

# North Dakota Legislative Council

STATE CAPITOL, 600 EAST BOULEVARD, BISMARCK, ND 58505-0360

Jim W. Smith  
Director

Jay E. Buringrud  
Assistant Director

Allen H. Knudson  
Legislative Budget  
Analyst & Auditor

John Walstad  
Code Revisor

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March 1, 2011

Ms. Illona A. Jeffcoat-Sacco  
Executive Secretary  
Public Service Commission  
State Capitol  
Bismarck, ND 58505-

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PUBLIC SERVICE COMMISSION

## ADMINISTRATIVE RULES COMMITTEE MEETING

The Legislative Management's Administrative Rules Committee reviews all rules recently adopted by administrative agencies. The committee will hold its next meeting on Thursday, March 10, 2011, in the Brynhild Haugland Room, State Capitol.

You are invited to appear before the committee and describe the procedure followed by the Public Service Commission in adopting the rules published in the April 2011 supplement to the North Dakota Administrative Code.

**You are tentatively scheduled to appear before the committee at 4:40 p.m.** Enclosed is a copy of the agenda for your reference. If you or a representative are unable to appear at that time, please notify me as soon as possible.

With respect to the rules published in the April 2011 supplement, the committee is interested in and would like you to testify before the committee concerning the following matters:

1. Whether the rules resulted from statutory changes made by the Legislative Assembly.
2. Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules.
3. A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.
4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.
5. The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.
6. An explanation of the subject matter of the rules and the reasons for adopting those rules.

24 AD-10-167 Filed 03/03/2011 Pages: 73  
Ltr requesting appearance and testimony at 3-10-11 Admin. Rules Committee mtg and copy of rules

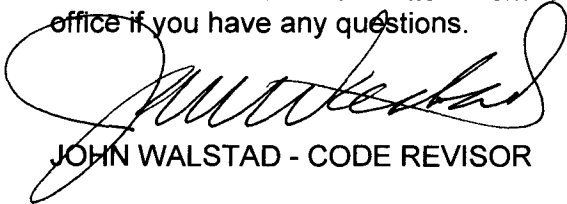
25 PU-10-129 Filed 03/03/2011 Pages: 73  
Ltr requesting appearance and testimony at 3-10-11 Admin. Rules Committee mtg and copy of rules  
Legislative Council

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7. Whether a regulatory analysis was required by North Dakota Century Code (NDCC) Section 28-32-08 and whether that regulatory analysis was issued. Please provide a copy.
8. Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide copies.
9. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.
10. If these rules were adopted as emergency (interim final) rules under NDCC Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules.

Please provide the committee with **written** testimony.

Enclosed is a copy of the April 2011 rules of the Public Service Commission in the form they will be presented to the committee at the meeting. The page numbers should be used as references for the committee because committee members will have pages with the same numbering. Please contact this office if you have any questions.



JOHN WALSTAD - CODE REVISOR

JW/AL  
Encs.

**CHAPTER 69-05.2-09**  
**PERMIT APPLICATIONS - PERMIT AREA - REQUIREMENTS FOR**  
**OPERATION AND RECLAMATION PLANS**

Section	
69-05.2-09-01	Permit Applications - Operation Plans - General Requirements
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69-05.2-09-03	Permit Applications - Operation Plans - Existing Structures
69-05.2-09-04	Permit Applications - Operation Plans - Blasting
69-05.2-09-05	Permit Applications - Operation Plans - Air Pollution Control
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69-05.2-09-07	Permit Applications - Operation Plans - Relocation or Use of Public Roads
69-05.2-09-08	Permit Applications - Operation Plans - Protection of Public Parks
69-05.2-09-09	Permit Applications - Operation Plans - Surface Water Management - Ponds, Impoundments, Banks, Dams, Embankments, and Diversions
69-05.2-09-10	Permit Applications - Operation Plans - Surface Mining Near Underground Mining
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69-05.2-09-13	Permit Applications - Reclamation Plans - Postmining Land Use
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69-05.2-09-15	Permit Applications - Operation and Reclamation Plans - Prime Farmlands
69-05.2-09-16	Permit Applications - Operation and Reclamation Plans - Alluvial Valley Floors
69-05.2-09-17	Permit Applications - Operation and Reclamation Plans - Fish and Wildlife Resources Protection and Enhancement Plan
69-05.2-09-18	Permit Applications - Operations and Reclamation Plans - Auger Mining
69-05.2-09-19	Permit Applications - Operations and Reclamation Plans - Coal Preparation Plants not Located Within the Permit Area of a Mine

**69-05.2-09-01. Permit applications - Operation plans - General requirements.** Each application must contain a detailed description of the proposed mining operations, including:

1. A narrative of mining procedures and engineering techniques, anticipated annual and total coal production, and major equipment.

2. A plan stating the anticipated or actual starting and termination date of each phase of mining activities and the amount of land to be affected for each phase over the life of the permit.
3. A narrative for each operations plan explaining the plan in detail and the construction, modification, use, and maintenance of each mine facility, water and air pollution control facilities or structures, transportation and coal handling facilities, and other structures required for implementing the plans.
4. A plan for each support facility to be constructed, used, or maintained within the permit area, including maps, appropriate cross sections, design drawings, and specifications of each facility sufficient to demonstrate compliance with section 69-05.2-24-08 or 69-05.2-24-09 as applicable.
5. If coal removal areas are proposed within five hundred feet [152.40 meters] of any farm building, the applicant must provide documentation showing compliance or plans to comply with North Dakota Century Code section 38-18-07.

**History:** Effective August 1, 1980; amended effective May 1, 1990; May 1, 1992; June 1, 1994; March 1, 2004.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14, 38-18-07

**69-05.2-09-02. Permit applications - Operation plans - Maps and plans.** Each application must contain an appropriate combination of 1:4,800 scale topographic maps, planimetric maps, and plans of the proposed permit and adjacent areas showing:

1. Scale, date, permit boundaries, company name, legal subdivision boundaries, and legend.
2. Lands to be affected throughout the operation and any change in a facility or feature caused by the operations, if the existing facility or feature was shown under chapter 69-05.2-08.
3. The boundaries of areas to be affected during the permit term according to the sequence of mining and reclamation operations and a description of size and timing of operations for each coal removal subarea.
4. Pit layout and proposed sequence of mining operations, crop line, spoil placement areas, final graded spoil line, highwall areas to be backsloped, and areas for stockpiling suitable plant growth material or other suitable strata.

5. Location of proposed surface water management structures and identification of permanent water impoundments or stream channel alignments.
6. Location of coal processing waste dams and embankments under section 69-05.2-09-09, and fill areas for the disposal of initial cut and other excess spoil under section 69-05.2-09-14 and North Dakota Century Code section 38-14.1-24.
7. Buildings, utility corridors, proposed and existing haul roads, mine railways, and other support facilities.
8. Each coal storage, cleaning and loading area, and each coal waste and noncoal waste storage area. For noncoal wastes that will be disposed of in the proposed permit area, the applicant must provide a description of any wastes listed under subdivision i of subsection 2 of section 33-20-02.1-01 and any other wastes requiring a permit from the state department of health. The location of any such disposal areas must be shown on a map of the permit area.
9. Each explosive storage and handling facility.
10. Each air pollution collection and control facility.
11. Each habitat area to be used to protect and enhance fish and wildlife and related environmental values.
12. Each source of waste and each waste disposal facility relating to coal processing or pollution control.
13. Each bond area, scheduled according to the proposed sequence of operations. Include the bond or guarantee amount for each area.
14. If an applicant proposes to remine or otherwise disturb lands that were affected by coal mining activities prior to January 1, 1970:
  - a. Detailed maps and other available information that clearly depicts the boundaries of the site that was previously affected by mining activities before January 1, 1970. This includes the identification of any sinkholes and other features that are the result of any past underground coal mining activities.
  - b. The applicant must identify and describe potential environmental and safety problems related to prior mining activity at the site and those that could be reasonably anticipated to occur. This identification must be based on a due diligence investigation which includes visual observations at the site, a record review of past mining at the site, and any necessary environmental sampling tailored to the current condition of the site.

- c. With regard to potential environmental and safety problems referred to in subdivision b, a description of the mitigative measures that will be taken to ensure that the applicable reclamation requirements can be met.

Maps and plans required under subsections 5, 6, and 12 must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a qualified registered land surveyor, or qualified professional geologist with assistance from experts in related fields. However, maps, plans, and cross sections submitted according to section 69-05.2-09-09 may only be prepared by, or under the direction of, and certified by a qualified registered professional engineer or qualified registered land surveyor.

**History:** Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990; June 1, 1997; April 1, 2011.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-03. Permit applications - Operation plans - Existing structures.**

1. Each application must contain a description of each existing structure in the proposed permit or adjacent permit areas used to support the surface coal mining and reclamation operation. The description must include:
  - a. Location.
  - b. Current condition.
  - c. Approximate beginning and ending construction dates.
  - d. A showing, including relevant monitoring data or other evidence, whether the structure meets the performance standards and design requirements of this article and North Dakota Century Code section 38-14.1-24.
2. The applicant shall modify or reconstruct a nonconforming structure to meet the design standards of this article after approval of the compliance plan required in subsection 3.
3. Each application must contain a compliance plan for each structure to be modified or reconstructed and include:
  - a. Specifications to meet the design and performance standards of this article and North Dakota Century Code section 38-14.1-24.
  - b. A construction schedule showing dates for beginning and completing interim steps and final reconstruction.

- c. Provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards are met.
  - d. A showing that the risk to the environment or to public health or safety is not significant during modification or reconstruction.
- 4. A structure which meets the performance standards of this article and North Dakota Century Code section 38-14.1-24 but does not meet the design requirements of this article may be exempted from those design requirements. The commission may grant this exemption as part of the application process after obtaining the information required by this section and making the finding required by section 69-05.2-10-04.

**History:** Effective August 1, 1980; amended effective May 1, 1990.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-04. Permit applications - Operation plans - Blasting.** Each application must contain a blasting plan explaining how the applicant intends to comply with chapter 69-05.2-17 and subsection 4 of North Dakota Century Code section 38-14.1-14 and including:

- 1. Types and approximate amounts of explosives for each type of blasting operation. The plan must identify the maximum amount of explosives to be detonated within any eight millisecond period and the maximum allowable limit on ground vibration for all structures not listed in subsection 7 of section 69-05.2-17-05.
- 2. Procedures and plans for recording and retaining information on:
  - a. Drilling patterns, including size, number, depths, and spacing of holes.
  - b. Charge and packing of holes.
  - c. Types of fuses and detonation controls.
  - d. Sequence and timing of firing holes.
- 3. Blasting warning and site access control equipment and procedures.
- 4. Types, capabilities, sensitivities, and locations of blast monitoring equipment and procedures.
- 5. Plans for recording and reporting results of preblasting surveys, if required.

6. The public notice content, procedure for changing the public notice, and a listing of landowners, government agencies, and other interested parties that will receive the notices.
7. Unavoidable hazardous conditions needing deviations from the blasting schedule and a general procedure outlining implementation of an emergency blasting process.
8. A map showing areas in which:
  - a. Blasting is prohibited under section 69-05.2-17-05.
  - b. The maximum permissible weight of explosives to be detonated is established by subsection 7 of section 69-05.2-17-05. The map must show the maximum weight of explosives at intervals not exceeding four hundred feet [121.92 meters] and continue until the maximum amount specified in subsection 1.

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

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-05. Permit applications - Operation plans - Air pollution control.** The applicant shall specify the measures to comply with the air pollution control requirements of the state department of health and any other measures necessary to effectively control wind erosion and attendant air pollution.

**History:** Effective August 1, 1980; amended effective May 1, 1990; June 1, 1997.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-06. Permit applications - Operation plans - Transportation facilities.**

1. Each application must contain a detailed description of each road, conveyor, or rail system to be constructed, used, or maintained. Appropriate maps, descriptions, profiles, and cross sections must be included to show:
  - a. Locations.
  - b. Specifications for each road width, gradient, surfacing material, cut, fill embankment, culvert, bridge, drainage ditch, low-water crossing, and drainage structure.
  - c. Plans for stabilizing road cut and fill embankments, ditches, drains, and other side slopes.



- d. Specifications for each road to be located in the channel of an intermittent or perennial stream under subsection 4 of section 69-05.2-24-01.
  - e. Specifications for each ford of intermittent or perennial streams to be used as a temporary route under subsection 4 of section 69-05.2-24-03.
  - f. Measures to obtain commission approval for altering or relocating a natural drainageway under subdivision e of subsection 5 of section 69-05.2-24-03.
  - g. Specifications for each low-water crossing of intermittent or perennial streams to provide maximum protection of the stream under subdivision f of subsection 5 of section 69-05.2-24-03.
  - h. Plans to remove and reclaim each road not retained under the proposed postmining land use, and a schedule for removal and reclamation.
2. The plans and drawings of each primary road must be prepared by, or under the direction of and certified by, a qualified registered professional engineer with experience in the design and construction of roads. The certification must state that the plans and drawings meet the requirements of this article, current and prudent engineering practices, and any design criteria established by the commission.

**History:** Effective August 1, 1980; amended effective May 1, 1990; May 1, 1992.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-07. Permit applications - Operation plans - Relocation or use of public roads.** Each application must describe, with appropriate maps and cross sections, measures to ensure the interests of landowners and the public are protected if the applicant plans to:

- 1. Conduct surface mining activities within one hundred feet [30.48 meters] of the right-of-way line of any public road, except where mine access or haul roads join that right of way; or
- 2. Relocate a public road.

