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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHWESTERN DIVISION**

DAKOTA RESOURCE COUNCIL	)	
	)	Case No. 1:12-cv-064
Plaintiff,	)	
	)	BRIEF IN SUPPORT OF
v.	)	PLAINTIFF'S MOTION FOR
	)	SUMMARY JUDGMENT
	)	
NORTH DAKOTA PUBLIC SERVICE	)	
COMMISSION	)	
	)	
Defendant.	)	

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## **II. INTRODUCTION**

Plaintiff Dakota Resource Council (DRC) is a nonprofit, grassroots activist organization headquartered in Bismarck, North Dakota. A small group of North Dakotans formed DRC in 1978, to protect North Dakota's land, air, water, rural communities and agricultural economy. DRC's 380 current members include individuals who reside, recreate, and/or work on or near, or own, land that is being actively strip mined or is proposed for strip mining and therefore falls under the jurisdiction of the federal Surface Mining Control and Reclamation Act (SMCRA), as implemented by the State of North Dakota. These members' peaceful enjoyment of their homes, the viability of their farming, ranching, and outfitting livelihoods, and their personal safety on local roads are or imminently would be threatened by surface coal mining operations, including but not limited to blasting, digging, and hauling. DRC members frequently participate in public comment and public hearing opportunities on North Dakota's surface mining program, in furtherance of the organization's conservation mission. They

have an active interest in full and correct implementation and enforcement of SMCRA, including full public participation.

In 1980, the U.S. Office of Surface Mining conditionally approved a state surface mining program submitted by the State of North Dakota. 45 F.R. 82214-01 (Dec. 15, 1980). SMCRA 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).” 30 U.S.C. 1253(a)(emphasis added). Each state regulatory authority has a mandatory, non-discretionary duty to refrain from giving effect to any change to an approved state regulatory program unless and until the Director of OSM (“Director”) lawfully approves the change. 30 C.F.R. § 732.17(g). “(A)ny alteration of an approved State program whether accomplished on the initiative of the State regulatory authority or the Director” is referred to as an “amendment”, for purposes of the applicable regulation. 30 C.F.R. § 732.17(a). Federal regulations require the State regulatory authority to “promptly notify the Director, in writing, of any significant events or proposed changes which affect the implementation, administration, or enforcement of the approved State program.” 30 C.F.R. § 732.17(b). The regulations specify that, “(a)t a minimum, notification shall be required for... (c)hanges in the provisions, scope or objectives of the State program”, among other triggers. *Id.*

As the responsible state agency, the North Dakota Public Service Commission

implements and enforces the North Dakota state surface mining program, reviewing applications for surface mining permits, reclamation plans, the sufficiency of bonds, and related matters. Since before initial approval of North Dakota's state regulatory program by OSM in 1980, NDPSC has issued twenty-three "Policy Memoranda to Mine Operators" ("Memoranda") – some later withdrawn, others updated multiple times – governing various state surface mining activities.<sup>1</sup> There is no documentary record of NDPSC submitting in writing any of the Memoranda to OSM for its evaluation and approval, as required by the above-referenced regulations implementing SMCRA. There is no documentary record of OSM carrying out the review process required by law to determine whether or not the Memoranda constitute program amendments requiring formal interagency review, pursuant to the procedures required by federal regulations implementing SMCRA at 30 C.F.R. § 732.17(e)-(h). As a matter of law, NDPSC lacks authority to decide unilaterally and without documentation or due process that the memoranda do not constitute program amendments requiring OSM's formal review.

Within 30 days of receiving written notification from the state regulatory agency of changes that may require a state program amendment, regulations require the Director to "determine whether a State program amendment is required and notify the State regulatory authority of the decision." 30 C.F.R. § 732.17(c). Without a written record of decision by OSM finding that the Memoranda do not require state program amendments, NDPSC is engaged in a pattern and practice of giving effect to each of these unapproved changes in the laws or regulations that make up the approved North Dakota program, in violation of 30 U.S.C. § 1254(a)(3) and 30 C.F.R. § 732.17(g). Plaintiffs seek summary

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<sup>1</sup> The full text of all surface mining memoranda currently in force is posted on the NDPSC website: <http://www.psc.nd.gov/public/laws/othercoalmining.php>

judgment.

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### **III. JURISDICTION**

This court has jurisdiction pursuant to 30 U.S.C. § 1270 and 28 U.S.C. § 1331. SMCRA provides for judicial review, initiated by citizen suit, of a State regulatory agency's compliance with SMCRA "where there is alleged a failure of... the appropriate State regulatory authority to perform any act or duty under (SMCRA) which is not discretionary with... the appropriate State regulatory authority." 30 U.S.C. § 1270(a). "The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties." *Id.* NDPSC and DRC maintain offices and conduct business, and regulated surface mining activity takes place, in this district.

### **IV. SUMMARY JUDGMENT IS APPROPRIATE IN THIS CASE**

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

### **V. STANDARD OF REVIEW**

Plaintiff seeks judicial review of final agency decisions by NDPSC pursuant to the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the citizen suit provision of SMCRA, 30 U.S.C. § 1270. Under the APA,

“agency action must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ or if the action failed to meet statutory, procedural, or constitutional requirements.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)(citing 5 U.S.C. §§ 706(2)(A), (B), (C), (D) (1964 ed., Supp. V.)). The court must accord substantial deference to the agency’s interpretation of the statutes and regulations it is charged with administering. *See Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). However, the court must also give the record “a thorough, probing, in-depth review.” *Citizens to Preserve Overton Park*, 401 U.S. at 415, 91 S.Ct. at 823.

If the agency’s position is not substantially justified, Plaintiff is entitled to costs and attorneys’ fees under the Equal Access to Justice Act. 28 U.S.C. § 2412; *Pierce v. Underwood*, 487 U.S. 552, 559, 108 S.Ct. 2541 (1988).

## **VI. STATEMENT OF UNDISPUTED FACTS**

Pursuant to D.N.D.Civ.L.R 7.1(A)(2), Plaintiff submits this Statement of Undisputed Facts consisting of the specific facts on which Plaintiff relies in its Motion for Summary Judgment.

1. NDPSC issued certain surface mining policy Memoranda listed by subject in the Exhibit attached to the Complaint. Complaint ¶ 11, Answer ¶ 11.

## **VII. ARGUMENT**

Since 1979, NDPSC has engaged in a pattern and practice of amending its federally approved state surface mining program by means of Memoranda published by NDPSC

without written submission to or approval by OSM, which SMCRA requires. 30 C.F.R. § 732.17(b). At least some of the Memoranda constitute material amendments to the state program that are also inconsistent with federal law. Both federal and state law require NDPSC to implement a state surface mining program consistent with SMCRA and federal rules and regulations implementing the statute. 30 U.S.C. § 1253(a) and N.D.C.C. § 38-14.1-03 ¶¶ 12, 20.

**A. Defendant NDPSC's pattern and practice of failing to submit its Memoranda in writing to OSM as program amendments, is arbitrary, capricious, an abuse of discretion, and not in accordance with law.**

Since issuing its first surface mining policy memoranda in 1979, through more than 50 publications of and changes to NDPSC's twenty-three Memoranda to Mine Operators over the last three decades, NDPSC has consistently failed to comply with SMCRA's clear directive to notify OSM in writing of all changes to provisions of the state program. The federal regulations implementing SMCRA provide explicit procedures for any amendments to the approved state program. 30 C.F.R. § 732.17(e)-(h). For purposes of 30 C.F.R. § 732.17, governing state program amendments, the term 'amendment' is defined as follows:

This section applies to any alteration of an approved State program whether accomplished on the initiative of the State regulatory authority or the (OSM) Director. Such alterations are referred to in this section as "amendments".

The regulation requires that the state regulatory authority:

shall promptly notify the Director, in writing, of any significant events or proposed changes which affect that implementation, administration or enforcement of the approved State program. At a minimum, notification shall be required for –

- (1) Changes in the provisions, scope or objectives of the State program;
- (2) Changes in the authority of the regulatory authority to implement, administer or enforce the approved program;
- (3) Changes in the State law and regulations from those contained in the approved State program;

(4) Significant changes in staffing and resources of the regulatory authority and divisions or departments of other agencies with duties in the approved program;

(5) Changes in agreements between the regulatory authority and other agencies which have duties in the approved program;

(6) Significant changes in funding or budgeting relative to the approved program; and

(7) Significant changes in the number or size of coal exploration or surface coal mining and reclamation operations in the State.

30 C.F.R. 732.17(b). The rule does not give the state regulatory agency any latitude to determine which changes are appropriate for written submittal to OSM, nor does it provide for any practice other than written submittal. A mere “change” in the “provisions” of the state program is sufficient to trigger the written notification requirement. 30 C.F.R. § 732.17(b)(1).

SMCRA’s procedural requirements for state program amendments – defined at 30 C.F.R. § 732.17(a) as “any alteration of an approved state program” – are detailed at 30 C.F.R. § 732.17(h):

(1) Within ten days after receipt of a State program amendment from a State regulatory authority, the Director will publish a notice of receipt of the amendment in the Federal Register.

(2) The Federal Register notice announcing the receipt of the amendment will indicate that the amendment(s) is being reviewed by the Director and will include the following:

(i) The text or a summary of the amendment(s) proposed by the regulatory authority;

(ii) Addresses where copies of the proposed amendment(s) may be obtained if the text is not included in the Federal Register notice and that each requestor may receive, free of charge, one single copy of proposed amendment(s) from the Director.

(iii) Date(s) of public comment period(s) and addresses where public comments should be directed;

(iv) Dates and locations of public hearing(s) and/or meeting(s) if public hearing(s) and/or meeting(s) are to be held; and

(v) A schedule for review and action on the amendment(s).

(3) A minimum public comment period of 30 days will be provided for each proposed State program amendment, except a 15 day public comment period may be provided where an amendment concerns changes in State law, regulations or the procedures contained in the approved program that are analogous to changes in SMCRA and/or implementing regulations: Provided, That the notice of receipt published in the Federal Register includes the full text of the proposed amendment: And provided,

That all applicable provisions of 43 CFR part 14 are complied with.

(4) All State program amendments which may have an effect on historic properties shall be provided to the State Historic Preservation Officer and to the Advisory Council on Historic Preservation for comment.

(5) Public hearings may be provided at the discretion of the Director and shall be held no sooner than five days before the close of the public comment period. The comment period shall end on a date following any public hearing scheduled to be held. Public hearing plans will be announced in the notice of receipt of the amendment published in the Federal Register. In determining whether to hold a public hearing, the Director will consider the subject of the amendment, its complexity and public hearing and meetings conducted by the State regulatory authority prior to submission of the amendment for OSM approval. When State regulatory authority public hearings or meetings are accepted in lieu of an OSM hearing, the State regulatory authority shall provide to the Director a complete record of any hearings or meetings including transcripts, written presentations, exhibits and copies of all comments. Hearings shall be informal and follow legislative procedures. The format and the rules of procedure for each hearing shall be determined by the Director and published in the notice required by paragraph (h)(1) of this section.

(6) Upon the close of the public comment period, the transcript, written presentations, exhibits and copies of all comments shall be transmitted to the Director.

(7) The Director shall consider all relevant information, including any information obtained from public hearings and comments, and shall approve or disapprove the amendment request within 30 days after the close of the public comment period established in accordance with §732.17(h)(3).

(8) If the Director disapproves the amendment request, the State regulatory authority will have 30 days after publication of the Director's decision to resubmit a revised amendment request for consideration by the Director.

(9) The Director will approve or disapprove amendment resubmissions within 30 days after receipt. There shall be a public comment period of not less than 15 days from the date of publication of the notice of receipt of the revised amendment. If the scope of the amendment has been expanded beyond that of the initial amendment request the Director may approve/disapprove portions of the initial amendment request and subject the remainder to review and approval procedures outlined in this paragraph or treat the entire amendment request as a new request and initiate the review procedures of this section.

(10) The applicable criteria for approval or disapproval of State programs set forth in §732.15 shall be utilized by the Director in approving or disapproving State program amendments.

(11) State program amendments shall not be approved until the Director has—

(i) Solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise relevant to the program amendment(s) as proposed; and

(ii) Obtained written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of a State program amendment(s) which relate to air or water quality standards promulgated under the authority of the

Clean Water Act, as amended (33 U.S.C. 1251 et seq.), and the Clean Air Act, as amended (42 U.S.C. 7401 et seq.).

(12) All decisions approving or disapproving program amendments shall be published in the Federal Register and shall be effective upon publication unless the notice specifies a different effective date. The decision approving or disapproving program amendments will be published in the Federal Register within 10 days after the date of the Director's decision.

(13) The Director shall complete actions on amendment requests in accordance with the schedule developed under paragraph (h)(2)(v); However, final action on all amendment requests must be completed within six months after receipt of the proposed amendments from the State.

Amendments have been made for changes to a state regulatory program as small as a single word, in the case of a 1990 amendment to the Kentucky state program by the state legislature, changing the term "performance bond" to "reclamation bond". Kentucky submitted this proposed change in writing, along with other legislative changes, and the Director conducted formal review prior to approval. 55 F.R. 32618-01 (August 10, 1990).

Each state regulatory authority has a mandatory, non-discretionary duty to refrain from giving effect to any "change to laws or regulations... for purposes of a State program until approved as an amendment." 30 C.F.R. § 732.17(g). DRC notes that this required review is not an excessively time-consuming or burdensome process for the state regulatory authority or regulated entities. In the period "1991-2004, a total of 1378 State program amendments (proposed and final) have been published in the Federal Register, for an average of approximately 100 per year." 70 F.R. 61194-01, 61196 (October 20, 2005). Such a common administrative exercise is not an unreasonable burden for a state regulatory agency. Review is performed by OSM, and must be completed within six months of receipt of a proposed amendment. 30 C.F.R. § 732.17(h)(13).

