

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Public Service Commission
Reclamation
Rulemaking**

Case No. RC-12-166

ORDER SUBMITTING REVISED RULES TO ATTORNEY GENERAL

April 10, 2013

Appearances

Commissioners Brian P. Kalk, Randy Christmann, and Julie Fedorchak

Preliminary Statement

On May 30, 2012 the North Dakota Public Service Commission (Commission) issued a formal Notice of Proposed Rulemaking and an Abbreviated Notice proposing to revise several sections of the North Dakota Administrative Code. The proposed rules related to North Dakota Administrative Code Article 69-05.2 are summarized as follows:

Several changes are proposed to North Dakota Administrative Code Article 69-05.2 pertaining to surface coal mining and reclamation operations. The federal Office of Surface Mining is requiring that provisions be added for the Commission's use of the Applicant Violator System prior to the approval of mining permits, renewals and certain revisions. The Applicant Violator System is a national database of mining companies that have unabated violations or unpaid civil penalties. A mining company that is linked to an entity in this database may be ineligible to receive a new mining permit, renewal, or revision that proposes to permit or mine additional lands. The proposed rules also contain procedures for companies to use if they want to challenge information or links in the Applicant Violator System.

Two other rule changes are recommended by staff. One adds a new subsection to an existing rule on the format of electronic permit applications. The other change will make a minor correction to a provision that should have been changed more than fifteen years ago when another rule was modified to no longer require the renewal of a permit once lands in that permit are no longer being mined or used in support of mining.

Public Hearing and Comments

The Abbreviated Notice was published once in 51 official county newspapers the week of June 12 through June 18, 2012. The notices were also forwarded to the Legislative Council for publication at least 30 days in advance of the hearing.

A public hearing was noticed for and held at 10:00 a.m., July 12, 2012. 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 July 23, 2012, 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.

Written comments filed by Commission staff were received at the hearing.

On October 10, 2012, the Commission adopted an Order Submitting Rules to Attorney General for an opinion on legality. The proposed rules were submitted to the Attorney General and the Attorney General approved the rules by letter dated October 26, 2012.

On November 9, 2012, the Commission submitted the changes to OSM for approval as a State Program Amendment. On March 13, 2013, OSM informed the Commission by phone and electronic mail of a required revision to the proposed rules.

Discussion

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

Staff testified that the proposed rules incorporate three new sections and amend several existing sections of the North Dakota Administrative Code Article 69-05.2 pertaining to surface coal mining and reclamation operations. Those changes would include procedures for mining companies to use to challenge information or links in the Applicant Violator System, general requirements for the format of electronic permit applications, and minor corrections to subsection 2 of to North Dakota Administrative Code Section 69-05.2-05-08 to no longer require the renewal of a permit once lands in that permit are no longer being mined or used in support of mining.

No other comments were received except as noted below.

Mining and reclamation rule changes must be as effective as the counterpart federal rules that have been issued by the federal Office of Surface Mining (OSM) within the Department of the Interior. After the Attorney General reviewed and approved the reclamation rules, the Commission submitted the changes to OSM for approval as a State Program Amendment.

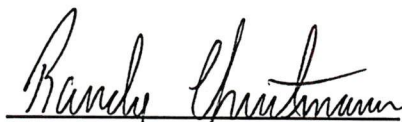
On March 13, 2013, Jim Deutsch, Director of the Public Service Commission's Reclamation Division, received a call and an electronic message from OSM requesting that the Commission revise the proposed rules slightly in order to be consistent with the federal Ownership and Control provisions. When drafting the original proposed Section 69-05.2-10-09(3), staff inadvertently used language similar to an outdated version of a federal rule. Consequently, OSM is requiring that the Commission change that language before OSM can approve the proposed rules. The relevant section of the attached proposed rules has been revised as requested by OSM. No other changes have been made to the rules as submitted to the Attorney General on October 10, 2012.

Order

The Commission orders

1. The proposed rule changes are revised as requested by OSM;
2. The proposed changes to the North Dakota Administrative Code, as revised and 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.

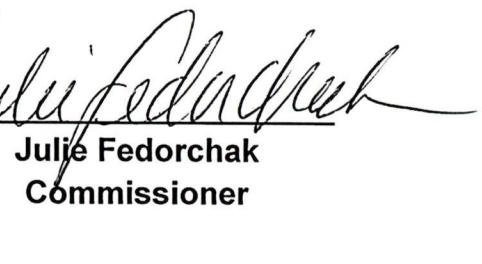
PUBLIC SERVICE COMMISSION



Randy Christmann
Commissioner



Brian P. Kalk
Chairman



Julie Fedorchak
Commissioner

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69-05.2-05-02. Permit applications – General requirements for format and contents.