**History:** Effective August 1, 1980; amended effective May 1, 1990.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-08. Permit applications - Operation plans - Protection of public parks.** For public parks or places listed on the national register of historic

places that may be adversely affected by the proposed operations, each plan must describe the measures to be used:

1. To prevent adverse impacts; or
2. If valid existing rights exist or joint agency approval is to be obtained under section 69-05.2-04-01, to minimize adverse impacts.

**History:** Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-09. Permit applications - Operation plans - Surface water management - Ponds, impoundments, banks, dams, embankments, and diversions.**

1. Each application must include a surface water management plan describing each water management structure intended to meet the requirements of chapter 69-05.2-16. Each plan must:
  - a. Identify and show on a map of appropriate scale the locations of proposed ponds, impoundments, and diversions, whether temporary or permanent, and include:
    - (1) Each watershed boundary within the permit and adjacent areas.
    - (2) Proposed disturbance boundaries within each watershed and the area of each watershed.
  - b. Provide the following preliminary information for each pond or impoundment:
    - (1) The purpose of the structure.
    - (2) A typical cross section of the proposed structure.
    - (3) The name and size in acres [hectares] of the watershed affecting the structure.
    - (4) Other preliminary hydrologic and geologic information required to assess the hydrologic impact of the structure.
  - c. If underground mining operations occurred in the area, include a survey describing the potential effect of subsidence on the structure from the past underground mining activities.

- d. Include a schedule of the approximate construction dates for each structure and, if appropriate, a timetable to remove each structure.
- e. Include a statement that detailed design plans, as required in subsection 2, will be submitted to the commission, provided that:
  - (1) Detailed design plans for structures scheduled for construction within the first year of the permit term must be submitted with the application.
  - (2) Detailed design plans for a structure must be approved by the commission prior to construction.
- f. Identify the location of proposed temporary coal processing waste disposal areas, along with design specifications to meet the requirements in section 69-05.2-19-03.
- g. Identify the location of proposed coal processing waste dams and embankments along with design specifications to meet the requirements in chapter 69-05.2-20. The plan must include the results of a geotechnical investigation of each proposed coal dam or embankment foundation area, to determine the structural competence of the foundation which will support the proposed dam or embankment and the impounded material. The geotechnical investigation must be planned and supervised by an engineer or engineering geologist, as follows:
  - (1) Determine the number, location, and depth of borings and test pits using current prudent engineering practice for the size of the dam or embankment, quantity of material to be impounded, and subsurface conditions.
  - (2) Consider the character of the overburden, the proposed abutment sites, and any adverse geotechnical conditions which may affect the particular dam, embankment, or reservoir site.
  - (3) Identify springs, seepage, and ground water flow observed or anticipated during wet periods in the proposed dam or embankment area.
  - (4) Consider the possibility of mudflows or other landslides into the dam, embankment, or impounded material.
- h. Include a statement that the plan has been prepared by, or under the direction of, and certified by a qualified registered professional engineer or qualified registered land surveyor experienced in the design of impoundments. The plans must be certified as meeting the requirements of this article using current, prudent

engineering practices and any design requirements established by the commission.

2. The application must contain detailed design plans for each structure identified in paragraph 1 of subdivision e of subsection 1. These plans must:
  - a. Meet all applicable requirements of sections 69-05.2-16-06, 69-05.2-16-07, 69-05.2-16-08, 69-05.2-16-09, 69-05.2-16-10, and 69-05.2-16-12.
  - b. Identify by watershed each mining activity along with an estimate of the affected area associated with each disturbance type.
  - c. Provide the total runoff and peak discharge rates attributable to the storm or storms for which the structure is designed, including supporting calculations. The plan should specify baseflow, if appropriate.
  - d. The estimated sediment yield of the contributing watershed, calculated according to subsection 2 of section 69-05.2-16-09, and sediment storage capacity of the structure.
  - e. Provide, at an appropriate scale, detailed dimensional drawings of the impounding structure including a plan view and cross sections of the length and width of the impounding structure, showing all zones, foundation improvements, drainage provisions, spillways, outlets, instrument locations, and slope protection. The plans must also show the measurement of the minimum vertical distance between the top of the impounding structure and the reservoir surface at present and under design storm conditions, permanent pool level, and other pertinent information.
  - f. Include graphs showing elevation - area - capacity curves to the top of the embankment.
  - g. Describe the spillway features and include stage discharge curves and calculations used in their determination.
  - h. If an impoundment meets the size or other criteria of subsection 17 or 18 of section 69-05.2-16-09, include a stability analysis of the structure. The stability analysis must include strength parameters, pore pressures, and long-term seepage conditions. The plan must also contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

- i. Demonstrate that detention time criteria of section 69-05.2-16-09 can be met, if applicable.
- j. Describe any geotechnical investigations, design, and construction requirements of the structure including compaction procedures and testing, including any direct connections of the impoundment basin to ground water flow in the area.
- k. If an impoundment meets the size or other criteria of subsection 17 of section 69-05.2-16-09, include a copy of the plan sent to the district manager of the United States mine safety and health administration.
- l. Describe proposed structure operations, maintenance and, if appropriate, a timetable for removal and reclamation plans.
- m. Provide detailed design specifications for diversions, including maps, cross sections, and longitudinal profiles which illustrate existing ground surface and proposed grade of all stream channel diversions and other diversions to be constructed within the permit area or feeding into the contributing drainage of an impoundment.
- n. Include additional information as necessary to enable the commission to completely evaluate the structure.

**History:** Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990; May 1, 1992; January 1, 1993; May 1, 1999.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-10. Permit applications - Operation plans - Surface mining near underground mining.** The application must contain a description of measures needed to comply with section 69-05.2-13-06 if mining activities will occur within five hundred feet [152.04 meters] of an underground mine.

**History:** Effective August 1, 1980; amended effective May 1, 1990; January 1, 1993.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-11. Permit applications - Reclamation plans - General requirements.** Each application must contain a reclamation plan for affected lands, showing how the applicant will comply with chapters 69-05.2-13 through 69-05.2-26. The plan must, at a minimum, include:

- 1. A discussion of how the scheduling of each reclamation phase meets the requirements for contemporaneous reclamation in subsection 14 of North Dakota Century Code section 38-14.1-24 and section 69-05.2-21-01.

2. A detailed reclamation cost estimate and supporting calculations.
3. Postmining topographic and area slope maps drawn to the specifications in subsection 3 of section 69-05.2-08-02, and a plan for backfilling, soil stabilization, compacting, and grading. The plan must provide cross sections and volumetric calculations or other information to show the final topography can be achieved.
4. A plan for the removal, reshaping, and final reclamation of each facility identified and discussed in this chapter.
5. A plan for the removal, storage, and redistribution of suitable plant growth material and other suitable strata to meet the requirements of chapter 69-05.2-15. This plan must provide the volumes, by ownership, of topsoil and subsoil available in all areas to be disturbed. These volumes must be determined from the soil survey required by section 69-05.2-08-10.
6. A revegetation plan to meet the requirements of chapter 69-05.2-22. The plan must include:
  - a. A revegetation schedule.
  - b. Seed and seedling species and amounts per acre [0.40 hectare].
  - c. Planting and seeding methods.
  - d. Mulching techniques.
  - e. Irrigation, if appropriate, and any pest and disease control measures.
  - f. General management plans until final bond release.
  - g. Methods to determine the success of revegetation required in section 69-05.2-22-07.
  - h. A soil testing plan for evaluating the results of suitable plant growth material handling and reclamation procedures related to revegetation.
7. Measures to ensure that all debris, toxic-forming materials, and materials constituting a fire hazard are disposed of in accordance with sections 69-05.2-19-04 and 69-05.2-21-03 and a description of the contingency plans developed to preclude their sustained combustion.
8. A description, including appropriate cross sections and maps, of measures to manage mine openings, and to plug, case, or manage

exploration holes, other boreholes, wells, and other openings within the permit area, under chapter 69-05.2-14.

**History:** Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; January 1, 1993.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-12. Permit applications - Operation and reclamation plans - Surface and ground water monitoring for protection of the hydrologic balance.**

1. The description required by subdivision i of subsection 2 of North Dakota Century Code section 38-14.1-14 must cover the proposed permit, and adjacent areas and include:
  - a. Appropriate maps and technical drawings.
  - b. A discussion of the control of surface and ground water drainage into, through, and out of the permit area under the surface water management requirements of section 69-05.2-09-09 and its relation to the monitoring requirements of this section.
  - c. A plan for the treatment, where required, of surface and ground water drainage from the disturbed area, and proposed quantitative limits on pollutants in discharges subject to section 69-05.2-16-04, according to the more stringent of:
    - (1) North Dakota Century Code section 38-14.1-24 and this article; or
    - (2) Other applicable state laws.
  - d. A plan for restoring the approximate recharge capacity of the permit area required in section 69-05.2-16-15.
  - e. A plan, based on the probable hydrologic consequences (PHC) determination, for the collection, recording, and reporting of ground and surface water quality and quantity data, according to sections 69-05.2-16-05, 69-05.2-16-13, and 69-05.2-16-14.
2. The determination required by subdivision o of subsection 1 of North Dakota Century Code section 38-14.1-14 must include a hydrologic reclamation plan that specifically addresses any potential adverse impacts identified in the probable hydrologic consequences

determination and contains preventive and remedial measures for those impacts.

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

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-13. Permit applications - Reclamation plans - Postmining land use.**

1. Each reclamation plan must contain a postmining land use map and detailed description of the postmining land use explaining:
  - a. How the postmining land use will be achieved and the support activities needed.
  - b. The detailed management plan for native grassland or tame pastureland during the liability period including any plans for livestock grazing prior to final bond release.
2. If land use changes are proposed, the description must be accompanied by materials needed for alternate land use approval under chapter 69-05.2-23.
3. The applicant shall submit a copy of the surface owner's preference statement and comments by the state and local authorities who would have to initiate, implement, approve, or authorize the land use following reclamation.

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

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-14. Permit applications - Reclamation plans - Disposal of initial pit spoil and other excess spoil.**

1. Each application must contain descriptions, maps, and cross-section drawings of the disposal site and spoil disposal area design according to chapter 69-05.2-18. These plans must describe the geotechnical investigation, design, construction, operation, maintenance, and removal, if appropriate, of the site and structures.
2. Each application must contain the results of a geotechnical investigation of the disposal site including:
  - a. The character of bedrock and any adverse geologic conditions in the disposal area.



- b. Springs, seepage, and ground water flow observed or anticipated in the disposal site during wet periods.
- c. The potential effects of subsidence of the subsurface strata due to past and future mining operations.
- d. A stability analysis including strength parameters, pore pressures, and long-term seepage conditions, and a description of all engineering design assumptions, calculations and alternatives considered in selecting the design specifications and methods. The commission may waive the stability analysis after analyzing the results of the geotechnical investigation if:
  - (1) No adverse geologic conditions exist in the disposal area.
  - (2) There are no springs, and there is no seepage or ground water flow in the disposal site area.
  - (3) There is no potential for subsidence of subsurface strata due to past and future mining operations.
  - (4) The slope of the disposal area does not exceed twenty percent.

**History:** Effective August 1, 1980; amended effective May 1, 1990.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-15. Permit applications - Operation and reclamation plans - Prime farmlands.** If appropriate, the applicant shall submit a mining and restoration plan for prime farmland containing:

- 1. The cooperative soil survey that identified the prime farmland, soil mapping units, and representative soil profile descriptions. The plan must include soil horizon depths, pH, and range of soil densities for each prime farmland soil mapping unit.
- 2. The method and equipment for removing, storing, and resspreading suitable plant growth materials.
- 3. Locations for separate stockpiling and plans for soil stabilization before redistribution.
- 4. The postmining topographic map showing the prime farmland resspread areas.
- 5. Applicable documentation that supports the use of other suitable strata, instead of the A, B, or C soil horizon, to obtain equivalent or higher

levels of productivity as nonmined prime farmlands in the surrounding area under equivalent management levels.

6. Plans for seeding or cropping the area and conservation practices. Proper adjustments for seasons must be proposed so that final graded land is not exposed to erosion when vegetation or conservation practices cannot be established or implemented.
7. Available agricultural school studies or other scientific data for areas with comparable soils, climate, and management (including water management) that affirmatively demonstrate achievement of postmining productivity equal to or greater than premining productivity.
8. If a reclaimed cropland tract will contain a mixture of prime and nonprime farmlands and commission approval of a single yield standard for the entire tract is requested as allowed by subdivision I of subsection 4 of section 69-05.2-22-07, a detailed description and comparison of the soil mapping units and acreages occurring in the prime and nonprime parcels must be provided. The comparison must include the appropriate yield calculations for the prime and nonprime parcels as well as the single yield standard that is proposed.

**History:** Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; May 1, 2001.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-16. Permit applications - Operation and reclamation plans - Alluvial valley floors.** Each application must contain operation and reclamation plans for lands in the permit or adjacent area identified as an alluvial valley floor. The plan must describe the mining and reclamation procedures that will protect or restore the alluvial valley floor characteristics or essential hydrologic functions identified in section 69-05.2-08-14 and meet the performance standards of chapter 69-05.2-25. The applicant shall submit an alluvial valley floor monitoring program under section 69-05.2-25-03 designed to collect sufficient information to demonstrate compliance with the approved plans.