Yet dozens of times, over decades, NDPSC has neglected this non-discretionary duty, violating SMCRA and undermining public notice and participation provisions. As a result of the lack of written notice, there is no documentary record of what review – if any – OSM may have given to the changes reflected in the Memoranda. There is also no final agency action by OSM on the Memoranda sufficient to allow affected parties to challenge approval of the Memoranda via SMCRA’s citizen suit provision. Because North Dakota’s state surface mining program does not authorize citizen suits against the state, the Memoranda create a serious gap in the due process rights of North Dakotans. This lawsuit is a first step to rectify this problem.

**B. The unapproved memoranda create substantive inconsistencies between the North Dakota state surface mining program and SMCRA, with which the state program must be in compliance.**

NDPSC’s failure to notify OSM in writing of changes in state program provisions is more than a bureaucratic omission without real world harm. Over more than thirty years, NDPSC has issued at least twenty-three (23) Memoranda, only twenty-one (21) of which are now posted on the NDPSC website as current “interpretive documents”. Most of the Memoranda have been modified several times, some as many as four times, and some retracted, all without any documented review or public process. *See Exhibit A – Amendments to Memoranda.* With at least five Memoranda, NDPSC is effectively implementing substantive changes in the state program, inconsistent with SMCRA, without documented OSM review or approval. Other Memoranda – Memo 3, for example – appear to require expert analysis beyond the scope of this litigation, but certainly appropriate to OSM’s formal amendment review process.

DRC's argument is not for specific outcomes with regard to each of the Memoranda, but for implementation of the mandatory process that has been abandoned, to the detriment of DRC's long-standing efforts to participate meaningfully in public review of North Dakota's state surface mining program. SMCRA requires that state programs meet the minimum requirements of SMCRA, including the "regulations issued by the Secretary" pursuant to SMCRA. 30 U.S.C. § 1253(a). At least some Memoranda, including those described in detail below, should be denied approval as state program amendments because of their inconsistency with SMCRA. The fact that they became part of the North Dakota state surface mining program with neither any record of review by OSM nor the public process that accompanies a proposed program amendment demonstrates the seriousness of NDPSC's pattern and practice of ignoring the written notification requirement.

**1. Memo 5 creates less stringent topsoil standards than allowed by 30 C.F.R. § 816.22.**

NDPSC first issued Policy Memorandum No. 5 to Mine Operators ("Memo 5")(Exhibit B) in 1979 and revised it in 1984 and 1995. Memo 5's stated purpose is "to let the mine operators know what the PSC inspectors are looking for when approving topsoil and subsoil removal and segregation", apparently interpreting NDAC § 69-05.2-15, "Performance Standards – Suitable Plant Growth Material". Memo 5 includes a provision that appears to allow case by case exceptions to standards created by statute and regulation for topsoil removal and separation from subsoil:

Exceptions to the above procedures may be granted on a case-by-case basis depending on the conditions involved. They may require sampling the questionable materials by the operator for laboratory analysis. Memo 5 ¶ 6.

Federal regulations implementing SMCRA create Permanent Program Performance

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Standards for topsoil and subsoil at 30 C.F.R. § 816.22. The federal Permanent Program Performance Standards make no such provision for “case-by-case” exceptions to the rule.

Under the North Dakota state program, NDPSC may:

waive the approval of subsoil removal operations if the operator demonstrates, in a detailed soil removal plan, surplus subsoil is available and that subsoil to be removed has good and relatively uniform characteristics. A request for such a waiver must be included as part of a detailed soil removal plan or permit revision application that contains the necessary information. NDAC § 69-5.2-15-02(2)(a).

Memo 5 is substantively less stringent than both the federal Permanent Program Performance Standards and the state program, because it allows waivers on a non-specific “case-by-case basis” depending on unspecified “conditions involved” with only the possibility – not the requirement – of sampling and laboratory analysis. Its inclusion in the state program without formal review by OSM is a violation of SMCRA.

**2. Memo 6 creates less stringent permit jurisdictional requirements than those defined at 30 C.F.R. § 701.5.**

NDPSC first issued Policy Memorandum No. 6 to Mine Operators (“Memo 6”)(Exhibit C) in 1979 and revised it in 1984 and 1995. Memo 6 clarifies the scope of surface coal mining operations regulated under SMCRA and NDCC 38-14.1-02(33), for jurisdictional purposes, including what lands must be included in permits. The state program defines “surface coal mining operations” as:

a. Activities affecting the surface of lands in connection with a surface coal mine. Such activities include extraction of coal from coal refuse piles, excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, and loading of coal at or near the minesite, except that such activities do not include coal exploration subject to chapter 38-12.1, or the extraction of coal incidental to reclamation operations under chapter 38-14.2; and

b. The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all adjacent lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

NDCC 38-14.1-02(33). Memo 6 lists “specific activities and types of disturbances which are included under the scope of ‘Surface Coal Mining Operations’” under state law, adding detail to the statutory language but also carving out at least one new exception inconsistent with state law and SMCRA. Specifically, “(r)oads maintained by public funds are excluded” categorically from the list of included activities and disturbances “must be conducted within the boundaries of a surface coal mining permit.” Memo 6 ¶ 1.

The federal rules exclude roads maintained by public funds from the surface mining permit area only where they are designated as public roads under the laws of the jurisdiction, were constructed in a manner similar to other public roads of the same classification within the jurisdiction, and have a substantial public use, relying on the definition of “affected area” at 30 C.F.R. § 701.5, which states in relevant part:

The affected area shall include every road used for purposes of access to, or for hauling coal to or from, surface coal mining and reclamation operations, unless the road (a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use.

OSM has refused to allow at least one other state to exclude more public roads from permit areas than federal regulations would exclude. In 1983, OSM explicitly disapproved a definition of “affected area” in the proposed Virginia state program “to the extent that it could be interpreted as excluding all public roads with more than incidental

public use....” 30 C.F.R. § 946.12. Similarly, Memo 6 creates a broader exclusion from the permit area than allowed by the three-part test for exclusion at 30 C.F.R. § 701.5, cited above. Because OSM has formally disapproved at least one other state’s attempt to expand the public road exception, there is no justification for allowing North Dakota to do so without any documented OSM review.

The potential harm is not a mere technicality. In Appalachia, where far smaller surface mines than North Dakota’s are common, this sort of language could be used to keep small mines out of SMCRA permit areas by siting them laterally within the public road right of way. If such a precedent were established, it could ultimately lead to non-SMCRA-jurisdictional surface mining in North Dakota, to the detriment of DRC and its members. This portion of Memo 6 is inconsistent with federal law, creates a potentially problematic precedent, has been disapproved by OSM in a similar context in another state program, and therefore merits OSM review, public comment, and development of a clear written justification – if one exists – for approving this amendment to North Dakota’s surface mining program.

**3. Memo 15 creates less stringent provisions for coal combustion waste placement and bond release than allowed at 30 C.F.R. § 816.41(i).**

NDPSC first issued Policy Memorandum No. 15 to Mine Operators (“Memo 15”)(Exhibit D) in 1985 and revised it in 1999. Memo 15 announces that NDPSC “has adopted a policy to totally release the performance bond amount of mined acreage utilized for the disposal of large quantities of ash from coal conversion facilities, sanitary landfills operated by a city, or other long-term solid waste disposal sites.” According to Memo 15, “(p)rior to Commission approval of such a bond release, a long-term industrial land use must be implemented in order to allow an exemption from the 10-year

revegetation responsibility period pursuant to NDAC Section 69-05.2-12-09(2).” The plain language of SMCRA requires that coal mining and reclamation operations, at minimum:

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 of which there is reasonable likelihood, so long as such use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution....

30 U.S.C. 1265(b)(2). Memo 15 incorporates the performance bond requirements at N.D.A.C § 69-05.2-12, but is inconsistent with SMCRA’s previous or better land use reclamation standard. Because most land mined in North Dakota was previously used for agricultural purposes, a state policy that incents reclamation of mined lands to an industrial waste disposal use is inconsistent with SMCRA’s “prior” or “higher or better” use standard. An industrial waste disposal site would be incapable of meeting the minimum standard of supporting crop production without significant additional reclamation efforts – which, under Memo 15, will never happen.

In addition, SMCRA does not authorize disposal of coal combustion waste in surface mines. The only use of mine land for coal ash disposal explicitly authorized by SMCRA is a limited amount permitted to be placed in underground mines – not “large quantities of ash” in surface mines as Memo 15 contemplates. 30 C.F.R. § 816.41(i). Finally, Memo 15’s statement that “(t)he purpose of this policy is to eliminate duplication of regulation by the Commission and State Department of Health on waste disposal sites constructed on mined lands” suggests that Memo 15 may have the effect of diminishing NDPSC jurisdiction over certain mined lands, in violation of SMCRA. The changes

instituted Memo 15 require formal written review by OSM because they are inconsistent with federal law.

**4. Memo 18 allows a single performance bond to cover multiple permits, a provision that does not exist in the federal surface mining program.**

NDPSC issued Policy Memorandum No. 18 to Mine Operators (“Memo 18”)(Exhibit E) in 1987 and has not revised it. Memo 18 announces and briefly outlines NDPSC’s policy of “allowing a single performance bond to cover more than one permit area at a mine.” This policy is inconsistent with the federal surface mining program, which requires that a permit applicant file with the regulatory authority a performance bond payable to the United States or the state,

conditional upon faithful performance of all the requirements of this chapter and the permit. The bond shall cover that area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations within the initial term of the permit. 30 U.S.C. § 1259(a).

Nowhere does SMCRA or its implementing regulations provide for a single performance bond covering multiple permit areas. To the contrary, SMCRA’s plain language anticipates a performance bond covering only the area to be mined within the initial term of the permit. NDPSC’s policy in Memo 18 allows an open-ended bonding period in which a single performance bond covers more than one permit area and different permitting timelines. The bond moves across large acreages in a process lasting decades, without the formal review triggered by final bond release proceedings. The result is a rate of final bond release that commonly falls around 2% per year of the total acreage of disturbed land, for a reclamation timeline of up to 50 years to final bond release. *See,*

*e.g.*, OSM Annual Evaluation Summary Report for the NDPSC Regulatory Program, Evaluation Year 2010, Table 5 (Exhibit F).<sup>2</sup>

To achieve final bond release, an operator would normally have to pass through a process including, at minimum, the following steps encoded in the original SMCRA statute:

- Formal application to the regulatory authority;
- Public notice by newspaper and letters to designated parties;
- Inspection and evaluation of reclamation work by the regulatory authority to confirm successful completion of all reclamation activities;
- Expiration of the period of extended operator responsibility under 30 U.S.C. § 1265(b)(20);
- Opportunity for written objections and public hearing; and
- Opportunity for informal conference in case of objections, to resolve such objections.

30 U.S.C. § 1269. Without these formal steps occurring on a timely basis at the time of bond release on each permit area, opportunities guaranteed by SMCRA for affected parties and members of the public to weigh in on the effectiveness of the state's surface mining regulatory program are postponed – often for decades.

NDPSC's policy represents a material change from the approved North Dakota surface mining program and SMCRA, to the detriment of DRC and its members. *See* NDAC § 69-05.2-12-01 (specifying a performance bond process on a single permit area).

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<sup>2</sup> Available online at:

<https://docs.google.com/viewer?url=http%3A%2F%2Fwww.wrcc.osmre.gov%2Fprograms%2Foversight%2Fnorthdakota%2Fevaluation%2F2010%2FND10-reg.pdf>

Neither NDPSC nor OSM has produced a written evaluation of possible effects of this policy on the reclamation timeline, and the public has had no opportunity to comment. At minimum, implementation of Memo 18 by NDPSC is a violation of the state program amendment procedure that requires full interagency review.

SMCRA does contemplate the possibility that the Secretary might approve an “alternative system that will achieve the objectives and purposes of the bonding program” laid out by SMCRA, but there is absolutely no authority under the law for a state to enact such an alternative system without formal review and approval by OSM, let alone without written notification to OSM, as NDPSC appears to have done with Memo 18. 30 U.S.C. § 1259(c). Although SMCRA does not include explicit reclamation timeline requirements, the statute’s bond release provisions are intended to motivate operators to complete reclamation in a “contemporaneous” manner, as required at 30 C.F.R. § 816.100:

Reclamation efforts, including but not limited to backfilling, grading, topsoil replacement, and revegetation, on all land that is disturbed by surface mining activities shall occur as contemporaneously as practicable with mining operations, except when such mining operations are conducted in accordance with a variance for concurrent surface and underground mining activities issued under § 785.18 of this chapter.

Because of the latitude granted to regulatory authorities to define contemporaneous reclamation, it is particularly important for the “carrot” of bond release to remain linked to recent mining activities as a motivation for operators to stick to what may be somewhat vague timelines. Memo 18 has the practical effect of allowing surface mining to roll across a landscape for many years under the same performance bond, without the operator’s financial need for final bond release triggering the notice and public process that SMCRA requires for final bond release at 30 U.S.C. § 1269.

**5. Memo 20 is inconsistent with federal standards for the reclamation timeline, potentially allowing a shorter – and therefore less stringent – reclamation responsibility time period.**

NDPSC first published Policy Memorandum No. 20 to Mine Operators (“Memo 20”)(Exhibit G) in 1989 and revised it in 1992, 1997, 2004, and 2009. Memo 20 addresses operators’ performance bond responsibility period for water management structures, other support facilities, and re-affected reclaimed areas.

