



North Dakota Legislative Council

Prepared for the Energy Development and Transmission Committee
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COAL CONVERSION FACILITY BONDING AND RECLAMATION - BACKGROUND MEMORANDUM

STUDY OVERVIEW

Section 2 of [House Bill No. 1455](#) (2021) directs the Legislative Management to study the need, cost, effect, and appropriate process for bonding and ensuring reclamation of coal conversion facilities. The study must include an examination and assessment of the:

- Methods and amounts of financial assurance and schedules;
- The interaction of economics and the statutes, rules, and policies relating to the remaining useful life and early retirement of coal conversion facilities;
- Role of the Public Service Commission in all electrical generation retirement; and
- Appropriate involvement of the public and local communities and political subdivisions in the retirement process.

The study also must evaluate the effectiveness of government programs and incentives relating to energy production, reliability, and the state's role in that process.

PUBLIC SERVICE COMMISSION JURISDICTION

General Jurisdiction of the Public Service Commission

Section 2 of Article V of the Constitution of North Dakota provides the Public Service Commission (PSC) consists of three Public Service Commissioners and the powers and duties of the PSC must be prescribed by law. North Dakota Century Code (NDCC) Section 49-02-01 sets out the general jurisdiction of the PSC. That section provides the general jurisdiction of the PSC extends to:

- Contract and common carriers engaged in the transportation of persons and property, excluding air carriers.
- Telecommunications companies engaged in the furnishing of telecommunications services as provided for in NDCC Chapter 49-21.
- Pipeline utilities engaged in the transportation of gas, oil, coal, and water.
- Electric utilities engaged in the generation and distribution of light, heat, or power.
- Gas utilities engaged in the distribution of natural, synthetic, or artificial gas.
- All heating utilities engaged in the distribution of heat.
- All other public utilities engaged in business in this state or in any county, city, township, or other political subdivision of the state.

North Dakota Century Code Section 49-02-02 authorizes the PSC to require public utilities or other persons to conform to the laws of this state and to all rules, regulations, and orders of the commission not contrary to law. In addition, the PSC may hold hearings on good cause or on its own motion. If, to the satisfaction of the PSC, it appears all interested parties have agreed concerning a matter at hand, or if no interested party has asked for a hearing, the PSC may issue an order without a hearing.

North Dakota Century Code Chapter 49-22 grants the PSC authority to issue certificates of site compatibility or route permits for electric energy conversion or transmission facilities.

Energy Conversion and Transmission Facility Siting Act

The 1975 Legislative Assembly passed Senate Bill No. 2050, the North Dakota Energy Conversion and Transmission Facility Siting Act, codified as NDCC Chapter 49-22. This chapter provides areas of protection to individual landowners in the siting of transmission and conversion facilities, such as:

- Including a statement of policy in which the Legislative Assembly declares "the construction of energy conversion facilities and transmission facilities affects the environment and the welfare of the citizens of this state. Therefore, it is necessary to ensure that the location, construction, and operation of energy conversion facilities and transmission facilities will produce minimal adverse effects on the environment and upon the welfare of the citizens of this state by providing that no energy conversion facility or transmission facility shall be located, constructed, and operated within this state without a certificate of site compatibility or a route permit acquired pursuant to this chapter." (NDCC Section 49-22-02)
- Requiring each utility that owns or operates, or plans within the next 10 years to own, operate, or start construction on any facility to develop a 10-year plan and submit the plan to the PSC. The plans must include a description of the general location, size, and type of all facilities to be owned or operated by the utility during the ensuing 10 years, as well as those facilities to be removed from service during the 10-year period; a description of the efforts by the utility to coordinate the plan with other utilities so as to provide a coordinated regional plan for meeting the utility needs of the region; and a description of the efforts to involve environmental protection and land-use planning agencies in the planning process, as well as other efforts to identify and minimize environmental problems at the earliest possible stage in the planning process. (NDCC Section 49-22-04)
- If not previously disclosed in a 10-year plan filing, requiring a utility owner or operator of an electric energy conversion facility to notify the PSC and the auditor of the county in which the facility is located if the owner or operator considers removing an electric energy conversion facility from service. Upon notice of the removal from service, the PSC may request the owner or operator provide the PSC with any applicable reliability study developed with a regional transmission organization in conjunction with the considered removal from service and may accept public comment in a format prescribed by the PSC. (NDCC Section 49-22-04)
- Requiring the PSC, in evaluating an application for a certificate of site compatibility, to consider the:
 - Effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment;
 - Effect of the proposed site or route on existing scenic areas, historic sites and structures, and paleontological or archaeological sites;
 - Potential for beneficial uses of waste energy from a proposed energy conversion facility;
 - Adverse direct and indirect environmental effects that cannot be avoided should the proposed site or route be designated;
 - Alternatives to the proposed site, corridor, or route which are developed during the hearing process and which minimize adverse effects;
 - Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated;
 - Direct and indirect economic impacts of the proposed facility;
 - Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route;
 - Effect of the proposed site or route on areas that are unique because of biological wealth or because the areas are habitats for rare and endangered species; and
 - Problems raised by federal agencies, other state agencies, and local entities. (NDCC Section 49-22-09)
- Requiring the PSC to hold a public hearing in each county in which any portion of a site, corridor, or route is proposed to be located in an application for a certificate or a permit. If more than one county is involved, the PSC may hold a consolidated hearing in one or more of the affected counties. A hearing for any county may not be consolidated if five or more affected landowners in the county file a petition with the commission within 10 days of the publication of the notice of hearing. At the public hearing, the PSC must afford interested persons an opportunity to be heard. Notice of a public hearing must be given by the PSC by service on any persons and agencies the PSC deems appropriate and twice by publication, once at least 20 days before the hearing and a second time within 20 days before the hearing. (NDCC Section 49-22-13)

- Allowing the PSC to appoint advisory committees to evaluate sites or corridors considered for designation. There must be at least one representative from the Department of Agriculture, a public or municipally owned utility, a private investor-owned utility, and a cooperatively owned utility; and one representative from each county and city in which an electric energy conversion facility or electric transmission facility is proposed to be located. (NDCC Section 49-22-14)
- Prohibiting a certificate of site compatibility for an energy conversion facility from superseding or preempting any local land use; zoning; or building rules, regulations, or ordinances and prohibiting a site from being designated if it violates local land use; zoning; or building rules, regulations, or ordinances. A permit for the construction of a transmission facility within a designated corridor may supersede and preempt any local land use; zoning; or building rules, regulations, or ordinances upon a finding by the PSC that such rules, regulations, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location. Without such a finding by the PSC, no route shall be designated which violates local land use; zoning; or building rules, regulations, or ordinances. (NDCC Section 49-22-16)
- Allowing any party aggrieved by the issuance of a certificate of site compatibility or transmission facility construction permit from the PSC, certification of continuing suitability filed by a utility with the PSC, or promulgation of a final order by the PSC, to request a rehearing by the PSC. (NDCC Section 49-22-19)

[House Bill No. 1144 \(2017\)](#) separated the siting requirements for electric energy facilities and the gas or liquid facilities into two separate chapters in NDCC Title 49. House Bill No. 1144 created NDCC Chapter 49-22.1 to address gas or liquid transmission facilities and gas or liquid energy conversion facilities while amending NDCC Chapter 49-22 to pertain only to electric transmission and electric energy conversion facilities.

STATUTORY DECOMMISSIONING, BONDING, AND RECLAMATION REQUIREMENTS

Solar and Wind

North Dakota Century Code Section 49-02-27 requires the PSC to adopt rules governing the decommissioning of commercial wind energy conversion facilities and authorizes the PSC to adopt rules governing the decommissioning of commercial solar energy conversion facilities. The rules adopted by the PSC governing the decommissioning of commercial wind energy conversion facilities must address:

- The anticipated life of the project;
- The estimated decommissioning costs in current dollars;
- The method and schedule for updating the costs of the decommissioning and restoration;
- The method of ensuring that funds will be available for decommissioning and restoration;
- The anticipated manner in which the project will be decommissioned and the site restored; and
- Present and future natural resource development.