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

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-09-17. Permit applications - Operation and reclamation plans - Fish and wildlife resources protection and enhancement plan.**

1. Each application must include a plan of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during surface coal mining and reclamation operations,

and how enhancement of these resources will be achieved where practicable. The plan must:

- a. Be consistent with the requirements of section 69-05.2-13-08.
  - b. Apply, at a minimum, to species and habitats identified under section 69-05.2-08-15.
  - c. Include protective measures that will be used during active mining. The measures may include establishment of buffer zones, selective location and special design of haul roads and powerlines, and monitoring of surface water quality and quantity.
  - d. Include enhancement measures that will be used during the reclamation phase to develop aquatic and terrestrial habitat. The measures may include restoration of streams and other wetlands, retention of ponds and impoundments, establishment of vegetation for wildlife food and cover, and replacement of perches and nest boxes. If the plan does not include enhancement measures, a statement must be given explaining why enhancement is not practicable.
  - e. Include monitoring of selected indicator species to assess surface mining effects on fish and wildlife resources. The applicant shall consult with the commission and state game and fish department before selecting the indicator species.
2. Within ten days of the request, the commission will provide the plan to the United States department of the interior, fish and wildlife service regional or field office for their review.

**History:** Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; May 1, 1992; January 1, 1993.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14, 38-14.1-24

**69-05.2-09-18. Permit applications - Operations and reclamation plans - Auger mining.** If applicable, the applicant shall submit a plan explaining how the applicant intends to comply with section 69-05.2-13-12 and subsection 1.1 of North Dakota Century Code section 38-14.1-24. This plan must contain:

1. A description of the augering methods.
2. A map showing where augering operations will be conducted.
3. A description of how the applicant intends to ensure the long-term stability of the augered area. This description should contain specific engineering designs ensuring that:

- a. Material backfilled into the holes can be compacted to provide sufficient strength to prevent subsidence;
  - b. The coal remaining between the auger holes and the overlying overburden is sufficiently strong to prevent subsidence; or
  - c. The auger mined area can be collapsed in a controlled manner through the use of explosive or other techniques to eliminate future subsidence.
4. A description of how auger holes will be sealed to prevent pollution of surface and ground water.

**History:** Effective September 1, 1984; amended effective May 1, 1990.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14, 38-14.1-24

**69-05.2-09-19. Permit applications - Operations and reclamation plans  
- Coal preparation plants not located within the permit area of a mine.**

1. This section applies to any person who operates or intends to operate a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine. A permit to operate must be obtained from the commission.
2. In addition to meeting the applicable provisions of chapters 69-05.2-05, 69-05.2-06, 69-05.2-07, 69-05.2-08, and this chapter, any application for a permit for operations covered by this section must contain an operation and reclamation plan for the construction, operation, maintenance, modification, and removal of the preparation plant and associated support facilities. The plan must demonstrate that those operations will be conducted in compliance with section 69-05.2-13-13.
3. No permit will be issued for any operation covered by this section unless the commission finds in writing that, in addition to meeting all other applicable requirements of this article, the operations will be conducted according to the requirements of section 69-05.2-13-13.

**History:** Effective January 1, 1987; amended effective May 1, 1990; May 1, 1992.

**General Authority:** NDCC 38-14.2-03

**Law Implemented:** NDCC 38-14.1-14

## **CHAPTER 69-05.2-22**

### **PERFORMANCE STANDARDS - REVEGETATION**

Section	
69-05.2-22-01	Performance Standards - Revegetation - General Requirements
69-05.2-22-02	Performance Standards - Revegetation - Methods
69-05.2-22-03	Performance Standards - Revegetation - Use of Introduced Species [Repealed]
69-05.2-22-04	Performance Standards - Revegetation - Timing
69-05.2-22-05	Performance Standards - Revegetation - Mulching and Other Soil Stabilizing Practices
69-05.2-22-06	Performance Standards - Revegetation - Grazing
69-05.2-22-07	Performance Standards - Revegetation - Standards for Success
69-05.2-22-08	Performance Standards - Revegetation - Tree and Shrub Stocking for Woodlands [Repealed]

**69-05.2-22-01. Performance standards - Revegetation - General requirements.** The permittee shall establish a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area for all disturbed areas, except water areas, surface areas of roads, and other facilities that are approved as a part of the postmining land use, or shall plant species that will support the approved postmining land use. Species planted must be compatible with plant and animal species of the area, meet the requirements of applicable state and federal seed and introduced species laws, and must not be poisonous or noxious. The postmining vegetative cover must be capable of stabilizing the soil surface from erosion and will be considered of the same seasonal variety when it consists of a mixture of species of equal or superior utility for the approved postmining land use when compared to the utility of vegetation existing prior to mining during each season of the year. If the postmining land use is cropland, planting of the crops normally grown will meet this requirement. The commission may approve the substitution of introduced species only if appropriate field trials have demonstrated that the introduced species are desirable and necessary to achieve the approved postmining land use. Lands that have been approved for postmining agricultural uses must be returned to productivity levels equal to or exceeding that of unmined agricultural lands in the surrounding area under equivalent management practices.

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

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-24

#### **69-05.2-22-02. Performance standards - Revegetation - Methods.**

1. All revegetation must be carried out in accordance with the approved reclamation plan.

2. When the approved postmining land use is tame pastureland, the permittee shall seed or plant species of introduced grasses and legumes adapted to the local site conditions and capable of supporting grazing and occasional haying under proper management.
3. When the approved postmining land use is native grassland, the species of grasses, legumes, forbs, half-shrubs, or shrubs seeded or planted and their pattern of distribution must be selected by the permittee to provide a diverse, effective, and permanent vegetative cover with seasonal variety, succession, and regenerative capabilities native to the area.
4. When the approved postmining land use is woodland or fish and wildlife habitat where the vegetation type is woodland, the permittee shall plant woody species adapted for local site conditions and climate, in combination with a cover of grains, grasses, legumes, or forbs to provide a diverse, effective, and permanent vegetative cover with the seasonal variety, succession, and regenerative capabilities native to the area. Approval of species composition, minimum stocking, spacing and planting arrangements of trees, shrubs, half-shrubs, and ground cover will be based on local and regional recommendations following consultation with the state game and fish department, state forester, and the natural resource conservation service.
5. When the approved postmining land use is shelterbelt, the permittee shall plant woody species adapted for local site conditions and climate. Understory vegetation must be controlled until it no longer interferes with the growth of woody species. The stocking of trees and shrubs must follow current standards and specifications developed by the natural resource conservation service for farmstead and field windbreaks in North Dakota or others approved by the commission.
6. When fish and wildlife habitat is included in the postmining land use, the permittee shall consult with appropriate state wildlife and land management agencies and shall select those plant species that will fulfill the needs of wildlife for food and cover. Plant groupings and water resources must be appropriately spaced and distributed.

**History:** Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; June 1, 1997.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-24, 38-14.1-42

**69-05.2-22-03. Performance standards - Revegetation - Use of introduced species.** Repealed effective May 1, 1990.

**69-05.2-22-04. Performance standards - Revegetation - Timing.** Seeding and planting of disturbed areas must be conducted during the first normal period for favorable planting conditions after suitable plant growth materials

have been spread. The normal period for favorable planting is that planting time generally accepted locally for the type of plant materials selected.

**History:** Effective August 1, 1980; amended effective May 1, 1990.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-24

**69-05.2-22-05. Performance standards - Revegetation - Mulching and other soil stabilizing practices.**

1. Mulching or other soil stabilizing practices must be used on all regraded and topsoiled areas to control erosion, promote germination of seeds, or increase the moisture-retention capacity of the soil. The commission may, on a case-by-case basis, suspend the requirement for mulch if the permittee can demonstrate that alternative procedures will achieve the requirements of section 69-05.2-22-07 and do not cause or contribute to air or water pollution.
2. When required by the commission, mulches must be mechanically or chemically anchored to the soil surface to assure effective protection of the soil and vegetation.
3. Annual grasses and grains may be used alone or in conjunction with another mulch when the commission determines that they will provide adequate soil erosion control and will later be replaced by species approved for the postmining land use.

**History:** Effective August 1, 1980; amended effective May 1, 1990.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-24

**69-05.2-22-06. Performance standards - Revegetation - Grazing.** Livestock grazing will not be allowed on revegetated land until the seedlings are established and can sustain managed grazing. No grazing will be permitted unless the grazing and stocking capacity is agreed to by the commission, the permittee, and the landowner or the governmental land managing agency having jurisdiction over the surface.

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

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-24

**69-05.2-22-07. Performance standards - Revegetation - Standards for success.**

1. Success of revegetation must be measured by using statistically valid techniques approved by the commission. Comparison of ground cover and productivity may be made on the basis of reference areas, through the use of standards in technical guides published by the United

States department of agriculture, or through the use of other approved standards. If reference areas are used, the management of the reference area during the responsibility period required in subsection 2 must be comparable to that required for the approved postmining land use of the permit area. If standards are used, they must be approved by the commission and the office of surface mining reclamation and enforcement. Approved standards are contained in the commission's Standards for Evaluation of Revegetation Success and Recommended Procedures for Pre- and Postmining Vegetation Assessments.

2. The period of responsibility under the performance bond requirements of section 69-05.2-12-09 will begin following augmented seeding, planting, fertilization, irrigation, or other work, except for cropland and prime farmland where the period of responsibility begins at the date of initial planting of the crop being grown or a precropland mixture of grasses and legumes, and must continue for not less than ten years. However, for eligible lands that are remined, the revegetation responsibility period must continue for not less than five years.
3. Vegetation establishment, for the purpose of the third stage bond release provided for in subdivision c of subsection 7 of North Dakota Century Code section 38-14.1-17, will be determined for each postmining land use according to the following procedures:
  - a. For native grassland, tame pastureland, and fish and wildlife habitat where the vegetation type is grassland, ground cover on the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence. All species used in determining ground cover must be perennial species not detrimental to the approved postmining land use.
  - b. For cropland, vegetation will be considered established after the successful seeding of the crop being grown or a precropland mixture of grasses and legumes.
  - c. For prime farmland, annual average crop production from the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence for a minimum of three crop years.
  - d. For woodland, shelterbelts, and fish and wildlife habitat where the vegetation type is woodland, the number of trees and shrubs must be equal to or greater than the approved standard. Understory growth must be controlled. Erosion must be adequately controlled by mulch or site characteristics.
  - e. For fish and wildlife habitat where the vegetation type is wetland, the basin must exhibit the capacity to hold water and support



wetland vegetation. Ground cover of the contiguous areas must be adequate to control erosion.

4. The success of revegetation on the permit area at the time of final bond release must be determined for each postmining land use according to the following:
  - a. For native grassland, the following must be achieved for any two years after year six of the responsibility period:
    - (1) Ground cover and productivity of the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence; and
    - (2) Diversity, seasonality, and permanence of the vegetation of the permit area must equal or exceed the approved standard.
  - b. For tame pastureland, ground cover and productivity of the permit area must be equal to or greater than that of the approved standard with ninety percent statistical confidence for any two years after year six of the responsibility period.
  - c. For cropland, crop production from the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence for any two years after year six of the responsibility period.
  - d. For prime farmlands, a showing that the requirements for the restoration of productivity as specified in subdivision c of subsection 3 have been met and that the ten-year period of responsibility has elapsed.
  - e. For woodlands and fish and wildlife habitat where the vegetation type is woodland, the following must be achieved during the growing season of the last year of the responsibility period:
    - (1) The number of woody plants established on the permit area must be equal to or greater than the number of live woody plants of the same life form of the approved standard with ninety percent statistical confidence. Trees, shrubs, half-shrubs, root crowns, or root sprouts used in determining success of stocking must meet the following criteria:
      - (a) Be healthy;
      - (b) Be in place for at least two growing seasons;
      - (c) If any replanting of woody plants took place during the responsibility period, the total number planted during

the last six years of that period must be less than twenty percent of the total number of woody plants required. Any replanting must be by means of transplants to allow for adequate accounting of plant stocking; and

- (d) Volunteer trees and shrubs of approved species will be considered at least two years of age and can be counted toward meeting success standards; however, volunteer trees must be at least thirty inches [76 centimeters] in height to be included in the count. Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding;
  - (2) The ground cover must be equal to or greater than ninety percent of the ground cover of the approved standard with ninety percent statistical confidence and must be adequate to control erosion; and
  - (3) Species diversity, seasonal variety, and regenerative capacity of the vegetation on the permit area must be evaluated on the basis of species stocked and expected survival and reproduction rates.
- f. For shelterbelts, the following must be achieved during the growing season of the last year of the responsibility period:
- (1) Trees, shrubs, half-shrubs, root crowns, or root sprouts used in determining success of stocking must meet the following criteria:
    - (a) Be healthy;
    - (b) Be in place for at least two growing seasons;
    - (c) If any replanting of woody plants took place during the responsibility period, the total number planted during the last six years of that period must be less than twenty percent of the total number of woody plants required. Any replanting must be by means of transplants to allow for adequate accounting of plant stocking; and
    - (d) Volunteer trees and shrubs of approved species will be considered at least two years of age and can be counted toward meeting success standards; however, volunteer trees must be at least thirty inches [76 centimeters] in height to be included in the count. Suckers on shrubby vegetation can be counted as

volunteer plants when it is evident the shrub community is vigorous and expanding;

- (2) Shelterbelt density and vigor must be equal to or greater than that of the approved standard; and
  - (3) Erosion must be adequately controlled.
9. For fish and wildlife habitat, where the vegetation type is wetland, vegetation zones and dominant species must be equal to those of the approved standard during the growing season of the last year of the responsibility period. In addition, wetland permanence and water quality must meet approved standards.
- h. For fish and wildlife habitat, where the vegetation type is grassland, the following must be achieved during the growing season of the last year of the responsibility period:
- (1) Ground cover must be equal to or greater than that of the approved standard with ninety percent statistical confidence and must be adequate to control erosion.
  - (2) Species diversity, seasonal variety, and regenerative capacity of the vegetation must meet or exceed the approved standard.
- i. For previously mined areas that were not reclaimed to the requirements of this chapter, any reclamation requirements in effect when the areas were mined must be met. In addition, the ground cover may not be less than can be supported by the best available plant growth material in the reaffected area, nor less than the ground cover existing before redisturbance. Adequate measures must be in place to control erosion as approved by the commission. If lands affected by coal mining activities prior to January 1, 1970, are remined or otherwise redisturbed, the applicable standard must be met for the last two consecutive years of the minimum five-year responsibility period that applies to remined lands. However, if the postmining land use for the remined area is woodlands, shelterbelts, or fish and wildlife habitat, the applicable standard must be met for just the last year of the responsibility period.
- j. For areas to be developed for water, residential, or industrial and commercial uses within two years after the completion of grading or soil replacement, the ground cover on these areas may not be less than required to control erosion.
- k. For areas to be developed for recreation, woody plants must meet or exceed the stocking and plant establishment standards for

woodlands or shelterbelts found in paragraph 1 of subdivision e or in subdivision f as applicable. In addition, ground cover must not be less than required to achieve the approved postmining land use.