Memo 20 allows for variances to the required reclamation timeline in the federal Permanent Performance Standards, which require:

(3) In areas of 26.0 inches or less average annual precipitation, the period of responsibility shall continue for a period of not less than:

(i) Ten full years, except as provided in paragraph (c)(3)(ii) below.<sup>3</sup> Vegetation parameters identified in paragraph (b) of this section shall equal or exceed the approved success standard for at least the last two consecutive years of the responsibility period.

30 C.F.R. § 816.116. *See also* 30 U.S.C. § 1265(20). Memo 20 refers to several situations where variances to the ten year timeline may be granted, but does not specify that the timeline may never be *less* than ten years:

The Commission, in its discretion, may grant specific variances so the ten-year responsibility period for water management structures, other support facilities, and reclaimed areas that are re-affected by repair and drainage improvement work coincides with that of the surrounding reclamation tract....

The Commission may grant similar variances for small isolated mined areas that were not reclaimed in conjunction with the surrounding tract if the permittee provides a detailed explanation with reasons for not reclaiming the small area at the same time as the surrounding tract....

The Commission will allow variances to the ten-year responsibility period for small portions of a reclaimed tract that are re-affected by repair work to eliminate settling and/or erosion features or to improve drainage....

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<sup>3</sup> “Five full years for lands eligible for re-mining included in permits issued before September 30, 2004, or any renewals thereof. To the extent that the success standards are established by paragraph (b)(5) of this section, the lands shall equal or exceed the standards during the growing seasons of the last two consecutive years of the responsibility period.” 30 C.F.R. § 816.116(c)(3)(ii).

Memo 20 ¶¶ 2, 3, 4. The language of Memo 20 with regard to variances to the reclamation timeline is too vague to determine whether or not it is consistent with the federal Permanent Performance Standards. The state program's Environmental Protection Performance Standards also require that operators:

(a) assume the responsibility for successful revegetation, as required by subsection 17, for a period of ten full years after the last year of augmented seeding, fertilizing, irrigation, or other work, provided that, when the commission approves a long-term intensive agricultural postmining land use, the ten-year period of responsibility for revegetation commences at the date of initial planting.

NDAC § 38-14.1-24(18). The N.D. Administrative Code creates a limited exception for a five year liability period for previously mined lands affected by re-mining, but Memo 20's "variances" are not authorized in the state program Performance Standards. Proper review by OSM is necessary to ensure consistency with SMCRA and the state program.

Memo 20 refers to a 1988 "proposal" made by NDPSC to OSM "to make the period of performance bond responsibility for sedimentation ponds and associated access roads, diversions, and stockpiles coincide with that of the surrounding reclamation tract" and OSM's determination that North Dakota possessed the latitude to do so within its existing state program. This consultation acknowledges a responsibility on the part of NDPSC and OSM to review such changes to the state program, but the process required by SMCRA was not followed. In response to records requests, neither NDPSC nor OSM has been able to produce written records of such a consultation, nor is there any notice or record of decision published anywhere in the Federal Register. The public was entirely excluded from the process. The 1988 interaction with OSM hints at the casual way that NDPSC and OSM alike have handled the decades of program changes implemented in North Dakota by way of the unapproved Memoranda: no written record, no publication,

no documented consultation or review by other agencies, and no public involvement, all in violation of SMCRA.

**C. OSM's Annual Program Evaluations do not provide the required review of the legality of NDPSC's surface mining Memoranda.**

OSM performs an annual evaluation of North Dakota's state surface mining program and produces an Annual Evaluation Report ("Report"). The most recent year in which one of the Memoranda discussed above (Memo 20) was modified is 2009. The Report for Evaluation Year July 1, 2008 to June 30, 2009 (Exhibit H) makes no mention of Memo 20, revised in January 2009 and signed by all three NDPSC commissioners. The Reports commonly include the boilerplate statement that North Dakota's "informal process" of proposing changes to its surface mining program "allows for input from industry, citizen groups, the general public and other agencies like OSM, prior to formalized rulemaking." *See, e.g.*, 2008 Report at 9 (Exhibit J), 2009 Report at 10 (Exhibit H). The lack of any documented review of the Memoranda raises doubt as to how thorough and fair this "informal process" may be.

**D. Plaintiffs are also entitled to summary judgment under state law.**

NDPSC has the duty and power under North Dakota law "(t)o promulgate such regulations as may be necessary to carry out the purposes and provisions of this chapter and the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201 et seq.]" NDCC § 38-14.1-03(12); and "(t)o take all action necessary and appropriate including the promulgation of regulations for all provisions of this chapter to secure for this state the benefits of and to implement the Surface Mining Control and Reclamation Act of 1977... and similar federal acts." *Id.* at ¶20. Through

these sections of the Century Code, compliance with and full implementation of SMCRA are enacted into North Dakota law. NDPSC's failure to comply with SMCRA provisions requiring written submission to OSM of any changes to the state program is also a violation of state law. NDPSC's implementation of Memoranda inconsistent with the state surface mining program and SMCRA is also a violation of state law requiring full SMCRA compliance.

### VIII. CONCLUSION

NDPSC's undisputed failure to submit state surface mining program changes in writing to OSM constitutes an actionable breach of federal and state law, sufficient to justify summary judgment in favor of Plaintiffs, declaratory judgment, and an order to compel compliance.

Respectfully submitted this 12<sup>th</sup> day of  
November, 2012.

**/s/ Carrie La Seur**  
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**CERTIFICATE OF COMPLIANCE**

I certify that the foregoing Brief in Support of Plaintiff's Motion for Summary Judgment complies with the page number limit approved by the Court in its October 12, 2012 Order. The Brief, excluding the caption, table of contents, table of authorities, certificate of service, and exhibits, contains 22 pages, formatted as required by D.N.D.Civ.L.R. 5.1.

**CERTIFICATE OF SERVICE**

I certify that on the 12<sup>th</sup> day of November, 2012, Baumstark Braaten Law Partners served copies of the attached document by CM/ECF as follows:

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Carrie La Seur  
Attorney for Plaintiff

**Exhibit A -- Amendments to Memoranda**

<b>Dates of Issue &amp; Revisions</b>	<b>Memo No.</b>	<b>Subject</b>
3/8/1995	2	Mine Personnel Accompanying Commission Representatives During Inspections
3/8/1995 2/25/1988 8/10/1984 4/27/1978	3	Covering Toxic-Forming Materials with Nontoxic Material and Covering Combustible Materials with Noncombustible Material
3/8/1995	4	Payment of Charges for Analysis of Soil, Spoil and Water Samples Taken by PSC Representatives
3/8/1995 8/10/1984 3/8/1995	5	Suitable Plant Growth Material Removal
3/8/1995 8/10/1984 5/4/1979	6	Activities Covered by Surface Coal Mining Permits
3/8/1995 8/10/1984 8/2/1979	7	Coordination of State Regulatory Program Surface Coal Mining Operation Communications with the PSC, State Dept. of Health, and State Water Commission
3/8/1995 8/10/1984 10/15/1980	8	Applicability of the Ten-Year Revegetation Liability Period Pursuant to NDCC 38-14.1-24(18)
7/12/2006 12/19/2001 3/8/1995 11/10/1982 11/10/1982	9	Clarification of Bond Release Notice Requirements of NDCC 38-14.1-17
2/17/1994 9/24/1991 8/10/1984 4/29/1983	10	Clarification of 1) standards and methods for proving reclamation success on cropland areas disturbed after July 1, 1975 and not used in support of mining after May 3, 1978, 2) management practices for all reclaimed cropland, and 3) breaking pre-cropland grass-legume stands prior to final bond release
3/8/1995 8/10/1984 7/25/1983	11	Sedimentation Pond Design, Construction, Operation and Maintenance
7/12/2006 12/19/2001 3/8/1995 2/12/1985	12	Impoundment Certifications and Impoundment Inspection Reports by a Registered Professional Engineer
3/8/1995 6/21/1985	14	Clarification of Annual Map Requirements, NDAC 69-05.2-13-02
1/13/1999	15	Performance Bond Release for Disposal Operations Located on Mined

1/13/1999	15	Performance Bond Release for Disposal Operations Located on Mined
11/5/1985		Lands
7/2006	16a	Reclamation Cost Estimating Guidelines for Establishing Performance
		Bond Amounts
7/2009	16b	2009 Updates to Variable Costs
3/8/1995	17	Suitable Plant Growth Material Removal and Redistribution Under
1/20/1987		NDAC 69-05.2-15, as revised January 1, 1987
2/3/1987	18	Policy for Allowing a Performance Bond to Cover More than One
		Permit Area
7/12/2006	19	Guidelines for Sedimentation Pond Removal and Pond Site
7/30/1997		Reclamation
3/8/1995		
5/18/1988		
7/15/1987		
1/29/2009	20	Performance Bond Responsibility for Water Management and Other
6/9/2004		Support Facilities
7/30/1997		
7/21/1992		
9/6/1989		
8/1/1995	21	Mine Waste Disposal
6/9/2004	22	Re-permitting Reclaimed Lands that Have Received Final Bond Release
7/12/2006	23	Mine-related Roads Subject to Design and Performance Standards and

**Exhibit B: Policy Memorandum to Mine Operators No. 5**

DATE: March 8, 1995 (Revised)(Original Issue Date March 7, 1979, revised August 10, 1984)

TO: All Mine Operators and Lignite Energy Council

FROM: Commissioners Wefald, Hagen and Reinbold

SUBJECT: Suitable Plant Growth Material Removal

The purpose of this memorandum is to let the mine operators know what the Public Service Commission (PSC) inspectors are looking for when approving topsoil and subsoil removal and segregation.

When removing topsoil materials, only the dark-colored topsoil materials should be saved. As a general practice, first lift removal should cease when the lighter-colored subsoil materials start to become representatively evident across an area. This may mean leaving a thin, irregular layer (no more than 2-3 inches) of the darker-colored materials in some areas as the lighter-colored materials are first encountered. During an inspection a PSC inspector will be reviewing the degree to which an operator has representatively exposed the subsoil materials across a given area and the overall accuracy of the topsoil removal process. Quite often the change from the dark-colored topsoil materials to the lighter-colored subsoil material will be gradual. However, it should be pointed out that the abruptness of the color change will vary with different soil types. Efforts must be taken to prevent the mixing of topsoil materials with subsoil materials since research by the Northern Great Plains Research Center has shown the mixing of these materials has resulted in lower productivity levels when compared to topsoil materials that have not been mixed with other materials. In addition, operators need to avoid placing calcareous soil material at the surface in the reclamation process since it may result in the creation of Highly Erodible Land (HEL) as defined under the federal farm program.

Two exceptions to the procedure to removing topsoil materials to the color change are when sandier-textured soil materials (fine sandy loams, sandy loams, loamy fine sands) or when sodium affected (sodic) soils are present. One of the mapping criteria for topsoil is that the materials have an organic matter content of at least 1 percent. The sandier-textured soil materials are usually dark-colored to a depth considerably greater than the thickness of topsoil materials mapped. For this reason, the thickness of topsoil material removed from areas with sandier-textured soil materials should not be any greater than that specified by the soil survey. If all of the dark-colored materials from these areas were saved as first lift, the organic matter content would be somewhat less than 1 percent, thus reducing the quality of the top-dressing materials.

Sodium affected (sodic) soils also tend to be dark colored to a depth considerably greater than the thickness indicated for topsoil removal. The B horizon of sodic soils consists of

dispersed clay and organic matter giving the B horizon a dark color; however, this material generally does not meet the requirements for topsoil due to the elevated sodium adsorption ratio (SAR). Mixing of this sodic B horizon material will degrade the physical characteristics of the topsoil it is mixed with. The thickness of topsoil material removed from sodic soils should not be any greater than that specified by the soil survey.

If the total soil respread thicknesses for disturbed areas will be based on the graded spoil characteristics as specified in NDAC 69-05.2-15-04(4)(a)(2), the total amount of soil removed (topsoil plus subsoil) must be sufficient to meet these requirements. However, if disturbed areas will be respread according to NDAC 69-05.2-15-04(4)(a)(1), the amount of soil removed should be the total thickness (thickness of topsoil and subsoil added together) indicated by the soil survey.

Exceptions to the above procedures may be granted on a case-by-case basis depending on the conditions involved. They may require sampling the questionable materials by the operator for laboratory analysis.

The removal of frozen soil materials is not prohibited; however, the operator must take special precautions to remove the frozen soil materials properly. These precautions should include more supervision and informing all equipment operators of the soil removal requirements when frozen soil materials are ripped and removed. Steps have to be taken to ensure there is no mixing of the topsoil and subsoil materials and that when the depth of subsoil is limited, that only the suitable materials are removed and saved.

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Bruce Hagen  
Commissioner

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Susan E. Wefald  
President

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Leo M. Reinbold  
Commissioner

**Exhibit C: Policy Memorandum to Mine Operators No. 6**

DATE: March 8, 1995 (Revised)(Original Issue Date May 4, 1979, revised August 10, 1984)

TO: All Mine Operators and Lignite Energy Council

FROM: Commissioners Wefald, Hagen and Reinbold

SUBJECT: Activities Covered by Surface Coal Mining Permits

Listed below are specific activities and types of disturbances which are included under the scope of "Surface Coal Mining Operations," as defined in North Dakota Century Code Section 38-14.1-02(33). These activities and disturbances must be conducted within the boundaries of a surface coal mining permit.