6. Applications may be filed in an electronic format acceptable to the commission. All text, tables, spreadsheets, maps and other information must be presented in a clear and concise manner and in a format that can be easily viewed using standard computer software. Changes to original and approved narratives must be displayed in an underline-strikethrough format until the application is approved by the commission. Similarly, tables that are revised must be highlighted or otherwise clearly marked to identify all changes. Maps included in an electronic submittal must depict the entire permit area when the scale allows and include the dimensions at which it can be printed, the scale of the map, a scale bar, and north arrow. Details on the map must be legible at the printed size; however, if text is not legible, color coding or other means of identification may be used and represented in the legend. Print size should not exceed forty-eight inches in width. Each electronic document must also include a date stamp or other marking that clearly shows the date the document was last revised.

History: Effective August 1, 1980; amended effective May 1, 1990; _____ 2012.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-11, 38-14.1-13, 38-14.1-14, 38-14.1-15

69-05.2-05-08. Permit applications - Permit term.

2. Permitted acreage where surface coal mining and ~~reclamation~~ operations are not complete shall be successively renewed under section 69-05.2-11-03 until final bond release.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; January 1, 1993; _____ 2012.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-12

69-05.2-06-01. Permit applications - Identification of interests.

2. With regard to the business entity information required by subdivisions d through f of subsection 1:
- a. If this information is already in the applicant violator system maintained by the office of surface mining reclamation and enforcement, the applicant:
- (1) May certify to the commission by affirming, under oath and in writing, that the relevant information in applicant violator system is accurate, complete, and up to date, or
- (2) If the part of the information in the applicant violator system is missing or incorrect, submit the necessary information or corrections and affirm, under oath and in writing, that the information you submit is accurate and complete.
- b. The applicant shall affirm, under oath and in writing, that all business entity information provided in an application is accurate and complete.
- c. The commission may establish a central file to house the applicant's business entity identity information, rather than place duplicate information in each permit file. If a central file is established for an applicant, the information in that file will be considered a component of each permit it is connected to. The commission will make information in a central file available to the public and the applicant shall file a copy with the county auditor in the county where mining is proposed.
- d. After notification that the application is deemed ready for approval but before the permit is issued, the applicant shall, as applicable, update, correct, or indicate that no change has occurred in the information previously submitted under subdivisions d through f of subsection 1 or certify that information in the applicant violator system is still accurate, complete, and up to date.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; May 1, 1992; July 1, 1995; _____ 2012.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-14

69-05.2-06-02. Permit applications - Compliance information.

6. With regard to the violation information required by subsections 3 through 5:
- a. If this information is already in the applicant violator system maintained by the office of surface mining reclamation and enforcement, the applicant:
- (1) May certify to the commission by affirming, under oath and in writing, that the relevant information in the applicant violator system is accurate, complete, and up to date, or

(2) If the part of the information in the applicant violator system is missing or incorrect, submit the necessary information or corrections and affirm, under oath and in writing, that the information you submit is accurate and complete.

b. The applicant shall affirm, under oath and in writing, that all violation information provided in an application is accurate and complete.

c. The commission may establish a central file to house the applicant's identity information, rather than place duplicate information in each permit file. If a central file is established for an applicant, the information in that file will be considered a component of each permit it is connected to. The commission will make information in a central file available to the public and the applicant shall file a copy with the county auditor in the county where mining is proposed.

d. After notification that the application is deemed ready for approval but before the permit is issued, the applicant shall, as applicable, update, correct, or indicate that no change has occurred in the information previously submitted under subsections 3 through 5 or certify that information in the applicant violator system is still accurate, complete, and up to date.

History: Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990; May 1, 1992; June 1, 1994; July 1, 1995; _____ 2012.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-14

69-05.2-10-01. Permit applications – Public notices of filing and entering data into the applicant violation system.

7. Upon deeming an application complete, the commission will:

a. Enter into the applicant violator system maintained by the office of surface mining reclamation and enforcement the business entity information that the applicant is required to submit under section 69-05.2-06-01 and information required by 69-05.2-06-02 pertaining to violations which are unabated or uncorrected after the abatement or correction period has expired. The applicant violator system, or AVS, is the automated information system of applicant, permittee, operator, violation and related data that the office of surface mining reclamation and enforcement maintains to assist in implementing the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201, et seq.].

b. Update the information referred to in subdivision a in AVS upon verifying any additional information submitted or discovered during the review of the permit application.