- I. If a reclaimed tract contains a mixture of prime and nonprime farmlands, the commission may approve a single yield standard for the entire tract based on the soil types that occurred on the prime and nonprime areas prior to mining. The operator must provide a detailed description and comparison of the soil mapping units, acreages, and yield calculations in the reclamation plan as required by subsection 8 of section 69-05.2-09-15. When a single yield standard is approved, the operator must demonstrate that the standard has been achieved for any three years starting no sooner than the sixth year of the responsibility period. If this option is approved, the operator must also meet the applicable requirements of section 69-05.2-26-05 for the entire tract.
5. Throughout the liability period the permittee must:
    - a. Maintain any necessary fences and use proper management practices; and
    - b. Conduct periodic measurements of vegetation, soils, and water prescribed or approved by the commission.

**History:** Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; May 1, 1992; January 1, 1993; June 1, 1997; May 1, 1999; May 1, 2001; March 1, 2004; April 1, 2007; April 1, 2011.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-24

**69-05.2-22-08. Performance standards - Revegetation - Tree and shrub stocking for woodlands.** Repealed effective May 1, 1990.

## **ARTICLE 69-06**

### **ENERGY CONVERSION AND TRANSMISSION FACILITY SITING**

Chapter	
69-06-01	General Provisions
69-06-02	Utility Reporting Requirements
69-06-02.1	Requests for Jurisdictional Determination
69-06-03	Letter of Intent
69-06-04	Certificate of Site or Corridor Compatibility
69-06-05	Transmission Facility Permit
69-06-06	Waiver of Procedures and Time Schedules
69-06-07	Emergency Certificate or Permit [Repealed]
69-06-08	Criteria
69-06-09	Continuing Suitability of Certificate or Permit

## **CHAPTER 69-06-02.1**

### **REQUESTS FOR JURISDICTIONAL DETERMINATION**

#### **Section**

69-06-02.1-01

Filing

69-06-02.1-02

Contents

**69-06-02.1-01. Filing.** A utility planning to construct an energy conversion or transmission facility may request a jurisdictional determination from the commission. A request for jurisdictional determination must be in writing.

**History:** Effective April 1, 2011.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-07.1

**69-06-02.1-02. Contents.** A request for a jurisdictional determination must contain:

1. A description of the size of the facility;
2. A description of the type of the facility;
3. A description of the area to be served;
4. A map of the study area for the proposed site or corridor;
5. A description of the ownership and operation responsibility of the facility;
6. A description of the facilities and equipment that will be used and how they will be maintained;
7. A description of the owner's or operator's plans for selling, transmitting, or distributing the output of the plant;
8. A description of how the facility will be physically and electronically interconnected with other energy conversion, transmission, and distribution facilities;
9. A description of the owner's and operator's economic evaluation of the facility; and
10. A description of how the site will be leased or other rights of access will be obtained.

**History:** Effective April 1, 2011.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-07.1

## CHAPTER 69-06-03 LETTER OF INTENT

### Section

69-06-03-01

Filing

69-06-03-02

Contents

**69-06-03-01. Filing.** Any utility planning to construct an energy conversion or transmission facility shall file a letter of intent with the commission at least one year prior to the filing of an application for a certificate unless a shorter period is requested in writing and approved by the commission.

**History:** Amended effective April 1, 2011.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-07.1

**69-06-03-02. Contents.** A letter of intent must contain the following:

1. A description of the size and type of facility, and the area to be served.
2. A map of the study area for the proposed site or corridor.
3. The anticipated construction and operation schedule.
4. An estimate of the total cost of construction.

**History:** Amended effective April 1, 2011.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-07.1

**CHAPTER 69-06-04**  
**CERTIFICATE OF SITE OR CORRIDOR COMPATIBILITY**

Section

69-06-04-01

Application

69-06-04-02

Designation of Sites and Corridors

**69-06-04-01. Application.**

1. **Form.** All applications shall be in such form as the commission may prescribe.
2. **Filing.** The applicant shall file an original and ten copies of an application with the commission.
3. **Notice of filing.** The commission shall serve a notice of filing of a complete application on the following:
  - a. The chairman of the board of county commissioners and the auditor of each county in which any part of the site or corridor is proposed to be located.
  - b. The chief executive officer of each city in a county in which any part of an energy conversion facility is proposed to be located.
  - c. The chief executive officer of each city within a proposed corridor for a transmission facility.
  - d. The state agencies and officers entitled to notice as designated in section 69-06-01-05.
  - e. The state senators and representatives of each legislative district in which any part of the site or corridor is proposed to be located.
4. **Amendment of application.** The commission may allow an applicant to amend its application at any time during the pendency of an application. A rehearing may be required if the commission determines that a proposed amendment, which is received after the hearing process has been completed, materially changes the authority sought.
5. **Reapplication.** When a certificate is denied and the commission specifies a modification that would make it acceptable, the applicant may reapply. In a reapplication:
  - a. The reapplication shall be heard in the same manner as an original application.
  - b. The utility shall indicate its acceptance or rejection of the suggested modification.



- c. If a suggested modification is rejected by the applicant, it shall propose an alternative modification.
- d. No initial fee shall be required.
- e. Further additional fees may be required.
- f. Reapplication must be made within six months of the order denying an application.

**History:** Amended effective August 1, 1979.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-08, 49-22-08.1

## **69-06-04-02. Designation of sites and corridors.**

### **1. Requirements of order.**

- a. An order approving the issuance of a certificate shall contain findings that the application, with modifications, if any, meets the site or corridor evaluation process requirements of the Act, and any special conditions the commission may require.
  - (1) Any modifications or special conditions required by the commission shall be deemed to be accepted unless the applicant petitions for a rehearing.
  - (2) If the applicant rejects any modifications or special conditions and proposes alternatives which it would accept, such a proposal shall be treated by the commission as an amendment to the application.
  - (3) If the applicant rejects any modifications or special conditions without either requesting a rehearing or proposing alternatives, the commission shall rescind its order and deny the application.
- b. The width of a corridor must be at least ten percent of its length, but not less than one mile [1.61 kilometers] or greater than six miles [9.66 kilometers] unless otherwise determined by the commission.
- c. An order denying the issuance of a certificate shall contain findings that state:
  - (1) The reason for such denial.
  - (2) What modification in the application would make it acceptable or that there is no modification that would be acceptable based upon the record before the commission.

2. **Issuance of a certificate.** When a site or corridor is approved, the commission shall issue a certificate in accordance with the order which shall:
  - a. Describe the authority granted.
  - b. Contain any special conditions that the commission may require.

**History:** Amended effective April 1, 2011.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-08

## **CHAPTER 69-09-08**

### **RENEWABLE ELECTRICITY AND RECYCLED ENERGY TRACKING SYSTEM**

Section	
69-09-08-01	Purpose, Application, and Effective Date
69-09-08-02	Definitions
69-09-08-03	Renewable Energy Certificates Tracking Program
69-09-08-04	Facilities Eligible for Participation in the Renewable Energy Certificates Tracking Program
69-09-08-05	Responsibilities of Program Administrator
69-09-08-06	Production and Transfer of Renewable Energy Certificates
69-09-08-07	Registration and Certification of Renewable Energy Facilities
69-09-08-08	Annual Reporting Requirements for Retail Providers

**69-09-08-01. Purpose, application, and effective date.** This chapter establishes a program to include tracking, recording, verifying, and reporting the transactions associated with certificates and credits for electricity generated from renewable electricity sources as defined by North Dakota Century Code section 49-02-25 among electric generators, utilities, and other interested entities within this state and with similar entities in other states. This chapter applies to all public utilities, electric cooperatives, and municipal electric utilities. The tracking program will be effective as specified in the commission's order that designates a program administrator and implements these rules.

**History:** Effective July 1, 2006; amended April 1, 2011.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-02-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-02-26

**69-09-08-02. Definitions.** As used in this chapter:

1. "Designated representative" means a responsible individual authorized by the owner or operator of a renewable energy facility or purchaser of energy produced from a renewable resource to register that resource with the program administrator. The designated representative must have the authority to represent and legally bind the owner, operator, or purchaser in all matters pertaining to the renewable energy certificates tracking program.
2. "Existing facilities" means renewable energy facilities placed in service before January 1, 2001.
3. "New facilities" means renewable energy facilities placed in service on or after January 1, 2001.
4. "Program administrator" means the independent entity designated by commission order to carry out the administrative responsibilities related to the renewable energy certificates tracking program as set forth in this chapter.

5. "Renewable energy certificate" means a document recording one or more renewable energy credits that have been certified by the program administrator as representing electricity generated by a renewable energy facility registered with the tracking system or a certificate imported from a compatible certificates tracking system.
6. "Renewable energy certificate account" means an account maintained by the program administrator for the purpose of tracking renewable energy certificates.
7. "Renewable energy certificates tracking program" means the process of tracking renewable energy certificates as a means of meeting the requirements set forth in section 69-09-08-04.
8. "Renewable energy credit" means the intangible, generally perceived environmental benefits and attributes associated with generating one megawatt hour of renewable electricity or recycled energy that is physically metered and meets the requirements set forth in section 69-09-08-04.
9. "Renewable energy facility" means a facility generating electricity from one or more generating units that exclusively rely on an energy source or fuel included in North Dakota Century Code section 49-02-25.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-02-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-02-26

**69-09-08-03. Renewable energy certificates tracking program.**

Renewable energy certificates may be recorded, transferred, and retired as set forth in this chapter. Except where specifically stated, the provisions of this section apply uniformly to all participants in the tracking program.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-02-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-02-26

**69-09-08-04. Facilities eligible for participation in the renewable energy certificates tracking program.** For a renewable energy facility to be eligible to participate in the tracking program, the facility must be either a new facility or existing facility as defined in section 69-09-08-02 and must also:

1. Register under section 69-09-08-07; and

2. The program administrator shall require that renewable energy certificates be adequately identified prior to recording a transfer and shall issue a confirmation of the transaction to parties when the transfer is recorded.
3. The program administrator shall establish a procedure to ensure that the award, transfer, and retirement of certificates are accurately recorded.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-02-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-02-26

**69-09-08-07. Registration and certification of renewable energy facilities.** To be awarded renewable energy certificates, a designated representative must complete the registration process described in this section.

1. The designated representative shall register with the program administrator each renewable energy generation unit. At a minimum, the registration must include the location, owner, technology, rated capacity of the facility, and evidence that the facility meets the resource eligibility criteria in North Dakota Century Code section 49-02-25.
2. After verifying the information required in the registration process for renewable facilities, the program administrator shall create a renewable energy certificate account for the designated representative of the renewable energy resource.
3. The commission or its program administrator may make onsite visits to any registered unit of a renewable energy resource and may revoke the registration of any unit not in compliance with applicable law and rules.
4. A renewable energy facility may not be awarded renewable energy certificates under this program if it is not registered.
5. Any disputes will be resolved using dispute resolution procedures established by the commission or its program administrator.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-02-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-02-26

**69-09-08-08. Annual reporting requirements for retail providers.** The annual progress report required by North Dakota Century Code section 49-02-34 must be filed in the form and detail the commission may require.

**History:** Effective April 1, 2011.

**General Authority:** NDCC 49-02-34

**Law Implemented:** NDCC 49-02-34

2. Have output that is capable of being physically metered and verified by the program administrator. A renewable energy facility with more than one generating unit may be metered with a single meter.

**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-02-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-02-26

**69-09-08-05. Responsibilities of program administrator.** At a minimum, the program administrator shall perform the following functions:

1. Create accounts that track renewable energy certificates for each participant in the tracking program;
2. Award renewable energy certificates to registered renewable energy facilities based on verified meter reads;
3. Maintain public information on the program administrator's web site that provides tracking program information to interested buyers and sellers of renewable energy certificates;
4. Facilitate private trading of renewable energy certificates;
5. Verify the accuracy of metered production data and other information identified in the renewable energy certificate; and
6. Provide an annual report to the commission. Beginning in the year following commission designation of the program administrator, the program administrator shall submit a report to the commission on or before April fifteenth of each year. At a minimum, the report must contain the amount of registered existing and new generating capacity from a renewable energy facility installed in the state, in megawatts, by technology type, the owner or operator of each facility or the facility's certificates, the date each facility began to produce electricity, and the total number of renewable energy credits certified by the program administrator during each month of the reporting period.