1. All mine haul and access roads including overpasses, underpasses, and at grade crossings of public rights-of-way. Roads maintained by public funds are excluded.
2. All railroad spur lines that are used solely to service a surface coal mine. The permit boundary should extend to center of "main" line.
3. All mine-site office, shop, and warehouse facilities. Employee parking lots should be included if they are a contiguous part of the facility and also utilized for support activities.
4. All tipple and truck dump facilities.
5. All storage areas for equipment and materials (including explosives).
6. All stockpile areas, including coal, leonardite, sand and gravel, scoria, and suitable plant growth material stockpiles.
7. All impoundments, including impoundments for sedimentation, drainage control, irrigation, dust control, or waste materials.
8. All diversions including natural drainageways used as a primary transport course to a treatment facility (e.g., sedimentation pond).
9. Mine development construction sites (e.g., dragline erection sites).
10. Dragline walkways where suitable plant growth material removal is necessary.
11. Solid waste disposal and sewage treatment areas for mine generated waste.

12. Dust control facilities.
13. Substation facilities (excluding transmission lines).
14. Scoria, sand, and gravel borrow pits as determined by the Commission on a site-specific basis.

The following is a list of specific areas which will not be included under the scope of "Surface Coal Mining Operations" and do not have to be included in the permit area:

1. Research and test plot facilities.
2. Transmission lines.
3. Vegetation reference areas.
4. Shelterbelts planted off the permit area to screen mine buildings and facilities.
5. Air and water monitoring stations.
6. Suitable plant growth material stockpile areas not utilized for additional storage after July 1, 1979.
7. Construction of alternate public roads outside of the area affected or that will be affected by mining activities.

The above lists must be considered partial and subject to review on a site-specific basis. If other disturbance activities will occur that are not listed above, the Reclamation Division will discuss these activities on a case-by-case basis.

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Bruce Hagen  
Commissioner

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Susan E. Wefald  
President

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Leo M. Reinbold  
Commissioner

**Exhibit D: Policy Memorandum to Mine Operators No. 15**

DATE: January 13, 1999 (Revised)(Original Issue Date November 5, 1985)  
TO: All Mine Operators and Lignite Energy Council  
FROM: Commissioners Reinbold, Hagen and Wefald, Neil Knatterud, North  
Dakota Department of Health  
SUBJECT: Performance Bond Release for Waste Disposal Operations Located on  
Mined Lands

The Commission has adopted a policy to totally release the performance bond amount of mined acreage utilized for the disposal of large quantities of ash from coal conversion facilities, sanitary landfills operated by a city, or other long-term solid waste disposal sites. Prior to Commission approval of such a bond release, a long-term industrial land use must be implemented in order to allow an exemption from the 10-year revegetation responsibility period pursuant to NDAC Section 69-05.2-12-09(2). This includes the issuance of the appropriate permits by the State Department of Health and county zoning authorities and the construction of the facility to a degree that it is ready for use. Final closure, revegetation and monitoring of these sites will have to be carried out in accordance with applicable State Department of Health and or county requirements.

The purpose of this policy is to eliminate duplication of regulation by the Commission and State Department of Health on waste disposal sites constructed on mined lands. It is also understood that future use of these sites following waste disposal and closure will probably be limited due to the final topography and the desire to maintain a permanent vegetation cover on the areas. However, with the respreading of sufficient topsoil and subsoil, most of the closed disposal sites will be capable of being hayed or having other well managed uses. As part of this policy, the Commission has assumed that sufficient topsoil and subsoil will be set aside and respread on these areas upon site closure to ensure a good vegetative cover to provide long term site stability, as well as having the capability to produce hay crops. Nearly all approved waste disposal sites located on mined lands were selected for that use following soil, overburden, and coal removal. All available topsoil and sufficient subsoil from these lands were removed to meet soil respreading requirements in the Commission's mining and reclamation rules.

The State Department of Health rules require that at least six inches of soil be respread on solid waste disposal sites as part of closure. This "minimum" thickness is specified since the amount of suitable soil is limited at many pre-existing waste disposal sites on non-mined lands. However, in the case of solid waste disposal sites located on mined lands, considerably more than six inches of soil is removed prior to mining to meet the Commission's soil respread requirements. Therefore, before granting final bond release on mined areas used for long-term waste disposal activities, the Commission will require a showing that sufficient topsoil and subsoil have been set aside to provide a total respread thickness of at least 24 inches of soil for sites where the cover material is non-sodic spoil and 36 inches where the cover is sodic spoil, with a minimum topsoil thickness of 8 inches. Exceptions to these thicknesses will be allowed if the quantities of

topsoil and subsoil removed prior to mining are less than those needed to provide these thicknesses.

These thicknesses of topsoil and subsoil are considered sufficient to ensure long term site stability and good vegetative production on the disposal sites upon final closure. The State Department of Health discourages cropping or grazing of the closed disposal sites due to the possibility of abusive practices that may cause the soil and other capping materials to erode and expose the wastes that were disposed. However, it is very likely that many of these areas will be suitable for haying (or other well managed uses) when the vegetation is adequately established.

The bond release application and Commission release procedures for approved waste disposal areas must comply with all applicable provisions of NDAC Chapter 69-05.2-12.

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Bruce Hagen  
Commissioner

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Leo M. Reinbold  
President

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Susan E. Wefald  
Commissioner

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Neil Knatterud  
Director, Solid Waste Division  
North Dakota Department of Health

**Exhibit E: Policy Memorandum to Mine Operators No. 18**

To: All Mine Operators and Lignite Council  
From: Commissioners Sandstrom, Hagen and Reinbold  
Date: February 3, 1987  
Subject: Policy for Allowing a Performance Bond to Cover More than One Permit Area

The Commission has adopted a policy allowing a single performance bond to cover more than one permit area at a mine. If a permittee decides to do this, a worst-case reclamation cost determination must be made considering all anticipated mining disturbances up to the latest expiration date of the permits to be covered by the bond. Liability under the bond must date back to the approval date of the first of those permits issued.

Dale V. Sandstrom, President

Bruce Hagen, Commissioner

Leo M. Reinbold, Commissioner

**TABLE 5**

**Annual State Mining and Reclamation Results**

Bond Release phase	Applicable performance standard	During this Evaluation Year		
		Total acreage released	Acreage also released under Phase I	Acreage also released under Phase II
A	B	C	D	E
Phase I	- Approximate original contour restored - Topsoil or approved alternative replaced	2,836		
Phase II	- Surface stability - Establishment of vegetation	2,221	0	
Phase III <sup>1</sup>	- Post-mining land use/productivity restored - Successful permanent vegetation - Groundwater recharge, quality and quantity restored - Surface water quality and quantity restored	2,370	2,221	2,221
<b>Bonded Acreage<sup>2</sup></b>			<b>Acres during this evaluation year</b>	
Total number of new acres bonded during this evaluation year			890	
Number of acres bonded during this evaluation year that are considered remaining, if available			0	
Number of acres where bond was forfeited during this evaluation year			0	
<b>Bonded Acreage Status</b>		<b>Cumulative Acres</b>		
Total number of acres bonded as of the end of last review period (June 30, 2009) <sup>3</sup>		106,457		
Total number of acres bonded as of the end of this review period (June 30, 2010) <sup>3</sup>		104,977		
Sum of acres bonded that are between Phase I bond release and Phase II bond release as of June 30, 2010 <sup>3</sup>		4,235		
Sum of acres bonded that are between Phase II bond release and Phase III bond release as of June 30, 2010 <sup>3</sup>		115		
<b>Disturbed Acreage</b>		<b>Acres</b>		
Number of Acres Disturbed during this evaluation year		1,965		
Number of Acres Disturbed at the end of the evaluation year (cumulative)		66,075		
<sup>1</sup> Bonded acreage is considered to approximate and represent the number of acres disturbed by surface coal mining and reclamation operations				
<sup>2</sup> Bonded acres in this category are those that have not received a Phase III or other final bond release (State maintains jurisdiction).				

Brief explanation of columns D & E. The Status will enter the total acreage under each of the three phases (column C). The additional columns (D & E) will "break-out" the acreage among Phase II and/or Phase III. Bond release under Phase II can be a combination of Phase I and II acreage, and Phase III acreage can be a combination of Phase I, II, and III. See "Instructions for Completion of Specific Tables," Table 5 for example

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**Exhibit G: Policy Memorandum to Mine Operators No. 20**

Date: January 29, 2009 (Revised) (Original Issue Date September 6, 1989, Revised July 21, 1992, July 30, 1997 and June 9, 2004)

To: Mine Operators and Lignite Council

From: Commissioners Cramer, Clark and Kalk

Subject: Performance Bond Responsibility Period for Water Management Structures, Other Support Facilities, and Re-affected Reclaimed Areas

**BACKGROUND:** In late 1988 the Commission presented a proposal to the Office of Surface Mining to make the period of performance bond responsibility for sedimentation ponds and associated access roads, diversions, and stockpiles coincide with that of the surrounding reclamation tract. The Director of OSM decided the Amendment was unnecessary and informed the Commission that adequate discretion existed within the State's regulatory program to do what the Amendment proposed. The Commission adopted a policy in 1989 for granting variances so the ten-year responsibility period for water management structures coincides with that of the surrounding reclamation tract. The policy has since been amended to allow variances for other support facilities and for reclamation repair work and drainage improvement work of a limited nature and size following the initial seeding of reclaimed tracts.

**POLICY:** The Commission, in its discretion, may grant specific variances so the ten-year responsibility period for water management structures, other support facilities, and reclaimed areas that are re-affected by repair and drainage improvement work coincides with that of the surrounding reclamation tract. For the purposes of this policy memorandum, water management and other support facilities may include, but not be limited to, sedimentation ponds, diversions, other water management structures, soil stockpiles, access roads, segments of haulroads, and electrical substations. Primary haulroads and associated disturbances that remain in use for many years following reclamation of the surrounding areas will not be considered for variances.

The Commission may grant similar variances for small isolated mined areas that were not reclaimed in conjunction with the surrounding tract if the permittee provides a detailed explanation with reasons for not reclaiming the small area at the same time as the surrounding tract. In addition, the permittee will need to explain the potential obstacles and any bond release delays that are likely to occur if the small area and surrounding tract cannot be treated as a single unit for final bond release.

The Commission will allow variances to the ten-year responsibility period for small portions of a reclaimed tract that are re-affected by repair work to eliminate settling and/or erosion features or to improve drainage. For any repairs or drainage improvement that is carried out during the first five years of the ten-year responsibility period, variances will be considered approved as long as these areas are described and clearly depicted with the annual map submitted for the year(s) that the work was done. The cumulative acreage of the areas re-affected during the first five years of a tract's ten-year

liability period cannot exceed twenty percent of the disturbed acreage within a larger reclaimed tract that is a logical bond release unit without re-initiating the ten-year responsibility period on that entire reclaimed tract. For the purposes of this policy, a logical bond release unit will typically be a quarter section of reclaimed land but it may be a larger or smaller tract that seems reasonable for final bond release purposes given the boundaries and ownership of the tract. If the seeding of multiple reclamation parcels within a quarter section or other logical bond release unit was carried out over a number of years, the initiation date of the ten-year liability period for the purposes of this policy may be based on the date that the last reclaimed parcel was seeded within that tract. Also, if the same area is repaired multiple times, the Reclamation Division will determine on a case-by-case basis if the ten-year liability period for that tract needs to be re-initiated.

For any repair and drainage improvement work that is done more than five years after the ten-year liability period was initiated on the disturbed lands within a quarter section or other logical bond release unit, a written request must be submitted for a variance from the ten-year liability period. Variances may be granted by the Commission to the extent that the total re-affected acreage does not exceed five percent of the disturbed acreage within the larger tract. However, no variance will be needed if the repair work is limited to one or more features that are each less than 0.5 acre in size and if the repair work only involves bringing in a small quantity of additional topsoil or reshaping the respread topsoil to repair each area.

**WRITTEN REQUESTS FOR VARIANCES and RECLAMATION STANDARDS:** As part of a written request for a variance, the permittee must affirmatively demonstrate that reclamation carried out on the proposed variance area provides equal or greater protection to the environment and to public health and safety. A further condition is that the support facilities must be removed, the affected land reclaimed, and all applicable reclamation performance standards in NDAC Article 69-05.2 are met when final bond release is requested. The vegetation measurements taken to prove reclamation success for a reclaimed tract that contains one or more variance areas must include samples that were taken from each variance area. However, for isolated small areas that require repair near the end of the liability period, a permittee may be granted approval to use an alternative sampling method to demonstrate reclamation success on the repair area. These methods must be described and justified in the variance request.

Areas considered for variances should be small in size when compared to the entire reclamation tract. The cumulative acreage of the areas for which a variance(s) is requested, including the total acreage of reclaimed water management structures, other support structures, small isolated mined areas, and areas re-affected by repair and drainage improvement work after the fifth year of the liability period, generally should not exceed twenty percent of the surrounding reclamation tract. (As discussed above, reclaimed areas re-affected by repair and drainage improvement work after the fifth year of the liability period cannot exceed five percent of the total acreage within the larger tract.) However, the Commission will consider granting variances for larger areas on a case-by-case basis if it appears final bond release will be otherwise significantly delayed

on the surrounding reclamation tracts and the permittee explains the steps that were taken to previously reclaim as much of the area as possible.

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Requests for specific variances to the responsibility period must be made and approved prior to submitting final bond release applications. A request must include the appropriate information demonstrating that the conditions discussed above are met and it must be accompanied by a post-mining topographic map showing the proposed variance areas, surrounding reclamation tract and watershed boundaries. The map must also clearly identify where all water management structures, other support facilities, and/or areas re-affected by repair and drainage improvement work were located within the entire reclamation tract, and show any support facilities that have not been reclaimed. For areas re-affected by repair and drainage improvement work, the request needs to describe the type of repair work performed (filling with topsoil, removing the respread topsoil and bringing in more subsoil, etc.) and the dates that the work was done. In addition, seeding dates for initiating the ten-year responsibility period on the proposed variance area and on the surrounding reclamation tracts need to be shown on a map.