8. The commission will rely upon the information that the applicant submits under section 69-05.2-06-01, information from AVS, and any other available information, to review the applicant's and operator's organizational structure and ownership or control relationships. This review will be conducted before a permit eligibility determination is made in accordance with subsections 1 through 5 of section 69-05.2-10-03.
9. The commission will rely upon the information that the applicant submits under section 69-05.2-06-01, information from AVS, and any other available information to review the applicant's and operator's permit histories and previous mining experiences. The commission will also determine if the applicant and operator have previous mining experience. If the applicant or operator does not have any previous mining experience, the commission may conduct additional reviews to determine if someone else with mining experience controls the mining operation. These reviews will be conducted before a permit eligibility determination is made in accordance with subsections 1 through 5 of section 69-05.2-10-03.
10. The commission will rely upon the information that the applicant submits under section 69-05.2-06-02, a report from AVS, and any other available information to review histories of compliance for the applicant, any person who owns or controls the applicant, the operator, or operations owned or controlled by the operator, in regard to violations of any law or rule of this state, the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201, et seq.], or any law or rule in any state enacted under federal law or regulation pertaining to air or water environmental protection, incurred in connection with any surface coal mining and reclamation operation. This review will be conducted before a permit eligibility determination is made in accordance with subsections 1 through 5 of section 69-05.2-10-03.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; June 1, 1997; April 1, 2007; _____ 2012.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-18

69-05.2-10-03. Permit applications - Criteria for permit approval or denial.

5. After an application is deemed ready for approval, but before the permit is issued, the commission's decision to approve or disapprove the application will be made, based on the compliance review required by subsection 1, in light of any new information submitted under subsection 2 of section 69-05.2-06-01 and subsection 6 of section 69-05.2-06-02. After that information is submitted, the commission will again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect the applicant's permit eligibility under subsections 1 through 4. This report will be requested no more than five

business days before the permit is issued by the commission. If the commission then determines that the applicant is not eligible for a permit, written notification of the decision will be sent to the applicant explaining the reasons and the appeal rights that are available under North Dakota Century Code 38-14.1-30.

History: Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990; May 1, 1992; June 1, 1994; July 1, 1995; June 1, 1997; May 1, 2001; January 1, 2009; _____ 2012.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-21, 38-14.1-33

69-05.2-10-07. Permit Applications – Challenges to ownership or control listings and findings.

1. A person may challenge a listing or finding of ownership or control using the procedures detailed below if that person is:
 - a. Listed in a permit application or in AVS as an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof;
 - b. Found to be an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof, under section 69-05.2-10-08 or section 69-05.2-32-01; or
 - c. An applicant or permittee affected by an ownership and control listing or finding.
2. In order to challenge an ownership and control listing or finding a written explanation must be submitted to the regulatory authority regarding the basis of the challenge along with any evidence or explanatory materials outlined in subsection 7. If the challenge concerns a pending permit application, the written explanation must be submitted to the regulatory authority with jurisdiction over the application. If the challenge concerns the applicant's ownership and control of a surface coal mining operation and the person is not currently seeking a permit, the written explanation must be submitted to the regulatory authority with jurisdiction over the surface coal mining operation.
3. When a challenge concerns a violation under the jurisdiction of a different regulatory authority, the commission will consult the regulatory authority with jurisdiction over the violation and the AVS office to obtain additional information.
4. If the commission is responsible for deciding a challenge under this section it may request an investigation by the AVS office may be requested.

5. At any time a person listed in AVS as an owner or controller of a surface coal mining operation may request an informal explanation from the AVS office as to the reason they are shown in the AVS in an ownership or control capacity.
6. When a challenge is made to a listing of ownership and control, or a finding of ownership and control, the challenger shall prove by a preponderance of the evidence that the challenger either:
 - a. Does not own or control the entire operation or relevant portion or aspect thereof; or
 - b. Did not own or control the entire operation or relevant portion or aspect during the relevant time period.
7. In order to meet the burden of proof in subsection 6, the challenger shall present reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority. A request to hold materials submitted under this section as a trade secret may be made to the commission following the procedures of North Dakota Administrative Code chapter 69-02-09. Acceptable materials include:
 - a. Notarized affidavits containing specific facts concerning the duties that were performed for the relevant operation, the beginning and ending dates pertaining to ownership or control of the operation, and the nature and details of any transaction creating or severing ownership or control of the operation in question.
 - b. Certified copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records.
 - c. Certified copies of documents filed with or issued by any State; municipal, or Federal government agency.
 - d. An opinion of counsel, when supported by evidentiary materials, a statement by counsel that counsel is qualified to render the opinion, and a statement that counsel has personally and diligently investigated the facts of the matter.
8. Within sixty days of receipt of an ownership and control listing or finding challenge, the commission will review and investigate the evidence and explanatory materials submitted and any other reasonable available information bearing on the challenge and issue a written decision. The decision will state whether the challenger own or control the relevant surface coal mining operation, or owned or controlled the operation during the relevant time period. Decisions regarding the challenge will be promptly provided to the challenger by certified mail, return receipt requested. Service of the decision will be complete upon delivery and is not incomplete if acceptance of delivery is refused. Appeals of the written decision must be made by

requesting a formal hearing under North Dakota Century Code section 38-14.1-30. The commission will also post all decisions in AVS.