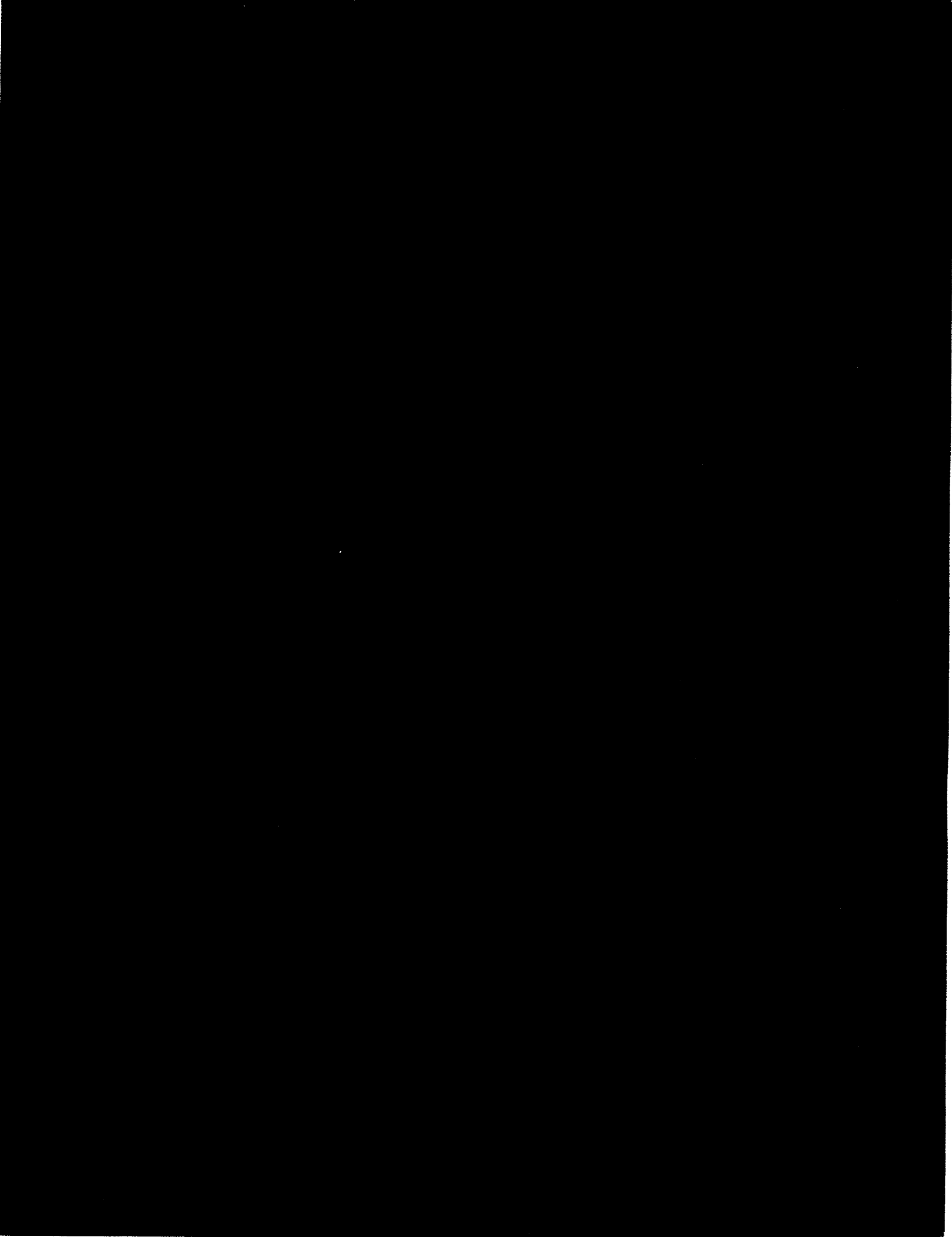
**History:** Effective July 1, 2006.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-02-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-02-26

**69-09-08-06. Production and transfer of renewable energy certificates.** The program administrator shall administer a tracking program for renewable energy certificates in accordance with the requirements of this chapter.

1. The transfer of renewable energy certificates between parties is effective only when the transfer is recorded by the program administrator.



STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Add.  
April, 2011  
to each  
history  
line

Public Service Commission  
Public Utilities - Siting  
Rulemaking

Case No. PU-10-128

**CHAPTER 69-06-02.1**  
**REQUESTS FOR JURISDICTIONAL DETERMINATION**

<u>Section</u>	
<u>69-06-02.1-01</u>	<u>Filing</u>
<u>69-06-02.1-02</u>	<u>Contents</u>

**69-06-02.1-01. Filing.** A utility planning to construct an energy conversion or transmission facility may request a jurisdictional determination from the commission. A request for jurisdictional determination must be in writing.

**History:** Effective \_\_\_\_\_  
**General Authority:** NDCC 49-22-18  
**Law Implemented:** NDCC 49-22-07.1

**69-06-02.1-02. Contents.** A request for a jurisdictional determination must contain:

1. A description of the size of the facility;
2. A description of the type of the facility;
3. A description of the area to be served;
4. A map of the study area for the proposed site or corridor;
5. A description of the ownership and operation responsibility of the facility;
6. A description of the facilities and equipment that will be used and how they will be maintained;
7. A description of the owner's or operator's plans for selling, transmitting, or distributing the output of the plant;
8. A description of how the facility will be physically and electronically interconnected with other energy conversion, transmission, and distribution facilities;



9. A description of the owner's and operator's economic evaluation of the facility, and
10. A description of how the site will be leased or other rights of access will be obtained.

**History:** Effective \_\_\_\_\_.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-07.1

## CHAPTER 69-06-03 LETTER OF INTENT

### Section

69-06-03-01

Filing

69-06-03-02

Contents

**69-06-03-01. Filing.** Any utility planning to construct an energy conversion or transmission facility shall file a letter of intent with the commission at least one year prior to the filing of an application for a certificate unless a shorter period is requested in writing and approved by the commission. ~~A letter of intent may be filed for the sole purpose of seeking a determination of whether the commission has jurisdiction over a proposed facility.~~

**History:** Amended effective \_\_\_\_\_.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-07.1

**69-06-03-02. Contents.** ~~All letters~~ A letter of intent shall ~~shall~~ must contain the following:

1. A description of the size and type of facility, and the area to be served.
2. A map of the study area for the proposed site or corridor.
3. The anticipated construction and operation schedule.
4. An estimate of the total cost of construction.

**History:** Amended effective \_\_\_\_\_.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-07.1

## **69-06-04-02. Designation of sites and corridors.**

### **1. Requirements of order.**

- a. An order approving the issuance of a certificate shall contain findings that the application, with modifications, if any, meets the site or corridor evaluation process requirements of the Act, and any special conditions the commission may require.
  - (1) Any modifications or special conditions required by the commission shall be deemed to be accepted unless the applicant petitions for a rehearing.
  - (2) If the applicant rejects any modifications or special conditions and proposes alternatives which it would accept, such a proposal shall be treated by the commission as an amendment to the application.
  - (3) If the applicant rejects any modifications or special conditions without either requesting a rehearing or proposing alternatives, the commission shall rescind its order and deny the application.
- b. The width of a corridor must be at least ten percent of its length, but not less than one mile [1.61 kilometers] or greater than six miles [9.66 kilometers] unless approved otherwise determined by the commission.
- c. An order denying the issuance of a certificate shall contain findings that state:
  - (1) The reason for such denial.
  - (2) What modification in the application would make it acceptable or that there is no modification that would be acceptable based upon the record before the commission.

### **2. Issuance of a certificate.** When a site or corridor is approved, the commission shall issue a certificate in accordance with the order which shall:

- a. Describe the authority granted.
- b. Contain any special conditions that the commission may require.

**History:** Amended effective \_\_\_\_\_.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-08

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Electric  
Rulemaking**

**Case No. PU-10-129**

**CHAPTER 69-09-08  
RENEWABLE ELECTRICITY AND RECYCLED ENERGY TRACKING SYSTEM**

**Section**

<b>69-09-08-01</b>	<b>Purpose, Application, and Effective Date</b>
<b>69-09-08-02</b>	<b>Definitions</b>
<b>69-09-08-03</b>	<b>Renewable Energy Certificates Tracking Program</b>
<b>69-09-08-04</b>	<b>Facilities Eligible for Participation in the Renewable Energy Certificates Tracking Program</b>
<b>69-09-08-05</b>	<b>Responsibilities of Program Administrator</b>
<b>69-09-08-06</b>	<b>Production and Transfer of Renewable Energy Certificates</b>
<b>69-09-08-07</b>	<b>Registration and Certification of Renewable Energy Facilities</b>
<b><u>69-09-08-08</u></b>	<b><u>Annual Reporting Requirements for Retail Providers</u></b>

**69-09-08-01. Purpose, application, and effective date.** This chapter establishes a program to include tracking, recording, and verifying, and reporting the transactions associated with certificates and credits for electricity generated from renewable electricity sources as defined by North Dakota Century Code section 49-02-25 among electric generators, utilities, and other interested entities within this state and with similar entities in other states. This chapter applies to all public utilities, electric cooperatives, and municipal electric utilities. The tracking program will be effective as specified in the commission's order that designates a program administrator and implements these rules.

**History:** Effective July 1, 2006; \_\_\_\_\_.

**General Authority:** NDCC 49-02-01, 49-02-24, 49-02-25, 49-22-26

**Law Implemented:** NDCC 49-02-24, 49-02-25, 49-22-26

69-09-08-08. **Annual reporting requirements for retail providers.** The annual progress report required by North Dakota Century Code section 49-02-34 must be filed in the form and detail the commission may require.

**History:** Effective \_\_\_\_\_.

**General Authority:** NDCC 49-02-34

**Law Implemented:** NDCC 49-02-34

*Add  
April 11 2011  
to history  
files*

**CHAPTER 69-05.2-09  
PERMIT APPLICATIONS - PERMIT AREA - REQUIREMENTS FOR  
OPERATION AND RECLAMATION PLANS**

**69-05.2-09-02. Permit applications - Operation plans - Maps and plans.**  
Each application must contain an appropriate combination of 1:4,800 scale topographic maps, planimetric maps, and plans of the proposed permit and adjacent areas showing:

1. Scale, date, permit boundaries, company name, legal subdivision boundaries, and legend.
2. Lands to be affected throughout the operation and any change in a facility or feature caused by the operations, if the existing facility or feature was shown under chapter 69-05.2-08.
3. The boundaries of areas to be affected during the permit term according to the sequence of mining and reclamation operations and a description of size and timing of operations for each coal removal subarea.
4. Pit layout and proposed sequence of mining operations, crop line, spoil placement areas, final graded spoil line, highwall areas to be backsloped, and areas for stockpiling suitable plant growth material or other suitable strata.
5. Location of proposed surface water management structures and identification of permanent water impoundments or stream channel alignments.
6. Location of coal processing waste dams and embankments under section 69-05.2-09-09, and fill areas for the disposal of initial cut and other excess spoil under section 69-05.2-09-14 and North Dakota Century Code section 38-14.1-24.
7. Buildings, utility corridors, proposed and existing haul roads, mine railways, and other support facilities.
8. Each coal storage, cleaning and loading area, and each coal waste and noncoal waste storage area. For noncoal wastes that will be disposed of in the proposed permit area, the applicant must provide a description of any wastes listed under subdivision i of subsection 2 of section 33-20-02.1-01 and any other wastes requiring a permit from the state department of health. The location of any such disposal areas must be shown on a map of the permit area.
9. Each explosive storage and handling facility.

10. Each air pollution collection and control facility.
11. Each habitat area to be used to protect and enhance fish and wildlife and related environmental values.
12. Each source of waste and each waste disposal facility relating to coal processing or pollution control.
13. Each bond area, scheduled according to the proposed sequence of operations. Include the bond or guarantee amount for each area.
14. If an applicant proposes to remine or otherwise disturb lands that were affected by coal mining activities prior to January 1, 1970:
  - a. Detailed maps and other available information that clearly depicts the boundaries of the site that was previously affected by mining activities before January 1, 1970. This includes the identification of any sinkholes and other features that are the result of any past underground coal mining activities.
  - b. The applicant must identify and describe potential environmental and safety problems related to prior mining activity at the site and those that could be reasonably anticipated to occur. This identification must be based on a due diligence investigation which includes visual observations at the site, a record review of past mining at the site, and any necessary environmental sampling tailored to the current condition of the site.
  - c. With regard to potential environmental and safety problems referred to in subdivision b, a description of the mitigative measures that will be taken to ensure that the applicable reclamation requirements can be met.

Maps and plans required under subsections 5, 6, and 12 must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a qualified registered land surveyor, or qualified professional geologist with assistance from experts in related fields. However, maps, plans, and cross sections submitted according to section 69-05.2-09-09 may only be prepared by, or under the direction of, and certified by a qualified registered professional engineer or qualified registered land surveyor.

**History:** Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990; June 1, 1997: \_\_\_\_\_.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14



Public Service Commission  
State of North Dakota

JAN 10 2011

COMMISSIONERS

Kevin Cramer  
Tony Clark  
Brian P. Kalk

Executive Secretary  
Darrell Nitschke

600 E. Boulevard Ave. Dept 408  
Bismarck, North Dakota 58505-0480  
Web: www.nd.gov/psc  
E-mail: ndpsc@nd.gov  
Phone 701-328-2400  
Toll Free 1-877-245-6685  
Fax 701-328-2410  
TDD 800-366-6888 or 711

10 January 2011

Mr. John Walstad  
Code Revisor  
North Dakota Legislative Council  
State Capitol  
600 East Boulevard, 2<sup>nd</sup> Floor  
Bismarck, ND 58505-0360

RE: Proposed mining and reclamation rule changes  
PSC Case No. RC-09-543

Dear Mr. Walstad:

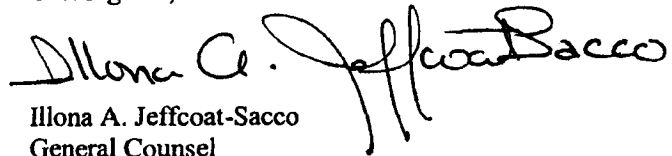
Enclosed for publication in the North Dakota Administrative Code please find a copy of amendments to N.D. Admin. Code Article 69-05.2 relating to a modification of the coal regulatory program Amendment XXXVIII that allow the revegetation responsibility period to be reduced from ten years to five years for eligible lands that are re-mined.

