

RELEASE OF COAL MINE RECLAMATION PERFORMANCE BONDS - BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3075 (attached as an appendix) directs the Legislative Council to study and identify federal and state statutory and regulatory policies that discourage or prevent final bond release applications from being filed and study and identify Public Service Commission regulatory policies that could be implemented to encourage flexibility in proving reclamation success and reducing administrative and regulatory burdens necessary for bond release applications, and study and identify actions being undertaken by the mining companies to achieve final bond release. The resolution notes that there are approximately 50,000 acres of disturbed land under mining permits in this state and that there is a 10-year statutory time period once mining and initial reclamation are completed before final bond release can be achieved. The resolution notes that the Public Service Commission estimates there may be between 8,000 and 10,000 acres of land that have been reclaimed for 10 years but for which no related final bond release requests by mining companies have been filed with the Public Service Commission. Finally, the resolution notes that there are circumstances in which land has been reclaimed for 10 years and is in full agricultural production but mining companies have not applied for final bond release due to the irregular shape of the tracts, proximity to active operations, need for future access, and safety concerns for the property's landowners or tenants.

Proponents of the resolution testified that nothing in state or federal law requires mining companies to apply for final performance bond release on strip-mined lands once the lands have been reclaimed. Proponents testified that as many as 10,000 acres of reclaimed land in this state have gone through the 10-year waiting period to prove reclamation success and should thus be eligible for final bond release, but mining companies have not applied to the Public Service Commission to have the bond covering the reclaimed land released.

COAL MINING, RECLAMATION, AND BONDING

North Dakota's coal resources are in the form of lignite--a low-grade, low-sulfur coal. Lignite was first mined in North Dakota by underground methods. This type of mining was gradually replaced by the safer and more economical method of mining called surface or strip mining, and all lignite mined in North Dakota since 1960 has been recovered by surface mining. There are six active coal mines in North Dakota. There are four large mines and two small mines that produce leonardite. The large mines are BNI Coal, Ltd.'s Center Mine, Dakota Westmoreland Corporation's Beulah Mine, Coteau Properties Company's Freedom Mine, and Falkirk Mining Company's Falkirk Mine. The Coteau

Properties Company and Falkirk Mining Company are subsidiaries of the North American Coal Corporation. In addition to these mines, there are five other mines that have closed and remain permitted and bonded for reclamation purposes. These are the Gascoyne, Glenharold, Indian Head, Larson, and Royal Oak Mines.

Coal plays an important part in North Dakota's economy. The production for fiscal year 2001 was 30,550,000 tons, compared to 16,750,000 tons in 1980 and 5,000,000 tons in 1970. Most of this coal is burned to generate electricity and for conversion to synthetic natural gas.

Surface coal mining operators in North Dakota must supply a performance bond before the Public Service Commission will issue a mining permit. The reason for requiring a performance bond is to ensure that land disturbed for coal mining will be reclaimed at no cost to the state or to the public in the event an operator's mining permit is revoked or the operator goes out of business. The Public Service Commission accepts several kinds of performance bond, including surety, collateral, self-bonding, or a combination of these types. Following removal of the coal resource, the land must be returned to its premined level of productivity before the mining operator will be released from liability. This is usually accomplished through proof of successful revegetation of the mined lands, and the revegetation requirement must be satisfied before the mine operator or permittee will be relieved of that person's legal liability to reclaim the land.

Since July 1, 1975, North Dakota law has required that reclaimed lands designated for agricultural purposes be restored to a level of productivity equal to or greater than that which existed before mining. Since July 1, 1979, all land disturbed for coal mining is subject to a 10-year period of responsibility for successful revegetation.

The performance bond normally is released incrementally. Up to 40 percent of the bond may be released on disturbed acreage following the backfilling, grading, and establishment of drainage control on the acreage. Another 20 percent may be released following the respreading of subsoil and topsoil. An additional amount of bond may be released once vegetation has been established, but enough bond must be retained to cover the costs of reseeding or minor erosion control during the 10-year period of responsibility for successful vegetation should that be necessary. When the mine operator has successfully completed all requirements of the regulatory program and has completed the 10-year period of responsibility, the Public Service Commission may release the remaining performance bond. Mining companies must show that lands reclaimed to agricultural use produce at least what the land did prior to mining.

