegetation potential; and
 - d. Consider the estimated cost submitted by the permit applicant.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988; January 1, 1993.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16

69-05.2-12-08. Performance bond - Adjustment of amount.

1. The commission will review each bond consistent with section 69-05.2-11-01 or more frequently and notify the permittee of any proposed bond adjustment.
2. The commission will reevaluate bonds with the standards in section 69-05.2-12-07.
3. If the commission determines a bond adjustment is required, the permittee is entitled to an informal conference on the adjustment under chapter 69-05.2-10 and North Dakota Century Code section 38-14.1-19.
4. A permittee may request reduction of the required bond amount upon submission of evidence showing the permittee's operations or other circumstances will reduce the maximum estimated cost for the commission to complete reclamation. Bond reductions which involve undisturbed land or revision of the cost estimate of reclamation are not bond releases. A request for reduction in bond for reclamation work performed on disturbed areas is a request for bond release.

History: Effective August 1, 1980; amended effective May 1, 1988; January 1, 1993.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16

69-05.2-12-09. Performance bond - Period of liability.

1. The bond liability period is the time necessary to meet the requirements of North Dakota Century Code chapter 38-14.1, this article, and the permit and shall continue a minimum of ten years as specified in subsection 2 of section 69-05.2-22-07. The period of extended responsibility begins again whenever augmented seeding, fertilization, irrigation, or other work is required or conducted on the site prior to bond release, unless the management practice conducted is a part of normal management for that particular land use and is approved by the commission.
2. If the commission approves a long-term postmining land use of developed water resources, recreation, residential, industrial, or commercial, the commission may approve a liability period of less than ten years if the other requirements of this subsection and the requirements of subdivisions j and k of subsection 4 of section 69-05.2-22-07 are met prior to the final release of bond.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988; July 1, 1995; May 1, 2001.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16

69-05.2-12-10. Performance bond - Request for reduction.

Repealed effective May 1, 1988.

69-05.2-12-11. Release of performance bond - Criteria for bond release.

1. The commission will not release any bond liability if the release would reduce the total remaining liability to less than that necessary for the commission to complete the required reclamation.
2. Release of bond for any combination of release stages identified in subsection 7 of North Dakota Century Code section 38-14.1-17 requires compliance with the reclamation standards established for each individual bond release stage.

History: Effective August 1, 1980; amended effective May 1, 1988; January 1, 1993.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-17

69-05.2-12-12. Release of performance bond - Bond release application.

1. The permittee may request the commission release all or part of a bond for lands disturbed after July 1, 1975, as follows:
 - a. For lands disturbed between July 1, 1975, and June 30, 1979, the application must comply with subsection 1 of North Dakota Century Code section 38-14.1-17 and subsections 3 and 4. The criteria for release of all or part of the bond will be according to the reclamation requirements in effect at the time of the disturbance.
 - b. For lands disturbed after June 30, 1979, the application must comply with the requirements of this section and section 69-05.2-12-11.

2. The permittee may file bond release applications only at times and seasons that allow the commission to properly evaluate the completed reclamation operations. Each application for bond release shall include a notarized statement by the permittee which certifies that all applicable reclamation activities have been accomplished in accordance with this article, North Dakota Century Code chapter 38-14.1, and the approved reclamation plan.
3. Within thirty days after filing a request for bond release, the permittee shall submit a copy of the newspaper advertisement that was published as required by North Dakota Century Code section 38-14.1-17. The advertisement published must include the permittee's name.
4. Lands for which the permittee requests final bond release must be legally described and delineated on maps of the permit area. Lands requested for partial bond release may be either legally described or otherwise clearly depicted and identified on maps of the permit area so the bond release tracts can be distinguished from other lands.
5. When the permittee requests a partial release of bond after regrading under subdivision a of subsection 7 of North Dakota Century Code section 38-14.1-17, the application must, unless waived by the commission, include surface profiles or topographic maps in accordance with section 69-05.2-21-06.
6. When the permittee requests a partial release of bond after resspreading suitable plant growth material under subdivision b of subsection 7 of North Dakota Century Code section 38-14.1-17, the application must include the thickness of the resspread first lift and second lift suitable plant growth materials.
7. When the permittee requests a partial release of bond after vegetation has been established under subdivision c of subsection 7 of North Dakota Century Code section 38-14.1-17, the application must include:
 - a. The data collected, analyses conducted, and a narrative demonstrating vegetation establishment as required by subsection 3 of section 69-05.2-22-07.
 - b. Documentation that the lands to which the release would be applicable are not contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by section 69-05.2-16-04.
 - c. A discussion of how the provisions of a plan approved by the commission for the sound future management of any permanent impoundment by the permittee or landowner have been implemented.
8. When the permittee requests final bond release under subdivision d of subsection 7 of North Dakota Century Code section 38-14.1-17, the application must include:
 - a. The data collected, analyses conducted, and a narrative detailing compliance with subsection 4 of section 69-05.2-22-07.
 - b. The history of initial and subsequent seedings and fertilization, including mixtures and rates, appropriate soil tests, supplemental irrigation, or other management practices employed.
 - c. Documentation showing the reestablishment of essential hydrologic functions of alluvial valley floors.
 - d. If a premine water delivery system will not be replaced, the bond release application must address the requirements of subdivision b of subsection 90 of section 69-05.2-01-02.