In support of this filing, enclosed please find copies of:

- 30 December 2010 Public Service Commission Motion, with the amendments as adopted and approved;
- Copy of 27 December 2010 *Federal Register* showing ND rule changes approved by Federal Office of Surface Mining
- Letter from the Attorney General dated 28 October 2009 approving the proposed rules as to legality;
- The Public Service Commission's 14 October 2009 Order Submitting Rules to Attorney General, which includes a summary of all comments and is the written record of the agency's consideration of all comments; and
- 16 September 2009 Commission staff testimony presented at the hearing, which were the only comments received.

Thank you for your attention to this matter.

Best regards,

  
Illona A. Jeffcoat-Sacco  
General Counsel

attachments

31 RC-09-543 Filed: 1/10/2011 Pages: 27  
Letter to Legislative Council enclosing proposed  
rules for publication

Public Service Commission

Illona Jeffcoat-Sacco



APPROVED  
DATE: 12-30-10  
[Signature]

**MOTION**

**December 30, 2010**

**Public Service Commission  
Reclamation  
Rulemaking**

**Case No. RC-09-543**

Having been approved by the North Dakota Attorney General and the Federal Office of Surface Mining, I move the Commission adopt the proposed amendments to Article 69-05.2 of the North Dakota Administrative Code, and forward the rules to the Legislative Council for publication, Case No. RC-09-543, Reclamation Rulemaking.

**CHAPTER 69-05.2-09**  
**PERMIT APPLICATIONS - PERMIT AREA - REQUIREMENTS FOR**  
**OPERATION AND RECLAMATION PLANS**

**69-05.2-09-02. Permit applications - Operation plans - Maps and plans.**  
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1. Scale, date, permit boundaries, company name, legal subdivision boundaries, and legend.
2. Lands to be affected throughout the operation and any change in a facility or feature caused by the operations, if the existing facility or feature was shown under chapter 69-05.2-08.
3. The boundaries of areas to be affected during the permit term according to the sequence of mining and reclamation operations and a description of size and timing of operations for each coal removal subarea.
4. Pit layout and proposed sequence of mining operations, crop line, spoil placement areas, final graded spoil line, highwall areas to be backsloped, and areas for stockpiling suitable plant growth material or other suitable strata.
5. Location of proposed surface water management structures and identification of permanent water impoundments or stream channel alignments.
6. Location of coal processing waste dams and embankments under section 69-05.2-09-09, and fill areas for the disposal of initial cut and other excess spoil under section 69-05.2-09-14 and North Dakota Century Code section 38-14.1-24.
7. Buildings, utility corridors, proposed and existing haul roads, mine railways, and other support facilities.
8. Each coal storage, cleaning and loading area, and each coal waste and noncoal waste storage area. For noncoal wastes that will be disposed of in the proposed permit area, the applicant must provide a description of any wastes listed under subdivision i of subsection 2 of section 33-20-02.1-01 and any other wastes requiring a permit from the state department of health. The location of any such disposal areas must be shown on a map of the permit area.
9. Each explosive storage and handling facility.

10. Each air pollution collection and control facility.
11. Each habitat area to be used to protect and enhance fish and wildlife and related environmental values.
12. Each source of waste and each waste disposal facility relating to coal processing or pollution control.
13. Each bond area, scheduled according to the proposed sequence of operations. Include the bond or guarantee amount for each area.
14. If an applicant proposes to remine or otherwise disturb lands that were affected by coal mining activities prior to January 1, 1970:
  - a. Detailed maps and other available information that clearly depicts the boundaries of the site that was previously affected by mining activities before January 1, 1970. This includes the identification any sinkholes and other features that are the result of any past underground coal mining activities.
  - b. The applicant must identify and describe potential environmental and safety problems related to prior mining activity at the site and those that could be reasonably anticipated to occur. This identification must be based on a due diligence investigation which includes visual observations at the site, a record review of past mining at the site, and any necessary environmental sampling tailored to the current condition of the site.
  - c. With regard to potential environmental and safety problems referred to in subdivision b, a description of the mitigative measures that will be taken to ensure that the applicable reclamation requirements can be met.

Maps and plans required under subsections 5, 6, and 12 must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a qualified registered land surveyor, or qualified professional geologist with assistance from experts in related fields. However, maps, plans, and cross sections submitted according to section 69-05.2-09-09 may only be prepared by, or under the direction of, and certified by a qualified registered professional engineer or qualified registered land surveyor.

**History:** Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990; June 1, 1997: \_\_\_\_\_.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-22-07. Performance standards - Revegetation - Standards for success.**

1. Success of revegetation must be measured by using statistically valid techniques approved by the commission. Comparison of ground cover and productivity may be made on the basis of reference areas, through the use of standards in technical guides published by the United States department of agriculture, or through the use of other approved standards. If reference areas are used, the management of the reference area during the responsibility period required in subsection 2 must be comparable to that required for the approved postmining land use of the permit area. If standards are used, they must be approved by the commission and the office of surface mining reclamation and enforcement. Approved standards are contained in the commission's Standards for Evaluation of Revegetation Success and Recommended Procedures for Pre- and Postmining Vegetation Assessments.
2. The period of responsibility under the performance bond requirements of section 69-05.2-12-09 will begin following augmented seeding, planting, fertilization, irrigation, or other work, except for cropland and prime farmland where the period of responsibility begins at the date of initial planting of the crop being grown or a precropland mixture of grasses and legumes, and must continue for not less than ten years. However, for eligible lands that are remined, the revegetation responsibility period must continue for not less than five years.
3. Vegetation establishment, for the purpose of the third stage bond release provided for in subdivision c of subsection 7 of North Dakota Century Code section 38-14.1-17, will be determined for each postmining land use according to the following procedures:
  - a. For native grassland, tame pastureland, and fish and wildlife habitat where the vegetation type is grassland, ground cover on the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence. All species used in determining ground cover must be perennial species not detrimental to the approved postmining land use.
  - b. For cropland, vegetation will be considered established after the successful seeding of the crop being grown or a precropland mixture of grasses and legumes.
  - c. For prime farmland, annual average crop production from the permit area must be equal to or greater than that of the approved

reference area or standard with ninety percent statistical confidence for a minimum of three crop years.

- d. For woodland, shelterbelts, and fish and wildlife habitat where the vegetation type is woodland, the number of trees and shrubs must be equal to or greater than the approved standard. Understory growth must be controlled. Erosion must be adequately controlled by mulch or site characteristics.
  - e. For fish and wildlife habitat where the vegetation type is wetland, the basin must exhibit the capacity to hold water and support wetland vegetation. Ground cover of the contiguous areas must be adequate to control erosion.
4. The success of revegetation on the permit area at the time of final bond release must be determined for each postmining land use according to the following:
- a. For native grassland, the following must be achieved for any two years after year six of the responsibility period:
    - (1) Ground cover and productivity of the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence; and
    - (2) Diversity, seasonality, and permanence of the vegetation of the permit area must equal or exceed the approved standard.
  - b. For tame pastureland, ground cover and productivity of the permit area must be equal to or greater than that of the approved standard with ninety percent statistical confidence for any two years after year six of the responsibility period.
  - c. For cropland, crop production from the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence for any two years after year six of the responsibility period.
  - d. For prime farmlands, a showing that the requirements for the restoration of productivity as specified in subdivision c of subsection 3 have been met and that the ten-year period of responsibility has elapsed.

- e. For woodlands and fish and wildlife habitat where the vegetation type is woodland, the following must be achieved during the growing season of the last year of the responsibility period:
- (1) The number of woody plants established on the permit area must be equal to or greater than the number of live woody plants of the same life form of the approved standard with ninety percent statistical confidence. Trees, shrubs, half-shrubs, root crowns or root sprouts used in determining success of stocking must meet the following criteria:
    - (a) Be healthy;
    - (b) Be in place for at least two growing seasons; and
    - (c) If any replanting of woody plants took place during the responsibility period, the total number planted during the last six years of that period must be less than twenty percent of the total number of woody plants required. Any replanting must be by means of transplants to allow for adequate accounting of plant stocking; and
    - (d) Volunteer trees and shrubs of approved species will be considered at least two years of age and can be counted toward meeting success standards; however, volunteer trees must be at least thirty inches (76 centimeters) in height to be included in the count. Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding;
  - (2) The ground cover must be equal to or greater than ninety percent of the ground cover of the approved standard with ninety percent statistical confidence and must be adequate to control erosion; and
  - (3) Species diversity, seasonal variety, and regenerative capacity of the vegetation on the permit area must be evaluated on the basis of species stocked and expected survival and reproduction rates.
- f. For shelterbelts, the following must be achieved during the growing season of the last year of the responsibility period:

- (1) Trees, shrubs, half-shrubs, root crowns, or root sprouts used in determining success of stocking must meet the following criteria:
    - (a) Be healthy;
    - (b) Be in place for at least two growing seasons; and
    - (c) If any replanting of woody plants took place during the responsibility period, the total number planted during the last six years of that period must be less than twenty percent of the total number of woody plants required. Any replanting must be by means of transplants to allow for adequate accounting of plant stocking; and
    - (d) Volunteer trees and shrubs of approved species will be considered at least two years of age and can be counted toward meeting success standards; however, volunteer trees must be at least thirty inches (76 centimeters) in height to be included in the count. Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding;
  - (2) Shelterbelt density and vigor must be equal to or greater than that of the approved standards; and
  - (3) Erosion must be adequately controlled.
- g. For fish and wildlife habitat, where the vegetation type is wetland, vegetation zones and dominant species must be equal to those of the approved standard during the growing season of the last year of the responsibility period. In addition, wetland permanence and water quality must meet approved standards.
- h. For fish and wildlife habitat, where the vegetation type is grassland, the following must be achieved during the growing season of the last year of the responsibility period:
- (1) Ground cover must be equal to or greater than that of the approved standard with ninety percent statistical confidence and must be adequate to control erosion.
  - (2) Species diversity, seasonal variety, and regenerative capacity of the vegetation must meet or exceed the approved standard.

- i. For previously mined areas that were not reclaimed to the requirements of this chapter, any reclamation requirements in effect when the areas were mined must be met. In addition, the ground cover must not be less than can be supported by the best available plant growth material in the reaffected area, nor less than the ground cover existing before redistribution. Adequate measures must be in place to control erosion as approved by the commission. If lands affected by coal mining activities prior to January 1, 1970, are remined or otherwise redistributed, the applicable standard must be met for the last two consecutive years of the minimum five-year responsibility period that applies to remined lands. However, if the postmining land use for the remined area is woodlands, shelterbelts, or fish and wildlife habitat, the applicable standard must be met for just the last year of the responsibility period.
  - j. For areas to be developed for water, residential, or industrial and commercial uses within two years after the completion of grading or soil replacement, the ground cover on these areas must not be less than required to control erosion.
  - k. For areas to be developed for recreation, woody plants must meet or exceed the stocking and plant establishment standards for woodlands or shelterbelts found in paragraph 1 of subdivision e or in subdivision f as applicable. In addition, ground cover must not be less than required to achieve the approved postmining land use.
  - l. If a reclaimed tract contains a mixture of prime and nonprime farmlands, the commission may approve a single yield standard for the entire tract based on the soil types that occurred on the prime and nonprime areas prior to mining. The operator must provide a detailed description and comparison of the soil mapping units, acreages, and yield calculations in the reclamation plan as required by subsection 8 of section 69-05.2-09-15. When a single yield standard is approved, the operator must demonstrate that the standard has been achieved for any three years starting no sooner than the sixth year of the responsibility period. If this option is approved, the operator must also meet the applicable requirements of section 69-05.2-26-05 for the entire tract.
5. Throughout the liability period the permittee must:
- a. Maintain any necessary fences and use proper management practices; and

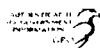


- 
- b. Conduct periodic measurements of vegetation, soils, and water prescribed or approved by the commission.

**History:** Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; May 1, 1992; January 1, 1993; June 1, 1997; May 1, 1999; May 1, 2001; March 1, 2004; April 1, 2007; \_\_\_\_\_.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-24



[FR Doc. 2010-32418 Filed 12-23-10; 8:45 am]  
BILLING CODE 4310-05-P

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 934

[SATS No. ND-051-FOR; Docket ID No. OSM-2009-0013]

#### North Dakota Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.  
**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We are approving an amendment to the North Dakota regulatory program (the "North Dakota program") under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"). North Dakota proposes revisions to rules and statutes that will allow the revegetation responsibility period to be reduced from ten years to five years for lands eligible for re-mining. North Dakota intends to revise its program to be consistent with the corresponding Federal regulations and to improve operational efficiency.

**DATES:** *Effective Date:* December 27, 2010

**FOR FURTHER INFORMATION CONTACT:** Jeffery Fleischman, Field Office Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, 150 East B Street, Room 1018, Casper, Wyoming 82604-1018, 307-261-6552, [jfleischman@osmre.gov](mailto:jfleischman@osmre.gov).

