

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-13

Date issued: May 21, 1990

Requested by: Public Service Commission

- QUESTIONS PRESENTED -

I.

Whether the Public Service Commission (PSC) may adjust a performance bond amount using the cost estimated for reclamation work yet to be performed, in addition to the percentage release procedure of N. D. C. C. ' 38-14.1-17(7).

II.

Whether public notice of a bond adjustment is required.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the Public Service Commission may adjust a performance bond amount using the cost estimated for reclamation work yet to be performed, or may use the percentage release procedure of N. D. C. C. ' 38-14.1-17(7).

II.

It is my opinion that public notice of a bond adjustment is not required.

- ANALYSES -

I.

An applicant for a coal mining and reclamation permit must file a performance bond conditioned upon performance of all the requirements contained in N. D. C. C. ch. 38-14.1, all the rules promulgated pursuant to N. D. C. C. ch. 38-14.1, and all the permit terms and conditions attached by the Public Service Commission (PSC) with that agency. N. D. C. C. ' 38-14.1-16(1). Prior to 1987, the required performance bond amount was based upon acreage. Bond was required in an amount of at least \$1,500 for each acre mined or for an amount adequate to assure completion of the reclamation plan in the event of forfeiture, whichever was greater. For acres affected by other activities conducted as part of a surface coal mining project, the required bond amount was at least \$200 for each acre or for an amount adequate to assure the completion of

the reclamation plan, whichever was greater. The 1987 Legislative Assembly, however, amended N. D. C. C. ' 38-14.1-16(2) to require the PSC to set bond at an amount sufficient to complete the reclamation plan in the event of forfeiture. Thus, the bond amount is no longer based solely upon acreage.

N. D. C. C. ' 38-14.1-17(7) sets forth the method of bond release available to the PSC. Section 38-14.1-17(7) provides:

The commission may release bond as follows:

- a. When the permittee completes the backfilling, regrading, and drainage control in a bonded area, forty percent of the bond for the area may be released.
- b. After spreading suitable plant growth material or other suitable strata on the regraded land, twenty percent of the bond for the area may be released.
- c. After vegetation is established on the regraded land additional bond may be released. The commission shall retain sufficient bond to cover third party revegetation and associated costs . . . .
- d. When the permittee has successfully completed all surface coal mining and reclamation operations . . . the remaining bond may be released. No bond may be fully released until all reclamation requirements are met.

Thus, the PSC may release bond incrementally, depending upon the work completed.

The release provisions of N. D. C. C. ' 38-14.1-17 do not work well with the current method of calculating the amount of the bond because the amount of the bond and the amount of the bond release are determined on a different basis. The incremental bond release criteria set forth in N. D. C. C. ' 38-14.1-17(7) worked well when bond amounts were calculated on a per acre basis. However, the amount of bond required under N. D. C. C. ' 38-14.1-16(2) is now calculated based upon the highest possible cost of reclamation. Because of this difficulty the PSC questions whether it may release bond based upon a cost estimate of reclamation work yet to be performed.

N. D. C. C. ' 38-14.1-17(7) provides the only method for the PSC to release bond. Therefore bond release must be determined pursuant to that section. However, the PSC is also authorized to adjust bonds from time to time as conditions change.

Bond adjustments are authorized by N. D. C. C. ' 38-14.1-16(9). That section provides: "The amount of the bond or deposit 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 the surface coal mining operations are increased or decreased or where the cost of future reclamation changes."

In conclusion, a performance bond may only be released using the percentage

release provisions of N. D. C. C. ' 38-14.1-17(7). However, adjustment to performance bond amounts may be made under N. D. C. C. ' 38-14.1-16(9) as acreages affected by mining operations increase or decrease or when the cost of future reclamation changes.

II.

The notice procedure for a bond release under N. D. C. C. ' 38-14.1-17(7) and bond adjustment under N. D. C. C. ' 38-14.1-16(9) differs. When there is a bond release, under N. D. C. C. ' 38-14.1-17(7) a person having a legal interest which may be adversely affected by a release of bond may request a public hearing. N. D. C. C. ' 38-14.1-17(2). However, for a bond adjustment under N. D. C. C. ' 38-14.1-16(9), there is no right to a hearing. In a bond adjustment procedure only the holder of the coal mining and reclamation permit may request an informal conference. N. D. Admin. Code ' 69-05.2-12-08. Thus public notice of a bond adjustment is not required.

- EFFECT -

This opinion is issued pursuant to N. D. C. C. ' 54-12-01. It governs the actions of public officials until such time as the question is decided by the courts.

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