Under the authority granted by NDCC Section 49-02-27, the PSC adopted North Dakota Administrative Code (NDAC) Chapters [69-09-09](#) and [69-09-10](#) pertaining to wind and solar facility decommissioning. Both chapters provide the owner of a wind or solar facility is responsible for decommissioning the facility and for all costs associated with decommissioning. In addition, an owner of a wind or solar facility is required to begin decommissioning within 12 months after abandonment or the end of its useful life. A facility is presumed to be abandoned if, after commencement of construction and before completion, a period of 24 consecutive months has passed with no significant construction and a facility is presumed to be at the end of its useful life if its annual capacity factor is less than 10 percent for 2 consecutive years for wind facilities and less than 5 percent for solar facilities.

Decommissioning requirements for wind or solar facilities include 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 before the disturbance, and grading and restoring topsoil of areas disturbed by the facility and reseeding according to natural resource conservation service recommendations.

Coal Mining

Under NDCC Chapter 38-14.1, a surface coal mining operator in North Dakota must supply a performance bond before the PSC may issue a mining permit. North Dakota Century Code Section 38-14.1-16 requires a performance bond and establishes the amount and sufficiency of the required surety. The PSC 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. The reason for requiring a performance bond is to ensure land disturbed for coal mining will be reclaimed at no cost to the state or to the public if an operator's mining permit is revoked or the operator goes out of business. The PSC 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 pre-mined level of productivity before the mining operator is released from liability. This usually is accomplished through proof of successful revegetation of the mined lands, and the revegetation requirement must be satisfied before the mine operator or permittee is relieved of that person's legal liability to reclaim the land.

North Dakota Century Code Section 38-14.1-17 governs the release of performance bonds. This section provides a permittee may file a request with the PSC 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 4 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 also is required to submit copies of letters the permittee has sent to all owners of surface rights within the permit area proposed for bond release; all owners of subsurface rights within the permit area proposed for bond release; adjoining property owners; certain state agencies; heads of local governmental bodies, including the county commissioners and mayors of municipalities; planning agencies; sewage and water treatment authorities; and water companies in the locality in which the surface coal mining and reclamation operations took place, notifying each of the permittee's intention to seek release from the bond. The letters also must 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 further provides 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 PSC 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 PSC 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 PSC is 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.

If the PSC disapproves the application for release of the bond or a portion of the bond, the PSC 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 PSC decides to release the bond either totally or in part, the PSC 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.

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 is that is necessary. When the mine operator has successfully completed all requirements of the regulatory program and has completed the 10-year period of responsibility, the PSC may release the remaining performance bond. Mining companies must show that lands reclaimed to agricultural use produce at least what the land did before mining.

STATE TAX INCENTIVES FOR COAL

Coal Severance Tax

The coal severance tax is imposed on the act of removing coal from the earth pursuant to NDCC Chapter 57-61. The tax is in lieu of both the sales and use taxes on coal and the property tax on minerals in the earth. The coal severance tax applies to all coal severed for sale or industrial purposes, except coal used for heating buildings in the state, coal used by the state or any political subdivision of the state, and coal used in agricultural processing facilities in the state or adjacent states. The tax is applied at a rate of 37.5 cents per ton. An additional 2 cents per ton tax is levied for the lignite research fund. A 50 percent reduction of the 37.5 cent tax is allowed for coal burned in a cogeneration facility designed to use renewable resources to generate 10 percent or more of its energy output. A county may grant a partial or complete exemption from the county's 70 percent portion of the 37.5 cent tax for coal that is shipped out of state.

