

PRELIMINARY DRAFT RULE LANGUAGE 8/28/2014

MNDNR SILICA SAND RECLAMATION – FINANCIAL ASSURANCE

PURPOSE OF THIS DOCUMENT: *This document contains preliminary draft language related to silica sand reclamation rules – financial assurance. The purpose of this document is present these concepts to the Silica Sand Rulemaking Advisory Panel (SSRAP) for the August 28th, 2014 meeting. The formation of the draft rules is and will continue to be an iterative process. The goal of this rulemaking is to work with the SSRAP members to produce draft rules for public comment.*

XXXX.0000 FINANCIAL ASSURANCE

Subpart 1. Purpose. The purpose of financial assurance is to ensure a source of funds exist to be used by the regulatory authority if the operator¹ fails to perform:

- A. Reclamation activities including closure and postclosure maintenance needed if operations cease; and
- B. Corrective action as required by the regulatory authority if noncompliance with design and operating criteria in the permit² occurs.

Subpart 2. Reclamation cost estimates. Persons intending to conduct a silica sand mining operation shall submit to the regulatory authority, as part of the reclamation plan and condition of the permit, a documented estimate of the cost necessary to implement the reclamation plan under part XXXX.0000. Financial assurance shall be payable exclusively to the regulatory authority that has jurisdiction and who issues the approval for the reclamation plan.

- A. Cost estimate shall be based on the following
 - (1) Current dollar value at the time of the estimate
 - (2) The cost to the regulatory authority of administering and hiring a third party to implement either the final reclamation or contingency reclamation according to the approved reclamation plan of all silica sand sites the operator has under permit.
 - (3) The cost of necessary postclosure monitoring and maintenance requirements.
- B. No salvage value attributed to the sale of wastes, facility structures, equipment, land or other assets shall be used for estimating purposes.
- C. The time of the financial assurance is dictated by the period of time required for the site to be self-sustaining in a manner protective of natural resources and approved within the mine reclamation plan and when postclosure maintenance is no longer necessary.

¹ OPERATOR – will need a definition. NR 135: Operator means any person who is engaged in, or who has applied for a permit to engage in silica sand mining, whether individually, jointly or through subsidiaries, agents, employees, contractors or subcontractors.

² PERMIT – will need a definition to include governmental approvals, conditional use permits, and interim use permits.

Subpart 3. Corrective action cost estimates. When the regulatory authority determines that a corrective action plan is required under part XXXX.0000, the operator shall submit a documented estimate of costs to perform the corrective action before implementation.

- A. The operator shall annually adjust cost estimate for corrective action undertaken according to an approved corrective action plan under XXXX.0000, subpart X.
- B. Cost estimate shall be based on the following:
 - (1) Current dollar value at the time of the estimate; and
 - (2) The cost to the regulatory authority of administering and hiring a third party to conduct corrective action activities.

Subpart 4. Criteria for financial assurance. Financial assurance for reclamation and for corrective action must meet the following criteria:

- A. Assurance that the funds equal to the amount determined by Subpart 2 will be available and made payable to the regulatory authority when needed;
- B. Assurance that the funds will be fully valid, binding, and enforceable under state and federal law;
- C. Assurance that the funds can be accessed by the regulatory authority by action within boundaries of the State of Minnesota;
- D. Assurance that the funds will not be dischargeable through bankruptcy; and
- E. All terms and conditions of the financial assurance must be approved by the regulatory authority. The regulatory authority, in evaluating financial assurance, shall use individuals with documented experience in the analysis. The reasonable cost of the evaluation shall be paid by the applicant.

(NOTE FOR SONAR language – Regulatory authority can make a self-determination if staff has documented experience in analysis to evaluate financial assurance.)

- F. The regulatory authority may accept a lesser initial amount of financial assurance at the beginning of a new project or transfer of a project provided that the operator initiates a process to continuously increase the amount of financial assurance until it is adequate to effect reclamation. An escrow account in cash may be established that is based on production gross sales and serves to provide regular payments to an account that is designed to grow to the amount necessary to guarantee performance of reclamation by the expected time of reclamation.

(NOTES FOR SONAR LANGUAGE – City of Woodbury has instituted this arrangement with a silica sand mine and processing site for building an escrow in cash. Building an escrow of cash was an acceptable risk over other potential financial assurance mechanisms.)