**PUBLIC SERVICE COMMISSION**

Tony Clark, Commissioner

Kevin Cramer, President

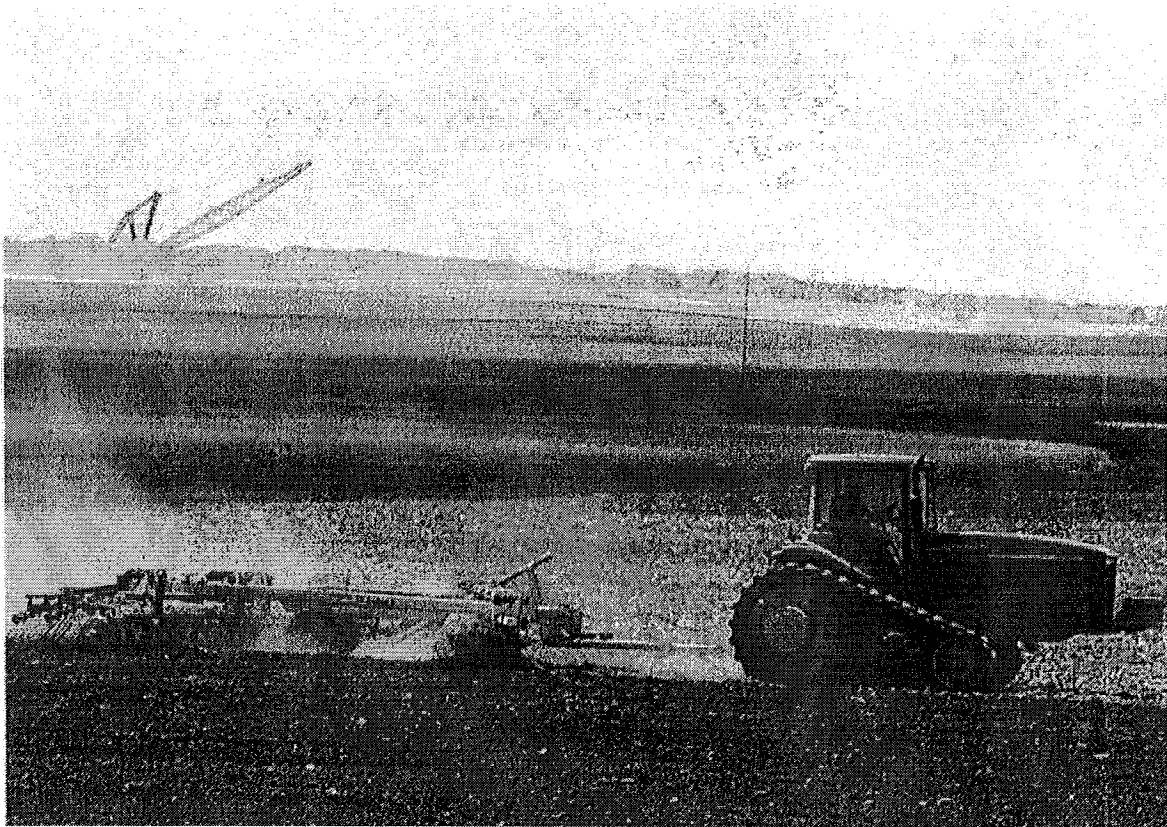
Brian P. Kalk, Commissioner



**OFFICE OF SURFACE MINING  
RECLAMATION AND ENFORCEMENT**

**Annual Evaluation Summary Report**

**For The  
North Dakota Public Service Commission  
Regulatory Program**



**Evaluation Year 2009 (July 1, 2008 to June 30, 2009)**

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Cover photo: Falkirk Mine, Permit NAFK- 9503, shows reclaimed cropland in the W1/2 of Section 25. This reclaimed cropland was deep chiseled a few years ago. It is currently being disked and seeded to oats. The dragline and a reclaimed wetland are in the background.

**I. Introduction**

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) created the Office of Surface Mining Reclamation and Enforcement (OSM) in the Department of the Interior. SMCRA provides authority to OSM to oversee the implementation of and provide Federal funding for State regulatory programs that have been approved by OSM as meeting the minimum standards specified by SMCRA. This report contains summary information regarding the North Dakota Program and the effectiveness of the North Dakota program in meeting the applicable purposes of SMCRA as specified in Section 102. This report covers the period of July 1, 2008 to June 30, 2009. Detailed background information and comprehensive reports for the program elements evaluated during the period are available for review and copying at the Casper OSM Office.

The following acronyms are used in this report:

CFO	Casper OSM Office
CO	Cessation Order
GIS	Geographic Information System
GPS	Global Positioning System
NDAC	North Dakota Administrative Code (Rules)
NDCC	North Dakota Century Code (Statute)
NOV	Notice of Violation
NRCS	Natural Resource Conservation Service
NTTP	National Technical Training Program
OSM	Office of Surface Mining Reclamation and Enforcement
OTT	Office of Technology Transfer
PSC	North Dakota Public Service Commission
SMCRA	Surface Mining Control and Reclamation Act of 1977
TIPS	Technical Innovation and Professional Services
TDN	Ten-Day Notice
WRCC	Western Region Coordination Center
WRTT	Western Regional Technical Team

**II. Overview of the North Dakota Coal Mining Industry**

The coalfields in North Dakota are located in the Williston Basin, which is part of the Great Plains Coal Province. They underlie approximately 40 percent of the State's surface area. Most of the coal is produced commercially from two mining districts located in the western part of the State: (1) Beulah-Zap and (2) Hagel. Recoverable coal reserves in North Dakota are generally classified as lignite, which is characterized by low heating value (6,500 BTU), average high moisture content (40 per cent) and low sulfur content (less than 1.0 per cent). The mineable beds in the Williston Basin vary in thickness from three to 30 feet; economic stripping ratios range from 1.5:1 to 11:1. All active mines in North Dakota are currently large-scale surface mines that provide coal for mine-mouth or regional electrical generation facilities and a nearby coal gasification facility.

The first commercial mine in North Dakota opened in Morton County in 1873. As the railroad developed across the State, demand for coal increased and was supplied by underground mines. North

Dakota was one of the first states to shift from underground to large-scale commercial surface mining. By 1927, 40 percent of the State's production was by surface mining methods, compared with 2 percent for the nation. By 1959, eighty six percent of North Dakota's coal production was from surface mines, and since 1966, the State's total production has been derived from this mining method. In 1884, North Dakota produced 35 thousand tons of lignite; in 2009 it produced 29.78 million tons (Table 1) using modern surface mining methods and equipment.

Coal mining in North Dakota is concentrated around the western half of the State. This area consists of approximately 28,000 square miles, and has an estimated total resource of 350 billion tons of coal, or about two-thirds of the total lignite reserves of the United States. North Dakota has a demonstrated recoverable coal reserve base of 35 billion tons. North Dakota enacted its first reclamation law in 1969 and major revisions to that law followed in 1973 and 1975. A new law was enacted by North Dakota in 1979 that is consistent with SMCRA.

North Dakota mines provide direct employment for approximately 4,074 people in five counties with another 23,915 people indirectly employed and affected by the lignite industry. However, the coal industry's substantial impact on the State's population and economy has secondary in-state multiplier effects. Most of the State's coal production also fuels electric power generation plants within North Dakota that supply most of the State's electrical needs. The coal industry generates an estimated \$103 million in state tax revenue.

### **III. Overview of the Public Participation Opportunities in the Oversight Process and the State Program**

The North Dakota coal reclamation and enforcement program allows for and encourages public input and participation throughout the program. The North Dakota Public Service Commission (PSC) is the State agency charged with the responsibility for the permitting and regulation of the coal mining industry in North Dakota. OSM's programmatic reviews of the North Dakota program indicate that the PSC is adhering to the State's policies and procedures regarding opportunities for public participation in all phases of their reclamation program.

### **IV. Major Accomplishments/Issues/Innovations in the (State) Program**

The North Dakota Public Service Commission (PSC) continues to administer a very efficient and successful coal regulatory program as set forth in Section 102 of the Surface Mining Control and Reclamation Act of 1977. North Dakota's permanent regulatory program has been in-place since 1980.

North Dakota's regulatory program is handled by a relatively small number of staff (Table 7) considering the amount of land mined and reclaimed each year. Reclamation Division staff members that review permit and revision applications also carry out the compliance inspections and evaluate bond release applications. This allows staff to remain very familiar with the ongoing field operations and approved mining and reclamation plans. The PSC has a very good working relationship with their customers that include industry, landowners, citizen groups, and other governmental agencies, including OSM. The Reclamation Division carries out its duties using the appropriate technical expertise and with a high level of professionalism.

The high quality of mine land reclamation is one of the most notable aspects of the North Dakota coal regulatory program. This is reflected in the number of national Excellence in Surface Mining and

Reclamation awards that North Dakota mines have received. Since the program was initiated in 1986, North Dakota mines have received fifteen national reclamation awards. The sense of environmental responsibility on the part of mining companies is also reflected in the minimal violations that have been occurred in the past.

The PSC continues to encourage mining companies to file bond release applications as reclaimed land becomes eligible for release at the end of the ten-year revegetation responsibility period. Over 9,000 acres of reclaimed lands that were subject to North Dakota's permanent regulatory program have received final bond release. All of the post-SMCRA acreages at the former Indian Head, Royal Oak and Velva Mines have been totally bond released. Reclaimed lands that have received final bond release under the permanent program include lands reclaimed to cropland, hayland, native grassland, tame pastureland, woodland, permanent impoundments, industrial, recreational and residential use.

To keep a strong focus on bond release and for workload planning purposes, the Reclamation Division is meeting annually with each of the major mining companies in North Dakota to discuss specific plans that they have for submitting final bond release applications. Annual mine maps are used to identify possible bond release areas based on reclaimed tracts that are nearing the end of the minimum ten-year revegetation liability period. These discussions also include the specific methods that are or will be used to collect the vegetative data needed for final bond release.

The Reclamation Division continues to encourage and works closely with mining companies on the submittal of permit related applications in an electronic format. All four active permits for the Falkirk Mine as well as two large active permits for the Freedom Mine and one active permit for the Beulah Mine are in an electronic format. Much of the monitoring data submitted by the mining companies is now submitted in an electronic format. Most incoming correspondence is also scanned and filed electronically using a structure that is very similar to the paper filing system.

The Reclamation Division has a Geographic Information System (GIS) to track mining and reclamation activities and conduct technical analysis of plans and data provided by the mining companies. Information entered into the GIS for several mines include recent high altitude air photos, permit boundaries, roads, stockpile locations, ponds and related features. Information for many final bond release tracts also has been entered. More information is being added as time allows. Much of this information is being loaded onto tablet PC's equipped with GPS receivers that inspectors use when carrying out mine inspections. This allows for accurate tracking and recording of activities during mine inspections.

Development of the GIS is an ongoing and dynamic project. OSM's Office of Technology Transfer (OTT) in the WRCC and TIPS has provided very valuable assistance with the GIS and mobile computing initiatives. The Reclamation Division has been able to move forward with these initiatives while ensuring the necessary mine inspections are conducted and timely action is taken on applications.

Reclamation Division staff continue to work with the Natural Resource Conservation Service (NRCS) on procedures for mapping and classifying reclaimed soils. A pilot project at one of the mines has been completed and NRCS plans to complete the mapping of all currently reclaimed lands in the next few years. These soil maps will be an important tool for individuals that farm reclaimed croplands and they will be used to develop conservation practices that may be needed to comply with federal programs.

Overall, North Dakota has an excellent coal regulatory program. PSC staff continue to implement the program in a highly professional, cooperative, and fair manner. The Reclamation Division uses new technology to become more efficient and make information more readily available to the public. The PSC has the necessary technical expertise for carrying out its functions to ensure that all of the requirements of SMCRA are met.

V. **Success in Achieving the Purposes of SMCRA as Determined by Measuring and Reporting End Results**

To further the concept of reporting end results, the findings from performance standard and public participation evaluations are being collected for a national perspective in terms of the number and extent of observed off-site impacts, the number of acres that have been mined and reclaimed and which meet the bond release requirements for the various phases of reclamation, and the effectiveness of customer service provided by the State. Individual topic reports are available in the Casper Field Office which provides additional details on how the following evaluations and measurements were conducted.

A. **Off-Site Impacts:**

For the purpose of oversight, an off-site impact is defined as anything resulting from a surface coal mining and reclamation activity or operation that causes a negative effect on people, land, water, or structures. The State program must regulate or control either the mining or reclamation activity, or the resulting off-site impact. In addition, the impact on the resource must be substantiated and be related to mining and reclamation activity. It must be outside the area authorized by the permit for conducting mining and reclamation activities. The CFO reviewed the following aspects of the North Dakota Program to identify any off-site impacts.

Several sources of information have been selected for identifying off site impacts. These include but are not limited to: State and OSM inspection reports, enforcement actions, civil penalty assessments, citizen complaints, special studies and information from other environmental agencies. If an off site impact is identified, the sources of information and the basis used to identify and report these impacts will be clearly recorded. Field evaluations for off site impacts were conducted during routine inspections by both North Dakota and CFO.