Surface mining and reclamation operations are governed by North Dakota Century Code (NDCC) Chapter 38-14.1. Section 38-14.1-01 provides the declaration of findings and intent and provides that the Legislative Assembly finds and declares that many surface coal mining operations may result in disturbances of surface areas that adversely affect the public welfare by diminishing the utility of land for commercial, industrial, residential, cultural, educational, scientific, recreational, agricultural, and forestry purposes, by causing erosion, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, other natural resources, and cultural resources. This section provides that the expansion of coal mining to meet the nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public. This section states that surface mining and reclamation technology as now developed require effective and reasonable regulation of surface coal mining operations in accordance with the requirements of Chapter 38-14.1 to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations. This section provides further that surface coal mining operations contribute to the economic well-being, security, and general welfare of the state and should be conducted in an environmentally sound manner and that surface coal mining and reclamation operations should be so conducted as to aid in maintaining and improving the tax base, to provide for the conservation, development, management, and appropriate use of all the natural resources of affected areas for compatible multiple purposes, and to ensure the restoration of affected lands designated for agricultural purposes to the level of productivity equal to or greater than that which existed in the permit area prior to mining. Finally, this section provides that warrantless inspections are necessary in this state to ensure effective enforcement of surface coal mining and reclamation operation requirements.

North Dakota Century Code Section 38-14.1-10 provides that it is unlawful for any operator to engage in surface coal mining operations without first obtaining from the commission a permit to do so. Section 38-14.1-16 requires a performance bond and establishes the amount and sufficiency of the required surety. This section provides that as part of a surface coal mining and reclamation permit application, the permit applicant must file with the Public Service Commission, on a form prescribed and furnished by the commission, a bond for performance payable to the state of North Dakota and conditioned upon faithful performance of all the requirements of Chapter 38-14.1 and the requirements of all rules adopted pursuant to Chapter 38-14.1 and all permit terms and conditions. The commission is required to set the bond amount sufficient to complete

the reclamation plan in the event of forfeiture. The bond for the permit area must be at least \$10,000. The bond must cover that area of land within the permit area upon which the permittee will initiate and conduct surface coal mining and reclamation operations for the ensuing year. Before initiating and conducting succeeding increments of surface coal mining and reclamation operations within the permit area, the permittee must file with the commission an additional bond or bonds to cover the increments in accordance with Section 38-14.1-16. Liability under the bond, subject to allowable releases, is for the duration of the surface coal mining reclamation operation and for a period coincident with the permittee's responsibility for revegetation requirements and until such time as the lands included in the surface coal mining operation have been approved and released by the commission. The bond must be executed by the permit applicant and a corporate surety licensed to do business in North Dakota, except that the permit applicant may elect to deposit cash, negotiable bonds of the United States or of North Dakota, or negotiable certificates of deposit of any bank organized or transacting business in the state. The cash deposit or market value of the securities must be equal to or greater than the amount of the bond required for the bonded area. Cash or securities deposited must be deposited upon the same terms as the terms upon which surety bonds may be deposited. The securities are security for the repayment of the negotiable certificate of deposit. A bond filed for areas not yet affected by surface coal mining and reclamation operations may not be canceled by the surety unless it gives not less than 90 days notice to the commission. For lands on which surface coal mining and reclamation operations are being conducted, the bond may not be canceled by the surety unless a substitute surety assuming liability from the initiation of the operations is obtained and is approved by the commission. If the corporate surety's license is suspended or revoked, the permittee, after notice from the commission, must provide a substitute performance bond. If the permittee fails to make substitution within 30 days, the commission may suspend the permit. If substitution is not made within 90 days, the commission is required to suspend the permit. The commission may accept the bond of the permit applicant itself without separate surety when a permit applicant demonstrates to the satisfaction of the commission the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount. The amount of the bond or deposit required and the terms of each acceptance of the permit applicant's bond must be adjusted by the commission from time to time as acreages affected by surface coal mining operations are increased or decreased or where the cost of future reclamation changes. The amount of any forfeiture of the bond or security must be the amount prescribed in the permit for each acre or portion thereof on which surface coal mining and reclamation operations are being conducted.