Subpart 5. Form and Management. Financial assurance shall be provided by the operator and shall be by a bond or an alternate financial assurance that is acceptable to the regulatory authority. Alternate

financial assurance may include, but are not limited to cash, certificates of deposits, irrevocable letters of credit, irrevocable trusts, established escrow accounts, or government securities.

- A. Financial assurance shall be submitted to the regulatory authority for approval before the issuance of a permit and before granting an amendment to the permit.
- B. Financial assurance arrangements may include, at the discretion of the regulatory authority, more than one mechanism.
- C. The amount of financial assurance shall be reviewed periodically or as needed by the regulatory authority to assure the financial assurance equals outstanding reclamation costs. The regulatory authority may notify the operator in writing about the review of financial assurance.
 - (1) If the new cost estimate approved by the regulatory authority is greater than the amount of the existing financial assurance, the operator shall provide additional financial assurance in an amount equal to the increase, or
 - (2) If the new cost estimate approved by the regulatory authority is less than the amount of existing financial assurance, the operator/person/permittee shall be released from maintaining financial assurance in an amount equal to the decrease.
- D. Financial assurances may be canceled by the operator on approval by the regulatory authority, only after it is replaced by an alternate mechanism or after the operator is released from financial assurance according to XXXX.0000.
- E. The operator must ensure that the provider of financial assurance gives the regulatory authority notice 90 days prior to the cancellation of the financial assurance mechanism. Upon receipt of this notice, the regulatory authority may initiate a proceeding to access the financial assurance according to XXXX.0000.
- F. Financial assurance must meet the criteria of subpart 3.

Subpart 6. Multiple Projects. Any operator who obtains a permit from the regulatory authority for two or more silica sand sites within their jurisdiction may elect, at the time the second or subsequent site is approved, to post a single financial assurance in lieu of separate financial assurance instruments for each silica sand mining site. When an operator elects to post a single financial assurance in lieu of separate financial assurances for each mining site, no financial assurances previously posted on individual mining sites shall be released until the new financial assurance has been accepted by the regulatory authority and is in effect.

Subpart 7. Multiple Jurisdictions. In cases where more than one regulatory authority has jurisdiction, a cooperative financial security arrangement may be developed and implemented by the regulatory authorities to avoid requiring the operator needing to prove financial assurance with more than one regulatory authority for the same silica sand mining site. Financial assurance is required for each site and two or more sites of less than one acre³ by the same operator, except that governmental units are not required to obtain financial assurance.

³ Is there minima related acreage for operators to submit a reclamation plan?

Subpart 8. Certification of completion and release. The operator shall notify the regulatory authority, by filing a notice of completion, at the time the operator determines that reclamation of any portion of the mine site, corrective action, or entire mine site is complete. The regulatory authority shall inspect the mine site or portion thereof that was the subject of the notice of completion to make determination of completion.

- A. The regulatory authority may make a determination under this subsection that:
 - (1) Reclamation is not yet complete;
 - (2) It is not possible to assess whether reclamation is complete due to weather conditions, snow cover or other relevant factors;
 - (3) Compliance has been achieved with a portion of the reclamation plan and requires no waiting;
 - (4) Reclamation is fully complete and conditions necessitating postclosure maintenance no longer exist and are not likely to recur;
 - (5) Corrective actions have been successfully accomplished.
- B. The regulatory authority shall release the operator from the responsibility to maintain financial assurance within 90 days of a determination of completion specified in XXXX.0000.

Subpart 9. Forfeiture of financial assurance. Financial assurance must be made available to the regulatory authority under items A to C when the operator is not in compliance with either the contingency reclamation plan or the corrective action plan.

- A. A proceeding to access financial assurance shall be commenced by:
 - (1) serving an order to forfeit the financial assurance on the person, institution, or trustee holding the financial assurance; and
 - (2) serving a notice of measures required to correct the situation and the time available for correction on the operator.
- B. If conditions that provided grounds for the order are corrected within a period established by the regulatory authority and if measures approved by the commissioner-regulatory authority are taken to ensure that the conditions do not recur, the order shall be canceled.
- C. If the conditions that provided grounds for the order are not corrected, the regulatory authority shall proceed with accessing and expending the funds provided by this part to implement the contingency reclamation or corrective action plans.

Subpart 10. Failure to comply. The regulatory authority may take one or more of the following actions if the failure to comply with any portion of this part occurs:

- A. Deny the permit to mine
- B. Suspend the permit to mine
- C. Revoke the permit to mine
- D. Modify the permit to mine