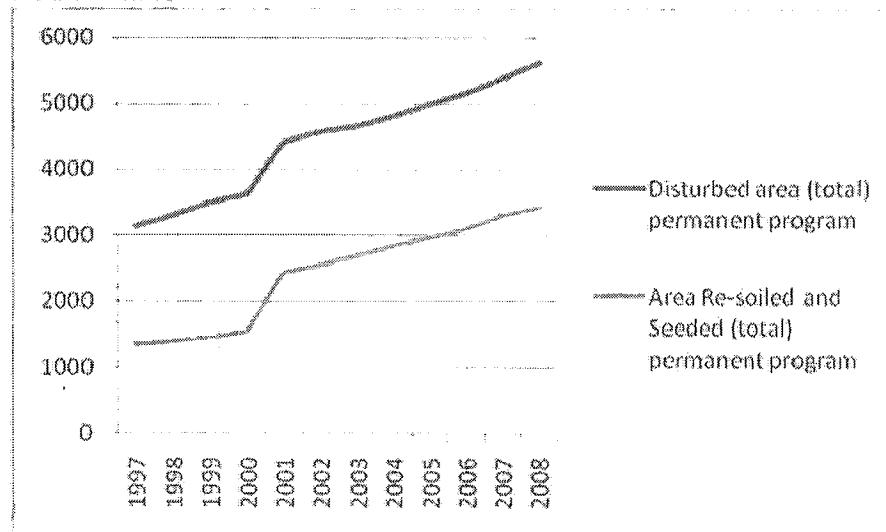
Table 4 in this annual report records the number and type of off-site impacts. At the time of this report, a single off-site impact has been reported, at the Falkirk Mine. This incident involved erosion at a discharge outlet and failure to have an energy dissipater on the discharge pipe of Pond P-E24-01. North Dakota PSC issued NOV No. 803 on October 29, 2008. Falkirk completed remedial actions specified in the NOV within the prescribed time and the PSC terminated the NOV on December 24, 2008.

Note that the evaluation year began with 31 inspectable units. One unit received final bond release. Tables 2 and 4 of this report reflect the total of 30 inspectable units that were present at the end of the evaluation year.

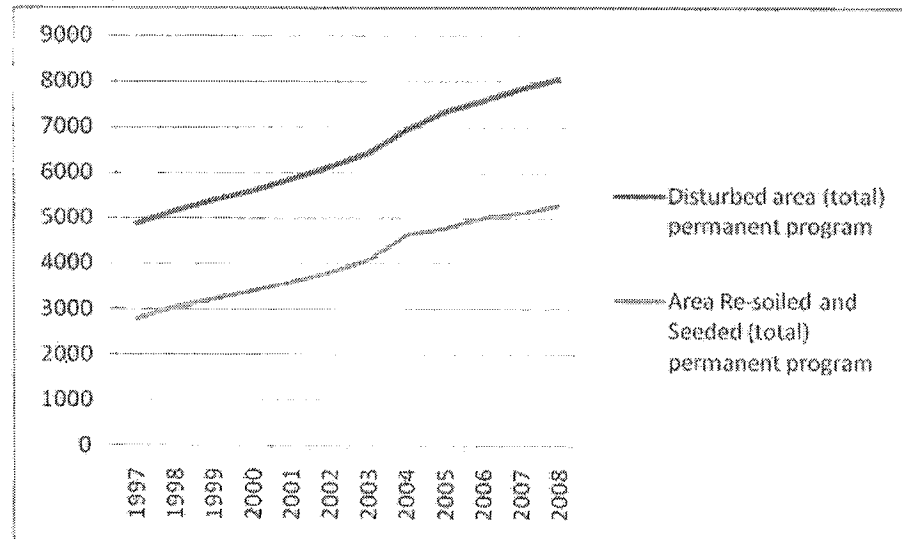
**B. Reclamation Success:**

OSM evaluated the effectiveness of the State program based on the number of acres that have received bond release (Table 5). The CFO determined that the State program is effective in its goal of having all disturbed lands reclaimed to the approved postmining land use. Table 5 catalogues the acreage of land released from bond for Phase I, II, and III. The CFO reviewed the acres disturbed and the acres reclaimed on a site-specific basis at the following mine sites: 1.) Beulah Mine, 2.) Center Mine 3.) Freedom Mine and 4.) Falkirk Mine. The following graphs demonstrate that the rate of reclamation largely parallels the rate of mining in each of these mines.

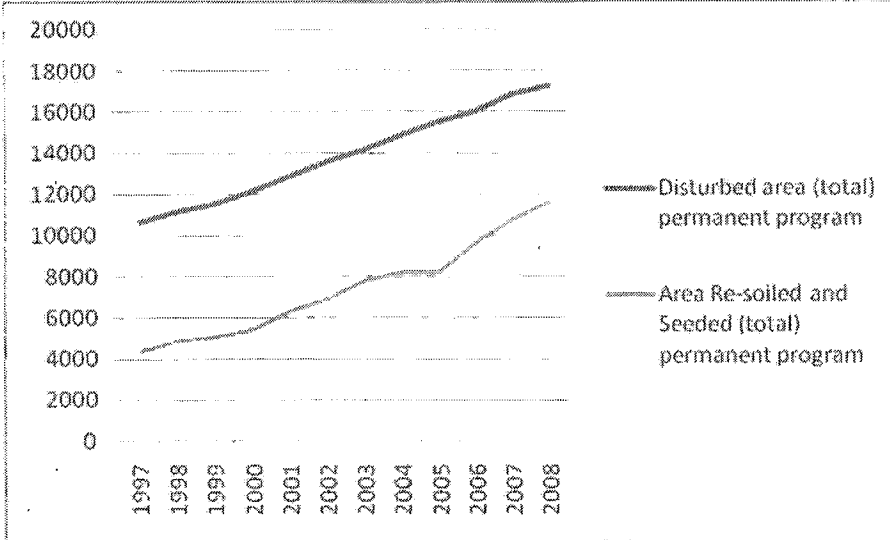
**Beulah Mine**



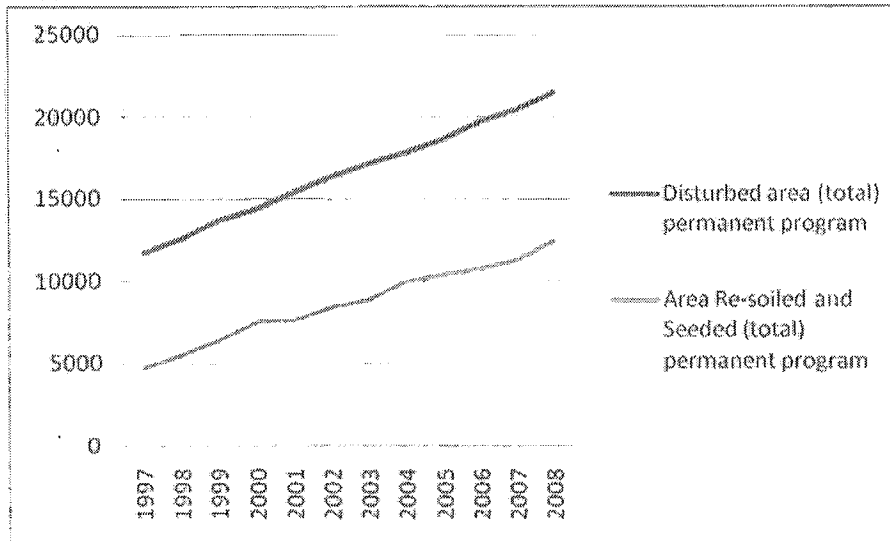
**Center Mine**



Falkirk Mine



Freedom Mine



The CFO feels that reclamation in North Dakota is occurring as contemporaneously as practicable. The CFO will continue to report "Reclamation Success" and inventory the status of disturbed lands for future reports.

**C. Customer Service**

One of the requirements of a regulatory authority for reclamation programs implemented under SMCRA is to develop and encourage open communication not only with the industry being regulated, but also the citizenry and communities in the coalfields around the mines. To accomplish this requirement, SMCRA programs must involve the public in all phases of coal

mine permitting. North Dakota's program provides for public involvement of permitting actions when a new application is received, when a permit is renewed, when any significant permit revision is proposed and when a phase of reclamation is completed to the point of requesting bond release from a tract. The provisions of the North Dakota program that extensively describe these procedures can be found at sections NDCC 38-14.1-18 and NDAC 69-05.2-10 and 69-05.2-12.

The Reclamation Division provided the required notices to landowners and other interested parties for significant revision applications, renewals and bond release applications. Staff encourages participation in bond release inspections by the landowners and county officials.

One verbal complaint was received by the Reclamation Division near the end of the evaluation period. This person had concerns that coal outcrop drilling by the mine operator had affected his water well. The concerns are still being investigated at the end of the evaluation year.

The Reclamation Division responded to numerous requests for information from landowners, mining companies, government agencies and others. There has been a renewed interest in energy development (including coal) in North Dakota in recent years. This has resulted in numerous inquiries of the Reclamation Division. Two permit applications for proposed new mines were filed during the evaluation year; however, one of these applications was later withdrawn. Staff spent a considerable amount of time during the evaluation period working with the companies and their consultants on premine baseline studies and responding to questions on other application requirements. In addition, another company is exploring the possibility of mining uraniferous (uranium enriched) lignite in western North Dakota. Mining of uraniferous lignite would be subject to the North Dakota's surface coal mining and reclamation law; however, additional rules may be necessary to address special concerns with radioactive materials.

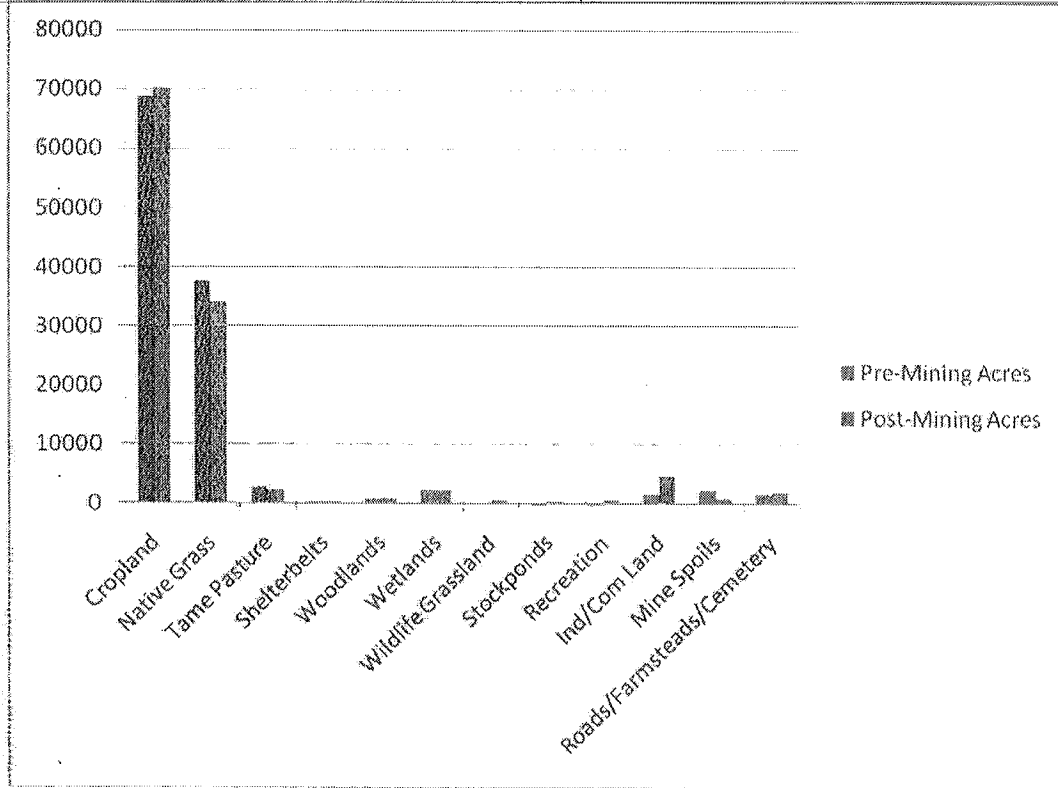
The PSC responds to customer requests for information and complaints in an appropriate, timely and professional manner.

**D. Pre and Post Mining Land Use**

OSM evaluated the pre and post mining land use of areas reclaimed on North Dakota surface coal mines. This evaluation included information from permitted surface coal mines, both active and inactive, and excluded leonardite operations. Land use acreages are estimates and low shrubs and woodland areas are included with native grasslands. Areas identified as cropland also include hayland.

Reclamation efforts strive to return mined lands to their pre-mine condition. However, changes in the post-mining land use can and do occur for a variety of reasons, often at the request of the land owner. Federal code clearly states that any changes from one land use category to another must be approved by the regulatory authority. Sound reclamation planning and sound postmining land management practices must be clearly stated and accessible in the mining permit.

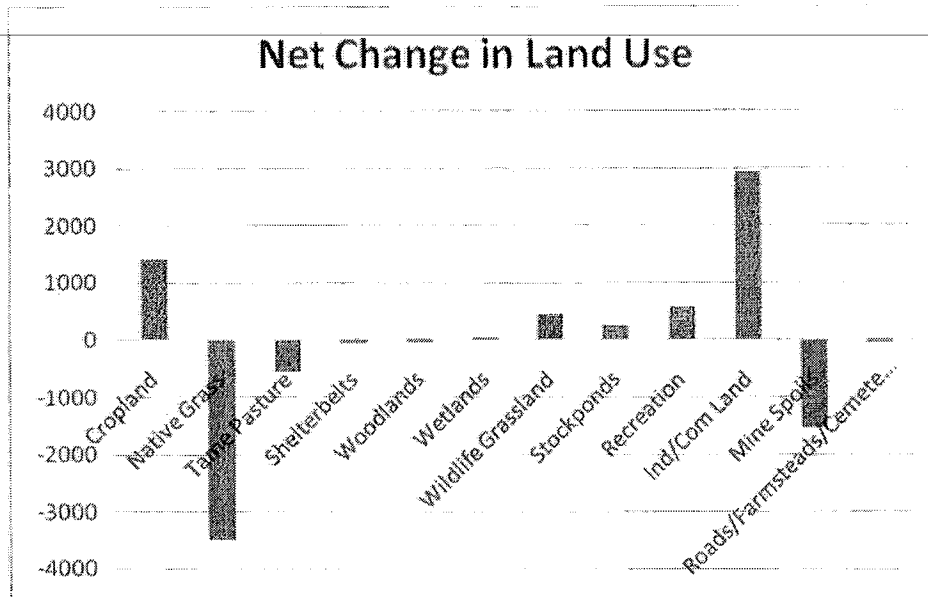
Pre-Mining Vs. Post Mining Land Use Comparison



Examination of the pre and post mining land use data reveal certain trends. The largest category of pre-mining land is predictably cropland and native grasslands. Statistically, these two groups have the greatest likelihood of experiencing a change in the post mining land use. The amount of cropland has increased from 68,870 pre-mining acres to 70,302 post-mining acres, for a net increase of 1,432 acres. The amount of native grassland has decreased from 37,614 pre-mining acres to 34,119 post-mining acres, for a net decrease of 3,495 acres. Demand for quality farmland in lieu of native grasslands in North Dakota undoubtedly contributed to this trend.