9. Following the commission's written decision, or any formal hearing decision or court reviewing such decision, the commission will review the information in AVS to determine if it is consistent with the decision. If it is not, the commission will promptly inform the office of surface mining reclamation and enforcement and request that the AVS information be revised to reflect the decision.

History: Effective _____ 2012.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-21, 38-14.1-22, 38-14.1-23

69-05.2-10-08. Permit Applications – Commission actions related to ownership and control information after permit issuance.

1. For the purposes of future permit eligibility determinations and enforcement actions, the commission will enter the following data into AVS:
 - a. Permit records will be entered within thirty days after issuing a permit or subsequent changes.
 - b. Unabated or uncorrected violations will be entered within thirty days after the abatement period expires for any violation.
 - c. Any changes to the information required under section 69-05.2-06-01 will be entered within thirty days after receiving notice of a change.
 - d. A change in status of violations listed in AVS will be entered within thirty days after abatement, correction, or termination of a violation, or an administrative or judicial decision affecting a violation.
2. If, at any time, it is discovered that any person owns or controls an operation with an unabated or uncorrected violation, the commission will determine whether enforcement action is appropriate under North Dakota Century Code section 38-14.1-28. The commission will enter the results of each enforcement action, including administrative and judicial decisions, into AVS.
3. The commission will serve a preliminary finding of permanent permit ineligibility under subdivision c of subsection 1 North Dakota Century Code section 38-14.1-28 on the applicant or operator if the criteria in subdivisions a and b below are met. In making a finding under this subsection, the commission we will only consider control relationships and violations which would make, or would have made, the applicant or operator ineligible for a permit under subsection 4 of section 69-05.2-10-03. A preliminary finding of permanent permit ineligibility will be made if it found that:

- a. The applicant or operator controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations under subdivision c of subsection 1 North Dakota Century Code section 38-14.1-28; and
- b. The violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with North Dakota Century Code chapter 38-14.1, this chapter, or the approved permit.

4. The permittee or operator may request a hearing on a preliminary finding of permanent permit ineligibility under North Dakota Century Code section 38-14.1-30.

5. If a hearing is not requested and the time for seeking a hearing has expired, the commission will enter the finding into AVS. If a hearing is requested, the commission will enter the finding into AVS only if that finding is upheld on appeal.

6. At any time, the commission may identify any person who owns or controls an entire operation or any relevant portion or aspect thereof. If such a person is identified, the commission will issue a written preliminary finding to the person and the applicant or permittee describing the nature and extent of ownership or control. The commission's written preliminary finding must be based on evidence sufficient to establish a *prima facie* case of ownership or control.

7. After the commission issues a written preliminary finding under subsection 6, the commission will allow the person subject to the preliminary finding thirty days in which to submit any information tending to demonstrate the lack of ownership or control. If after reviewing any information that is submitted, the commission is persuaded that the person is not an owner or controller, a written notice will be served to that effect. If, after reviewing any information that is submitted, the commission still finds that the person is an owner or controller, or no information is submitted within the 30-day period, the commission will issue a written finding and enter that finding into AVS.

8. If the commission identifies a person as an owner or controller under subsection 7, that finding may be challenged using the provisions under section 69-05.2-10-07.

History: Effective 2012.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-21, 38-14.1-22, 38-14.1-23

69-05.2-10-09. Permit Applications – Ownership and control requirements for permittees after permit issuance.

1. Within thirty days of being issued a cessation order under subdivision b of subsection 1 North Dakota Century Code section 38-14.1-28, the permittee must provide or update all the information required under section 69-05.2-06-01.
2. A permittee does not have to submit information under section 1 if a court of competent jurisdiction grants a stay of the cessation order and the stay remains in effect.
3. Within sixty days of any addition, departure, or change in position of any person identified in subdivision e of section 1 of section 69-05.2-06-01, the permittee must provide:
 - a. The date of any departure; and
 - b. The following for that person:
 1. The person's name, address and phone number.
 2. The person's position title and relationship to you, including percentage of ownership and location in the organizational structure.
 3. The date the person began functioning in that position.

History: Effective _____ 2013.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-21, 38-14.1-22, 38-14.1-23