

**PUBLIC SERVICE COMMISSION
Reclamation Division**

Memorandum

TO: Case No. RC-05-591

FROM: Jim Deutsch, Reclamation Division

DATE: November 14, 2005

SUBJECT: Regulatory and Takings Assessment for mining and reclamation rule changes proposed in Case No. RC-05-591

The Reclamation Division has prepared Regulatory and Takings Assessments as required by North Dakota Century Code (NDCC) Sections 28-32-08.1 and 28-32-09 for the mining and reclamation rule changes proposed in Case No. RC-05-591. NDCC Section 28-32-08.1 requires an agency to prepare a regulatory analysis with regard to the impact of the proposed rules on small entities. NDCC Section 28-32-09 requires an agency to prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of private real property.

NDAC 28-32-08.1 requires a regulatory analysis which considers utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. The following addresses the provisions of subsection 2 of NDAC 28-32-08.1 with regard to the rule changes proposed in Case No. RC-05-591:

NDCC 28-32-08.1(2)(a) – Establishment of less stringent compliance or reporting requirements for small entities.

No additional compliance standards or reporting requirements are proposed by the rule changes.

NDCC 28-32-08.1(2)(b) – Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities.

No additional compliance standards or reporting requirements are proposed by the rule changes.

NDCC 28-32-08.1(2)(c) – Consolidation or simplification of compliance or reporting requirements for small entities.

As previously noted, no additional compliance standards or reporting requirements are proposed by these rule changes. However, since the Commission's mining and reclamation rules must be consistent with and as effective as counterpart federal rules, we cannot

consolidate or simplify the requirements for small entities and maintain an approved state regulatory program for surface coal mining and reclamation operations.

NDCC 28-32-08.1(2)(d) – Establishment of performance standards for small entities to replace design or operational standards required in the proposed rule.

No additional performance standards are proposed by these rule changes. Since the Commission's mining and reclamation rules must be consistent with and as effective as counterpart federal rules, we cannot adopt special performance standards for small entities and maintain an approved state regulatory program for surface coal mining and reclamation operations.

NDCC 28-32-08.1(2)(e) – Exemption of small entities from all or any part of the requirements contained in the proposed rule.

No additional compliance standards or reporting requirements are proposed by these rule changes. Since the Commission's mining and reclamation rules must be consistent with and as effective as counterpart federal rules, we cannot exempt small entities from the rules that are being modified and maintain an approved state regulatory program for surface coal mining and reclamation operations.

While the proposed rule changes in Case No. RC-05-591 will not limit the use of private real property, the six items listed in NDCC 28-32-09 are addressed below:

NDCC 28-32-09(1)(a) – Assess the likelihood that the proposed rule may result in a taking or regulatory taking.

None of these proposed rule changes affect the use of private real property so they will not result in any taking.

NDCC 28-32-09(1)(b) - Clearly and specifically identify the purpose of the proposed rule.

The purpose of the proposed rule is to reduce some information that is currently required for permit and bond release applications, clarify impoundment inspection requirements, reduce some of the vegetation data needed for final bond release and to otherwise revise some for revegetation success standards to be consistent with changes to counterpart federal rules, and correct a cross reference.

NDCC 28-32-09(1)(c) - Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.

We do not expect any impact on private property owners as a result of the proposed rule changes. The changes involve information that must be provided in permit and bond release applications, modify the requirements for impoundment inspections, and revise revegetation success standards for final bond release. The changes may result in some reclaimed lands receiving final bond release a year or two sooner which will also allow the return of these lands to the full control of private property owners somewhat sooner as well.

NDCC 28-32-09(1)(d) - Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.

We do not expect the proposed rules to constitute a taking; therefore, there should be no cost to the state.

NDCC 28-32-09(1)(e) - Identify the source of payment within the agency's budget for any compensation that may be ordered.

Not applicable, the proposed rule changes will not limit the use of private real property.

NDCC 28-32-09(1)(f) - Certify that the benefits of the proposed rule exceed the estimated compensation costs.

Not applicable, the proposed rule changes will not limit the use of private real property.