The amount of mine spoils has decreased from 2,400 pre-mining acres to 853 post-mining acres, for a net decrease of 1,547 acres. This trend is demonstrative of successful efforts to reclaim older, pre-law spoils.

The data also shows a significant increase in industrial/commercial land from 1,665 pre-mine acres to 4,622 post-mine acres. Moderate increases in wildlife grassland, stockponds, and recreational lands are also evident.



**VI. OSM Assistance**

North Dakota PSC staff continue to participate in technological advances, exchanging electronic information with their industries, converting non-electronic documents to electronic format, and developing a GIS for managing data and technical evaluations, including bond release.

OSM staff offered their assistance to North Dakota PSC by re-processing imagery from the Royal Oak area in an effort to improve the quality of the images. North Dakota also requested assistance georeferencing three sets of images taken over the Glenharold mine in Mercer and Oliver Counties.

The North Dakota Program utilized the FLIR (Forward Looking InfraRed) Camera as part of the “shared equipment program. OSM-TIPs (Technical Innovative and Professional Services) also loaned the GeoVision Borehole Camera system to the North Dakota Program, who used the equipment in a comparative evaluation of the GeoVision system and the Mini PTZ Model Mk2 borehole camera system.

The North Dakota PSC retains highly qualified staff capable of utilizing OSM TIPs software and equipment. Staff routinely use mobile computing technology, and require TIPs support of ArcPad, GIS, AutoCAD, and Remote Sensing software licenses to perform their regulatory duties. The North Dakota Program has representatives that are Geospatial Data Stewards, participate on the Western Region Technology Transfer Team, and had several staff attend the OSM TIPs Geospatial Conference. Continued involvement in these technical conferences and teams will foster additional partnerships and innovative approaches to resolve technical challenges.

During the evaluation period, five Reclamation staff and one AML staff attended a total of eleven NTTP (National Technical Training Program) training courses. Four Reclamation staff and two AML staff

attended a total of seven TIPs course. No North Dakota regulatory personnel participated as instructors during this reporting period.

OSM's Technical Librarian filled one reference request and provided four article reprints to North Dakota staff members.

## **VII. General Oversight Topic Reviews**

### **A. Program Amendments**

Overall, the PSC has kept its program in compliance with SMCRA and any changes to the counterpart Federal regulations. The North Dakota program has been maintained in a contemporaneous and professional manner. During this evaluation period, the final approval decision on North Dakota State Program Amendment XXXVIII (SPATS # ND-050-FOR) was published in the Federal Register Notice on September 12, 2008. The amendment package pertains primarily to changes in the self bonding provisions in NDAC 69-05.2-12-05.1. Language has been added that will allow the Commission to accept bond ratings from other national recognized ratings organizations, in addition to Moody's Investor Service and Standards and Poor's ratings, for companies that guarantee self-bonds. At this time, there are no other outstanding programmatic issues unresolved in the North Dakota program.

North Dakota does an excellent job of keeping OSM informed of any proposed changes to its program. Their informal process allows for input from industry, citizen groups, the general public and other agencies like OSM, prior to formalized rulemaking. Any issues or problems with the proposed rule changes can then be identified and dealt with early in the process, allowing the formal program changes to proceed through the rulemaking process easier and more efficiently.

### **B. Inspection and Enforcement**

The North Dakota Public Service Commission continues to conduct frequent and thorough inspections. North Dakota conducted 84 complete inspections and 460 partial inspections on all active mine sites during this evaluation year. North Dakota also conducted 43 complete inspections and 72 partial inspections on all inactive mine sites during this evaluation year. They have exceeded the number of inspections required on all mine sites during this evaluation year.

The Casper Field Office conducted one final bond release inspection, four complete inspections and two partial inspections of coal mining operations in North Dakota during this evaluation year.

North Dakota PSC and OSM personnel participated in an annual overflight of the four major mines, the Glenharold Mine, and various AML sites. Photographs and a GPS tracklog were taken to document current conditions at each mine.

North Dakota inspection reports are complete, accurately document site conditions and mine activity, and give the status of any violations. The reports have continuity with previous reports. All performance standards were reviewed and documented during complete inspections and the reports contain a discussion of the current mine status. Each partial inspection report documents mining and reclamation activities, performance standards and permit requirements that were reviewed, as well as those portions of the mine that were inspected.

The PSC maintains an inspectable units list and an inspection database sufficient to meet its program requirements.

The PSC issued five NOV's and no CO's during this evaluation period. No patterns of violation exist. No-show cause hearings or alternative enforcement actions occurred during this evaluation period.

The CFO did not issue any enforcement actions (NOV, CO) during this review period. No TDN's were sent to the State.

### **C. Grants Management**

On April 21<sup>st</sup> 2009, CFO conducted an evaluation plan performance review, which evaluated the effectiveness of state procedures for property procurement, management and disposal of property. This review looked at methods used by North Dakota to make purchases for supplies and equipment. Also sampled were large purchases that may have been made from the FY2007 and FY2008 A&E Grants. This included any leased items and contracted services that may have been secured by the State Regulatory Program.

This review focuses on North Dakota's purchasing procedures that must be followed when making purchases with federal funds provided by the Office of Surface Mining (OSM) through annual A&E Grants. It will help clarify the States procurement procedures for major purchases \$5,000 or above and if they are effectively implemented by the State program.

The North Dakota Regulatory Program keeps track of all purchases of \$5,000 or more. The North Dakota Regulatory Program is also responsible for ensuring that all equipment acquired by the State is properly accounted for, the date acquired, location and disposal date. The North Dakota Program is also responsible for taking care of fixed assets and their annual physical inventory. The Public Service Commission's Accounting Division is in charge of reviewing all requisitions requiring procurement actions.

The North Dakota Regulatory Program keeps a summary by grant, of all materials, supplies and equipment, purchased through federal funding provided by OSM's A&E Grants. This list updated monthly, consists of expenditures by project, account code and revenue source. It tracks all capital expenditures, office equipment, and fees and services. Specific account codes are used for purchases meeting the capitalization threshold of \$5,000 and for those assets below the capitalization threshold.

This review found that the North Dakota Regulatory Program uses OSM Form 60 to report equipment purchases made by Federal grant funds. The property report is submitted to OSM on an annual basis. This review also found that in the past the North Dakota Regulatory Program has purchased some items valued at \$5,000 or more. The latest purchase, a Graphtec Scanner valued at \$14,800 was cost shared with the North Dakota AML Program, for shared use by both programs. The North Dakota Program notifies OSM of planned disposition of property or equipment that still retains a marketable value of \$5,000 or above. It is a common practice within the State to make use of materials and equipment until they are no longer usable or do not meet the needs of the program.

Most of the North Dakota Regulatory Program purchases consist of office materials and supplies, and office equipment. Computer purchases average under \$5,000 per unit and have a depreciation life of three to five years where upon new machines have to be purchased. All purchases are made through the North Dakota State procurement system which requires proper documentation and inventory records. They are kept and tracked by North Dakota's asset management program.

Vehicles are purchased through the State motor pool system and as such, are not purchased by grant funds as they are on a state use lease system. A log is kept of all fleet vehicle use and rates. This list includes vehicle operation, depreciation and replacement rates and mileage/hour usage rental rates. The replacement cost rates are not charged to the federal programs.

The North Dakota State Property Disposal Manual sets forth policies and procedures for disposition of property. This manual applies to all agencies and departments within the State. Procedures are outlined within the manual for identifying and declaring surplus property and how it should be handled. Property that has been declared to be surplus can be transferred to another State Agency, traded-in, or parted out for use on similar equipment. Each agency must complete a State Surplus Property Disposal form SFN 2426 request whenever it is releasing excess property. No items valued at \$5,000 or above were surplus by the North Dakota Regulatory Program in the past two grant fiscal years.

This review found that the State of North Dakota's Regulatory Program has made equipment purchases that exceed \$5,000 in the past. Some of these purchases however have been cost-shared with North Dakota's Abandoned Mine Land Program. The State's Fixed Asset accounting Policy is employed when large or major purchases are made. This applies to materials, supplies and contracted services. All inventory records are kept up to date, and grant summary records are kept by the State Regulatory Program to identify capitalized asset purchases.

Through OSM Form 60 the State keeps OSM informed of purchases made with A&E grant funds. North Dakota has a good procurement system along with a viable property inventory system. This review found that the State procedures for property procurement, management and disposal are effective and no further action is required as a result of these report findings.

## **APPENDIX A**

### **Tabular Summaries of Data Pertaining to Mining, Reclamation and Program Administration**

These tables present data pertinent to mining operations and State and Federal regulatory activities within North Dakota. They also summarize funding provided by OSM and North Dakota staffing. Unless otherwise specified, the reporting period for the data contained in all tables is the same as the evaluation year. Additional data used by OSM in its evaluation of North Dakota's performance is available for review in the evaluation files maintained by the Casper OSM Office.

When OSM's Directive REG-8, Oversight of State Programs, was revised in December 2006, the reporting period for coal production on Table 1 was changed from a calendar year basis to an evaluation year basis. The change was effective for the 2007 evaluation year. However, with Change Notice REG-8-1, effective July 1, 2008, the calendar year reporting period in Table 1 for coal produced for sale, transfer or use was reestablished and is effective for the 2008 evaluation year. In addition, for the 2008 evaluation report, coal production for the two prior years reported on Table 1 was recalculated on a calendar year basis so that all three years of production reported in the table are directly comparable. This difference in reporting periods should be noted when attempting to compare coal production figures from annual evaluation reports originating both before and after the December 2006 revision to the reporting period.

## APPENDIX B

### North Dakota PSC Comments on this Report

North Dakota PSC relayed the following comments about the draft OSM Annual Evaluation Summary Report for EY2009:

\*On Page 8, the net decrease of native grassland is 3,495 acres, not 1,432 acres.

\*Also on Page 8, the word "reclaim" was misspelled.

\*On Page 10, the word "regulatory" was added to the 2<sup>nd</sup> to last paragraph of Section **VI. OSM Assistance**. This is to clarify that the one ND staff member that did participate as an instructor is a member of the AML program.

\*ND PSC asked for confirmation that CFO conducted four complete inspections during the evaluation year. The number of complete inspections reported by CFO reflects inspections of four inspectable units, not individual mines. The original statement that four complete inspections were conducted is confirmed as correct.

\* It was also suggested that the annual overflight be mentioned in Section **VII. B. Inspection and Enforcement**.

\*Appendix A, Table 3: The number of incidental boundary revisions is 0, not 27. Changes in the totals are also reflected by this change.

\*Appendix A, Table 8: Federal funding as a percentage of total program costs is 64.00 %, not 64.07 %.

The Casper Field Office agrees with all North Dakota PSC comments and has made appropriate changes to the report.