9. When the permittee requests release of bond for any combination of release stages detailed in subsection 7 of North Dakota Century Code section 38-14.1-17, the application must contain all the information required at each bond release stage.
10. Requests for a reduction in bond amount for reclamation work performed according to subsection 4 of section 69-05.2-12-08 must include a detailed description of the work performed and a new reclamation cost estimate.
11. The commission may request any additional information necessary to evaluate the bond release application.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988; May 1, 1992; January 1, 1993; May 1, 2001; March 1, 2004; April 1, 2007.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-17

69-05.2-12-13. Release of performance bond - Location of hearing.

Any formal hearing on the release of bond under subsection 2 of North Dakota Century Code section 38-14.1-17 shall be held in the city nearest the permit area, or the state capitol, at the option of the objector. Any person having a valid legal interest in a proposed release from bond shall specify preference for the place of hearing in the request for a formal hearing.

History: Effective August 1, 1980; amended effective May 1, 1988.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-17

69-05.2-12-14. Release of performance bond - Commission inspection - Time of release.

1. The surface owner, agent, or lessee will be notified by the commission of the bond release inspection and may participate in the inspection. If requested by a person with an interest in the bond release, the commission may arrange with the permittee access to the permit area for that person to gather relevant information within the time specified by subsection 3 of North Dakota Century Code section 38-14.1-17.
2. The commission will not release bond until the time to request a formal hearing has expired, or the commission has issued a final decision after a formal hearing.

History: Effective August 1, 1980; amended effective May 1, 1988; January 1, 1993.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-17

69-05.2-12-15. Release of performance bond - Objections to the decision and request for a public hearing.

1. The permittee or any person having a valid legal interest in the decision to release all or part of the performance bond shall have the right to file written objections to the release and to request a formal hearing under subsection 3 of North Dakota Century Code section 38-14.1-30 within thirty days of the decision.
2. The location of the formal hearing shall be selected in accordance with section 69-05.2-12-13.

History: Effective August 1, 1980; amended effective May 1, 1988.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-17

69-05.2-12-16. Forfeiture of performance bond - Procedures.

If forfeiture of the bond is required by section 69-05.2-12-18, the commission will:

1. Send notice by certified mail to the permittee and any surety of the commission's final decision to require forfeiture of the bond, the reasons for forfeiture, and the amount to be forfeited.
2. Advise the permittee and any surety of the permittee's right to request judicial review under North Dakota Century Code section 38-14.1-35.
3. Proceed to collect on the bond.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988; January 1, 1993.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16, 38-14.1-30, 38-14.1-33, 38-14.1-35

69-05.2-12-17. Forfeiture of performance bond - Criteria.

Repealed effective June 1, 1983.

69-05.2-12-18. Forfeiture of performance bond - Amount of forfeiture.

If the commission requires performance bond forfeiture, the total amount of all bonds for the bonded area for which liability is outstanding must be forfeited. Any bond proceeds remaining after reclamation is completed will be refunded. If there is more than one bond for a bonded area, including collateral bonds and self-bonds, any proceeds remaining after reclamation work is completed will be refunded proportionately.

History: Effective August 1, 1980; amended effective May 1, 1988; May 1, 1992.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16, 38-14.1-30

69-05.2-12-19. Permit revocation - Forfeiture of performance bond.

Repealed effective June 1, 1983.

69-05.2-12-20. Liability insurance.

1. The permittee shall submit to the commission a certificate of public liability insurance in accordance with subsection 3 of North Dakota Century Code section 38-14.1-14. Minimum coverage for bodily injury and property damage must be one million dollars for each occurrence and two million dollars aggregate.
2. The policy must be maintained in full force during the life of the permit or any renewal, as well as the liability period necessary to complete all reclamation operations under this article.

History: Effective August 1, 1980; amended effective June 1, 1983; March 1, 1987; May 1, 1990; May 1, 1992.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16, 38-14.1-30