North Dakota Century Code Section 38-14.1-17 governs the release of performance bonds. This section

provides that a permittee may file a request with the Public Service Commission for the release of all or part of a performance bond or deposit furnished subsequent to July 1, 1975. As part of any bond release application, the permittee must submit within 30 days after filing the request a copy of an advertisement placed at least once a week for four successive weeks in the official newspaper of each county in which the surface coal mining operation is located and in other daily newspapers of general circulation in the locality of the surface coal mining operation. The advertisement must contain notification of the precise location and the number of acres of land affected, the permit and the date approved, the amount of the bond filed and the portion sought to be released, the type and approximate dates of reclamation work performed and a description of the results achieved as they relate to the permittee's approved reclamation plan, and the right to file written objections and to request a public hearing or an informal conference. The permittee is also required to submit copies of letters that the permittee has sent to all owners of surface rights within the permit area proposed for bond release, to all owners of subsurface rights within the permit area proposed for bond release, to adjoining property owners, to certain state agencies, to heads of local governmental bodies, including the county commissioners and mayors of municipalities, to planning agencies, to sewage and water treatment authorities, and to water companies in the locality in which the surface coal mining and reclamation operations took place, notifying them of the permittee's intention to seek release from the bond. The letters must also contain notice of the right to file written objections and request an informal conference or a public hearing.

North Dakota Century Code Section 38-14.1-17 provides further that a person having a valid legal interest that is or may be adversely affected by release of the bond or the responsible officer or head of any state or local governmental agency that has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the surface coal mining operation, or is authorized to develop and enforce environmental standards with respect to the operations, has the right to file written objections to the proposed release from bond with the commission and to request an informal conference or a public hearing within 30 days after the last publication of the notice. Upon receipt of the application for bond release, the Public Service Commission is required, within 30 days, to conduct an inspection and evaluation of the reclamation work involved. The evaluation must consider, among other things, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of continuance or future occurrence of such pollution, the estimated cost of abating such pollution, the effectiveness of soil erosion control measures employed, and the level of bonding. The commission is then required to make written findings with its rulings to release or not to release all or part of the performance bond or deposit within 60 days from the filing of the request for bond

release, if no informal conference or public hearing is held, and if there has been an informal conference or a public hearing, within 30 days thereafter. Section 38-14.1-17(4) provides that the foregoing time periods do not apply if effective inspections cannot be carried out because of inclement weather.

If the commission disapproves the application for release of the bond or portion thereof, the commission is required to state the reasons for disapproval, recommend corrective actions necessary to secure the release and provide the permittee with an opportunity for a formal public hearing. If the Public Service Commission decides to release the bond either totally or in part, the commission must notify the county commissioners and the mayors of the municipalities in the county in which the applicable surface coal mining operation is located by certified mail at least 30 days before the actual release of all or a portion of the bond. Finally, NDCC Section 38-14.1-17 provides that the Public Service Commission may release bond as follows:

- When the permittee completes the backfilling, regrading, and drainage control in a bonded area, 40 percent of the bond for the area may be released.
- After spreading suitable plant growth material or other suitable strata on the regraded land, 20 percent of the bond for the area may be released.
- After vegetation is established on the regraded land, additional bond may be released. The commission is required to retain sufficient bond to cover third-party revegetation and associated costs for 10 years, provided there may not be a release until certain environmental protection performance standards are met and prime farmlands are returned to productivity equal to or greater than nonmined prime farmland in the surrounding area under equivalent management practices and if there is a permanent silt dam impoundment, bond may be released if the commission approves the commitments for future maintenance.
- When the permittee has successfully completed all surface coal mining and reclamation operations, and after the period set by NDCC Section 38-14.1-24(18), which is 10 years, the remaining bond may be released. No bond may be fully released until all reclamation requirements are met.