North Dakota  
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<b>TABLE 1</b>			
<b>Coal Produced for Sale, Transfer, or Use</b> (Millions of Short Tons)			
Period	Surface Mines	Underground Mines	Total
Coal production <sup>A</sup> for entire State:			
Calendar Year			
CY 2006	30.415	0.000	30.415
CY 2007	29.674	0.000	29.674
CY 2008	29.780	0.000	29.780
<p>Coal production as shown in this table is the gross tonnage and includes coal produced during the calendar year (CY) for sale, transfer or use. The coal produced in each CY quarter is reported to OSM during the following quarter by each mining company on line 8 (a) of form OSM-1, 'Coal Reclamation Fee Report.' Gross tonnage does not provide for a moisture reduction. OSM verifies tonnage reported through routine auditing of mining companies. This production may vary from that reported by States or other sources due to varying methods of determining and reporting coal production.</p> <p><sup>A</sup> Provide production information for the latest three full calendar years to include the last full calendar year for which data is available.</p>			

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TABLE 2															
Inspectable Units As of June 30, 2009															
Coal mines and related facilities	Number and Status of Permits									Nbr. of Insp. Units <sup>A</sup>	Permitted Acreage <sup>B</sup> (100's of acres)				
	Active or temporarily inactive		Inactive Phase II bond release		Abandoned		Totals		Federal Lands		State/Private Lands		All Lands		
	IP	PP	IP	PP	IP	PP	IP	PP	IP		PP	IP	PP	Total	
<b>LANDS FOR WHICH THE STATE IS THE REGULATORY AUTHORITY</b>															
Surface mines	0	20	1	9	0	0	1	29	30	0.0	145.2	1.4	918.0	1,064.6	
Underground mines	0	0	0	0	0	0	0	0	0	0.0	0.0	0.0	0.0	0.0	
Other facilities	0	0	0	0	0	0	0	0	0	0.0	0.0	0.0	0.0	0.0	
<b>Total</b>	<b>0</b>	<b>20</b>	<b>1</b>	<b>9</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>29</b>	<b>30</b>	<b>0.0</b>	<b>145.2</b>	<b>1.4</b>	<b>918.0</b>	<b>1,064.6</b>	
Total number of permits:										30					
Average number of permits per inspectable unit (excluding exploration sites):										1.00					
Average number of acres per inspectable unit (excluding exploration sites):										3,548.67					
Number of exploration permits on State and private lands:										0		On Federal lands <sup>C</sup> :		0	
Number of exploration notices on State and private lands:										7		On Federal lands <sup>C</sup> :		0	
<p>IP: Initial regulatory program sites PP: Permanent regulatory program sites</p> <p><sup>A</sup> Inspectable units include multiple permits that have been grouped together as one unit for inspection frequency purposes by some State programs.</p> <p><sup>B</sup> When a single inspectable unit contains both Federal lands and State/Private lands, enter the permitted acreage for each land type in the appropriate category.</p> <p><sup>C</sup> Includes only exploration activities regulated by the State pursuant to a cooperative agreement with OSM or by OSM pursuant to a Federal lands program. Excludes exploration regulated by the Bureau of Land Management.</p>															

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<b>TABLE 3</b>												
<b>State Permitting Activity</b> As of June 30, 2009												
Type of Application	Surface mines			Underground mines			Other facilities			Totals		
	App. Rec.	Issued	Acres	App. Rec.	Issued	Acres <sup>A</sup>	App. Rec.	Issued	Acres	App. Rec.	Issued	Acres
New Permits	2	0	0	0	0	0	0	0	0	2	0	0
Renewals	4	3		0	0		0	0		4	3	
Transfers, sales, and assignments of permit rights	0	0		0	0		0	0		0	0	
Small operator assistance	0	0		0	0		0	0		0	0	
Exploration permits										0	0	
Exploration notices <sup>B</sup>											7	
Revisions (exclusive of incidental boundary revisions)		22			0			0			22	
Revisions (adding acreage but are not incidental boundary revisions)	1	2	414	0	0	0	0	0	0	1	2	414
Incidental boundary revisions	0	0	0	0	0	0	0	0	0	0	0	0
<b>Totals</b>	<b>7</b>	<b>27</b>	<b>414</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>7</b>	<b>34</b>	<b>414</b>
OPTIONAL - Number of midterm permit reviews completed that are not reported as revisions:										10		
<sup>A</sup> Includes only the number of acres of proposed surface disturbance.												
<sup>B</sup> State approval not required. Involves removal of less than 250 tons of coal and does not affect lands designated unsuitable for mining.												

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**TABLE 4**  
**OFF-SITE IMPACTS (excluding bond forfeiture sites)**

RESOURCES AFFECTED	People			Land			Water			Structures		
	Minor	Moderate	Major	Minor	Moderate	Major	Minor	Moderate	Major	Minor	Moderate	Major
DEGREE OF IMPACT												
Blasting	0	0	0	0	0	0	0	0	0	0	0	0
Land Stability	0	0	0	0	0	0	0	0	0	0	0	0
Hydrology	1	0	0	1	0	0	1	0	0	0	0	0
Encroachment	0	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0	0
Total	1	0	0	1	0	0	1	0	0	0	0	0

Total number of inspectable units (excluding bond forfeiture sites): 30

Inspectable units free of off-site impacts: 29

Inspectable units with off-site impacts: 1

**OFF-SITE IMPACTS ON BOND FORFEITURE SITES**

RESOURCES AFFECTED	People			Land			Water			Structures		
	Minor	Moderate	Major	Minor	Moderate	Major	Minor	Moderate	Major	Minor	Moderate	Major
DEGREE OF IMPACT												
Blasting	0	0	0	0	0	0	0	0	0	0	0	0
Land Stability	0	0	0	0	0	0	0	0	0	0	0	0
Hydrology	0	0	0	0	0	0	0	0	0	0	0	0
Encroachment	0	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0	0
Total	0	0	0	0	0	0	0	0	0	0	0	0

Total number of inspectable units (only bond forfeiture sites): 0

Inspectable units free of off-site impacts: 0

Inspectable units with off-site impacts: 0

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<b>TABLE 5</b>				
<b>Annual State Mining and Reclamation Results</b>				
Bond release phase	Applicable performance standard	During this Evaluation Year		
		Total acreage released	Acreage also released under Phase I	Acreage also released under Phase II
A	B	C	D	E
Phase I	- Approximate original contour restored - Topsoil or approved alternative replaced	2,225		
Phase II	- Surface stability - Establishment of vegetation	2,664	0	
Phase III	- Post-mining land use/productivity restored - Successful permanent vegetation - Groundwater recharge, quality and quantity restored - Surface water quality and quantity restored	2,664	2,225	2,664
<b>Bonded Acreage <sup>A</sup></b>			<b>Acres during this evaluation year</b>	
Total number of new acres bonded during this evaluation year			415	
Number of acres bonded during this evaluation year that are considered remaining, if available			0	
Number of acres where bond was forfeited during this evaluation year			0	
<b>Bonded Acreage Status</b>			<b>Cumulative Acres</b>	
Total number of acres bonded as of the end of last review period (June 30, 2008) <sup>B</sup>			108,706	
Total number of acres bonded as of the end of this review period (June 30, 2009) <sup>B</sup>			106,457	
Sum of acres bonded that are between Phase I bond release and Phase II bond release as of June 30, 2009 <sup>B</sup>			3,769	
Sum of acres bonded that are between Phase II bond release and Phase III bond release as of June 30, 2009 <sup>B</sup>			264	
<b>Disturbed Acreage</b>			<b>Acres</b>	
Number of Acres Disturbed during this evaluation year			1,873	
Number of Acres Disturbed at the end of the evaluation year (cumulative)			64,110	
<sup>A</sup> Bonded acreage is considered to approximate and represent the number of acres disturbed by surface coal mining and reclamation operations. <sup>B</sup> Bonded acres in this category are those that have not received a Phase III or other final bond release (State maintains jurisdiction).				

Brief explanation of columns D & E. The States will enter the total acreage under each of the three phases (column C). The additional columns (D & E & E) will "break-out" the acreage among Phase II and/or Phase III. Bond release under Phase II can be a combination of Phase I and II acreage, and Phase III acreage can be a combination of Phase I, II, and III. See "Instructions for Completion of Specific Tables," Table 5 for example.

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<b>TABLE 6</b>			
<b>State Bond Forfeiture Activity</b> (Permanent Program Permits)			
Bond Forfeiture Reclamation Activity by SRA	Number of Sites	Dollars	Acres
Sites with bonds forfeited and collected that were unreclaimed as of June 30, 2008 (end of previous evaluation year) <sup>A</sup>	0		0
Sites with bonds forfeited and collected during Evaluation Year 2009 (current evaluation year)	0	\$ 0	0
Sites with bonds forfeited and collected that were re-permitted during Evaluation Year 2009 (current evaluation year)	0		0
Sites with bonds forfeited and collected that were reclaimed during Evaluation Year 2009 (current evaluation year)	0		0
Sites with bonds forfeited and collected that were unreclaimed as of June 30, 2009 (end of current evaluation year) <sup>A</sup>	0		0
Sites with bonds forfeited but uncollected as of June 30, 2009 (end of current evaluation year)	0		0
<b>Surety/Other Reclamation (In Lieu of Forfeiture)</b>			
Sites being reclaimed by surety/other party as of June 30, 2008 (end of previous evaluation year) <sup>B</sup>	0		0
Sites where surety/other party agreed to do reclamation during Evaluation Year 2009 (current evaluation year)	0		0
Sites being reclaimed by surety/other party that were re-permitted during Evaluation Year 2009 (current evaluation year)	0		0
Sites with reclamation completed by surety/other party during Evaluation Year 2009 (current evaluation year) <sup>C</sup>	0		0
Sites being reclaimed by surety/other party as of June 30, 2009 (current evaluation year) <sup>B</sup>	0		0
<sup>A</sup> Includes data only for those forfeiture sites not fully reclaimed as of this date <sup>B</sup> Includes all sites where surety or other party has agreed to complete reclamation and site is not fully reclaimed as of this date <sup>C</sup> This number also is reported in Table 5 as Phase III bond release has been granted on these sites			

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<b>TABLE 7</b>	
<b>State Staffing</b> (Full-time equivalents at end of evaluation year)	
Function	EY 2009
Regulatory Program	
Permit Review	4.70
Inspection	1.95
Other (administrative, fiscal, personnel, etc.)	1.90
Regulatory Program Total	8.55
AML Program Total	4.55
<b>Total</b>	<b>13.10</b>

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<b>TABLE 8</b>		
<b>Funds Granted To North Dakota BY OSM</b> (During the Current Evaluation Year) (Actual Dollars, Rounded to the Nearest Dollar)		
Type of Funding	Federal Funds Awarded During Current Evaluation Year	Federal Funding as a Percentage of Total Program Costs
Regulatory Funding		
Administration and Enforcement Grant	\$ 719,156	64.00 %
Other Regulatory Funding, if applicable	\$ 0	0.00 %
<b>Subtotal</b>	<b>\$ 719,156</b>	
Small Operator Assistance Program	\$ 0	100 %
Abandoned Mine Land Reclamation Funding <sup>A</sup>	\$ 3,092,166	100 %
<b>Totals</b>	<b>\$ 3,811,322</b>	
<sup>A</sup> Includes funding for AML Grants, the Clean Streams Initiative and the Watershed Cooperative Agreement Program.		

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<b>TABLE 9</b>		
<b>State Inspection Activity During Current Evaluation Year</b>		
Inspectable Unit Status	Number of Inspections Conducted	
	Complete	Partial
Active <sup>A</sup>	84	460
Inactive <sup>A</sup>	43	72
Abandoned <sup>A</sup>	0	0
<b>Total</b>	<b>127</b>	<b>532</b>
Exploration	6	0
<sup>A</sup> Use terms as defined by the approved State program.		

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<b>TABLE 10</b>		
<b>State Enforcement Activity</b>		
<b>During Current Evaluation Year</b>		
Type of Enforcement Action	Number of Actions <sup>A</sup>	Number of Violations <sup>A</sup>
Notice of Violation	5	5
Failure-to-Abate Cessation Order	0	0
Imminent Harm Cessation Order	0	0
<sup>A</sup> Do not include those violations that were vacated.		

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<b>TABLE 11</b>		
<b>Lands Unsuitable Activity</b>		
<b>During Current Evaluation Year</b>		
	Number	Acreage
Number Petitions Received	0	
Number Petitions Accepted	0	
Number Petitions Rejected	0	
Number Decisions Declaring Lands Unsuitable	0	0
Number Decisions Denying Lands Unsuitable	0	0

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<b>TABLE 12 Optional</b>	
<b>Post Mining Land Use Acreage (after Phase III bond release)</b>	
Land Use	Acreage Released during this Evaluation Year
Cropland	422
Pasture/Hayland	475
Grazing Land	708
Forest	75
Residential	0
Fish & Wildlife Habitat	1
Developed Water Resources	76
Public Utilities	14
Industrial/Commercial	39
Recreation	0
Other (please specify): undisturbed lands	854
Other (please specify):	0
Other (please specify):	0
Other (please specify):	0
Other (please specify):	0
Other (please specify):	0
Other (please specify):	0
Other (please specify):	0
Other (please specify):	0
<b>Total</b>	<b>2,664</b>

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The North Dakota PSC retains highly qualified staff capable of utilizing OSM TIP software and equipment. Staff routinely use mobile computing technology, and require TIPs support of ArcPad, GIS, AutoCAD, and Remote Sensing software licenses to perform their regulatory duties. The North Dakota Program has representatives that are Geospatial Data Stewards, participate on the Western Region Technology Transfer Team, and had several staff attend the OSM TIPs Geospatial Conference. Continued involvement in these technical conferences and teams will foster additional partnerships and innovative approaches to resolve technical challenges.

During the evaluation period, three staff from the Reclamation Division attended a total of five NTTP training courses. Two Reclamation staff attended one TIPs course. Two staff from the Abandon Mine Lands Division attended a total of four NTTP training courses. No North Dakota personnel participated as instructors during this reporting period.

OSM's Technical Librarian filled one reference request and provided three article reprints to North Dakota staff members.

## VII. General Oversight Topic Reviews

### A. Program Amendments

Overall, the PSC has kept its program in compliance with SMCRA and any changes to the counterpart Federal regulations. The North Dakota program has been maintained in a contemporaneous and professional manner. During this evaluation period, North Dakota has one program amendment currently under review by OSM. The amendment package pertains primarily to changes in the self-bonding provisions in NDAC 69-05.2-12-05.1. Language has been added that will allow the Commission to accept bond ratings from other national recognized ratings organizations, in addition to Moody's Investor Service and Standards and Poor's ratings, for companies that guarantee self-bonds.

North Dakota does an excellent job of keeping OSM informed of any proposed changes to its program. Their informal process allows for input from industry, citizen groups, the general public and other agencies like OSM, prior to formalized rulemaking. Any issues or problems with the proposed rule changes can then be identified and dealt with early in the process, making the formal program changes proceed through the rulemaking process easier and more efficiently.

### B. Inspection and Enforcement

The North Dakota Public Service Commission continues to conduct frequent and thorough inspections. North Dakota conducted 130 complete inspections and 565 partial inspections, exceeding the required number of inspections on all permits during the evaluation year. The Casper Field Office conducted two complete random sample inspections and one partial / focused inspection of coal mining operations in North Dakota.

North Dakota inspection reports are complete, accurately document site conditions and mine activity, and give the status of any violations. The reports have continuity with previous reports. All performance standards were reviewed and documented during complete inspections and the reports