#### SUPPLEMENTARY INFORMATION:

- I. Background on the North Dakota Program
- II. Submission of the Proposed Amendment
- III. Office of Surface Mining Reclamation and Enforcement's (OSM's) Findings
- IV. Summary and Disposition of Comments
- V. OSM's Decision
- VI. Procedural Determinations

#### I. Background on the North Dakota Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." See 30 U.S.C.

1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the North Dakota program on December 15, 1980. You can find background information on the North Dakota program, including the Secretary's findings, the disposition of comments, and conditions of approval in the December 15, 1980, *Federal Register* (45 FR 82214). You can also find later actions concerning North Dakota's program and program amendments at 30 CFR 934.15, 934.16, and 934.30.

#### II. Submission of the Proposed Amendment

By letter dated November 12, 2009, North Dakota sent us an amendment to its program (Amendment number XXXVIII, Administrative Record Docket ID: OSM-2009-0013) under SMCRA (30 U.S.C. 1201 *et seq.*). North Dakota submitted the amendment on its own accord. The amendment reduces the reclamation liability period on previously mined areas from ten full years to five full years. The Federal regulations at 30 CFR 816.116 provide incentives for eligible re-mining operations including reduced revegetation responsibility periods (2 years in the East and 5 years in the West).

Specifically, North Dakota proposes revisions to the North Dakota Century Code at Chapter 38-14.1-24(18) (Environmental protection performance standards) and to the North Dakota Administrative Code at Article 69-05.2-09-02(14) (Permit applications—operation plans—maps and plans) and Article 69-05.2-22-07(2) and (4)(i) (Performance standards—Revegetation—Standards for success).

North Dakota proposes to reduce the reclamation liability period on previously mined areas from ten years to five years. This change will apply to the North Dakota Century Code as well as the North Dakota Administrative Code. North Dakota defines previously mined areas as "lands that were affected by coal mining activities prior to January 1, 1970." North Dakota also proposes to require permit applications that include previously mined areas to include additional maps and information addressing potential environmental and safety problems that might occur at the mining site.

We announced receipt of the proposed amendment in the February 9, 2010, *Federal Register* (Vol. 75, No. 26, FR page number 6330). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy

(Administrative Record Docket ID: OSM-2009-0013).

We did not receive any comments. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on March 11, 2010.

#### III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment as described below.

##### *A. Revisions to North Dakota's Rules and Statutes That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations and/or SMCRA*

North Dakota proposed revisions to the following rules containing language that is the same as or similar to the corresponding section of the Federal regulations. North Dakota Administrative Code (NDAC) 69-05.2-22-07 (30 CFR 816.116), Performance standards—Revegetation—Standards for success.

North Dakota proposes for areas meeting the definition of previously mined area to require a five year liability period for revegetation success. All other areas in North Dakota have a ten year liability period. The Federal regulations at 30 CFR 816.116 allow the same five year period.

Because these proposed rules contain language that is the same as or similar to the corresponding Federal regulations, we find that they are no less effective than the corresponding Federal regulations and we approve it.

##### *B. Revisions to North Dakota's Rules That Are Not the Same as the Corresponding Provisions of the Federal Regulations*

North Dakota Century Code Chapter (NDCC) 38-14.1-24(18) (SMCRA Section 515(20)(B)), Environmental Protection Performance Standards.

North Dakota proposes to add a definition for "previously mined areas." The definition would adopt January 1, 1970, the effective date of North Dakota's first reclamation law, as the cut-off eligibility date for lands eligible for re-mining. Previously mined areas are those that were mined prior to January 1, 1970. The Federal definition of previously mined areas are those mined prior to August 3, 1977, and for which investigation reveals, are not reclaimed to the standards of SMCRA. Under North Dakota's proposed definition far fewer lands would be considered but

there is no determination as to their condition.

This date is more restrictive than SMCRA as clarified by the State. North Dakota states, "North Dakota's definition of lands eligible for re-mining will apply to fewer lands as compared to the SMCRA provisions. Since North Dakota's first reclamation law went into effect on January 1, 1970, we will only apply the special performance standard (the reduced revegetation liability period) to lands that were mined prior to that date. Therefore, for the purposes of re-mining under the coal regulatory program, land must have been mined prior to January 1, 1970, and be left in an inadequate reclamation status. Any lands that were mined in North Dakota between January 1, 1970, and August 3, 1977, are subject to certain reclamation standards as required by the pre-SMCRA State reclamation laws and will not be eligible for the reduced 5-year revegetation liability period. However, under the SMCRA provisions, the special re-mining standards can be applied to lands that were mined prior to August 3, 1977. We consider North Dakota's re-mining provisions to be more stringent than SMCRA since fewer lands are eligible for the special performance standards. In North Dakota, lands mined between January 1, 1970, and August 3, 1977, that are proposed to be re-mined or re-disturbed will be subject to the 10-year revegetation liability period, whereas under SMCRA they could qualify for the 5-year liability period."

North Dakota's explanation that the special performance standard (the 5-year revegetation liability period) will only apply to lands that were mined prior to January 1, 1970, but not to those lands mined between January 1, 1970, and August 3, 1977, that are proposed to be re-mined or re-disturbed, clarifies which lands qualify for the shorter responsibility period under its revised statute at NDCC Chapter 38, Section 14.1–24, subsection 18. North Dakota's adoption of the January 1, 1970, date rather than August 3, 1977, (the effective date of SMCRA) renders its definition no less stringent than the Act and we approve it.

#### *C. Revisions to North Dakota's Rules With No Corresponding Federal Regulation*

NDAC 69–05.2–09–02, Permit applications—Operation plans—Maps and plans.

This addition to North Dakota's rules does not have a Federal Counterpart. It requires the permit application under the re-mining provision to include potential environmental and safety hazards that could be reasonably

anticipated to occur as well as include the mitigative measures that will be taken to ensure that the applicable reclamation requirements can be met. It is more stringent than the Federal rules since the Federal rules have no such requirement and we approve it.

#### **IV. Summary and Disposition of Comments**

##### *Public Comments*

We asked for public comments on the amendment (Administrative Record Docket ID: OSM–2009–0013), but did not receive any.

##### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the North Dakota program (Administrative Record Docket ID: OSM–2009–0013).

##### *Environmental Protection Agency (EPA) Concurrence and Comments*

Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to get concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

We note that none of the proposed changes relate to air or water quality standards. Nevertheless, under 30 CFR 732.17(h)(11)(ii), OSM requested comments on the amendment from EPA (Administrative Record Docket ID: OSM–2009–0013). EPA did not respond to our request.

##### *State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)*

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On November 25, 2009, we requested comments on North Dakota's amendment (Administrative Record Docket ID: OSM–2009–0013), but neither responded to our request.

#### **V. OSM's Decision**

Based on the above findings, we approve North Dakota's November 12, 2009, amendment.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 934, which codify decisions concerning the North Dakota program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's

program demonstrates that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### **VI. Procedural Determinations**

##### *Executive Order 12630—Takings*

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

##### *Executive Order 12866—Regulatory Planning and Review*

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

##### *Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

##### *Executive Order 13132—Federalism*

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

**Executive Order 13175—Consultation and Coordination With Indian Tribal Governments**

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

**Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy**

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

**National Environmental Policy Act**

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C) *et seq.*).

**Paperwork Reduction Act**

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

**Regulatory Flexibility Act**

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

**Small Business Regulatory Enforcement Fairness Act**

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act. This rule:

- a. Does not have an annual effect on the economy of \$100 million.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises. This determination is based upon the

fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

**Unfunded Mandates**

This rule will not impose an unfunded Mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

**List of Subjects in 30 CFR Part 934**

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 12, 2010.

Allen D. Klein,  
Regional Director, Western Region.

■ For the reasons set out in the preamble, 30 CFR part 934 is amended as set forth below:

**PART 934—NORTH DAKOTA**

■ 1. The authority citation for part 934 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 934.15 is amended in the table by adding a new entry in chronological order by "Date of Final Publication" to read as follows:

**§ 934.15 Approval of North Dakota regulatory program amendments**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
November 12, 2009	December 27, 2010	NDCC 38–14.1–24(18). NDAC 69–05.2–09–2. 2NDAC 69–05.2–22–07.

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 943**

[SATS No. TX–059–FOR; Docket No. OSM–2010–0001]

**Texas Regulatory Program**

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving an amendment to the Texas regulatory program (Texas program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Texas proposed revisions to its regulations regarding annual permit fees. Texas revised its



Wayne Stenehjem  
ATTORNEY GENERAL

STATE OF NORTH DAKOTA  
**OFFICE OF ATTORNEY GENERAL**

STATE CAPITOL  
600 E BOULEVARD AVE DEPT 125  
BISMARCK, ND 58505-0040  
(701) 328-2210 FAX (701) 328-2226  
www.ag.nd.gov

**RECEIVED**

OCT 28 2009

OPINION

October 28, 2009

**PUBLIC SERVICE COMMISSION**

Ms. Ilona A. Jeffcoat-Sacco  
General Counsel  
Public Service Commission  
State Capitol  
Bismarck, ND 58505

Dear Ms. Jeffcoat-Sacco:

The Office of Attorney General has examined the proposed amendments to N.D.A.C. § 69-09-03-02 concerning gas pipeline safety (Case No. GS-09-67) and proposed amendments to N.D.A.C. art. 69-05.2 concerning mining and reclamation (Case No. RC-09-543), along with the notice of the proposed rules, the publication of that notice, and the filing of that notice with the Legislative Council. This office has also determined that 1) a written record of the agency's consideration of any comments to the proposed rules was made, 2) a regulatory analysis was not issued or requested, 3) a takings assessment was not prepared, 4) a small entity regulatory analysis and an economic impact statement were not prepared for the proposed amendments to N.D.A.C. § 69-09-03-02 because they are required by federal law and a small entity regulatory analysis and an economic impact statement were prepared for the proposed amendments to N.D.A.C. art. 69-05.2, and 5) the proposed rules are within the agency's statutory authority.

These administrative rules are in compliance with N.D.C.C. ch. 28-32 and are hereby approved as to their legality. Upon final adoption, these rules may be filed with the Legislative Council.

Sincerely,

Wayne Stenehjem  
Attorney General

eee/vkk

cc: John Walstad, Legislative Council

19 RC-09-543 Filed: 10/28/2009 Pages: 1  
Letter Approving Administrative Rules

24 GS-09-67 Filed: 10/28/2009 Pages: 1  
Letter Approving Administrative Rules

Attorney General

Attorney General

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
2009 Gas Pipeline Safety Rules  
Rulemaking**

**Case No. GS-09-67**

**Public Service Commission  
Reclamation  
Rulemaking**

**Case No. RC-09-543**

**ORDER SUBMITTING RULES TO ATTORNEY GENERAL**

**October 14, 2009**

**Appearances**

Commissioners Tony Clark, Kevin Cramer, and Brian P. Kalk

**Preliminary Statement**

On August 12, 2009, the North Dakota Public Service Commission (Commission) issued a formal Notice of Proposed Rulemaking and an Abbreviated Notice proposing to revise Articles 69-09 and 69-05.2 of the Administrative Code. The proposed amendments relate to the adoption by reference of federal gas safety requirements and surface coal mining and reclamation permit application requirements and revegetation success standards. The proposed rules are summarized as follows:

**Gas Safety/Gas Pipeline Safety: Case No. GS-09-67**

In order to continue the Commission's role as an agent for the federal pipeline safety program, the proposed change to the North Dakota Administrative Code Section 69-09-03-02 adopts by reference changes made to federal pipeline safety regulations since December 31, 2006. The proposed amendment is not expected to have an impact on the regulated community in excess of \$50,000.

**Reclamation: Case No. RC-09-543**

The Surface Coal Mining and Reclamation Law was amended by the 2009 Legislature to reduce the revegetation responsibility period from ten years to five years for eligible lands that are re-mined. The proposed changes to North Dakota Administrative Code Sections 69-05.2-09-02 and 69-05.2-22-07 will amend permit

application requirements and revegetation success standards to reflect this statutory change. The proposed amendment is not expected to have an impact on the regulated community in excess of \$50,000.

### **Public Hearing and Comments**

The Abbreviated Notice was published once in all 52 official county newspapers the week of August 20 through August 26, 2009. The Notice of Intent to Amend Administrative Rules and Notice of Public Hearing and proposed rules were also sent to those identified as interested or affected parties. The notices were also forwarded on August 13, 2009 to the Legislative Council for publication.

A public hearing on the proposed rule changes was noticed for and held at 10:00 a.m. September 16, 2009. The hearing was held in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota.

The Commission allowed, after the conclusion of the rulemaking hearing, a comment period until September 26, 2009, during which data, views, or oral arguments concerning the proposed rulemaking could be received by the Commission and made a part of the rulemaking record to be considered by the Commission.

The only written comments filed were received at the hearing and were those of Commission staff.

### **Discussion**

#### **Gas Safety/Gas Pipeline Safety: Case No. GS-09-67**

Staff prepared and filed a statement regarding the required regulatory analysis, takings assessment, and small entity regulatory analysis.

Staff testified that the proposed changes were intended to incorporate into state rules changes in federal rules that must also apply to the state program, and summarized these required changes.

No other comments were received and no changes are being made to the rules as originally proposed.

#### **Reclamation: Case No. RC-09-543**

Staff prepared and filed a statement regarding the required regulatory analysis, takings assessment, and small entity regulatory analysis.

Staff testified that the statutory changes to North Dakota's surface coal mining and reclamation law enacted by the 2009 Legislature reduces the revegetation responsibility period from 10 years to 5 years for eligible lands that are re-mined. Staff explained that lands disturbed by coal mining activities prior to January 1, 1970 are

eligible for the shortened responsibility period if they are re-mined or otherwise re-disturbed by permitted mining operations.

