



Public Service Commission

State of North Dakota

COMMISSIONERS

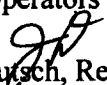
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Memorandum

TO: Mine Operators and Other Interested Parties

FROM:  Jim Deutsch, Reclamation Division

DATE: August 17, 2009

SUBJECT: Proposed mining and reclamation rule changes, Case No. RC-09-543

The Commission is proposing a few changes to North Dakota Administrative Code Article 69-05.2 pertaining to surface coal mining and reclamation operations. Enclosed are the hearing notice, proposed rule changes, and the document containing statements regarding the regulatory analysis, takings assessment, and small entity analysis for these rule changes. The rule changes proposed in Case No. RC-09-543 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 mining operations.

The proposed change to NDAC 69-05.2-09-02 will require a permit applicant to clearly identify any previously mined lands that will be re-mined and to describe and address any special environmental and safety problems that may be associated with the re-mining of these areas. Two subsections in the revegetation success standards under NDAC 69-05.2-22-07 are being amended to be consistent with the statutory change. The rules adopted by the Commission must be as effective as counterpart federal rules issued by the federal Office of Surface Mining.

The hearing on these proposed rule changes will be held at 10:00 a.m. CDT on September 16, 2009 in the Commission Hearing Room at the State Capitol. The deadline for submitting written comments is September 26, 2009.

If you have any questions, please contact the Reclamation Division.

Enclosures

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20 **GS-09-67** Filed: 8/17/2009 Pages: 19
Staff Memo to Mine Operators and Other Interested Parties re. Proposed Rule Changes

Public Service Commission Staff
Jim Deutsch

15 **RC-09-543** Filed: 8/17/2009 Pages: 19
Staff Memo to Mine Operators and Other Interested Parties re. Proposed Rule Changes

Public Service Commission Staff
Jim Deutsch

**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

**NOTICE OF INTENT TO AMEND ADMINISTRATIVE RULES
AND NOTICE OF PUBLIC HEARING**

August 12, 2009

PLEASE TAKE NOTICE that the Public Service Commission will hold a public hearing to address proposed amendments to three sections of the North Dakota Administrative Code. The hearing will be held at **10:00 a.m., on September 16, 2009, in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota.** The proposed revisions to the North Dakota Administrative Code are as follows:

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 the 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.

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.

All of the proposed rule changes and any statements concerning Regulatory Analyses, Small Entity Analyses and Takings Assessments may be reviewed at the

4 RC-09-543 Filed: 8/12/2009 Pages: 2
Notice of Intent to Amend Admin. Rules and Notice of Hearing

Public Service Commission

8 GS-09-67 Filed: 8/12/2009 Pages: 2
Notice of Intent to Amend Admin. Rules and Notice of Hearing

Public Service Commission

Public Service Commission's offices on the 12th floor of the State Capitol, Bismarck, North Dakota. To obtain a copy of the proposed rule changes, or any statements concerning the Regulatory Analyses, Small Entity Analyses and Takings Assessments contact the Public Service Commission at 600 East Boulevard Avenue, Department 408, Bismarck, North Dakota 58505-0480, or 701-328-2400, toll free 1-877-245-6685. This information is also available to view on our web site at www.psc.state.nd.us under Formal Actions/Case Search.

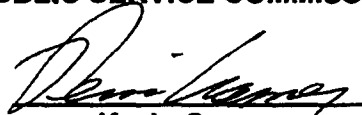
Interested persons may submit written comments on the proposed rules. Written comments should be filed with Darrell Nitschke, Executive Secretary, Public Service Commission, 600 East Boulevard Avenue, Department 408, Bismarck, North Dakota 58505-0480. The comment period closes 10 days after the hearing. Comments received by September 26th will be considered.

If individuals require any auxiliary aids or services, such as readers, signers, or Braille materials, please notify, Darrell Nitschke, Executive Secretary, at least 24 hours prior to the hearing. He can be contacted at the following numbers: 701-328-2400 and Relay North Dakota TTY: 1-800-366-6888.

PUBLIC SERVICE COMMISSION



Tony Clark
Commissioner



Kevin Cramer
Chairman



Brian P. Kalk
Commissioner

Proposed Change to Article 69-05.2
Surface Coal Mining and Reclamation Operations
Case No. RC-09-543
July 2009

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

**Statements Regarding Regulatory Analysis, Takings Assessment, and
Small Entity Analysis**

July 20, 2009

The rule changes proposed in Case No. RC-09-543 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 proposed rule changes require a permit applicant to clearly identify any previously mined lands that will be permitted and to describe and address any special environmental and safety problems that may be associated with the re-mining of these areas. Two provisions in the rule containing revegetation success standards are also being amended due to the statutory change. It should be noted that any mining and reclamation rules adopted by the Commission must be as effective as the counterpart federal rules that have issued by the federal Office of Surface Mining within the Department of the Interior.

Statement Regarding Regulatory Analysis

North Dakota Century Code Section 28-32-08 requires that an agency issue a regulatory analysis if the proposed rule is expected to have an impact on the regulated community in excess of fifty thousand dollars or if a written request for the analysis is filed by the governor or a member of the legislative assembly.

The additional information that will be required in permit applications for the previously mined areas as proposed by the rule changes is not expected to have an impact on the regulated community in excess of fifty thousand dollars and no regulatory analysis is necessary.

Statement Regarding Takings Assessment

North Dakota Century Code Section 28-32-09(1) requires an agency to prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of private property. The assessment must:

- a. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.
- b. Clearly and specifically identify the purpose of the proposed rule.

- 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.
- d. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.
- e. Identify the source of payment within the agency's budget for any compensation that may be ordered.
- f. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

This proposed rule changes do not affect place any limits for the use of private real property and therefore will not result in any taking.

The proposed rule changes will not constitute a taking; therefore, there should be no cost to the state.

Subsection e is not applicable because the proposed rule changes will not limit the use of private real property.

Subsection f is not applicable because the proposed rule changes will not limit the use of private real property.

Statement Regarding Small Entity Regulatory Analysis

An economic impact analysis under North Dakota Century Code Section 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. Small entities employ fewer than 25 full-time employees or have gross annual revenue sales of less than \$2.5 million dollars. The proposed rule changes only apply to persons or companies that conduct surface coal mining operations and it is possible that a mine could be owned or operated by a small entity. 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-09-543:

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.

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. The performance standard being changed reduces the revegetation responsibility period for eligible lands that are re-mined as allowed by the recent statutory change. Also, 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.

The proposed rule changes will not have an adverse impact on small entities; therefore an economic impact statement has not been prepared.

Hibi, Sheila

Distribution List Name: Rules

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. The performance standard being changed reduces the revegetation responsibility period for eligible lands that are re-mined as allowed by the recent statutory change. Also, 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.

The proposed rule changes will not have an adverse impact on small entities; therefore an economic impact statement has not been prepared.

Hibi, Sheila

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