Coal Conversion Privilege Tax

The coal conversion tax is imposed in lieu of property taxes on the operator of each coal conversion facility pursuant to NDCC Chapter 57-60. The land on which the facility is located remains subject to property taxes. The privilege tax on coal conversion facilities is applied based on the type of coal conversion facility as follows:

Electrical generating plants.

Electrical generating plants are subject to two separate levies. One levy is a .65 mill times 60 percent of installed capacity times the number of hours in the taxable period, and the other levy is .25 mill per kilowatt-hour of electricity produced for sale. Installed capacity means the number of kilowatts a power unit can produce as displayed on the nameplate assigned to the turbine of the power unit.

Other coal conversion plants.

- Coal gasification plants - A coal gasification plant is subject to a monthly tax in the amount of 13.5 cents per thousand cubic feet of synthetic natural gas produced for sale, or 2 percent of gross receipts, whichever is greater.
- Plants converting coal to products other than gas - These plants are taxed at a rate of 2 percent of gross receipts.
- Coal beneficiation plants - The tax rate for a coal beneficiation plant is 20 cents per ton of beneficiated coal produced for sale, or 1.25 percent of gross receipts, whichever is greater.

Exemptions to the coal conversion tax include:

- Beneficiated coal produced in excess of 80 percent of a plant's design capacity or produced for use within a coal conversion facility.
- A new or repowered coal-burning electrical generation plant is exempt from the general fund portion of both levies for 5 years. The county may grant an exemption for up to 5 years from the county's 15 percent share of the levy on installed capacity.
- All new coal conversion plants other than electrical generating plants are exempt from the general fund's 85 percent share of the tax for 5 years. The county may grant a partial or complete exemption from the county's 15 percent share for up to 5 years.
- A coal conversion facility that achieves a 20 percent capture of carbon dioxide emissions during a taxable period receives a 20 percent reduction in the general fund share of the tax, and an additional reduction of 1 percent for every additional 2 percentage points of carbon dioxide emissions captured, up to a 50 percent reduction for 80 percent or more capture. The reduction is available for 10 years from the date of the first capture or from the date the facility is eligible to receive the credit. A coal conversion facility that met the carbon dioxide capture requirements before January 1, 2017, is not eligible for the reduction.

Additional state tax incentives pertaining to coal.

- A sales and use tax exemption for machinery or equipment used to produce coal from a new mine. The exemption for each mine is limited to the first \$5 million of sales and use tax paid pursuant to NDCC Section 57-39.2-04.8.
- A sales tax exemption for materials used to construct or expand a facility used to extract or process byproducts associated with coal gasification pursuant to NDCC Section 57-39.2-04.11.

- A sales and use tax exemption for materials used to construct, expand, repower, or add environmental upgrades to an electrical generation plant, and all additions thereto, which processes or converts coal into electrical power pursuant to NDCC Sections 57-39.2-04.2 and 57-40.2-04.2.
- A sales and use tax exemption on gross receipts from the initial sale of beneficiated coal and the sale of coal which is exempt from the coal severance tax pursuant to NDCC Sections 57-39.2-04 and 57-40.2-04.
- A property tax exemption for each coal conversion facility and any carbon dioxide capture system located at a coal conversion facility pursuant to NDCC Section 57-60-06. The property tax exemption does not apply to the land on which the facility or capture system is located.

SUGGESTED STUDY APPROACH

In conducting the study, the committee may wish to receive testimony from the PSC, the North Dakota Association of Counties, North Dakota League of Cities, North Dakota Township Officers Association, Northwest Landowners Association, Western Dakota Energy Association, Great River Energy, The Lignite Council, the Dakota Resource Council, Utility Shareholders of North Dakota, and the Department of Environmental Quality. The focus of the testimony should be on the role of the PSC in all electrical generation retirement, the appropriate involvement of the public and local communities and political subdivisions in the retirement process, and input on potential government programs or incentives relating to advancing and ensuring continued North Dakota energy production and reliability.