DAKOTA RESOURCE COUNCIL
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Comments on Public Service Commission Case No. RC-08-640
Revision No. 13, Permit NAFK-9601
August 3, 2009

Dakota Resource Council (DRC) is a grassroots, member-run organization. Its membership includes numerous persons who are directly affected by the surface mining of coal in North Dakota. DRC has a 31-year history of engagement in surface mining reclamation issues in the state.

With these comments DRC urges the Public Service Commission (PSC) to deny in part the permit revision application now under consideration. Specifically, DRC urges that post-mining land use of the 86 acres of land in the revision whose use was cropland prior to mining, and whose post-mining land use is designated as cropland, not be changed to recreation, but remain cropland.

North Dakota's surface mining law, in its statement of findings and intent (NDCC 38-14.1-01) notes that surface mining of coal "may result in disturbances of surface areas that adversely affect the public welfare" in a number of ways. Among the adverse effects listed is "diminishing the utility of the land for...agricultural...purposes."

The environmental performance standards enacted under the law (NDCC 38-14.1-24) state that the permittee "at a minimum" must "Restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses approved by the commission." The list of such uses is open-ended, but "may include industrial, commercial, agricultural, residential, recreational, or public facilities."

The law does not determine which of these uses is higher or better than others. In fact, it lists agriculture as well as recreation as a possible "higher and better use," suggesting that the commissioners may just as well find agriculture a higher and better land use than recreation, rather than vice-versa. Instead of laying out a ranking of uses from higher to lower, the law directs the PSC to "establish by regulation postmining land use criteria that must be demonstrated by the permittee and considered by the commission in making a decision."

The regulation established in direct connection with this "higher or better uses" clause (NDAC 69-05.2-23), however, is itself brief and cryptic. It establishes 10 post-mining land use categories (the first three all agricultural), but like the law itself, the regulation is silent on which land uses the commissioners are to consider higher or better than others. On the contrary, it states, "The postmining land use must be compared to those uses the land previously supported under proper management unless the land has been previously mined and not reclaimed."

The regulation allows the commissioners to approve "an alternative postmining land use...after consulting the landowner or the land management agency having jurisdiction over state or

federal lands," subject to several criteria, including consistency with applicable land use policies or plans.

Neither by law nor regulation, then, do the commissioners gain specific guidance for any judgments they might be called on to make with regard to the ranking of various possible post-mining land uses. On the contrary, the regulation gives deference to the pre-existing land use, and it requires that the land be *capable* of supporting its pre-mining use. In the case of land used for agricultural purposes prior to mining, the PSC can reasonably make this determination only on the basis of a successful final bond release application, at which time the mining company must demonstrate that the 100% of pre-mining agricultural productivity can be achieved on the reclaimed land.

Clearly, the vast majority of surface mining in North Dakota has taken place, and will continue to take place, on land that used for agricultural purposes prior to mining. DRC therefore submits that it should require a very strong countervailing public interest indeed for the PSC to change post-mining land use designation for any land subject to the state surface mining law.

DRC believes this is especially true given the abysmal record of the state's coal operators in general, and Falkirk Mining Company in particular, to complete its reclamation responsibilities for agricultural land by applying for and obtaining final bond release. Only at the time of final bond release are surface mining companies required to demonstrate that agricultural land is fully as productive as it was prior to mining, which is what the law requires.

According to PSC figures as of June 30, 2009, only 5,438 acres of agricultural land disturbed by mining over the last 30 years has been granted final bond release, while 107,223 acres of land (about 20 times as much), the vast majority of it agricultural land, remains under permit. In fact, mines have obtained final bond release for 2,541 acres of industrial land (primarily waste disposal sites, and primarily agricultural land prior to mining), more than the total amount of cropland released from bond. The record is especially poor among active mines, and poorest of all in the case of Falkirk, which holds 34,828 acres under permit and has yet to obtain final bond release on a single acre of land for agricultural purposes.

It is also worth noting that the Falkirk Mining Company now owns the entire acreage represented in this post-mining land use change application. Thus, when the PSC is "consulting the landowner" in connection with alternative post-mining land use, as required in NDAC 69-05.2-23-03, it is also consulting with the regulated entity that has disturbed the land in the first place and has taken out a bond against its possible failure to reclaim it. When the mine is the landowner, it is only natural for the landowner to prefer a post-mining land use under which it may attain final bond release with less rigorous effort and less risk of failure. For example, in the pending case, to obtain final bond release on the 86 acres of land whose post-mining land use is designated as cropland, Falkirk must demonstrate that on the reclaimed land it can meet 100% of pre-mining agricultural productivity levels. Under the alternative post-mining land use of recreation, Falkirk need not meet this standard or face the risk of remedial reclamation work if it is not met. Naturally, in consultation with the PSC, Falkirk would welcome the option of a post-mining recreational land use, although it is doubtful that a farmer would make that choice.

Nor are the circumstances of land ownership in this pending permit revision an unusual case. Research conducted by DRC in 2006 revealed that coal mines owned over 90 sections of land in the state, the vast majority of it agricultural land. There may be many reasons why individual farmers and other owners of agricultural land choose to sell it to coal mines, but in the context of final bond release, this practice clearly pits the narrow self-interest of a coal mining company, which is to achieve the least difficult and expensive route to bond release, against the broad interests of communities where mining has taken place to return farmers to the land, and the land to profitable agricultural production. To continue to grant post-mining land use changes that remove cropland from production clearly violates the intention of NDCC 38-14.1-01 to "ensure the restoration of affected lands designated for agricultural purposes to the level of productivity equal to or greater than that which existed in the permit area prior to mining," This practice has perhaps already led to "degrading the quality of life in local communities" that state surface mining and reclamation laws were intended to prevent.

For the reasons stated above, DRC urges the commissioners not to grant Falkirk Mining Company a post-mining land use change for the 86 acres of cropland that is part of the pending permit revision application. Under other circumstances, one might say that 86 acres is really not that much agricultural land for a farming community to lose. But the fact is that it is 86 acres more than the number of acres of agricultural land for which Falkirk Mining Company has obtained final bond release. And this fact should give the commissioners pause before deciding that recreation is a higher and better use than agriculture of those 86 acres, especially in an agricultural community where thousands of acres of good farmland are out of production to facilitate coal mining, and thousands more owned by the coal mine, with no end in sight. Let the commissioners find a way to get mined land released from bond and sold back to local farmers before easing the Falkirk Mining Company's responsibilities under the law by changing these 86 acres of farmland into a recreational area.

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SUBJECT: Comments on Case RC-08-640

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