Control of the affected lands remains in the Public Service Commission, and the commission may not allow use of the land which is inconsistent with reclamation until reclamation has been accomplished to the satisfaction of the commission and until the bond has been fully released.

The 10-year successful revegetation requirement contained in NDCC Section 38-14.1-24(18) is required by the federal Surface Mining Control and Reclamation Act. The Surface Mining Control and Reclamation Act requires that, as a prerequisite for obtaining a coal mining permit, a person must post a reclamation bond to

ensure that the regulatory authority will have funds to reclaim the site if the permittee fails to complete the reclamation plan approved in the permit. Section 515 of the Surface Mining Control and Reclamation Act (30 U.S.C. 1265) provides that any permit issued under any approved state or federal program pursuant to the Surface Mining Control and Reclamation Act to conduct surface coal mining operations must require that the surface coal mining operations will meet all applicable performance standards of the Act and such other requirements as the regulatory authority may issue. General performance standards are applicable to all surface coal mining and reclamation operations and must require the operation as a minimum to assume the responsibility for successful revegetation for a period of five full years after the last year of augmented seeding, fertilizing, irrigation, or other work except in those areas or regions of the country where the annual average precipitation is 26 inches or less, then the operator's assumption of responsibility and liability will extend for a period of 10 full years after the last year of augmented seeding, fertilizing, irrigation, or other work.

COAL MINING EXCEPTION TO CORPORATE FARMING LAW

Testimony relating to House Concurrent Resolution No. 3075 indicated that since nothing in state or federal law requires mining companies to apply for final bond release on strip-mined lands they have reclaimed, the mining companies are violating the spirit of the corporate or limited liability company farming law. However, NDCC Section 10-06.1-06 provides a specific exemption from the corporate or limited liability company farming law for surface coal mining. This section provides that a corporation or limited liability company not engaged in the business of farming or ranching may own or lease lands used for farming or ranching, when the business of the corporation or limited liability company is the conducting of surface coal mining operations or related energy conversion, and when the owning or leasing of lands used for farming or ranching is reasonably necessary in the conduct of the business of surface coal mining or related energy conversion. This section provides further that when the necessity for owning or leasing the lands used for farming or ranching no longer exists, the exception provided in this section ceases and the corporation or limited liability company owning or leasing the lands is subject to Chapter 10-06.1.

2003 PROPOSED LEGISLATION

The 58th Legislative Assembly considered one bill relating to coal mine reclamation. House Bill No. 1470, which failed to pass the House, would have provided that for reclaimed tracts that are 80 acres or larger and have an agriculture postmining land use, the permittee must prepare for final bond release by beginning vegetation measurements for proving reclamation success no later than the eighth year of the 10-year period of revegetation responsibility. The beginning of the 10-year responsibility period for this requirement would have been based on the latest date that any area within the tract was initially planted; however, the permittee must also have applied for any variances that were available to expedite the final bond release process. Once the vegetation measurements had shown that the reclamation success standards were met and the 10-year responsibility period had ended, the permittee would have been required to submit an application for final bond release during the growing season of the following year. The bill also would have provided that if the permittee did not submit an application for final bond release as required, the Public Service Commission would be required to assess the permittee an annual fee. The fee would have been \$25 an acre the first year the eligible lands were not bond-released, and the fee would have increased \$5 per acre for each successive year until final bond release was obtained.

POSSIBLE STUDY APPROACH

In conducting its study and identification of federal and state statutory and regulatory policies that discourage or prevent final bond release applications from being filed and study and identify Public Service Commission regulatory policies that could be implemented to encourage flexibility in proving reclamation success and reducing administrative and regulatory burdens necessary for bond release applications and study and identify actions being undertaken by the mining companies to achieve final bond release, the committee could solicit testimony from a number of sources. These include the Public Service Commission, the Lignite Energy Council, the affected mining companies, and the Dakota Resource Council.

ATTACH:1