A new subsection is being proposed to North Dakota Administrative Code Section 69-05.2-09-02 to require a permit applicant to 1) clearly identify any previously mined lands that will be re-mined; 2) describe any potential environmental and safety problems related to the prior mining activities at the site and those that could be expected to occur with re-mining or re-affecting these lands; and, 3) if potential problems are anticipated, the applicant must describe the measures that will be taken to ensure the applicable reclamation requirements can be met.

Additional language is also being proposed in North Dakota Administrative Code Section 69-05.2-22-07 to reflect the shortened liability period of eligible lands that are re-mined. This rule contains the revegetation success standards that must be met prior to bond release.

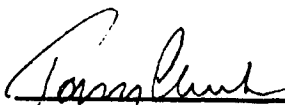
No other comments were received and no changes are being made to the rules as originally proposed.

#### **Order**

The Commission orders:

The proposed changes to Sections 69-09-03-02, 69-05.2-09-02, and 69-05.2-22-07 of the North Dakota Administrative Code, as attached to and made a part of this order, be submitted to the Attorney General for an opinion that the rules are approved as to legality.

#### **PUBLIC SERVICE COMMISSION**



**Tony Clark**  
**Commissioner**



**Kevin Cramer**  
**Chairman**



**Brian P. Kalk**  
**Commissioner**



**CHAPTER 69-05.2-09**  
**PERMIT APPLICATIONS - PERMIT AREA - REQUIREMENTS FOR**  
**OPERATION AND RECLAMATION PLANS**

**69-05.2-09-02. Permit applications - Operation plans - Maps and plans.**  
Each application must contain an appropriate combination of 1:4,800 scale topographic maps, planimetric maps, and plans of the proposed permit and adjacent areas showing:

1. Scale, date, permit boundaries, company name, legal subdivision boundaries, and legend.
2. Lands to be affected throughout the operation and any change in a facility or feature caused by the operations, if the existing facility or feature was shown under chapter 69-05.2-08.
3. The boundaries of areas to be affected during the permit term according to the sequence of mining and reclamation operations and a description of size and timing of operations for each coal removal subarea.
4. Pit layout and proposed sequence of mining operations, crop line, spoil placement areas, final graded spoil line, highwall areas to be backsloped, and areas for stockpiling suitable plant growth material or other suitable strata.
5. Location of proposed surface water management structures and identification of permanent water impoundments or stream channel alignments.
6. Location of coal processing waste dams and embankments under section 69-05.2-09-09, and fill areas for the disposal of initial cut and other excess spoil under section 69-05.2-09-14 and North Dakota Century Code section 38-14.1-24.
7. Buildings, utility corridors, proposed and existing haul roads, mine railways, and other support facilities.
8. Each coal storage, cleaning and loading area, and each coal waste and noncoal waste storage area. For noncoal wastes that will be disposed of in the proposed permit area, the applicant must provide a description of any wastes listed under subdivision i of subsection 2 of section 33-20-02.1-01 and any other wastes requiring a permit from the state department of health. The location of any such disposal areas must be shown on a map of the permit area.
9. Each explosive storage and handling facility.

10. Each air pollution collection and control facility.
11. Each habitat area to be used to protect and enhance fish and wildlife and related environmental values.
12. Each source of waste and each waste disposal facility relating to coal processing or pollution control.
13. Each bond area, scheduled according to the proposed sequence of operations. Include the bond or guarantee amount for each area.
14. If an applicant proposes to remine or otherwise disturb lands that were affected by coal mining activities prior to January 1, 1970:
  - a. Detailed maps and other available information that clearly depicts the boundaries of the site that was previously affected by mining activities before January 1, 1970. This includes the identification any sinkholes and other features that are the result of any past underground coal mining activities.
  - b. The applicant must identify and describe potential environmental and safety problems related to prior mining activity at the site and those that could be reasonably anticipated to occur. This identification must be based on a due diligence investigation which includes visual observations at the site, a record review of past mining at the site, and any necessary environmental sampling tailored to the current condition of the site.
  - c. With regard to potential environmental and safety problems referred to in subdivision b, a description of the mitigative measures that will be taken to ensure that the applicable reclamation requirements can be met.

Maps and plans required under subsections 5, 6, and 12 must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a qualified registered land surveyor, or qualified professional geologist with assistance from experts in related fields. However, maps, plans, and cross sections submitted according to section 69-05.2-09-09 may only be prepared by, or under the direction of, and certified by a qualified registered professional engineer or qualified registered land surveyor.

**History:** Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990; June 1, 1997: \_\_\_\_\_.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14

**69-05.2-22-07. Performance standards - Revegetation - Standards for success.**

1. Success of revegetation must be measured by using statistically valid techniques approved by the commission. Comparison of ground cover and productivity may be made on the basis of reference areas, through the use of standards in technical guides published by the United States department of agriculture, or through the use of other approved standards. If reference areas are used, the management of the reference area during the responsibility period required in subsection 2 must be comparable to that required for the approved postmining land use of the permit area. If standards are used, they must be approved by the commission and the office of surface mining reclamation and enforcement. Approved standards are contained in the commission's Standards for Evaluation of Revegetation Success and Recommended Procedures for Pre- and Postmining Vegetation Assessments.
2. The period of responsibility under the performance bond requirements of section 69-05.2-12-09 will begin following augmented seeding, planting, fertilization, irrigation, or other work, except for cropland and prime farmland where the period of responsibility begins at the date of initial planting of the crop being grown or a precropland mixture of grasses and legumes, and must continue for not less than ten years. However, for eligible lands that are remined, the revegetation responsibility period must continue for not less than five years.
3. Vegetation establishment, for the purpose of the third stage bond release provided for in subdivision c of subsection 7 of North Dakota Century Code section 38-14.1-17, will be determined for each postmining land use according to the following procedures:
  - a. For native grassland, tame pastureland, and fish and wildlife habitat where the vegetation type is grassland, ground cover on the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence. All species used in determining ground cover must be perennial species not detrimental to the approved postmining land use.
  - b. For cropland, vegetation will be considered established after the successful seeding of the crop being grown or a precropland mixture of grasses and legumes.
  - c. For prime farmland, annual average crop production from the permit area must be equal to or greater than that of the approved

reference area or standard with ninety percent statistical confidence for a minimum of three crop years.

- d. For woodland, shelterbelts, and fish and wildlife habitat where the vegetation type is woodland, the number of trees and shrubs must be equal to or greater than the approved standard. Understory growth must be controlled. Erosion must be adequately controlled by mulch or site characteristics.
  - e. For fish and wildlife habitat where the vegetation type is wetland, the basin must exhibit the capacity to hold water and support wetland vegetation. Ground cover of the contiguous areas must be adequate to control erosion.
4. The success of revegetation on the permit area at the time of final bond release must be determined for each postmining land use according to the following:
- a. For native grassland, the following must be achieved for any two years after year six of the responsibility period:
    - (1) Ground cover and productivity of the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence; and
    - (2) Diversity, seasonality, and permanence of the vegetation of the permit area must equal or exceed the approved standard.
  - b. For tame pastureland, ground cover and productivity of the permit area must be equal to or greater than that of the approved standard with ninety percent statistical confidence for any two years after year six of the responsibility period.
  - c. For cropland, crop production from the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence for any two years after year six of the responsibility period.
  - d. For prime farmlands, a showing that the requirements for the restoration of productivity as specified in subdivision c of subsection 3 have been met and that the ten-year period of responsibility has elapsed.

- e. For woodlands and fish and wildlife habitat where the vegetation type is woodland, the following must be achieved during the growing season of the last year of the responsibility period:
- (1) The number of woody plants established on the permit area must be equal to or greater than the number of live woody plants of the same life form of the approved standard with ninety percent statistical confidence. Trees, shrubs, half-shrubs, root crowns or root sprouts used in determining success of stocking must meet the following criteria:
    - (a) Be healthy;
    - (b) Be in place for at least two growing seasons; and
    - (c) If any replanting of woody plants took place during the responsibility period, the total number planted during the last six years of that period must be less than twenty percent of the total number of woody plants required. Any replanting must be by means of transplants to allow for adequate accounting of plant stocking; and
    - (d) Volunteer trees and shrubs of approved species will be considered at least two years of age and can be counted toward meeting success standards; however, volunteer trees must be at least thirty inches (76 centimeters) in height to be included in the count. Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding;
  - (2) The ground cover must be equal to or greater than ninety percent of the ground cover of the approved standard with ninety percent statistical confidence and must be adequate to control erosion; and
  - (3) Species diversity, seasonal variety, and regenerative capacity of the vegetation on the permit area must be evaluated on the basis of species stocked and expected survival and reproduction rates.
- f. For shelterbelts, the following must be achieved during the growing season of the last year of the responsibility period:

- (1) Trees, shrubs, half-shrubs, root crowns, or root sprouts used in determining success of stocking must meet the following criteria:
    - (a) Be healthy;
    - (b) Be in place for at least two growing seasons; and
    - (c) If any replanting of woody plants took place during the responsibility period, the total number planted during the last six years of that period must be less than twenty percent of the total number of woody plants required. Any replanting must be by means of transplants to allow for adequate accounting of plant stocking; and
    - (d) Volunteer trees and shrubs of approved species will be considered at least two years of age and can be counted toward meeting success standards; however, volunteer trees must be at least thirty inches (76 centimeters) in height to be included in the count. Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding;
  - (2) Shelterbelt density and vigor must be equal to or greater than that of the approved standards; and
  - (3) Erosion must be adequately controlled.
- g. For fish and wildlife habitat, where the vegetation type is wetland, vegetation zones and dominant species must be equal to those of the approved standard during the growing season of the last year of the responsibility period. In addition, wetland permanence and water quality must meet approved standards.
- h. For fish and wildlife habitat, where the vegetation type is grassland, the following must be achieved during the growing season of the last year of the responsibility period:
- (1) Ground cover must be equal to or greater than that of the approved standard with ninety percent statistical confidence and must be adequate to control erosion.
  - (2) Species diversity, seasonal variety, and regenerative capacity of the vegetation must meet or exceed the approved standard.

- i. For previously mined areas that were not reclaimed to the requirements of this chapter, any reclamation requirements in effect when the areas were mined must be met. In addition, the ground cover must not be less than can be supported by the best available plant growth material in the reaffected area, nor less than the ground cover existing before redisturbance. Adequate measures must be in place to control erosion as approved by the commission. If lands affected by coal mining activities prior to January 1, 1970, are remined or otherwise redisturbed, the applicable standard must be met for the last two consecutive years of the minimum five-year responsibility period that applies to remined lands. However, if the postmining land use for the remined area is woodlands, shelterbelts or fish and wildlife habitat, the applicable standard must be met for just the last year of the responsibility period.
  - j. For areas to be developed for water, residential, or industrial and commercial uses within two years after the completion of grading or soil replacement, the ground cover on these areas must not be less than required to control erosion.
  - k. For areas to be developed for recreation, woody plants must meet or exceed the stocking and plant establishment standards for woodlands or shelterbelts found in paragraph 1 of subdivision e or in subdivision f as applicable. In addition, ground cover must not be less than required to achieve the approved postmining land use.
  - l. If a reclaimed tract contains a mixture of prime and nonprime farmlands, the commission may approve a single yield standard for the entire tract based on the soil types that occurred on the prime and nonprime areas prior to mining. The operator must provide a detailed description and comparison of the soil mapping units, acreages, and yield calculations in the reclamation plan as required by subsection 8 of section 69-05.2-09-15. When a single yield standard is approved, the operator must demonstrate that the standard has been achieved for any three years starting no sooner than the sixth year of the responsibility period. If this option is approved, the operator must also meet the applicable requirements of section 69-05.2-26-05 for the entire tract.
5. Throughout the liability period the permittee must:
- a. Maintain any necessary fences and use proper management practices; and

- b. Conduct periodic measurements of vegetation, soils, and water prescribed or approved by the commission.

**History:** Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; May 1, 1992; January 1, 1993; June 1, 1997; May 1, 1999; May 1, 2001; March 1, 2004; April 1, 2007;\_\_\_\_\_.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-24



**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Reclamation  
Rulemaking**

**Case No. RC-09-543**

**STAFF TESTIMONY**

**September 16, 2009**

I am Jim Deutsch, Director of the Public Service Commission's Reclamation Division, and I will discuss the rule changes in Case No. RC-09-543. A few changes are proposed to North Dakota Administrative Code Article 69-05.2, rules for surface coal mining and reclamation operations. The rule changes are due to a statutory change to North Dakota's surface coal mining and reclamation law that was enacted by the 2009 Legislature. The statutory change reduces the revegetation responsibility period from ten years to five years for eligible lands that are re-mined. Lands disturbed by coal mining activities prior to January 1, 1970 are eligible for the shortened responsibility period if they are re-mined or otherwise re-disturbed by permitted mining operations. The rules adopted by the Commission must be as effective as counterpart federal rules issued by the federal Office of Surface Mining.

A new subsection is being added to NDAC Section 69-05.2-09-02 to require a permit applicant to 1) clearly identify any previously mined lands that will be re-mined; 2) describe any potential environmental and safety problems related to the prior mining activities at the site and those that could be expected to occur with re-mining or re-affecting these lands; and, 3) if potential problems are anticipated, the applicant must describe the measures that will be taken to ensure the applicable reclamation requirements can be met.

Additional language is also being added to subsection 2 and subdivision i of subsection 4 of NDAC Section 69-05.2-22-07 to reflect the shortened liability period of eligible lands that are re-mined. This rule contains the revegetation success standards that must be met prior to bond release.

Regulatory and takings assessments for these rule changes have been prepared and copies are available for review. This concludes my testimony on the mining and reclamation rule changes proposed in Case No. RC-09-543.